Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum

Paul Rishworth  
Senior Lecturer in Law  
The University of Auckland

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Introduction

When can a parent require that her child be exempted from tuition because the parent objects to the nature of the curriculum? Does the parent have a legal right to require that curriculum be altered so as not to give offence to religious groups? May a school board include Maori language instruction for all students as part of its curriculum? May it restrict such tuition only to Maori students? Does a Maori have legal grounds for challenging the school which, it alleges, fails to promote Maori language and culture appropriately? These and other questions are the subject of this paper.

My thesis is that in an increasingly pluralistic society there will be tensions in school communities over issues such as these. Certainly that is true in the United States, where a “battle for the schoolroom” is waged between religious fundamentalist groups and liberals using the American Bill of Rights as a weapon. The recent enactment of the Canadian Charter of Rights and Freedoms in Canada has seen the beginning of similar disputes in Canada. Will it happen here now that the New Zealand Bill of Rights Act 1990
guarantees "freedom of religion," and guarantees minorities the right to speak their language, enjoy their culture, and practise their religion.

There is, so far as I am aware, only anecdotal evidence of religious objections to curriculum content in New Zealand schools. A small controversy over the book "The Colour Purple" emerged a few years ago, and there have been rumblings over a new English syllabus. But none of these issues has come, as yet, anywhere close to litigation. I suspect that in New Zealand culture a recourse to litigation on such issues is far from the minds of the protagonists. In this respect, we probably differ from Americans. This paper is not intended to promote this type of litigation by suggesting how it could be done here. Rather, my aim is to explore, using the tools of analysis suggested by the Canadian and American cases, how such issues would be resolved if they were litigated. This is, I hope, a worthwhile exercise because even in a climate where such issues are resolved in other ways, it helps to have a clear understanding of how the law would deal with the problem. Further, there are signs that New Zealand is becoming more of a "rights-oriented" culture: the enactment of the Bill of Rights being just one symptom. It is not beyond the bounds of possibility that litigation of the type discussed in this paper will occur in this country. Indeed, one of the purposes of a Bill of Rights is to affirm rights which one individual can assert against a majority. Experience from North America is that all it takes is one person willing to be a plaintiff to bring about great changes through constitutional litigation.

It is necessary to set the scene in part A by discussing the legal framework in which curriculum decisions are made in schools, and the role of the courts in adjudicating in educational disputes. The remaining three parts then discuss the specific issues which arise out of religion, biculturalism and multiculturalism. I have chosen to address religion separately because it is an integral part of culture, and because, being recognized as a right in Bills of Rights both here and overseas, it has been the subject of much litigation. I should also make it clear that when I speak of curriculum, I generally mean to include all that occurs in the classroom and assemblies (where it is possible that religious exercises may occur). I do not mean only the formally prescribed curriculum.

PART A

LEGAL FRAMEWORK OF CURRICULUM DECISIONS IN EDUCATION

1 Setting the scene: the right to an education

As in other developed countries, education in New Zealand is compulsory between certain ages. However, the state does not require that children be educated in its own schools. While it provides primary and secondary education free of charge, it also provides that a student's attendance at a private school will satisfy the compulsory education requirement. In these basic respects New Zealand law substantially mirrors the educational regimes which have been held by the courts of the United States and Canada to be constitutionally permissible. In both countries the Supreme Courts have recognised a compelling state interest in compulsory education, but have enforced, or noted, the constitutional requirement (rooted in parental "liberty", or "religious freedom", or both)
to allow private education also. In this way the individual’s rights operate as a limit on the state’s power to prescribe state education. The United States and Canadian courts have not yet had to explore the converse proposition: is there a right to extract a free state education system from a state which otherwise would not provide one?

In strict legal terms, then, there is not so much a right to an education as a duty to submit one’s children into the education system for the prescribed period. However, this is (1) free of charge if parents opt for the state system and (2) one may choose to send children for private education. In these respects, New Zealand law appears to discharge the obligations relating to primary and secondary education found in international human rights instruments. It is these international instruments which affirm the “right to an education”.!

In theory the system entitles parents to seek the education of their choice. In reality most parents’ choice is limited by their ability to pay. This means that the overwhelming majority of New Zealand parents consign their children to the state system. It is this fact which raises the issues to be addressed in the remaining parts of this paper: to what extent can parents require the state system to accommodate the values which they would like to inculcate in their children? These are the sorts of issues litigated in North American courts by parents claiming rights.

2 Whose rights are involved, parents’ or children’s?

I believe it is clear that both parents and children have a right to an education for the child. The international instruments speak of both parent’s and children’s rights. There are obviously issues within education where it is more helpful to speak of students’ rights than parents’ - disciplinary procedures being one example. But when it comes to the fundamental right to an education, and the claims of a religious, linguistic or cultural minority to seek accommodation by the state, I suggest it is appropriate to approach the topic from the parents’ rights perspective. That is the framework I adopt in this paper, though there will be occasions when it is necessary to explore what happens when students of appropriate age differ from their parents on issues relevant to our discussion.

3 Rights which may be claimed from the state in education

In this section I briefly review the types of “rights-claims” which parents may seek to make in relation to education. I suggest there are three basic sources of rights which are relevant to our discussion. I set these out now because the distinction is important to my later discussion as to how courts should deal with rights claims in education.

(a) Moral or “extra-legal” claims

Put simply, the bottom line in the field of human rights is that people are free to claim their rights as they perceive them, and they do not need to ground their claim in any particular authority or legal source. Thus, a parent might demand that certain books should not be used because they are profane or evil. Obviously, however, the effectiveness of this sort of claim is greater when it is rooted in some persuasive source. In the New Zealand context the Treaty of Waitangi has become such a source. While not directly enforceable in the courts, due to the operation of the legal doctrine by which international treaties must be
incorporated into domestic law before courts can enforce them, it is nonetheless a powerful instrument of moral suasion in the 1990s. So, to take one example, the growing awareness by the Crown of its Treaty obligations is reflected in the educational reforms of 1989. These reforms instituted the “school charters” which are deemed by law to contain “the aim of developing ... practices that reflect ... the unique position of the Maori culture” and the aim of ensuring “instruction in tikanga Maori ... and te reo Maori ... for full time students whose parents ask for it.”

My present point is simply that these reforms, along with many others, reflected the submissions received by government by those making claims upon it. In short, one way of achieving recognition of rights in education as in other fields is to seek, through the political process, their enshrinement in the law. This type of “extra-legal” rights-claim may seem too obvious too mention. But it has been suggested that the 1989 educational reforms had, as one of the goals, the creation of structures to allow political control by local communities over their schools. This has implications for the role of the judiciary. If the system was designed so that rights issues are resolved through the local body politic (the school parent community) then perhaps this means that courts were not intended to play a role and should intervene only to preserve the sanctity of the process and not the results of that process.

(b) Rights as duties imposed by law upon educational actors

This is the typical way in which the English and New Zealand legal systems reflect civil rights. The starting position is that “all is permitted save that which is expressly prohibited”. Religious, cultural or linguistic freedom of parents is, in this sense, a starting point. It may, however, be eroded by positive laws passed by the state. When the state crafts these laws it generally seeks to do so in a manner which strikes a balance (as it sees it) between individual rights and the efficient attainment of its objective. We see this in the education area in several forms:

(i) the compulsory provisions as to Maori language and custom in school charters just discussed above - boards of trustees are charged with the duty of achieving those goals and this creates a right in the constituent community;

(ii) the duty of school principals to release students from tuition if satisfied of “sincerely held religious views”;

(iii) the duty to offer only teaching of a “secular character” to primary students;

(iv) the duty imposed on school boards (as on others) to refrain from discrimination of the type prohibited by the Race Relations Act 1977 and the Human Rights Commission Act 1977.

These various types of legal duty expose persons owing the duty to sanctions if they are breached. The effect is to uphold the rights which are protected by the duty. It is important to note that some of these duties may be called to account only in special forums. So, for example, school boards’ duties imposed through Charters are enforceable only by the Secretary for Education, while the duties under the Human Rights Commission and
Race Relations Acts are enforceable before the Equal Opportunities Tribunal and then only if prior mediation is unsuccessful.

The significant point for present purposes, to which I shall return in a moment, is that the rights protected by duties expressly imposed by legislation have generally been the subject of careful consideration in the legislative process. To this extent there is a presumption of sorts that it is the role of the court, or other forum, to intervene so as to hold the educational actor to his or her duty. Thus, in the recent Waitara complaint to the Human Rights Commission as to Maori language instruction, there was no suggestion that the Commission should not intervene but should instead leave the whole affair to the school board. Plainly there could not have been any such suggestion. The Commission had to respond to a complaint, subject only to ensuring it had jurisdiction (and to various provisions in the Human Rights Commission Act which justify it in refusing to investigate certain types of complaints).25

(c) The New Zealand Bill of Rights Act 1990

This is the third source of legal rights relevant to education. This does not protect rights through carefully expressed duties tailored to particular concerns. Rather, it follows the model of modern Bills of Rights around the world and declares a set of rights in the abstract. They are not tailored specifically to education: they apply in all spheres of governmental activity. These rights operate in the opposite way from the previous category: they imply a duty on governmental actors not to infringe them. Yet the very abstract nature of the “vague but meaningful generalities”26 found in the Bill of Rights means that it is difficult to discern with any precision just what they involve. What does it mean for a teacher or a school board that a parent has freedom of religion,27 or a right to speak the language of a minority linguistic group?28 Here are some of the provisions of the Bill of Rights which are of importance to education:

13. Freedom of thought, conscience and religion - Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. Freedom of expression – Everyone has the right to freedom of expression, including the right to seek, receive and impart information and opinions of any kind in any form.

20. Rights of minorities – A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

The impact of these rights on the school curriculum would have been far from the minds of legislators when they enacted the Bill of Rights in August 1990. This is not to say it doesn’t apply to school curriculum decisions; only that the implications of it applying can not have been thought through.

A prior question with the Bill of Rights, though, is whether it applies to the person or organisation against whom one seeks to use it. The question of “application” - that is, who bears the burden of observing the Bill, is dealt with in s 3 which provides:
3. Application—This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power or duty conferred or imposed upon that person or body by or pursuant to law.

So an important threshold question is whether the Bill of Rights applies to the actions of teachers and school boards in curriculum decisions. To this we now turn.

4 The legal position of teachers

Once it was generally accepted that teachers exercised their authority over students by way of delegation of parental authority. This in loco parentis doctrine may well have accounted for the powers and responsibilities of teachers in a bygone age when education was organised at a community level, but it cannot explain the powers and duties of the modern teacher operating within a compulsory system. An illustration of the shortcomings of the in loco parentis doctrine in explaining teacher authority is that, if applied consistently, it must allow for parents to revoke or modify the authority which they have implicitly granted to teachers. Yet the law has not reflected this. In the case of corporal punishment, for example, it was not possible for parents to legally impose conditions to the effect that their own children not be corporally punished. As to curriculum, the in loco parentis doctrine would mean that parents could delegate their authority to teachers only on the basis that certain subjects be taught or not taught. This is far from the legal reality; curriculum has the force of law behind it, as we shall soon see.

The source of teachers’ authority over students and their education is, rather, that they are delegates of the state. It is the public power of the state as parens patriae which is brought to bear in the education field. While the loco parentis doctrine is not without its usefulness in describing certain teacher functions, it is really no more than a helpful analogy. State school teachers are the state’s face in education, even though their role is often akin to a parental one.

To put this in terms of s 3 of the Bill of Rights, I think it undeniable that education is a public function, or duty, which is imposed upon the teacher pursuant to law. The relevant law is the Education Acts 1964 and 1989 which make education compulsory and provide for the establishment of state schools as the forum for the education of all those who do not opt for private education. The Acts provides for teacher registration and for prescription of what teachers actually teach to their students. This combination of factors makes it inescapable that the state school teacher exercises a public function pursuant to law.

Teachers are also, of course, subject to the Human Rights Commission Act 1977 which is not limited to public actors.

5 Legal status of school boards of trustees

The position of school boards of trustees in, in my opinion, the same. They too are subject to the Bill of Rights Act because they are a body with a public function conferred by law.
In this case it is the function conferred by s 75 of the 1989 Act: to control the management of schools. This authority conferred by statute is wide ranging, and while there are sound reasons for thinking that much of the legal autonomy apparently conferred by s 75 is taken away by s 78 (the Governor-General’s power to make regulations for inter alia management of schools), the important point for present purposes is simply that the legislation confers the power, not that it might also confer superior power on someone else. This means that the Board of Trustees may be argued to be subject to the Bill of Rights in all its endeavours, be they in relation to curriculum decisions, employment of staff, or contracting with cleaners and others to work at schools. Of course, for the purpose of this paper, it is only their power in relation to curriculum and other decisions affecting what students receive in their education that concerns us. This is undoubtedly a public function pursuant to the authority of law.

Boards of trustees, like teachers, will also be subject to the Human Rights Commission Act 1977.

6 The position of private and integrated schools

I deal with these here in order to decide whether they too are subject to the Bill of Rights.

(a) Private schools

Private schools are required to submit to an inspection and registration process in terms of s 35A of the Education Act 1989. To be registered they must be “efficient”, a term which is defined in the section to mean “having suitable premises staffing, equipment, and curriculum”, “providing suitably for the inculcation in the minds of students of sentiments of patriotism and loyalty”, having over 9 students and providing tuition of similar standard to state schools. The curriculum must be “suitable”. This is a difficult term to which to attribute precise meaning in this context since it invites the question “suitable to what?” The best explanation is that it means suitable having regard to matters contained in the state schools’ curriculum. It probably means “not too different”. In any event, what is important here is that private schools are not required by law to operate under the National Curriculum Guidelines and the Charter regime imposed upon state schools by Part VII of the Act. The teachers and managers of the registered private school do not, in my view, exercise a “public function ... pursuant to law” so as to make them subject to the Bill of Rights by virtue of s 3(b). The state certainly inspects and registers them, but this does not in my view convert them to state institutions. The legal authority of private school teachers and managers is, in my submission, a matter of private law - the contract between school and parent for education of the child - and the Bill of Rights does not apply to them.

The Human Rights Commission Act 1977 and the Race Relations Act 1977 would, however, apply since these are not limited in their operation to the public sphere.

(b) Integrated schools

Private schools which integrated under the terms of the Public Schools Integration Act 1975 thereby become a part of the state system of education. Teachers, proprietors and
the controlling authority of integrated schools are therefore subject to the provisions of the Bill of Rights to the same extent as those in state schools. However, insofar as integrated schools have a “special character” (which will almost always be religious) the Act provides that that is to be preserved and safeguarded. Since this right to special character is clearly guaranteed in the statute, it would preclude any complaint by parent or student that rights in the Bill of Rights are infringed as a result of that character.

Therefore, while the combination of state funding and religion would most certainly be unconstitutional under the United States Constitution, there is no possibility of legal challenge to the concept of integrated schools per se in New Zealand.

