

The Powers, Duties and Accountability of School Boards of Trustees

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“Each second we live in a new and unique moment of the universe, a moment that never was before and will never be again. And what do we teach our children in school? We teach them that two and two make four, and that Paris is the capital of France. We should say to each of them: Do you know what you are? You are a marvel. You are unique. In all of the world there is no other child exactly like you. In all of the millions of years that have passed there has never been another child like you. And look at your body - what a wonder it is! your legs, your arms, your cunning fingers, the way you move! You may become a Shakespeare, a Michelangelo, a Beethoven. You have the capacity for anything. Yes, you are a marvel. And when you grow up, can you then harm another who is, like you, a marvel? You must cherish one another. You must work - we all must work - to make this world worthy of its children.”

- Pablo Casals
Joys and Sorrows

Introduction

This seminar, devoted as it is entirely to education and the law, is both timely and fitting. The Legal Research Foundation is to be complimented - yet again - upon its ability to pick out an important field of legal study, almost as it emerges and takes on a discrete identity. Today's proceedings will surely demonstrate that education law, and in particular the law relating to schools, is a body of law possessing many facets and significant complexity.

However, there emerges from this a considerable irony - one not lost, I am confident, on the Trustees of the Umawera Primary School, of whom considerably more later. It is this. On the one hand, almost overnight, the law relating to our schools and to School Boards of Trustees has become considerably more complex, and the duties of Boards both legal and non-legal have expanded ten-fold. Yet on the other hand, there has been no specific budgetary provision by government to enable Boards to obtain paid legal advice. In other words, for those Boards - one suspects a significant number - not in the fortunate position of having a lawyer member or an honorary solicitor as a free resource, the price of obtaining necessary, sometimes essential legal advice or representation must come out of scarce or even non-existent general funds. Yet legal error by a Board can prove most costly - particularly in the employment field, as has already been seen.¹

While this paper is not the place for a political plea in relation to the funding of School Boards of Trustees, there can be no doubt as to the dilemma which Boards of lay trustees under severe budgetary constraints face in having to grapple with increasingly more complex tasks with a significant legal dimension, when they either lack or only fortuitously possess the expert legal advice which increasingly they need. It is both a credit to Boards and a small miracle that by all appearances there have been remarkably few legal punch-ups to date. Of course, one way of largely avoiding legal punch-ups is to provide adequate alternative remedies. The issue of availability of alternative remedies, specifically the Ombudsmen, will be visited in the final section of this paper.

The paper begins with a brief overview of the statutory scheme of the Education Act 1989, in relation to the status, powers and duties of Boards of Trustees. Specific areas of significance in relation to the powers and duties