It should be noted, though, that the statutory guarantee of special character for the integrated school is not a guarantee of complete immunity from Bill of Rights challenge. If a school practice or the actions of a teacher amounted to an infringement of the Bill of Rights, it would be excused by the Private Schools Conditional Integration Act only to the extent that the infringing act or practice was a part of the special character.

7 The application of the Bill of Rights to curriculum decisions

(a) The scheme of the Bill of Rights

The Bill contains a set of rights and freedoms, the relevant ones for present purposes having been set out already. The Bill also provides, in s 5, that these rights are not to be regarded as absolute: they are subject to such “reasonable limits prescribed by law” as are “demonstrably justified in a free and democratic society”. Section 6 of the Bill provides that legislation is to be interpreted where possible to give effect to rights and freedoms included in the Bill. Section 4 provides that in cases of conflict between the Bill of Rights and another statute, it is the other statute which is to prevail. It is this latter feature which distinguishes our Bill of Rights from the Canadian Charter and the United States Bill of Rights. Those two documents are entrenched as fundamental law and entitle judges to strike down laws which are inconsistent.

Since our Bill of Rights is directed to interpretation of statutes rather than their validity, it is often assumed the Bill introduced no significant safeguard for rights that were not present in the legal system already. This overlooks the fact that bills of rights operate also as a restraint on executive power - that is, on the powers wielded by public officials who are subject to it. These include, relevantly for our purposes, teachers and school boards.

The potential impact of the Bill of Rights in education therefore lies in two main areas. First, in influencing, through s 6, the interpretation of the Education Acts and other relevant statutes. Secondly, since the Bill of Rights applies to teachers and boards of trustees, it requires that they should not perform acts which amount to infringements. Where, however, those teachers and boards can point to legislation which clearly authorises their acts, then even if such acts amount to an unreasonable invasion of a right, the Bill is powerless to help. For in such a case the authorising legislation, being inconsistent with the Bill of Rights, would override the Bill of Rights through s 4. But where the legislation to which a teacher points as justification for her act is not clear authority for that act, then the interpretive effect of the Bill of Rights ought to ensure that
the relevant legislation is read so as not to justify the infringement.

In fact it will be a rare case where a teacher or a board can point to a clear and explicit justification for an act which is claimed to breach the Bill of Rights. Decisions by teachers as to what to teach and how to teach it cannot be prescribed in legislation, except in the broadest sense through the promulgation of syllabuses. These are not so precise as to provide clear authority for the choices which must be made within the framework provided. Boards of trustees, for their part, operate under the terms of a broadly worded statutory authority, s 75 of the Education Act 1989:

*Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school’s board has complete discretion to control the management of the school as it thinks fit.*

The first point to note is that this broad power is expressly circumscribed by other enactments, which include, obviously, the Bill of Rights. It is therefore possible to read boards’ powers as though the section included the words “but these powers do not extend so as to authorise acts which are infringements of the Bill of Rights”. Of course, the possibility remains that there might be a clear legal power to perpetrate a certain act which would otherwise be an infringement in which case s 4 would apply so as to preclude invoking the Bill of Rights. But, generally speaking, this is unlikely.40 Neither the Education Acts nor the curricula which are prescribed go into any detail as to what is specifically mandated. For the most part, teachers and boards have powers which may be used either consistently or inconsistently with the Bill of Rights. The clear message of the Bill of Rights combined with s 75 is that they should be used consistently.

This raises the critical question of what consistency with the Bill of Rights actually is. As we saw, s 5 of the Bill says that rights may be subject to “reasonable limits prescribed by law”. The precise way in which the Bill of Rights applies in the courts is still a matter of some controversy. It is not necessary to clutter this paper with details of the controversy, which is covered elsewhere.4oa For present purposes it is enough to state my conclusion, which is this. When someone complains to a court that the acts of a school teacher or board amount to an infringement of their rights in the Bill of Rights, then it is the task of the court to decide whether that alleged infringement is a real infringement; that is, is it an unreasonable limit on the right as judged by the standards of a free and democratic society. If it is, then the act of the teacher or Board was an illegal act, should be declared so, and ought not to be repeated. If the alleged infringement is held to be reasonable, then there is no actual infringement of the Bill of Rights at all and there is no cause for complaint.

(b) The Bill of Rights and the school curriculum.

It is necessary to briefly set out the legal basis of curriculum prescription in more detail, in order to see how the Bill of Rights might apply.

The 1989 reforms were preceded by the Picot Report which referred to the need for community participation in detailing course content:41

Following the development and approval of the institution’s Charter, the principal
and staff determine how the objectives in it are to be achieved. That task will include
the detailing of course content, the resources to be used, the organisational
arrangements of the institution, and the methodology and teaching techniques to be
used.

In the government’s policy statement entitled Tomorrow’s Schools - the Reform of
Education Administration in New Zealand the matter was phrased rather differently,
though still leaving room for local community input within the framework of national
guidelines:

There will be a set of national curriculum objectives established within the national
guidelines for education. Optional elements possible within the national objectives
will be determined by the community and the institution working together, and we
institution’s charter. Parents and the community will also have a role to play in the
establishment of national curriculum objectives through consultation via commu­
nity education forums.

In the eventual reform the national curriculum was included. This is the result of the
statutory incorporation into charters of the aim of meeting national curriculum objectives,
coupled with the retention of specific powers in the Minister to prescribe curriculum.
However there is still a residual scope for local curriculum objectives, and indeed at the
time this paper was being written the School Trustee’s Association was calling for more
boards to set such local objectives.

Taking charters first, these are deemed to contain aims relating to Maori culture, language
and tikanga Maori as set out in s 63. The realisation of these aims may presumably be
attained through curriculum choices at the local level. Section 61(2) further provides
that charters are deemed to contain the aim of meeting “national education guidelines”,
a term which itself is defined to include “national curriculum goals” and “national
curriculum statements”. The latter phrase is further defined as follows:

(i) The areas of knowledge and understanding to be covered by students; and
(ii) The skills to be developed by students; and
(iii) Desirable levels of knowledge, understanding, and skill to be achieved by
students, ...

A second more direct method of curriculum prescription, imposed upon schools from, as
it were, “above”, is as follows. In the case of primary and intermediate schools, s 75(1A)
of the 1964 Act confers power upon the Minister to prescribe syllabuses, courses, studies
or activities to be included in the schools’ programmes of instruction. For secondary
schools Regulation 4(1) of the Education Secondary Instruction) Regulations 1975 (as
amended in 1990) provides powers upon the Qualifications Authority to prescribe
syllabuses. The regulation concludes:

Subject to the approval of the Chief Executive, the scope and treatment of the
material specified in any such syllabus may be freely decided by the Principal of
any school.

An examination of the actual syllabuses in use reveals that they are written - no doubt
necessarily - at a level of generality which would make it difficult for any school board
or teacher to contend that a specific educational task required of students - such as "read this particular book" or "perform this play" - is clearly mandated by the legally prescribed curriculum. The significance of this is, of course, that if a parent were to object to the content of the curriculum - for example, say, that the school readers contain too many references to witches and spirits and promote an anti-religious message - then it will not be possible for a school to respond "but the law requires we teach this way." This means that the challenge to curriculum decisions based upon the Bill of Rights is unlikely to be defeated in limine by citing clear statutory authority which defeats the Bill of Rights.

In some syllabuses this may be more arguable. The English: Form 3-5 Statement of Aims may be argued to justify a certain approach to values education with which some in the community undoubtedly disagree. Here is an extract from a section about extending students' "awareness of ideas and values through language":44

Students need to:

- understand and appreciate that their attitudes and values, and those of others, are influenced by environment and background;
- appreciate that the acceptance or rejection of ideas and values may depend on the language in which they are expressed.

It might be argued that this mandates a teaching of value relativity, and that any religious objections to specific curriculum tasks designed to meet this educational aim are precluded by clear legal authority, resting ultimately on the duly prescribed syllabus. (The validity of the prescription of the syllabus itself may then be attacked: it too is a discretionary matter, resting upon broad delegated authority from Parliament. Again, it may be contended that the authority was not delegated on terms that it be used to infringe rights. A similar argument may be used to attack course prescriptions for external exam purposes. This will be necessary when local curriculum choices are in fact dictated by these prescriptions, so that any parental challenge must be directed to the prescription itself.)

The general impression from the syllabus statements, though, is that wide discretion is left to teachers and schools in making curriculum choices so as to attain the broad aims of the curriculum. As to local curriculum goals, boards have discretion as to what these should be (after completion of the consultation processes prescribed in the Act). And, again, teachers implementing the local curriculum goals will have choices to make as to how they go about it. Putting this in Bill of Rights terms, the teacher and school board decisions are taken under a general authority conferred or implied by the Act but few specific decisions can claim clear statutory authority. I therefore conclude that there is scope for the argument that certain types of decisions ought not to have been made if their effect is to breach rights in the Bill of Rights.45

In practice, legal objections to curriculum of the type I am concerned with will usually be preceded by complaints to the school board as the employer of the teacher concerned. Assuming the board upholds the actions of the teacher, the board is likely to find that it is the target in any resulting litigation. This raises the question whether courts are able or willing to hear complaints about school board decisions. Many will recoil from the
proposition that courts should have to decide whether a particular curriculum decision is or is not consistent with the Bill of Rights. Aren’t these the very sort of decisions that teachers are trained, and school boards elected, to make? Why should a court interfere? Accordingly, even though I believe I have shown the potential application of the Bill of Rights to curriculum decisions it is now necessary to discuss whether courts will or should be willing to entertain this type of dispute.

8 The legitimate role of the courts in educational disputes

It is well known amongst lawyers that the rapid growth of the administrative state through the middle decades of the 20th century has seen equally rapid growth of legal doctrines conferring judicial control over the administration. These "administrative law" doctrines are easy to state in the abstract - persons vested with statutory powers should exercise them reasonably and in accordance with fair procedures. But their application in the myriad circumstances of public life requires careful balancing of the legitimate role of judges, on the one hand, and the need to defer to the judgments of the expert administrators, on the other. Hence the courts have largely confined themselves to monitoring procedural fairness, as well as ensuring that decision makers do not stray from their statutory jurisdiction so as to make decisions which they are not in fact authorised to make.

Educational disputes of the type described in this paper are ultimately a subset of general administrative law problems. Accordingly the debate about the legitimate role of judges must be faced with particular reference to education. Should judges second-guess the judgments of teachers and school boards over what is of educational value?

By way of illustration, the American case of Board of Education v Pico is valuable. The Supreme Court split 4-4 on the legitimacy of a New York School Board’s act in removing 11 books from the libraries of schools under their jurisdiction. Was this a matter for the highest Court in the land to consider? As to this, here are extracts from the opposing views:

Justice Brennan, with whom three other judges agreed, said:

In sum, students do not “shed their rights at the school house gate” [citing an earlier case]. Of course courts should not “intervene in the resolution of conflicts which arise in the daily operations of school systems” unless “basic constitutional values” are directly and sharply implicated in those conflicts.

But these four held that basic constitutional values were so implicated.

Chief Justice Burger, with whom three other judges agreed, said:

In order to fulfil its function, an elected school board must express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. It is a startling erosion of the very idea of democratic government to have this court arrogate to itself the power the [other group of judges] asserts today.

Examples could be multiplied. It is a familiar debate in American constitutional law.

As it happens, one of the first major New Zealand judgments in New Zealand education
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law after Tomorrow's Schools echoes this debate. In Maddever v Umawera School Board of Trustees the parents' complaint revolved around the manner in which the principal and Board of Trustees had dealt with a playground incident in which their son punched a girl. The matter never progressed anywhere near disciplinary action against the child, and in any event the parents soon voluntarily removed their son from the school. Their concern was with an alleged grievance against the principal. The case came to court three years after the event, and after an Ombudsman's investigation instigated by the parents had vindicated the principal. On reading this case the immediate impression is that the parents' legal action (for judicial review of the various Board decisions relating to the complaint against the principal) thoroughly deserved to be struck out as incapable of success - as indeed it was. The striking out was based on a number of grounds, any one of which would have justified the decision. Of present significance is the lengthy discussion - as one basis for the striking out - of the appropriate role of courts in the judicial review of education decisions. The conclusion is worth setting out in full: 46

Against this background it seems clear that except in rare cases it would be wrong for the Court to intervene too readily in cases brought against Boards of Trustees in relation to purely managerial or administrative matters not seriously affecting the rights of students: see Edwards v Onehunga High School Board [...] If such matters become contentious they should be negotiated, mediated and resolved at the local level. The legislation is informed by the democratic belief that responsibility is the great developer of the citizenry and that issues of local educational administration are best left for resolution through the individuality of local communities. A tendency to turn always to the law for resolution of these matters would be unwise and inappropriate. Support for decision made within local schools must be found by means other than their vindication in courts of law. To paraphrase the words of Frankfurter J in West Virginia State Board of Education v Barnette..., a persistent positive translation of the concepts of fairness, equity and justice into the convictions, habits and actions of a local school community will be the ultimate protection against maladministration and unfairness.

Indeed even in cases where pupils' rights are concerned it seems to me, with respect, that there is need for very considerable judicial caution. In the sensitive area of education there is a significant risk that the Courts will, in administering judicial review, unwittingly impose their views on educational issues when they have no special competence for that task and the legislature has made it tolerably clear that such matters are not primarily judicial issues but rather issues of educational policy for School Boards operating against the broad backdrop of the National Education Guidelines.

The background to which Williams J alludes in the opening paragraph of the above quotation is the greater parental participation which the 1989 Act introduced. This, the judge suggests, was part of a trade-off involving reduced judicial review. Accountability is secured through public meetings and periodic elections rather than litigation. Indeed, as the judge points out in a separate part of his judgment, the expense of litigation will quickly exhaust school budgets and will always take money away from more fruitful endeavours.

There is substantial force in these comments. Few will welcome a regime in which educational issues are fought in the courts. It has certainly not been evident in New Zealand's history to date. 47 But the critical point, which did not arise in the patently
unmeritorious case before Williams J, is whether citizens who contend in court that their or their children’s legal rights have been infringed by school actions must fail at the threshold on the ground that the courts are not the appropriate forum for their complaint.

The first point to note from the Maddever case is that Williams J is speaking of administrative and managerial decisions. That was the type of decision there involved - the board’s handling of a parent complaint. But Williams J also expressed the view that even if student rights had been involved - he recognizes that they could, even in managerial decisions - the courts should still proceed with caution.

I take it that the caution he advocates is borne of the same sorts of concerns as animated the Burger group of judges in Pico. That is, the need to respect the decisions of elected school boards and not to interfere with them lightly. Of course the critical issue in any particular case is whether the right is so important as to demand a remedy - notwithstanding that it would frustrate the will of an elected majority on a school board. The Brennan group of judges thought that Pico was such a case. Ultimately the question is not so much whether or not judicial deference to school boards is a good thing - all would agree that it is. It is where that deference should end and vindication of fundamental rights begin.

In this context it is significant to note that the paraphrased words of Frankfurter J as to the need for deference to educational decisions were actually made in a dissenting judgment. The majority of the United States Supreme Court held that the state of West Virginia was acting unconstitutionally in penalising Jehovah’s Witness students who refused for religious reasons to salute the American flag. In the 1990s I think most would agree with the assessment that a majority ought not to be able to compel a member of a minority to perform an act which that person regards as contrary to religious belief, especially in a school context where the countervailing interest is relatively weak. The concept of a right, after all, is that it be able to be invoked as a shield against majority rule.

Indeed, the argument against judicial review based on parental control can be turned the other way. The devolution of real power over curriculum and related issues to locally elected school boards of trustees might be said to call for more, rather than less, judicial review when individual rights are at stake. The New Zealand Bill of Rights Act 1990 affirms individual rights enjoyed by all who are in New Zealand. It sets national standards in rights, just as there are national standards in curriculum. The Bill may be taken as a legislative statement that judges are to uphold the rights especially when, as is possible given community control over education, there are local deviations from them. However this is not to say that judges should not defer when appropriate to legitimate educational decisions made by school boards and teachers. The question remains, how far should a court go? What considerations are relevant to a court in deciding when and how to intervene?

The Bill of Rights methodology requires, in my opinion, the following approach. When a parent invokes rights to challenge school courses and activities - say, the prescribing of certain readers or requiring Maori language to be compulsory - the threshold question is whether the claimed right applies in the situation. Is, say, freedom of religion affected at all? This involves defining what is involved in the right.
The next issue is deciding whether the right is actually infringed or whether the alleged infringement is "saved", being a reasonable limit demonstrably justified in a free and democratic society in terms of s 5 of the Bill of Rights. Canadian authorities on the meaning of the phrase "reasonable limits" in the Charter have been accepted here. A part of the test for reasonableness is that the court should identify the objective of the offending act, and ask whether that objective could have been obtained in a manner which had a less severe effect upon rights. This is a balancing test in which the importance of the objective is weighed against the seriousness of the rights invasion. It is at this stage of the test that there is proper scope for deference to school board decisions. The board's own assessment of the importance of the objective, and the appropriateness of the particular means used to attain that objective, ought to be presumptively accepted if it can be grounded in "reasonable education policy". Deference is due to school boards in that kind of assessment but ultimately it is properly a matter for a court to decide if fundamental rights protected by law have been infringed. This, to repeat, is a balancing exercise. Deference is due in considering the balance. But the call for deference is not a reason for refusing to even enter into a consideration of the claim.

This view is consistent with the view advanced in another paper on the Bill of Rights: that the Bill calls for detailed consideration of the reasonableness of alleged rights-infringements so that "vague assertions of deference or non-justiciability have now to survive the transparent particularisation in weighing which s 5 [of the Bill of Rights Act] requires."

In conclusion, I suggest that there is a role for the courts in adjudicating on rights in the education context, and this includes challenges to curriculum decisions and practices. In any particular case a court will properly defer to a school board's reasonable judgment that the impugned curriculum decision or practice was "reasonable education policy". Nevertheless, the courts are also charged with ensuring that rights are not infringed, and it is clear from s 75 of the Education Act that a school board action or decision which breaches the Bill of Rights is beyond its power.

PART B

FREEDOM OF RELIGION AND THE SCHOOL CURRICULUM

1 Conflict between compulsory education and religious freedom?

The presence of s 4 of the Bill of Rights makes this issue academic in New Zealand. But since some may claim that the very concept of a compulsory education is inimical to religious freedom, I deal with it briefly.

The United States Supreme Court decided as long ago as 1922 that there was a constitutional right to have one's children educated outside the state system in private schools. Since the Education Act allows private education, there could be no successful challenge to compulsory education even if our Bill of Rights permitted such a challenge.
A related issue, however, is whether the state may legitimately impose standards on private schools through a system of inspection and licensing such as that provided in s 35A. Once again, the fact is that such inspection is provided for in statute and could not be attacked on Bill of Rights grounds, but I doubt that it could successfully be challenged in any event. United States\textsuperscript{58} and Canadian\textsuperscript{60} jurisprudence on the issue recognises that the state has a legitimate interest in monitoring and imposing minimum standards on private schools. In Canada the claim of a fundamentalist Baptist pastor that it was offensive to his religious freedom to even submit his private school to inspection and certification by the state was rejected.\textsuperscript{60}

The United States Supreme Court has also held, on one occasion, that a religious group could claim exemption from compulsory education altogether, without having to send its children to private schools. This controversial decision, \textit{Wisconsin v Yoder}, involved Old Order Amish parents who objected to sending their children to school after eighth grade.\textsuperscript{61} The Court's reasoning was rooted in the religious freedom of the Amish to maintain the integrity of their group beliefs by keeping their children away from exposure to worldly influence.\textsuperscript{62} The Court accepted that education after 8th grade was not essential to Amish lifestyle.

The law in the United States has been less helpful to those who seek to remain in the state system yet have the state system accommodate their religious views. We deal with these issues in the next section.

\section{Religious observance and instruction in primary schools}

The teaching in primary schools is to be of a "secular nature".\textsuperscript{63} However by s 78 of the Education Act 1964 there is express legislative authority for school boards (the successor to the Committees mentioned in s 78) to allow religious observance and instruction outside school hours.

Religious "observance" and "instruction" are the terms used in s 78. I take observance to mean what is called "exercises" in North American jurisprudence - that is, prayer, Bible (and other) readings and hymn singing. Instruction is the impartation of religious doctrine or belief. Whether instruction also covers the teaching "about" religion as well as teaching "of religion" is a point which becomes important as we shall see.

\textbf{78. Religious instruction and observances in state primary schools--} Notwithstanding anything to the contrary in section 77 of this Act, if the School Committee for the school district in which the school is situated, after consultation with the principal, so determines, any class or classes at the school, or the school as a whole, may be closed at any time or times of the school day for any period or periods exceeding in the aggregate neither 60 minutes in any week nor 20 hours in any school year, for any class, for the purpose of religious instruction given by voluntary instructors approved by the School Committee and of religious observances conducted in a manner approved by the School Committee, or for either of those purposes; and the school buildings may be used for those purposes or for either of them.

Section 78A allows for the possibility of further time for religious instruction and observance, where the Minister of Education so authorises after satisfying himself that
a majority of parents so require. Section 79 provides that attendance is not compulsory and parents may, on behalf of their children, opt out by written notice.

This approach of “closing the school” but allowing the classrooms to be used for religious purposes preserves, albeit by way of a fiction, consistency with the requirement that teaching be secular. There is absolutely no doubt that s 78 would be unconstitutional in the United States and Canada, even allowing for the “opt out” provisions in s 79, but this result could not happen in New Zealand because s 4 of the Bill of Rights provides that statutes inconsistent with the Bill must prevail.

It is true that the Board’s power to allow religious instruction in terms of s 78 is discretionary, but any argument along the lines suggested above - that the discretion ought not be exercised if religious freedom is infringed - would in this instance be bound to fail. This is because a Board which does allow religious instruction has the clear authority of the statute behind it. The possibility that it may wish to authorise religious instruction is expressly covered.

While this particular issue is foreclosed in primary schools by the clear statutory provision, there remain thorny issues such as what sort of teaching about religion is permitted, say, in relation to celebration of holidays with religious significance. This issue is explored under a separate heading.

3 Religious instruction and observance in secondary schools

Section 81 says that “religious instruction or religious observance” in schools other than primary schools is not affected by the Education Act 1964. There is no requirement that teaching in secondary schools be secular. What is more, there is even a faint suggestion in s 81 that religious instruction is anticipated - otherwise why say that secondary education is not affected by the Act? A rationale may be the greater age of students at secondary schools.

I shall deal with the issue of “observances”, or “exercises”, first. If a secondary school has prayer, Bible readings, and hymns then it is not a matter mandated or permitted by any legislative enactment. It will be a policy decision of a teacher, principal or school board. Since the Bill of Rights restricts the permissible scope of actions by these educational actors, it will be possible for parents and students to argue that their religious freedom is infringed by such exercises. The experience from the United States and, particularly, Ontario in Canada, is illuminating.

First, religious exercises on school property are a prohibited “establishment of religion” in the United States of America. An “opt out” provision for students does not alter this. Such provisions are held to be inherently coercive in that peer pressure may result in students not opting out when they otherwise would, and in any event the very act of opting out forces them to make a “religious statement” against their will. In the United States various legislative techniques have been employed by states to circumvent the ban on school prayer. So-called “dismissed-time” programmes, whereby religious instruction happens off school premises during hours on an “opt-in” basis, have been upheld. But a law prescribing a “minute of silence” was struck down as a colourable attempt to
introduce school prayer without saying so, a result which hinged largely on the particular history of the legislation. This last case suggests that, as a general proposition, a “minute of silence” for students to pray or reflect as they desire is constitutional.\textsuperscript{70}

All these decisions were based on the “Establishment Clause” of the First Amendment to the United States Constitution - “Congress shall make no laws respecting the establishment of religion”. The First Amendment also protects the “free exercise” of religion. The Canadian Charter of Rights and our own Bill of Rights have no establishment clause, only a “free exercise” clause. In Canada and New Zealand every person is guaranteed freedom of religion, but not freedom from religion. Does this make a difference?

The answer is that it makes very little difference, due to the fact that many “establishment” situations also contain an element of coercion which affects freedom of religion. This was the conclusion of the Supreme Court of Canada in \textit{R v Big M Drug Mart Ltd.} In that case, a law prohibiting Sunday trading was held to infringe religious freedom because of the subtle coercion inherent when the state appeared to “take sides” on a matter of religious significance.\textsuperscript{71} Where there is that element of coercion then the freedom of religion clause in Canada’s Charter is the functional equivalent of the Establishment Clause of the United States constitution. However mere establishment, absent coercion, may not offend the Charter.

The Ontario situation as to religion in schools is therefore relevant to New Zealand. Regulations passed under authority of the province’s education statute allowed for “religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord’s Prayer or other suitable prayers.” This wording did not in its terms mandate Christian readings, nor even Christian prayers (save that the concept of prayer may itself connote only Judaeo-Christian religions including Islam). In \textit{Zylberberg v Sudbury Board of Education} parents complained about the practice of their school board. In Sudbury schools the Lord’s Prayer was recited by the classroom teacher, or over the school public address system, at the beginning of each school day. Some schools also had scripture readings, and all required that “O Canada” be sung.\textsuperscript{72}

The plaintiffs sought a declaration that the regulations permitting the religious exercises were an unconstitutional invasion of their religious freedom. A preliminary issue was whether religious freedom was impaired when the regulations allowed for “opting out”, and in any event did not compel belief. The answer was that freedom of religion was taken to imply also a freedom from having the state espouse a particular religion or appear to take sides on matters of belief. This, being a subtle coercion to adopt majority beliefs, was an infringement of religious freedom - of the freedom not to have a religion. The opt out provision did not save the offending practice. Compelling students to “make a religious statement”, by opting out, \textit{itself} infringed their freedom.

The Court in \textit{Zylberberg} therefore concluded that the regulations allowing religious exercises did indeed infringe religious freedom. Further, it held that the infringement could not be saved by s 1 of the Charter, the “reasonable limits” section. This was because once it was accepted that the purpose of the regulation was to advance the cause of
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religion, the resultant infringement was incapable of being reasonable. (Evidence as to the origin of the regulation at issue showed that the purpose was indeed to advance religion.) Previous Canadian cases relevant to assessing "reasonableness" of limits on rights had held that the state must first have a legitimate purpose in enacting the legislation at issue. The purpose of advancing religion had been held objectionable per se and legislation enacted with that purpose is incapable of being "saved" as a reasonable limit.73

What are the implications of this case in New Zealand? Most of the reasoning in the case is equally valid here, in the sense that it rests upon the meaning of the term "freedom of religion" which is also found in our Bill of Rights. In New Zealand any similar challenge would not be to any enactment but to a specific policy or act of a school board or principal. Section 4 of the Bill of Rights cannot prevent such a challenge from succeeding. The one doubtful and possibly "non-transportable" element in the Ontario reasoning is this. Since it was the regulations that were being attacked, it was the purpose behind the regulations which the Court searched for when deciding the issue of reasonable limits. Previous Supreme Court jurisprudence established that it was the purpose at the time of enactment which was relevant for this assessment.74 On the facts there was clear evidence that the purpose at the time of enactment was indeed the advancement of religion.

In New Zealand the purpose of the religious exercises would fall to be assessed as at the date the exercises were introduced by principal or board decision. Might not an educational purpose be advanced for religious exercises? As a Canadian Commission on religious education has pointed out, the verb "to educate" is defined in the Concise Oxford Dictionary to mean "give intellectual and moral training".75 As a basis for morals education the reading of scriptures (and, arguably, not only of the Christian faith) is surely relevant. Prayer, admittedly, is different and it is difficult to conceive a non-religious purpose.76

A useful guide to what may be deemed acceptable by a Canadian court is the Toronto Board of Education practice as to religious exercises. These were referred to in Zylberberg as an example of how "educational and moral values" behind religious exercises may be imparted with a less intrusive impact on religious freedom. The Toronto Board practice consisted of singing "O Canada" followed by a reading from a book containing readings and prayers from "a number of sources including Bahaism, Buddhism, Christianity, Confucianism, Hinduism, Islam, Jainism, Judaism, People of Native Ancestry, Secular Humanism, Sikhism and Zoroastrianism."77

Following Zylberberg the Ontario regulation allowing religious exercises was re-enacted as follows:

1. Every public elementary and secondary school shall hold opening or closing exercises.
2. Opening or closing exercises shall include O Canada and may include God Save the Queen.
3. Opening or closing exercises may include the following types of readings that impart social, moral or spiritual values and that are representative of Ontario's multicultural society.
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1. Scriptural writings including prayers
2. Secular writings
4. Opening or closing exercises may include a period of silence.

An opt out provision is included.

As to religious instruction in secondary schools, there are again helpful North American precedents. The Supreme Court of the United States has on several occasions struck down legislation designed to impart Christian belief within the school curriculum. No American legislatures have tried to do this directly - this would be pointless since it would be assuredly struck down - but there are several cases surrounding the evolution/creation science issue in which religious issues have been held to have improperly motivated the legislature. For example, the Courts have struck down an Arkansas statute making it a crime to teach evolutionary theory,78 and a Louisiana statute mandating equal time for “creation science”.79 These cases accept that educational reasons may dictate the teaching of differing theories of human origin but that legislatures may not interfere with this type of decision for religious reasons.

In Stone v Graham80 the Supreme Court struck down a law which allowed for the display of the Ten Commandments on the walls of classrooms in a Tennessee school district.

In Canada the same regulation at issue in Zylberberg over the “exercises” issue also authorised religious instruction within school hours. The regulation, and a religious curriculum approved under it, came under attack in Re Canadian Civil Liberties Association v Ontario (Education Minister),81 known as the Elgin County case after the district whence it originated. The regulation allowed two half-hours per week of religious instruction to be provided, if a school board so wished, by outside clergy or lay people. An opt out provision was included. The regulation and the curriculum were held by the Ontario Court of Appeal to infringe religious freedom. The regulation was struck down and the board was enjoined from further use of the curriculum. The reason was that the curriculum was “substantially of an indoctrinating nature”, and the regulation permitted such indoctrination.

Once again, as in Zylberberg, the Court accepted that the regulation has been passed with indoctrination as a purpose, making it impossible for the province to argue that religious freedom was only reasonably limited in terms of s 1 of the Charter. Evidence for indoctrination being the purpose was (1) that clergy could be invited to take the lessons, (2) that such “outsiders” could not take any other part of the school curriculum, and (3) there was no evidence that clergy were better suited to teaching about religion that they were at indoctrination. By 1989, however, the Elgin County had resolved not to use outside teachers and instead required Board staff to teach using a Board curriculum. It also allowed on an opt-in basis for outside religious instruction by lay people using their own curriculum, and about 10% of students opted for that.82 The case did not address the legitimacy of that voluntary instruction. Rather, it focused on the official school curriculum which was in use for 87% of students (the remaining 3% had opted out of religious instruction altogether).
The Court began by quoting an American test for distinguishing indoctrination from education about religion. It is useful to quote this in full:

1. The school may sponsor the study of religion, but may not sponsor the practice of religion.
2. The school may expose students to all religious views, but may not impose any particular view.
3. The school’s approach to religion is one of instruction, not one of indoctrination.
4. The function of the school is to educate about all religions, not to convert to any one religion.
5. The school’s approach is academic, not devotional.
6. The school should study what all people believe, but should not teach a student what to believe.
7. The school should strive for student awareness of all religions but should not press for student acceptance of any one religion.
8. The school should seek to inform the student about various beliefs, but should not seek to conform him or her to any one belief.

The curriculum in issue in Elgin County fell on the indoctrination side of the line. My impression, from what we see in the judgment, is that it was a close call, with the Court being influenced by earlier versions of the curriculum which, though now superceded, had clearly betrayed an underlying motive of indoctrination. The court undertook an analysis of the wording in the curriculum, and noted features such as the following:

[A passage in the curriculum read:]

“Jesus made it very clear that the Word of God and the Work of God were for both men and women alike.”

This material teaches about the evil of prejudice almost entirely from the Christian perspective and may fairly be regarded as a form of indoctrination.

At the intermediate level, there are included student worksheets which require the pupil to read passages in the Bible and then fill blanks in sentences such as:

“Jesus is the ________ way to God.”

The word to be inserted is “only”.

The treatment of other religions is, as one might expect, entirely non-indoctrinal. For example, with respect to Buddhism, there are statements with blanks to be filled in that begin “Buddhists believe [or believe in] ...”. There is no similar treatment of Christianity, eg “Christians believe [or believe in] ...”.

Other aspects of the curriculum mentioned were the section on prophecy (students to look at “modern day examples of it”) and an emphasis in the Christian section more on “matters of belief” than on “factual description.” All in all the Court concluded there was sufficient...
indoctrinating material to regard the intrusion on religious freedom as more than trivial or inconsequential.

The aftermath of the *Elgin County* decision is instructive as it shows that judicial decisions do not resolve these issues. To understand the aftermath it is necessary to note that the Ontario Education Act also contains a provision allowing pupils to receive such “religious instruction as his parent desires”. This section was not challenged in the *Elgin County* litigation. The Ontario government announced its intention to amend s 50 after *Elgin County* but subsequently backed down in the face of public opposition. The underlying issue is that religious groups contend, with justification, that *Elgin County* only proscribes a compulsory religious instruction with an “opt out” clause, but says nothing against voluntary religious instruction on an “opt-in” basis. That is to say, consistently with *Elgin County* a school ought to be able to offer parents who wish their children to receive sectarian religious instruction the opportunity for such instruction on a publicly funded basis. The options, as set out by the Ontario based Coalition for Religious Freedom, are these:

The following publicly funded options should be made available to parents on a voluntary basis:

(a) a program in which students are instructed in their own religious or ideological tradition, while learning about the role of other religious and ideological beliefs in shaping society in Canada and around the world.

(b) simultaneously with and as an alternative to [a] above, a multifaith program which emphasises the role of religious and ideological beliefs in shaping society in Canada and around the world, without instructing students in a particular religious or ideological tradition;

(c) religious or ideological instruction programs which may be taught by persons other than the regular teaching staff and would be offered outside of regular school hours; and

(d) alternative schooling in which particular religious or ideological perspectives are integrated into all areas of the school curriculum.

This approach is argued to be consistent with the Charter of Rights, and to reflect in a positive sense the freedom of parents of religious persuasion to have their beliefs taught within the public school system though without compulsion. Such a system would meet the concern of such groups that an austere “education about religion” “relegates religion to the level of private belief at best or quaint customs and superstitions at worst.” In American terms this suggested approach would be classified as “released time” in that it allows consensual religious instruction within the public system. This is the very concept declared a prohibited establishment of religion in *McCollum v Board of Education* on the grounds that the school buildings were used and that, although students had to opt in, the state aided an audience of likely “opters-in” through its compulsory education machinery.

Notwithstanding the United States approach, a similar result is by no means inevitable in Canada (or New Zealand). This is because establishment of religion is not prohibited as such, only infringement of religious freedom. A voluntary system of the type mooted by
the Ontario organisation might amount to “establishment” to the limited extent noted in *McCollum* but would not be unconstitutional on that ground in Canada or New Zealand. It would only be so if it infringed any student’s right to religious freedom. It is arguable that such a system does not amount to the state taking sides, only permitting freedom of choice.87

While these proposals are “on the table” in Ontario, actual developments have been in the other direction. In some respects the *Elgin County* decision has been taken further than it actually went. The Court did not pronounce upon the constitutionality of the “opt-in” provision for religion classes of which 10% of students had availed themselves, but the Ministry, one month after the case, announced that such classes could only be held after school hours. Due to confusion over whether lunch time is part of school time, “even voluntary noon-hour programs have been discontinued by many boards.”88 Christmas programmes with Christian content are also reported to have been cancelled.89

Meanwhile, guidelines for “Education About Religion in Ontario Public Elementary Schools” are being prepared by the Ministry. The proposal is for compulsory “multi-faith” instruction, though still with an “opt out” clause. The thinking is apparently that an opt out is less coercive when that from which a student opts out is a lesson about religion and not indoctrination.90

The Ontario draft “Education About Religion …” curriculum draws heavily on the suggested “test” for indoctrination as quoted in *Elgin County*. It has been suggested by the Ontario Multi Faith Coalition that much existing secular education actually falls within this definition of “indoctrination” and that the difference between indoctrinating religion and indoctrinating, say, the “belief that democracy is superior to autocracy” is much more subtle than is given credit to. Indeed, amongst the lessons in feminist and other critiques of law and society is that supposedly neutral concepts are in fact value-laden and demonstrate a commitment to an ideology.

It is precisely this issue which underlies the debates in North America about wider aspects of the curriculum and I deal with that in the next part of this paper. The conclusion, so far as education about religion is concerned, is that it is consistent with religious freedom even when it is compulsory (with opt out provided). This type of program could be attacked by both the religious and the atheist; by the former on the grounds that it undermines a student’s belief when her religion is presented as one amongst many, and by the latter on the grounds that the state ought not to teach religion at all. The latter objection is easily answered in that education about religion ought to be no more off limits to schools than anything else. The former is a little more difficult but in the end I believe the situation is covered by the opt out provision which New Zealand law provides: s 25A of the Education Act 1989 (to be described below).

4 Religious issues arising in the general secular curriculum

When the state education system actually attempts religious instruction or observance, it is usually obvious. A separate issue arises when the curriculum may not be intended to have a religious content but is perceived by parents to make a religious statement. What are the powers of schools and rights of parents in this area?
(a) Religious holidays

Holidays such as Christmas and Easter have in modern times a secular purpose but are undeniably intertwined with Christian religion. What type of observance of these holidays is permissible in schools in New Zealand without infringing the religious freedom of students or parents of different religions, or no religion? Again, there is North American authority.

The issue has arisen mainly outside the public school context, particularly in the area of Sunday closing laws and religious displays on public land to mark religious occasions. A clear theme in these cases, at least from the United States, is that despite its religious origins, Christmas at least now has a secular aspect. The celebration of it is therefore not, per se, an unconstitutional establishment of religion. Appropriate public celebration is permissible. In practice this has come to mean that public Christmas displays which mix both religious and secular aspects are constitutional: nativity scenes tempered by Santa Clauses, reindeer, Christmas trees etc have passed examination on First Amendment grounds.

In the Easter context, this explains the emphasis given over to eggs and rabbits, and the fact that New Zealand schools follow suit indicates, no doubt, teacher sensitivity in this area which long predates the 1990 Bill of Rights. It is similar with All Saints’ Eve or Hallowe’en, which is of course given over entirely to a secular celebration featuring Jack ‘o lanterns and trick or treating. And Thanksgiving in North America has also been disconnected from its Christian beginnings.

These are areas where North American schools tread carefully. It has not received direct attention in the United States Supreme Court but an illustrative case from a lower level is Florey v Sioux Falls School District 49-5. The Board had adopted policy guidelines on religious holiday observance following parent complaints about the religious content of a kindergarten’s Christmas pageant the previous year. The guidelines, which were upheld by the United States Court of Appeals for the 8th Circuit, were as follows:

The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.

Music, art, literature and drama having religious themes or bases are permitted as part of the curriculum for school sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.

The use of religious symbols, such as a cross, menorah, crescent, Star of David, creche, symbols of Native American religions or other symbols that are a part of a religious holiday is permitted as a teaching aid or resource, provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hannukah, St Valentines Day, St Patrick’s Day, Thanksgiving and Halloween.

I suspect that this is not too different from the present practice in New Zealand schools. Some have criticized Florey v Sioux Falls on the ground that the words of hymns and carols would, if spoken as prayers, clearly be unconstitutional, though in my view this
is a mistaken view which does not give sufficient emphasis to the context. Still others argue for a more extreme view: that even the sanitised secular celebration of Christmas sends subtle signals of the state’s preference for Christianity and thus excludes and denigrates other faiths.95

It is pertinent, however to note that the 1977 Christmas pageant at the relevant kindergarten had included a responsive item which, though it was not a live issue in the case, the court agreed would have been unconstitutional and not within the above guidelines. I find it hard to see exactly why, though perhaps it was because it required children to affirm statements other than in the context of a hymn:

Teacher: Of whom did heavenly angels sing, and news about his birthday bring?
Class: Jesus.

Now can you name the little town where they the baby Jesus found?
Class: Bethlehem

Where had they made a little bed for Christ the blessed Saviour’s head?
Class: In a manger in a cattle stall.

What is the day we celebrate as birthday of this One so great?
Class: Christmas.

Those examples of a permissible guideline, and an impermissible Christmas recitation, may offer some guidance in New Zealand. I suspect it is relevant also to inquire into how other religious occasions are marked. It should also be noted that Florey was an establishment clause case in which a parent sought to have the practice stopped. It was not a freedom of religion case in which an exemption was sought from participation. In New Zealand objection could be taken to religious holiday celebration only to the extent that the school’s apparent sponsorship of the holiday wrought a coercive effect, or if the student was compelled to affirm something (eg by taking part in the play) which was contrary to her or her parent’s beliefs. Absent those factors, I do not think the mere fact of religious holiday celebration infringes the religious freedom sections of the Bill of Rights in New Zealand.

(b) The general curriculum: objection to material offensive on religious grounds

I want to begin by distinguishing certain types of religious objections which may be made to apparently non-religious aspects of the curriculum. First, there may be material to which a parent objects because of her morality based on religious convictions. I have in mind objections to witchcraft and vulgar language in texts, or to sex education in the health syllabus. I deal with these under the heading of “objections to offensive material”. Another category is material which is argued to systematically undermine a student’s faith (or the faith of the parents into which they desire to inculcate the student). The objection here is not so much that it causes offence to a formed belief, but that it impairs the chances of the child developing that belief.96 I now deal with the first category - material which offends.
Courts have been understandably unwilling to uphold religious objections founded on feelings of offence. The usual response is that the right of religious freedom is not a sword which citizens can wield against the state so as to require that they not be offended. Justice Jackson in *McCollum v Board of Education* put it this way:97

> Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that it objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

There is obvious wisdom in this for the alternative is a religious veto in the nature of a heckler’s veto.98 The only practical way of accommodating religious belief in this context is to allow opting out, rather than alterations to curriculum.99 But to maintain the integrity of compulsory education the opt-out provisions have to be kept under control, and I suspect it is the fear of continual litigation on this issue which has kept American courts from fashioning an opt out remedy on free exercise grounds for those who are offended.100

The issue arises repeatedly, usually bound up with religious objections of the second, more serious, type which I shall discuss in a moment. Ironically, while successful court cases on the “offence” issue are few, the spectre of litigation has affected North American school texts drastically.101 The American group People for the American Way reported that there were 376 reported attempts to have school materials censored in the 1991-92 school year, with 41% of cases resulting in removal or restriction of the materials involved.102 The spectre emanates from the politically correct as well as the religious right: Mark Twain’s *Huckleberry Finn* has been removed from school libraries and text prescriptions because it uses the word “nigger”. School readers comes under close scrutiny for possible offence on race and gender grounds. The words “bosom” and “maidenhead” were edited out of one school edition of Shakespeare’s *Romeo and Juliet*, along with 300 other lines.103

The leading court case in which the issue has been raised in the religious context is *Mozert v Hawkins County Board of Education*,104 a decision of the United States Court of Appeals for the 6th circuit. Parents objected to the Holt Rinehart and Winston basic reading series - a collection of literary works designed for use in school. Although the complaints were not articulated in these categories, the analysis of a commentator reveals that much of the complaint concerned matters giving “offence”. The Appeals Court found that the complaint did not cross the threshold of religious freedom, and so the parents lost the case without the state having to advance any compelling interest in making the readers compulsory. The reasoning, echoing Justice Jackson, was that “distaste” motivated by religious views did not warrant legal protection.105

Given the American jurisprudence, it is rather surprising to note that the New Zealand legislation appears to go much further in protecting religious freedom from “offence”. I refer to the recently enacted s 25A of the 1989 Act. The section reads:

**25A Release from tuition on religious or cultural grounds**— (1) A parent of a student under 18 enrolled at a state school that is not an integrated school may, at
least 24 hours before the start of tuition in any class or subject at the school, ask the principal in writing to release the student from the tuition.

(2) Unless satisfied that—

(a) The parent has asked because of sincerely held religious or cultural views; and

(b) The student will be adequately supervised (whether within or outside the school) during the tuition.—

the principal shall not release the student.

(3) Before releasing the student, the principal shall take all reasonable steps to ascertain the student’s views on being released from the tuition.

(4) Subject to subsection (2) of this section, the principal shall release the student from the tuition and (if the student is to be supervised outside the school) let the student leave the school during the tuition unless satisfied, in the light of—

(a) The student’s age, maturity, and ability to formulate and express views; and

(b) Any views the student has expressed,—

that it is inappropriate to do so.

(5) Nothing in this section limits or affects section 79 of the Education Act 1964.

It seems clear that so long as religion or culture provide the basis, mere offence (the nature of which need not even be articulated) allows an opt out. Section 25A is therefore a significant section and I shall examine it in some detail after I have examined the second category of religious objection to curriculum content: impairment of a student’s belief formation.

(c) Objection to indoctrination by the state

Modern educational objectives of the state include teaching children tolerance and respect for the beliefs of others. This is usually seen as self evidently right and proper. The difficulty is that lines must be drawn. The beliefs of the neo-Nazi and the racist are not judged worthy of respect. While that particular line is easily drawn for most, it is otherwise with intolerance rooted in religious belief. Fundamentalist parents in the United States have challenged school curricula which promote the ideal of tolerance for all forms of belief and behaviour. They say that this promotes an insidious relativity which presents their beliefs as simply one option amongst many. This undermines attempts in the home to inculcate their religion in their children. Is this form of intolerance to be tolerated? Fundamentalist legal challenges to general curricula have taken two forms.

The first is the “establishment clause” challenge exemplified by *Smith v Board of School Commissioners of Mobile County*. Plaintiff parents objected to readers in the Mobile School District. They contended that the systematic exclusion of religion in the curriculum (no doubt to meet perceived establishment clause objections), especially in history texts, amounted to an establishment of the religion of secular humanism. They further contended that secular humanism was established because morals were communicate
through the offending texts which were antithetical to theistic belief. The trial judge agreed, ordering that the books not be used. Three days later the federal Court of Appeals for the 11th Circuit suspended the decision, and reversed it on full hearing five months later.

The second type of challenge is the free exercise challenge. This is more relevant to New Zealand in view of the wording of our Bill of Rights. *Mozert v Hawkins County School Board* concerned parent complaint about a reading series on this ground. The plaintiffs sought exemption for their children, not an order that the reading series be discontinued. The actual decision, foreshadowed in the discussion above, was that the plaintiffs’ case amounted to a plea for immunity from “offence”, and that this was not part of religious freedom. Their complaints failed at the threshold. But this was a simplistic analysis, as the following discussion shows.

Academic and media commentary on *Smith* and *Mozert* is illuminating. On the one hand, media generally ridiculed the plaintiffs and legal academics affirmed that “mere offence” did not implicate religious freedom. So-called “secular humanism”, it is said, is a bogey invented by fundamentalists. On the other hand, some academics detected a legitimate concern in the fundamentalist position. It is a claim that the state ought not to indoctrinate their children with values which they do not agree with, and which will alienate them from their religious and cultural heritage. In a society which increasingly celebrates cultural diversity, the complaint that schools are inculcating a homogenous uniformity of belief as to the relativity of morals and values demands some attention.

As Stolzenberg puts it (speaking of the *Mozert* plaintiffs):

> But the plaintiffs most challenging claim was precisely that the objective technique of “mere exposure” is itself a form of value inculcation. This claim, which all but one of the *Mozert* opinions studiously ignored, raises the empirical question of whether and to what degree exposure affects the formation of children’s values, identities and beliefs. At a more basic level, the disagreement is over whether to consider the cultivation of individual reason, objective judgment and rational, critical thought - all qualities admittedly “encouraged” by the program - as a form of indoctrination.

Stolzenberg did not offer a means of resolving the problem; only a plea that the issue be understood for what it is. The claim is, ultimately, that all education is indoctrination. The state makes a judgment in curriculum as to what values are to be indoctrinated. The courts appear reluctant to grasp this problem, save in *Wisconsin v Yoder* where the group objecting was so discrete and insular that their separation from the state’s compulsory education system did not raise the “floodgates” problem (that is, of copious exemptions being sought). Apart from the floodgates problem there are practical problems. The school board in *Mozert* claimed in defence that opting out by the plaintiffs’ children would mean that the school would have to change their course of instruction.

Given this, it is interesting that s 25A of the New Zealand Act allows an opt out which can be invoked as easily for the “indoctrination” ground as the “offence” ground. The *Mozert* plaintiffs would no doubt wish to emigrate to New Zealand: our law provides what they wanted but could not get in the United States. This said, it is most unlikely that those
responsible for s 25A ever considered it would be invoked for large scale opt outs by religious parents - see the discussion below.

A similar type of battle has been waged over school library decisions, both as to initial purchases (or decisions not to purchase) and to removal of books from libraries. *Pico*, mentioned above, was such a case. The unhelpful 4-4 result is mirrored by lower court decisions which go both ways, some advocating judicial deference to Board decisions, others asserting that it is the courts’ job to ensure public officials remain within constitutional authority. Given the opt out provision in s 25A it is difficult to imagine battles being fought in New Zealand over school library decisions unless they are waged for symbolic value.\(^{114}\)

5  **The interpretation and application of s 25A of the Education Act 1989**

The section was introduced in December 1991. In speaking in favour of s 25A the Minister alluded to the Exclusive Brethren as potential beneficiaries of the section.\(^{115}\) However the Opposition speakers dubbed it the “Broadwood School” clause, a reference to a controversy over parents who sought an exemption for their child from Maori tuition.\(^{116}\) Comments in Parliament illustrate the differing perspectives possible on this issue. For opponents of the clause, emphasis was placed upon the rights of the child against the parents, and upon the undesirability of acceding to parents’ fears over exposure of their children to material they deem objectionable.\(^{117}\) Supporters emphasised the need to respect the views of parents.\(^{118}\) Opponents emphasised the elasticity of the term “culture” and the consequent possibility of large scale opt outs and resultant truancy. Supporters urged the common sense of principal and parents.

How will the section work? I propose to examine the various components of the section.

(i)  **What is tuition in any class or subject?**

If the word “subject” was not there we would have in the word “class” an ambiguity of the type/token variety. Does it mean an individual class - say Tuesday’s biology class - or a type of class - biology? The issue is resolved by use of the word “subject” as well, which suggests biology as a whole. On this view the section is incredibly generous, amounting to an opt-out provision for a whole subject in the curriculum (providing the other criteria are met). However, when read so broadly there is a consequent restriction of the time for invoking the right. The request must be made at least 24 hours before tuition in the “subject” starts, which so far as the subject as a whole is concerned is presumably the first class of the year. But even if that deadline were missed, nothing seems to prevent a blanket request then being made at one time for every “class” in that subject throughout the year.

(ii)  **The definition of “religious”**

The definition of religion for legal purposes has been much explored in the United States, particularly in the context of objections to military service. In New Zealand and Australia the issue has arisen only in the context of income tax law, where “religious” trusts qualify for tax relief. The leading New Zealand case is *Centrepoint Community Growth Trust v*
Commissioner of Inland Revenue\textsuperscript{119} in which Tompkins J adopted the approach of Mason CJ and Brennan J of the Australian High Court:\textsuperscript{120}

First, belief in a supernatural Being, Thing, or Principle.

Second, the acceptance of canons of conduct in order to give effect to that belief (though canons of conduct which offend against the ordinary law are outside the area of any immunity, privilege or right conferred on the grounds of religion.

This definition is wider than definitions adopted in English courts because it extends to non-theistic religions\textsuperscript{121} but not as wide as United States definitions which extend to belief systems not centred on the supernatural, such as secular humanism.\textsuperscript{122} It is not self evident that a definition arrived at for tax purposes is transferable to s 25A, but at the least it should be no narrower. The affirmation of religious freedom in the Bill of Rights in 1990, after Centrepoint, is reason enough for a generous approach to the meaning of “religion”. A complicating factor is the fact that in the Bill of Rights there are also the concepts of “conscience” and “belief”. The presence of those words to cover secular “religion” such as humanism may mean that “religion” in the Bill is construed more narrowly. This would mean that the use of “religious” in 25A was not intended to include views emanating from “conscience” and “belief”. Overall, though, I doubt that a court would place much significance on an argument for a restricted meaning of “religion” in s 25A. In any event there is the word “cultural” to fall back on.

(iii) The definition of “cultural”.

This is a much used term but barely capable of precise definition in the present context. Culture is defined in the Concise Oxford Dictionary as a “particular form, stage or type of intellectual development or civilisation.” A cultural view, then, is one which a person has formed because it is required by, or inspired by, the culture to which one belongs, and which is not religious. The customs and norms of a culture are difficult to define with precision, and even then what ultimately counts is whether the parent “sincerely” holds the view - not whether it is a legitimate view, nor whether it correctly interprets the culture concerned. It is difficult to be any more precise. A possible analytical tool is to distinguish “cultural” from “political” views. Ironically, the one case known to me where s 25A has been applied strikes me as not within the concept of “culture” - more of this later in the discussion of the Maori language “compulsion” at Broadwood Area School.

(iv) The burden of proof

The principal has to be satisfied that the request is made for sincerely held religious or cultural views and that adequate supervision is available. The onus is on the parent. These are necessary conditions but they may not be sufficient, for a third factor is the student’s own views. Here the burden shifts, for once the necessary conditions are established the student shall be released in accordance with the parent’s wishes unless the student’s views satisfy the principal that it would be inappropriate to do so. This will obviously be a difficult decision for a principal.

(v) Relationship to homeschooling and compulsion provisions

While the student is absent from class he or she need only be supervised, not tutored. Yet
in theory a parent could request release from all classes and subjects (subject only to being sincere) and have no obligation to provide education for the affected student. I feel certain that a court would strain against such an interpretation and the weakest link in the parent’s argument is probably the issue of sincerity. An alternative approach is to say that the section is not reconcilable with the compulsory nature of education unless the phrase “adequately supervised” is taken to import the requirements of s 21 (“long term exemptions from enrolment”). The practical answer is that a significant discretion is vested in principals through use of the terms “adequately” in subs (2)(b) and “inappropriate” in subs (4)(b).

(vi) The availability of “supervision”.

This is a necessary condition and many schools may not have the resources to offer it themselves. The duty to provide it could become contentious, for without it the parents’ request must be rejected. In practice it appears that the requesting parent could foreclose any problems by providing the necessary supervision himself (for the supervision may take place outside the school).

(vii) The residual areas where s 25A does not assist the religious objector

Section 25A operates against an assumed background of discrete classes with fixed timetables. This is the secondary school scenario. It is of less application to a school schedule which is less rigid and does not permit advance notice of what is to happen in particular classes. Section 25A cannot be invoked by the parent whose objection is to a “subliminal” religious (or anti-religious) message which is claimed to be present throughout all subjects - unless of course the opt out is claimed for all. The remedy for this person is private or home schooling.

A similar type of opt out provision is given in respect of sex education, though there is no need to satisfy the principal of any cultural or religious reason for invoking it: s 105D Education Act 1964.

6 The public funding for private schooling option

If one concludes that it is not reasonable for the state to accommodate the various cultural and religious sensibilities of its citizens in its public schools, apart from letting them opt their children out, then the next logical step is to raise the issue of public funding for private schools. This was the next development in Ontario after Zylberberg and Elgin County. In Adler v The Queen the plaintiffs representing Jewish and independent Christian schools sought a declaration that the province’s non-funding of private education violated their Charter equality rights and religious freedom. The case is on appeal to the Ontario Court of Appeal after the trial judge held that mandatory attendance provisions did indeed impose a burden on the beliefs of those who for religious reasons could not send their children to the state school system, but that this burden was a reasonable limit demonstrably justified in a free and democratic society. In short, it was reasonable for the state not to fund private education “in that the funding of such independent schools would be inimical to the welfare of the public schools.”

The result of the pending appeal is awaited with interest. Whatever is decided will,
however, be of only indirect assistance to us in New Zealand. Our Bill of Rights, being unentrenched, could not be used to bring similar challenge here to non-funding of private religious schools, despite the fact that we have essentially the same words in our Bill of Rights as were relied upon in that case. The relevance of the decision will simply be that a court in a similar country, which for legal reasons has power to decide such things, has decided that public funding for private religious schools is, or is not, constitutionally required to protect equality and religious freedom.

7 Conclusion on religious freedom

The recent passage of s 25A allows a spectacularly broad opt out provision which will effectively defuse the tensions on religious issues of the type that have erupted over school curriculum in the United States. The parent who would rather not opt her child out but who seeks accommodation by the school - eg in changing offensive readers - is unlikely to succeed in court. It would be a mistake, however, to characterize religious objections to curriculum as trivial and to reject them on that ground. The problem is deeper than that. There is force in the claim that all education, or at least all education about values, is indoctrination. The real difficulty is that no satisfactory accommodation can be made for those who disagree with the values being indoctrinated by the state (eg as to sex role models, sexual orientation etc) since this would only raise a fresh set of challenges from a new set of objectors. The private schooling option may be the only practical answer for parents who object to the state’s values being promoted. This in turn raises issues about state funding for private schools. The pending Ontario case dealing with this will be instructive.

PART C

ISSUES ARISING OUT OF BICULTURALISM

In the New Zealand educational context the term biculturalism signifies a philosophy which recognises and promotes the Maori culture as equal in standing to European culture. It is distinct from multiculturalism, a term widely used in other comparable jurisdictions,¹²⁵ which connotes affirmation of all cultures in the community. The reason why biculturalism stands apart from multiculturalism in New Zealand is because grounds exist for dealing with Maori culture distinctly from other non-European cultures. The Treaty of Waitangi may be taken as laying out in 1840 a constitutional arrangement in which political power is apportioned between Maori and the English Crown. In any event, whether or not political power is to be shared, the Treaty contains promises by the Crown to protect Maori “chieftainship over their lands villages and all their treasures”. The term “treasures” has been taken to include the Maori language¹²⁶ and it is a small step to say it includes Maori culture generally. For this reason Maori culture is not to be regarded as one culture amongst many, as would be implied by the term “multiculturalism”. Biculturalism captures the idea of a society in which Maori culture has this special status promised by the Treaty. Subject to that recognition, multiculturalism too may be pursued as a value.
Ultimately, however, terms such as “multiculturalism” and “biculturalism” are slogans with little significance in a court room. Even for sociologists and educationalists their meaning is a matter of debate. What really counts for present purposes is whether and how these philosophies have been enacted in law. In this section I examine how biculturalism is reflected in the Education Acts, and the sort of disputes which may fall to be resolved when people complain that their rights are infringed.

The sorts of issues I have in mind in this part of the paper are as follows. Can a school board make Maori language a part of its compulsory curriculum? Must it? Can a parent exempt her child if a board does? Can Maori classes be limited to Maori students only? What is the position as to teaching of Maori spiritual beliefs as part of Maori culture? Can parents object on the grounds that it is teaching religion and is in breach of the “secular” clause? Can Maori parents assert rights (such as those in s 20 of the Bill of Rights, or in the Human Rights Commission Act 1977) so as to require greater recognition of their culture and language in schools, and greater allocation of resources?

The legal framework of biculturalism in education

1 The significance of the Treaty of Waitangi

The Treaty itself is not directly enforceable in the Courts, unless legislation declares that this is so. Such a declaration is rare and moreover would generally be unhelpful. Rather, what is required is a determination as to what the Treaty requires in a relevant context, with legislation then passed to specifically achieve that. In the education field there is evidence of this approach: the legislation does not grandly proclaim the Treaty to be enforceable, but does set out certain provisions which should be understood as a legislative attempt to give effect to the Crown’s Treaty promises in the education field. As always, whether these provisions go far enough is a matter for debate. But for those concerned with the legal position we must begin with the legislation and not the Treaty itself.

2 Bicultural provisions in the Education Act 1989

The compulsory Charter provisions in s 63 reflect the biculturalism philosophy, alongside but distinct from that of multiculturalism:

Every charter and proposed charter is deemed to contain—

(a) The aim of developing for the school concerned policies and practices that reflect New Zealand’s cultural diversity, and the unique position of the Maori culture.

(b) The aim of taking all reasonable steps to ensure that instruction in tikanga Maori (Maori culture) and te reo Maori (the Maori language) are provided for all full-time students whose parents ask for it.

It is noteworthy that these goals are articulated with reference not only to Maori children. All full-time students whose parents ask for it should receive the education specified in s 63(b) - at least, that is the aim. And all students will be schooled under “policies and practices” that reflect the unique position of Maori culture. The message is that the Maori
dimension of New Zealand life is a part of the heritage of all students and is to be reflected in schools accordingly. This message is repeated in the National Education Goals, where again the objectives listed are not expressed as limited to Maori children.  

Some may see this as a new and insidious form of cultural imperialism, whereby the dominant culture makes the Maori culture its own through making it accessible to all. I address in a moment whether a school might restrict Maori language tuition to Maori students. For the moment, though, it is significant to note that the biculturalism philosophy extends beyond giving non-Maori students the benefit of exposure to Maori culture. Section 62 of the Act imposes on school boards the duty of consultation with Maori communities as to the entire content of their charter - not merely the part relating to Maori issues. So the process of cross-cultural learning and influence works both ways, at least on paper.  

By section 155 the Minister may designate a school to be a Kura Kaupapa Maori. In these schools Maori is the principal language of instruction. Again, the Act does not specify that only Maori students may attend such a school, though it does allow a board to refuse the enrolments of those students "whose parents do not accept the aims, purposes and objectives that constitute the Kura Kaupapa Maori’s different character." The careful articulation of these reasons for refusal supports the inference that other reasons - such as the race of the student - are insufficient to refuse enrolment. On the other hand, if the board of such a school were to restrict it to Maori students (and assuming that the charter so providing was approved), there could be no complaint of racial discrimination. Section 26(2) of the Human Rights Commission Act 1977 specifically allows "discrimination" which is implicit in racial, religious or single sex schools. Section 155 may therefore permit Maori only state schools.  

The legal ability of the Minister to approve a charter so providing would itself be a debatable issue. It might be argued that his or her discretion to approve charters ought not to be exercised when it would give effect to a breach of the Bill of Rights - in this case s 19, the right to be free of discrimination on the grounds of race. Section 19(2) expressly permits affirmative action programmes, however. Of greater difficulty would be the reverse situation, where a minister refuses to agree to a charter restricting the school to Maori students. The argument here would be that his discretion ought to be guided by Crown obligations in the Treaty of Waitangi and other international law instruments supporting the right to an education in Maori for Maori. It would seem that there is some support in the Maori community for separate institutions and the Ministry appears open, at least, to the possibility.  

Section 156 provides for “designated character” schools and there is scope there for schools to be designated “bi-lingual”.  

These then are the principal methods by which the Act deals with Maori language and culture. The National Education Guidelines reinforce the Act’s provisions, and also provide for an “interstitial” role for the Treaty. This is because the Treaty Goal is to “fulfil the intent of the Treaty of Waitangi by valuing and reflecting New Zealand’s dual cultural heritage”. This, so far as I can see, is the only place in education law where the Treaty is
mentioned by name, and it means that where discretions are exercised by boards they must take account of the Treaty along with all other relevant considerations. Like most of the goals, however, this particular one is not so precisely stated as to be decisive. There will always be room for argument about what “the intent of the Treaty” actually requires. Courts are unlikely to substitute their own judgment on the issue for that of the honestly intentioned school board. This could work both for and against Maori interests, depending on the primary decision made by a board to whose judgment judicial deference is paid. For example, a school board which limits tuition in Maori language classes to Maori students may face a challenge from a non-Maori parent who seeks tuition in Maori for her child. On the face of it, the parent can invoke s 63(b) and the compulsory charter provision as to Maori language “for all”. But a board’s concern as to how it should use limited resources may have caused it to limit enrolments to Maori students only - at least until more funds are available. Section 63 contains, after all, only compulsory aims, and it does not require their fulfilment all at once. The board decision to begin with Maori students would, I think, be a legitimate judgment as to the “intent of the Treaty” which a court would be reluctant to disturb. I imagine that a decision the other way could also be upheld. The “intent of the Treaty” is open to many legitimate interpretations.

The above was a description of the basic legislative framework within which educational issues affecting Maori culture and language fall to be made. In order to explore potential conflict in the area I propose to consider two recent “high-profile” controversies about Maori in schools. The first - the Broadwood School case in Northland - revolved around whether parents could exempt their child from “compulsory” Maori language instruction. The second case - the Waitara High School Board case - concerned complaints by a Maori group that the school board was not doing enough for Maori language education.

The Broadwood Area School Case

Broadwood Area School formulated a curriculum, after the required community consultation, which included Maori language instruction. The curriculum was expressed in the charter which was duly approved. As a curriculum component, Maori language instruction was compulsory in the same way that other subjects in the curriculum were. There was no express legal basis on which a parent could require exemption of her child. The curriculum was also incorporated in and publicised through a prospectus so that parents knew the position. In 1991 a parent of a student sought an exemption. The Board would not allow this. (In so deciding, my opinion is that the Board acted properly for this was before the 1991 amendment which introduced s 25A of the Education Act 1989.)

Because the board would not (and I believe could not) grant an exemption, the issue then became the legitimacy of the board’s having made Maori a part of the curriculum in the first place. The parents’ complaint was publicised in the media and the Minister of Education stated that Maori language could not be made compulsory by a school board. Meanwhile the student did not attend the classes but the board resolved not to press truancy charges. The parents themselves threatened court action over the legitimacy of a Maori compulsion. Lawyers were instructed.

The matter was not ultimately tested in the courts because of the passage of s 25A. The
parents’ initial written complaint over the classes was taken by the principal to be a request for exemption in terms of that section. This effectively resolved the issue leaving the school board’s Maori language requirement intact.\textsuperscript{139}

What was the legal position? Was the Board acting legally by making Maori part of the curriculum, contrary to the Minister’s assertion? On the face of it, having all children learn Maori assuredly reflects New Zealand’s cultural diversity and the unique position of the Maori culture. That is, the curriculum reflected charter aims. The case for Maori language in the curriculum was even stronger when conceived as a local curriculum initiative. The measure was included following consultation with community and Maori interests in accordance with the prescribed procedures. There was substantial support. It is a predominantly Maori area and knowledge of Maori spoken at events on marae etc would properly be judged an important asset for all students.

Was there any argument available suggesting that the Board could not make Maori a part of the compulsory curriculum? Arguably, there is an inference to be drawn from s 63(b) which provides for the charter aim of ensuring Maori language instruction for “students whose parents ask for it”. This could mean that if it is not asked for by a parent, then their child should not get it. I doubt very much, however, whether s 63(b) could bear that negative meaning. It probably means only that where there is no Maori language instruction there is to be the aim of providing it for parents who ask. It has no bearing on whether it can be made compulsory for all in the curriculum.

Was the s 25A exemption properly granted? I have some doubts about this, though of course I know nothing about the particular circumstances of the objecting parents. It is, I suppose, arguable that a view that a language is educationally valueless is a cultural view. It seems, though, a faint argument. I suspect, however, that there was a symbolic underlay to the incident. Making Maori compulsory may have been viewed by the parents as part of a perceived over-emphasis on Maori issues in New Zealand. They may have thought this unhealthy and divisive, and wished to register their protest in, again, a symbolic way. If this view of their motives is correct, I again question whether it is a cultural view in terms of s 25A. If it is, then the word “cultural” has few limits.

The Waitara High School Board incident

In 1992 a complaint under the Human Rights Commission Act 1977 was made by Te Whanau Whanui Ki Waitara against the Waitara High School Board of Trustees. The allegation was that the school board had breached s 26(1)(b), s 26(1)(c) and s 26(1)(d) of the Act. These provide:

It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment,—

(b) To admit [a person] on less favourable terms and conditions than would otherwise be made available; or

(c) To deny or restrict access to any benefits or services provided by the establish­ment; or

(d) To exclude him or subject him to any other detriment—
by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief of that person ....

The Commission’s formal decision is not a matter of public record but was widely reported in newspaper and magazine accounts. It seems the Commission interpreted the complainant’s case to be as follows: that Maori students were discriminated against because the school did not provide an environment in which their language and culture was affirmed, whereas it did for other students. For reasons I shall explore shortly, the Commission held that the complaint had substance, and successfully mediated a settlement. That settlement was expressed in a deed. The contents of that deed are public knowledge because they are summarised in a recent issue of STA News.  

This is a significant case and I shall consider the reasoning and the implications of the decision in some detail.

1 Is indirect discrimination covered by the Human Rights Commission Act 1977?

A threshold question was whether s 26 applied at all. After all, Maori students were admitted into the school on precisely the same terms as others. It did not seem, on the face of it, to be a case of admission on less favourable terms than would otherwise be made available. Nor was it obviously a case of denial of access to benefits or services, nor subjection to detriment. The Commission’s reasoning, however, was that an appropriate and proper education for Maori included providing an environment in which their culture is affirmed and in which they feel comfortable. Since that type of environment was provided for non-Maori, the failure to provide it for Maori could amount to discrimination. The Commission then considered the facts to see if there had been such a failure.

In my view this approach to discrimination in s 26 is problematic. I concede immediately that the concept of discrimination is broad enough to include a failure to treat differently situated people according to their differences. Providing the same education to all, while making no accommodation for a special category which properly requires different treatment, is quite capable of being classified as discrimination in a moral sense. But the legal question was whether the board had offended s 26(1). This requires examination of that section to see if it covers this type of discrimination (which is usually called “indirect discrimination”).

Section 26(1)(b) is infringed when “less favourable terms and conditions” are offered on account of race “than would otherwise be made available”. Its language - “terms and conditions” and “made available” - suggests that it is the terms offered which are to be scrutinised, to see if they differ from what would have been offered to a person of another race. The section is aimed at positive acts of discrimination: departing from a normal set of conditions on account of a person’s race. It seems to me that the language of s 26(1)(b) is not apt to catch the uniform application of one set of terms and conditions which become discriminatory only because of the underlying nature of the institution. If s 26 is read that way then an educational establishment (which may often have no choice about taking the applicant) would have to ensure reallocation of its resources so that it can provide an environment which takes account of relevant characteristics of the applicant. This might be desirable in an ideal world but I question whether s 26 requires it.
The trouble with the Commission's interpretation is that it would know no bounds. Section 26 applies to all schools, private schools included, and protects all races. So far as its text is concerned, it could be invoked just as legitimately by the lone Maori student and the Laotian immigrant in private schools. On the Commission's approach, the same result ought to follow in those cases as at Waitara. But if the section is interpreted more restrictively, as I suggest its wording requires, then this would not be so. Again, it might be said that the result of the Commission's interpretation is desirable. But it hardly seems a practical result since it would result in schools being found in breach when they are doing all they can within the limits of their resources. There is no defence of "doing all you can".

The Commission was, it appears, much influenced by the fact that current educational policy - reflected in the Act, the National Education Guidelines, and in initiatives such as Maori factor funding - requires an environment where Maori have access to knowledge of their language and culture. But it is not made clear why this was relevant. On the Commission's interpretation of s 26, it should not have mattered what government education policy was. They said there was discrimination because some students were not receiving education in an environment which affirmed their culture and language. This could be the case with any race whether or not the government also wanted that race's language and culture affirmed.

One might add that government policy does not in fact limit the need for knowledge of Maori language and culture to Maori students only.141 All students being admitted to Waitara could legitimately call for the school to affirm Maori language and culture. To the extent there were shortcomings in the underlying situation at Waitara, all students suffered equally.

Section 26(1)(c) is about denial of access to benefits or services to those already in the institution, on the grounds of race. Again, I suggest that these sections may well be restricted to direct discrimination. The words should take their colour from those around them. Since s 26(1)(b) is in my view addressed to discriminatory acts upon admission, s 26(1)(b) is addressed to similar sorts of acts which occur after enrolment.

Section 26(1)(d) speaks of exclusion or subjection of a person to "any other detriment" on the grounds of race. Again, "exclude" or "subject" connote positive acts, while "other detriment" must be taken to signify something in the nature of restricted access to benefits and services. I do not think there could have been a breach of this section on the Waitara facts.

I recognise that in limiting s 26, as I do, to direct discrimination, I would have to conclude that the section could not avail the Sikh student who is refused admission by the routine application of a standard "no turban" rule and thus suffers obvious indirect discrimination. I note, however, that in the House of Lords' case of Mandla v Dowell Lee142 this type of discrimination was held to come under a provision of the relevant English statute which explicitly dealt with indirect discrimination. It was accepted that the direct discrimination provisions did not apply. 143

It is also notable that most Australian jurisdictions contain specific indirect discrimina-
tion provisions. The New Zealand legislation has, instead, s 27 entitled "discrimination by subterfuge". The Commission did not need to consider s 27 in view of its conclusion that the direct discrimination provision in s 26 extended to meet the case. Would s 27 have applied? The section is directed at imposition of a "condition" or a "requirement" which appears neutral but discriminates indirectly (for example, a height restriction which in fact keeps more women than men out of an institution). I do not think it covers discrimination resulting from the underlying state of an institution. Where there is no "condition" or "requirement" imposed there can in my opinion be no contravention of s 27. In addition a defence under s 27 is available if the institution can show that the imposition of the requirement or condition was not a "subterfuge to avoid complying with" a Human Rights Commission Act provision. It is difficult to give meaning to this defence unless the subterfuge section is taken to deal only with conditions and requirements positively imposed.

So, while recognizing the possibility of contrary arguments, I conclude that the Human Rights Commission Act 1977 did not apply in the circumstances at Waitara. 144

2 The facts in the Waitara case

The complaint was that Maori language and culture was undervalued. Eleven different symptoms of that undervaluing were advanced. These included the school's delay in filling a vacant position for a Maori teacher, the unfavourable siting of the class room used for Maori activities, not releasing students for Maori events and not taking up offers of Maori visits. There was also the allegation that Maori procedures and protocols were not observed in consultation, particularly in disciplinary matters where the right of whanau to be present with the student had been questioned on occasion. On most of these matters there were two sides to the story, and it is reasonably clear (more so from a magazine article about the events 145) that the situation was exacerbated by personalities on each side. It was the cumulative effect of all the symptoms which prompted the Human Rights Commission to conclude that Waitara had failed to provide education to Maori on as favourable terms as it provided education to non-Maori. My own impression from the facts, for what it is worth, is that while all was not well with Maori things at Waitara, it is not obvious that the Human Rights Commission Act was being infringed. The issue for the Commission of course, was whether the complaint had "substance". This is the term which triggers the power to mediate under s 37(1)(a) and it may be a lesser threshold than an infringement. As it turned out, the matter was brought to an end by mediation. Whether on the merits there would have been an infringement found by the Equal Opportunities Tribunal is thus a matter for speculation.

3 Was the Human Rights complaint an enforcement of the charter?

Section 64(2) empowers the Secretary of Education to enforce school charters against a board by taking "proceedings", a term not defined. Section 64 provides that no other person has power to take proceedings "having or intended to have the effect of enforcing a charter ...". Was this section offended in the Waitara case?

The school's charter obligations featured heavily in the reasoning. And the outcome, as expressed in the settlement deed, contains promises by the board to take steps which are
all consistent with realisation of its charter duties. Further, there is a good argument that
the whole affair has had “the effect” of enforcing the charter, and under s 64 it is not
necessary that it be “intended” to do so in order to be precluded. I further suggest that
Equal Opportunity Tribunal proceedings, had the complaint progressed that far, would
indeed have been “proceedings” within the meaning of that phrase in s 64 and arguably
precluded. These issues were not raised in the Commission findings, but I shall venture
my opinion as to the position had the matter progressed to the Tribunal and the point been
taken.

I doubt that s 64 would have prevented EOT proceedings. This is because a statutory
provision designed to oust the jurisdiction of the courts is strictly construed. The
EOT proceedings would have been to vindicate rights against discrimination, not to enforce the
charter. Though they might have the effect of doing so, that would not have been their
principal purpose.

**Other issues arising out of Maori language and culture**

A residual matter which was not raised in the Broadwood and Waitara cases is whether
issue can be taken with Maori influences in the general day to day routine of schools. The
telling of Maori myths, for example, may be objected to by parents who contend that they
are religious in character and ought to be treated the same way as, say, Bible reading. Or
that, if there are to be Maori myths then there ought also to be Bible reading. Objection
may also be taken by the non-religious to the use by Maori of prayer in their meetings.
These types of issues can, I think, all be resolved in terms of the framework set out above
as to religion. Where myths are told in discrete periods that allow for exemption in terms
of s 25A, that is the parent’s option. Otherwise I doubt there is any remedy, for there would
be a legitimate educational goal (especially given the Maori charter provisions) and the
religious freedom of any objector could not, in my view, result in discontinuation of the
practice. As to Maori prayer, where it occurs on occasions of school visits by Maori and
requires no participation by students, there would not seem to be cause for objection. It
would differ in substance from officially sanctioned prayer such as would be seen to occur
when a teacher or principal initiates it.

**PART D**

**ISSUES ARISING OUT OF MULTICULTURALISM**

**The aims of multiculturalism**

The term is generally used in contrast to “assimilation”. A multicultural society is one
which protects the cultures represented in it by promoting their *retention*. This retention
is considered a public good and therefore a legitimate claim on public utilities such as the
education system. In addition to retention, an aim of multiculturalism is, or ought to be, the
*affirmation* of cultures as equal participants in the national life of the country. Retention on its own would not facilitate a multicultural society if the cultures were
alienated from the mainstream culture. Diversity with equality is the goal.
Insofar as religious issues arise out of cultural claims, these will of course fall to be resolved in the framework suggested in Part B of this paper. It would be, or ought to be, surprising if the religion of a minority culture was treated more favourably than the predominant religion. And plainly it ought not to be treated any less favourably.

The main issue to discuss in this section is therefore the question of language instruction, plus affirmation in school activities and curriculum of those cultures with a significant presence in a school.

**Legal bases for multiculturalism**

The rights of members of minority cultures “not to be denied” the right to enjoy their culture is set out in s 20 of the Bill of Rights. This is based in turn on Article 27 of the International Covenant on Civil and Political Rights, which is to substantially similar effect. There is this subtle difference between them, however. The Bill of Rights is in essence a statement of limits on governmental power: it sets out things a government ought not to do to its citizens. It is not, or not yet, construed as a statement of goals which citizens can use to extract greater recognition by government. So when s 20 of the Bill says a government is not to deny the right to culture, this is different from saying it must promote cultures present in New Zealand. On the other hand the International Covenant, while also worded negatively, is open to a positive reading if only because it is not directly enforceable in court and so has moral suasion only. Absent a positive reading it is doubtful whether any claims for greater affirmation of minority cultures in education can be based directly on s 20. But even as a negative restraint there is scope for some effect in s 20, however. If a minority language was made a curriculum option by charter, and the Minister refused assent, the right in s 20 could be asserted to attack that refusal. In that sense the right is being used negatively - to challenge the legitimacy of a decision - but to attain a positive result. This type of use depends on an initial decision to promote a minority language or culture and then relies upon s 20 to defend that decision from being thwarted by superior decision makers who are subject to the Bill of Rights.

A more direct instrument of moral suasion is the recently adopted Convention on the Rights of the Child, Article 29(1)(c) of which affirms that education of children is to develop “respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own ...”.

The compulsory charter aim in s 63 of recognizing the “cultural diversity” in New Zealand may be taken as legislative incorporation of Article 29 of this Convention. However, as was pointed out above in relation to Maori, this aim is not stated to be exclusively for the members of other cultures. Nonetheless, on the basis of s 63 and Article 29 boards could and should promote policies which at a minimum enhance prospects for immigrant cultures to have those cultures affirmed. Schools will not often have resources to be responsible for imparting those cultures to members, but the related aim of affirmation is something that schools can achieve, and at little cost. This could be through
celebration of festivals associated with other cultures, inviting groups to speak, etc. Many schools do this already.

The reasoning in the Waitara School Board case suggests that a minority who finds that its language and culture is not affirmed in a school is able to invoke the Human Rights Commission Act 1977 anti-discrimination procedures. I am not aware of any other minority group having attempted this, and if my criticism of the Commission’s interpretation and application of s 26 is correct, then it is not in fact possible.

A final issue to address is the claim to general instruction in the immigrant minority’s language, at least until English proficiency has advanced to the point where equal advantage is available to the minority students from teaching in English. In Canada there are no statutory rights to this type of education. As to whether the Charter is violated by the failure to provide such instruction, there does not seem to be any case law. The crux of the argument would be one of equality. The United States Supreme Court decision in Lau v Nicholls would be relevant to the argument, for the Court expressly noted that minority language use in general tuition was one option to redress the inequality which they found. The minority students disadvantaged there numbered about 1800, and whether a similar result would have followed if there had been a lesser number is open to doubt.

In New Zealand these decisions and arguments fall well short of establishing a legal right to claim minority language tuition. However, the compulsory charter aim of “reflecting cultural diversity” would amply justify a school board which judged it appropriate to introduce such tuition in light of particular circumstances in their school. The “affirmation” aspect of multiculturalism is not attained if an immigrant minority receives unequal benefit from education due to lack of proficiency in English. But the school which chooses not to do this in the face of claims that it should is probably immune from legal challenge, unless the Human Rights Commission’s “Waitara” approach is followed.

The general anti-discrimination provision in the Bill of Rights - s 19 - could be relied upon instead of s 26 of the Human Rights Commission Act but I do not think that it would take the matter any further. The purposive and generous approach required to the Bill of Rights could justify a generous reading of “discrimination” so as to include indirect discrimination arising out of uniform application of rules taking no account of relevant differences. But even allowing for a generous approach to interpretation, my view is that a court dealing with the matter would, in a matter so directly affecting allocation of resources within a school, be loath to second-guess a school board’s decision not to allow minority language tuition unless there were compelling circumstances making that decision unreasonable. A large number of minority language speakers, as in Lau, might tip the balance.
Section 13, New Zealand Bill of Rights Act 1990.

A popular account of this process, which includes a description of key religion cases <i>Gobitis v Minersville School District</i> 310 US 586; <i>Eppeerson v Arkansas</i> 393 US 11 and <i>Wallace v Jaffree</i> 472 US 38, is to be found in Irons, <i>The Courage of their Convictions</i> (1988).

Section 20, Education Act 1989; the ages are 6 and 16.

Section 3, Education Act 1989.

This is the effect of s 20 and s 35A.

In the case of the United States, see <i>Pierce v Society of Sisters</i> 268 US 510 (1925); <i>Meyer v Nebraska</i> 262 US 390 (1923).

In Canada the issue is noted in <i>Jones v The Queen</i> [1986] 2 SCR 284.

The term “liberty” is found in the Fourteenth Amendment to the United States Constitution which applies against the states. Freedom of religion in the First Amendment is also made applicable to the state governments by the Fourteenth Amendment.

The United States Supreme Court has declared that the availability of private education was constitutionally required to give effect to the “liberty of parents and guardians to direct the upbringing and education of children under their control”. <i>Pierce v Society of Sisters</i> 268 US 510 (1925). The State of Oregon had enacted a law in 1922 providing for compulsory education only in state schools. It had been “adopted after a referendum campaign organized and promoted primarily by the Ku Klux Klan and the Oregon Scottish Rite Masons as part of a strategy to Americanize the schools: if the campaign was successful, a dozen other states were next in line”: Kirp & Yudof, <i>Education Policy and the Law</i> (Berkeley, California, 1974)

Finkelstein “Legal and Constitutional Aspects of Public Funding for Private Schools in Ontario”, reprinted in Dickinson & Mackay, <i>Rights Freedoms and the Education System in Canada</i> (1987), 71, 77, suggests there is a right to free public education which is rooted in the Canadian Charter of Rights' guarantee of “liberty” in s 7. A more pressing concern in Canada is whether there is a right for private schools to receive public funding, an issue brought to the fore once Ontario Catholic Schools received full public funding in 1987. Litigation brought by Jewish and other religious schools is pending before the Ontario Court of Appeal after the trial court ruled there was a “prima facie” infringement of religious freedom in a failure to fund religious schools but that it was a “reasonable limit” in a “free and democratic society” that there be no such funding. See below, text at note 123.

In this sense the word “right” connotes an extra-legal right, since the international instruments are not directly enforceable in courts. See International Covenant on Economic, Social and Cultural Rights, Article 13; Convention on the Rights of the Child, Articles 28, 29.

The “school choice” movement, with its call for education vouchers redeemable at the school of choice would improve the situation for these parents, though this is itself controversial for the impact which it would have on the state system: see Egle, “The Constitutional Implications of School Choice” [1992] Wisconsin LR 459.

See above, note 13. The Convention on the Rights of the Child emphasises rights of the child in education (see Article 28) while including an educational aim, “development of respect for the child’s parents ...”. The ICCPR speaks of educational rights for “everyone” (Article 13(1) while recognizing also a right in parents to choose education in private schools (Article 13(3)).

The American cases in which religious freedom is asserted by parents as a basis for objection to school decisions do not founder on the fact that parents have no rights: it is accepted that they have a legitimate interest in asserting their religious freedom in relation to the education of their children. As Dent puts it (“Religious Children, Secular Schools” (1988) 61 Southern California LR 863, note 3: “[A] court need not enquire whether a young child shares the religious belief of his or her parents; by virtue of the parents authority, the child is treated as if those beliefs are shared” (citing <i>Pierce</i>, above note 11, Wisconsin v Yoder 406 US 205 (1972) and <i>Carey v Population Services International</i> 431 US 678 (1977).

I recognise that the dichotomy between parental and children’s rights is controversial and that my decision to organise this paper around the concept of parental rights to choose for their children represents a value judgment. I wish to explore the potential tensions between families and the state over issues such as religious and cultural maintenance (as opposed to assimilation). Rights within families, or against them, is a different perspective. This issue is dealt with in an essay by Lasch, “Hillary Clinton, Child Saver” Harper’s Magazine, October 1992. See also note 62 and accompanying text, below.

Section 63, Education Act 1989.

This is one thesis explaining the legitimacy of judicial review in the United States: that laws and practices may be monitored by courts to the extent that the laws or practices threaten the democratic
process, whereas the courts should be slow to intervene to thwart the results of the democratic process, save when necessary to protect "discrete and insular minorities" (United States v Carolene Products Co 304 US 144 (1938), 152, n 4).

20 See below, at text at notes 46 - 55.
21 See below, text at notes 129-137.
22 See below, text at note 116.
23 Section 77, Education Act 1964.
24 Section 64(2) and s 64(3).
25 Section 35 deals with grounds upon which Commission may refuse to investigate a complaint, eg the trivial, frivolous or vexatious complaint.
26 The phrase is that of Lyon, "The Teleological Mandate of the Fundamental Freedoms: What to do with Vague but Meaningful Generalities" (1982) 4 Supreme Court LR 57.
27 Section 13 and 15 Bill of Rights.
28 Section 20 Bill of Rights.
29 Several cases brought against the United Kingdom by its citizens under the European Convention on Human Rights illustrate this proposition: the education authorities had refused to give undertakings that the parents' children would not be corporally punished, or had administered the punishment over parental objections: Campbell and Cosans v United Kingdom (1980) 3 EHRR 531 (ECHR).
30 The useful discussion in Mackay & Sutherland, Teachers and the Law: A Practical Guide for Educators (1992), xi-xviii puts this well in relation to Canada. The book is organised in chapters headed "Teachers as Parents", "Teachers as Educational State Agents", "Teachers as State Agents for the Police" "Teachers as Social Welfare Agents" and "Teachers as Employees". The authors in the introduction make it plain that the overall position, in their view, is that teachers are state agents.
31 Education Act 1964, s 75: state primary and intermediate schools to be conducted in accordance with regulations made under the Act; s 75(1A) the Minister empowered to prescribe syllabuses etc by Gazette Notice; s 84: every secondary school to provide "such courses of study in secondary education as may be prescribed in regulations made under this Act".
32 The relationship between the two sections, and their reflection of the underlying contest for control of education between elected boards and the state, is explored in some detail by Browning, School Boards of Trustees: their responsibility and authority with respect to curriculum choice, (LLB (Hons) dissertation deposited at the Davis Law Library, The University of Auckland, 1993), pp 6-9. I am indebted to this valuable dissertation on this point.
33 In Canada the susceptibility of school boards to Charter challenge was accepted in R v JMG (1986) 56 OR (2d) 705, 708: the board was assumed to be subjected to the Charter "in their actions and dealings with the students under their care."
34 In passing one may note the missing referent in s 35A. Loyalty is an attribute which a person exhibits in relation to another person or institution. One presumes that the institution implicitly referred to in s 35A is the state, though it is then difficult to understand why "loyalty" was added to "patriotism".
35 The potential application to private schools of the Human Rights Commission Act is discussed below at text accompanying note 140-144.
36 Section 4(1), Private Schools Conditional Integration Act 1975.
37 Section 2, definition of "integration", s 3.
38 The Establishment Clause of the First Amendment.
39 Just as there can be no objection to public funding of Catholic schools in Canada due to the favoured position of certain denominational schools (Catholics in Ontario and some other provinces, Protestants in Quebec). For an overview see Hogg, Constitutional Law of Canada (1992) ch 54.
40 Section 78 of the Education Act 1964 is an example.
40a See Rishworth, "How does the Bill of Rights Work?" [1992] NZ Recent Law Review 189; Brookfield "Constitutional Law"[1992] NZ Recent Law Review 231, 236-240; McLean, Rishworth and Taggart, below, note 45. In the present context I consider that school board decisions are "prescribed by law" in that they are made under statutory power, albeit a broad discretionary one. The legal power is thus not so precise as to amount to clear law which overrides the Bill of Rights under s 4, and instead should be interpreted under s 6 so as to be consistent with the Bill by authorising only consistent decisions. Insofar as teachers may not be able to point to similar broad statutory power for their decisions, then they probably are not prescribed by law within s 5 and cannot be justified under the section. In the context of religious freedom I doubt this makes much difference for the real issue will be whether a court is prepared to say that religious freedom is impaired at all. If they conclude it is, it is unlikely to be upheld as a reasonable limit in any event, whether a school board or a teacher is responsible.
42 August 1988, 5.2.1.
The incorporation by the Broadwood Area School of Maori into its curriculum is an illustration, see below at text accompanying note 138.

This argument is also addressed in McLean, Rishworth and Taggart, “The Impact of the Bill of Rights on Administrative Law” in The New Zealand Bill of Rights Act 1990 (Legal Research Foundation Seminar, 1992), 62.

HC Whangarei, CP 49/91, 24 September 1992, pages 45-46. The citation of the American case referred to in the quotation is (1943) 319 US 624, 87 L Ed 1628. The passage of Justice Frankfurter which is paraphrased is found at p 671 (US), p 1654 (L Ed).

As Williams J points out, education cases in court have mainly concerned expulsions and suspensions, and dismissals of teachers.

The comprehensive and thorough treatment of the Maddever's case is a notable feature of Williams J's judgment. The judge may have been taking care to assure the plaintiffs, who present as rather querulous individuals, that they had received their day in court and were not being lightly denied the opportunity of suing the board, principal, and Minister of Education.

The relevant interest was the inculcation of patriotism and loyalty (cf our ss 35A). Although that is not an inherently weak interest, the difficulty lies in establishing any real connection between that interest and forcing children to salute the flag against their will.

It bears repeating in this context that school boards' powers are expressly limited by other enactments of the New Zealand Parliament and the Bill of Rights is one such enactment.

Certainly, in the case of the Human Rights Commission's handling of the Waitara School Board complaint, a matter to be discussed later in this paper (see note 140-144), no one involved asserted, nor could they, that the matter ought not to be dealt with by the Commission since the School Board was better equipped to resolve the issue. The point, of course, was that the complainants in that case had invoked their statutory right to complain of discrimination and the Commission was obliged to investigate in terms of its Act. It found the complaint to have substance. It proceeded to deal with the complaint according to its own procedures and successfully resolved it through mediation.


I adopt this phrase from Estreicher “School Books, School Boards and the Constitution" (1980) 80 Columbia LR 1092, 1119 where the issue is addressed in terms of the United States Constitution.

I am not suggesting that Williams J was asserting this. His views on the value of judicial review were, after all, expressed in the context of a claim lacking merit. His judgment had exposed the lack of real prospects of success for the Maddever's claim; the inappropriateness of judicial review was advanced as a further reason for striking out the claim and must be seen in that light.

McLean, Rishworth & Taggart, “The Impact of the Bill of Rights on Administrative Law” in The New Zealand Bill of Rights Act 1990 (Legal Research Foundation Seminar 1992), 62, 96. Williams J takes this passage from our paper to mean we would favour a robust expansion of judicial review because it is desirable per se. The thrust of our article was that whether desirable or not the Bill of Rights requires that there should be a "transparency" - that is, reasons given why it is reasonable in a particular case for rights to be infringed. Whether deference is due in the process of deciding reasonableness is another issue. There are sound reasons for deference to educational decisions, as I say in the text above.


Section 20 requires attendance at a registered school. That term means state schools plus private schools registered under s 35A.

Pierce v Society of Sisters, above, note 11.

Jones v The Queen [1986] 2 SCR 284 (SCC).

Jones v The Queen, above, note 59. Three judges held that the certification requirement infringed Jones' freedom but only reasonably. Three others held that it did not infringe it at all, The seventh judge held that the certification process infringed Jones' right to "liberty and security", and the right "not to be deprived thereof except in accordance with the principles of fundamental justice" in s 7 of the Charter. This was because the legislation exposed him to penalty for truancy and provided only one defence - a certificate from an inspector that his charges were under "efficient" instruction. Wilson J’s point was that the law ought not to preclude his establishing the quality of his tuition in ways other than a certificate from the inspector.


The decision is criticized by, amongst others, Hillary Clinton: see Lasch, "Hillary Clinton, Child Saver", Harper's, October 1992. The criticism is that the decision of the majority did not pay sufficient attention to the rights of the Amish children to be educated beyond the horizons of their parents. The case is a good illustration of the clash between the rights of a group and those of individuals within the group.
Section 77, Education Act 1964. 
See further below, text accompanying notes 67 - 72.

See text at note 40 above.

See text at note 91 - 115.

McCollum v Board of Education 333 US 203 (1948). A recent illustration of the principle is the Supreme Court finding that a Jewish Rabbi’s prayer (thanking the “God of the free, hope of the brave” for “the legacy of America where diversity is celebrated and the rights of minorities are protected”) violated the Constitution on establishment grounds: Lee v Weisman 112 S Ct 2649 (1992).


[1985] 1 SCR 295. For historic and legal reasons it was accepted that the purpose of the law was to protect the Christian conception of Sunday, rather than to establish a “secular pause day”.

The singing of “O Canada” was not itself objectionable and I am confident that no legitimate objection could be taken to the singing in New Zealand of “God Defend New Zealand”, notwithstanding the religious references.

This was decided in R v Big M Drug Mart Ltd, above note 71.

R v Big M Drug Mart Ltd, above, note 71.

Royal Commission on Education in Ontario, cited in Zylberberg, p 666, per Lacourciere JA).

The attempt to prescribe an official non-denominational prayer for schools in the New York Schools District was struck down by the Supreme Court of the United States in Engel v Vitale 370 US 421 (1962).

Zylberberg, p 651.

Epperson v Arkansas 393 US 97 (1969)


(1990) 71 OR (2d) 341 (Ont CA).

The Board was responding to parental pressure.


Coalition for Religious Freedom, undated brochure on file with author.

Ibid.

333 US 203 (1948).

Indeed, in the Canadian context it secures to religious parents who are not Roman Catholics the advantages which the latter enjoy: state funded education in sectarian schools which are protected by the Canadian Constitution.


Ibid.

It is hard to see, however, why this should be any less intrusive on the rights of parents and children who do not want exposure to a multi-faith survey precisely because they hold a strong religious view.


619 F 2d 1311 (1980) (8th circuit Court of Appeals)

Ibid, pp 1319-1320.

See Pevar, “Public Schools Must Stop Having Christmas Assemblies” (1979-81 St Louis University LJ 327.

Hartenstein, “A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion” (1992) 80 California Law Review 981. This author offers as part of his argument, in apparent seriousness, the following (p 999): 

Consider Christmas television programming. The Christmas episode of nearly every television series, whether or not directed at children, revolves around the idea of Santa Claus. Often a life long disbeliever is converted or characters overcome with doubt and cynicism from the previous eleven months have their faith restored through “witnessing” what every grown up knows to be impossible. Cf Charles Dickens, A Christmas Carol (1843) (Bah! Humbug!”—type sees the light and discovers how wonderful Christmas really is); Dr Seuss, How the Grinch Stole Christmas (1967) (same), [...] the retelling of these myths is hardly secular. Perhaps presentation of Christ’s miraculous conception would be inappropriate in the popular media; however the magical feats of Santa - squeezing his immense jolliness through millions of impossibly skinny chimneys on a single night - is no less miraculous. The unmistakable effect is to evoke thoughts of the religious miracle
and message of Jesus Christ, forsaken by the harried and jaded, and to rephrase Christ’s brotherly love in the quotidian terms of Santa’s holiday gift-giving spirit.

I am indebted to the careful analysis of these issues in Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education” (1993) 106 Harvard LR 581. The author analyses the categories of complaint in the Mozert case (see below, note 104) as follows: (1) offence, (2) coercion of conduct in violation of religious commands (3) coercion of declarations, and (4) indoctrination or interference with parental control. For my present purposes it is sufficient to differentiate categories (1) and (4). I think that (2) and (3) may be regarded as subsets of (1) in that they affect “belief enjoyment” whereas (4) is concerned with “belief formation.”

333 US 203, 235. (1948). I suspect there would be a lot more than 256 now.

In a different context I argued (with McLean and Taggart) that the Maori objectors religious objection to dumping in the Hauraki Gulf was ultimately a claimed right not to be offended, rather than a right to actually do something, and that it was on that account more susceptible to being overridden by competing interests. See McLean Rishworth Taggart, above, n 55.

Of course many matters which cause offence arise on an ad hoc basis and could not be the subject to curriculum statement in any event.

This explains why Wisconsin v Yoder, above, note 61, was such an exceptional case.

From the Washington Post, 1 May 1991, p B1:

Textbook publishers, concerned that controversy might derail a possible sale, made matters worse [than teachers’ own reticence had already made it]. Of 31 texts surveyed in 1986 by People for the American Way, a constitutional issues group, almost all treated religion “by exclusion or by brief and simplistic reference”. One leading textbook defined the Pilgrims only as people who went on long journeys.

Another failed to mention that Martin Luther King was a Christian Minister.


Manning, “Pressure Rises to Censor Text Books”, USA Today, October 1, 1992, 6D. A New York “atheist” failed in an attempt to have the Bible banned by a school board for alleged descriptions of “violence, sexual impropriety and vulgarity”: “Censorship’s Defeat in Brooklyn Center”, Star Tribune, November 11, 1992.

647 F Supp 1194, rev’d 827 F 2d 1058.

Page 1065.


For definitions and discussion of “secular humanism” see, inter alia, Note, “Secular Humanism in Public School Text Books” (1987-88) 63 Notre Dame L R 358. The concept of secular humanism is generally taken to mean a world view which puts humankind at the centre, and denies any transcendental values.

One book to which objection was taken contained, for example, the following: “Too strict a conscience may make you ... feel different and unpopular ... None of these feelings belongs to a healthy personality.” “Only you can judge your own values.”

A similar complaint in Grove v Mead School District No 354, 753 F 2d 1528 was dismissed.


Dent, above, note 110; Stolzenberg, above, note 96.

Page 611.

A controversy along these lines has surrounded the “sexual orientation” component to the Toronto School Boards syllabus on Health Education. This syllabus, which was adopted in June 1992, attracted opposition in some quarters because it presents homosexuality as an option for sexual orientation alongside heterosexuality.

A useful discussion which may be consulted by anyone who has to deal with such an issue is that by Estreicher, “School Books, School Boards, and the Constitution” (1980) 80 Columbia LR 1092.

521 NZPD 6080 (The Hon Mr Lockwood Smith).

521 NZPD 5340 (Hon Margaret Austin). See also 521 NZPD 5352 (Bruce Gregory).

See, eg, the comments of Steve Maharey at 521 NZPD 6092 in the Second Reading Debate. See also Peter Hodgson, 6180: “it will drive a wedge between the parent and the child”.

The Hon Lockwood Smith, above, note 115.

[1985] 1 NZLR 673 (HC).


See Barralet v A-G [1980] 3 All ER 918 (Ch).

Ma‘naik v Yogi 592 F 2d 197.


Above, note 123, p 443.
There is a strong inference that the very purpose of s 25A was to allow parents an

Section 155(9)(c).

In the State-owned Enterprises Act 1986 the "principles of the Treaty of Waitangi" were incorporated as a limit on the power of the Crown to transfer state assets. Other legislation has referred to Maori interests without mention of the Treaty itself: eg Law Commission Act 1985.

Education Gazette, 1 February 1990, supplement, p 2.

It seems that the charter provisions of the Act would apply: see s 155(11).


In the United States case of Lau v Nicholls 414 US 563 (1974) a similar situation was dealt with by the Supreme Court. Chinese students in the San Francisco area who did not speak English brought a class action under the Fourteenth Amendment (equal protection of the laws) and under the Civil Rights Act of 1964 on the basis that they received unequal educational opportunities. The Court dealt with the matter under the Civil Rights Act which dealt with discrimination. That Act provided that the federal Health Education and Welfare Department could prescribe regulations to ensure that recipients
of federal funds comply with the antidiscrimination provision. Regulations were duly issued which expressly provided that "where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the deficiency in order to open its instructional program to these students." The Court duly ordered the school district to take such steps. For present purposes the important point is that federal regulations on the very matter of indirect discrimination influenced the Court's holding that there had been discrimination. Three of the judges, concurring in the result, observed that the blanket prohibition on discrimination in the use of federal funds may not have been enough to decide the case in the plaintiffs' favour, and that the specific federal guideline set out above was decisive.

The pending Human Rights Bill contains a revised indirect discrimination provision, this time described as such in the marginal note. The provision, clause 78, would remove the defence of showing that imposition of a condition etc is "not a subterfuge" but retains the defence of showing "good reason" for the impugned "conduct, practice, requirement, or condition". The terms "conduct" and "practice" are also new to clause 78. These terms may, if the Bill is enacted, extend to cover the Waitara type situation.

McLeod, "The Winds of War" North & South, 74.

Magsino, "The Immigrant Student and Multicultural Education: Exploring the Bases of Legal Entitlement" unpublished paper presented to May 1991 Conference of the Canadian Assn for the Practical Study of the Law in Education, Edmonton, Alberta (copy on file with author). I am indebted to this valuable paper in my discussion of multiculturalism. The concept of multiculturalism is also discussed by Harker, above, note 128.

The argument for a positive reading of Article 27 is set out in the paper by Hastings, above, note 135. Since that paper was written New Zealand has adopted the Optional Protocol to the ICCPR which allows individual petitions to the Human Rights Committee of the United Nations claiming violations of the Covenant. A claim that New Zealand is breaching Article 27 by not taking positive acts is therefore a possibility. In this sense the Covenant has more than moral suasion, though it has to be said that the right of individual complaint has not, to my knowledge, been used at all so far and in any event an unfavourable outcome for the government is not enforceable as if it were a court judgment.

Waitie in Aoteareo: Speaking for Ourselves (1992) makes the good point that education for language maintenance of immigrant and other cultures is something that is most likely accommodated outside school hours. He suggests positive government assistance for this should be made available (p 59). This would be consistent with the Convention.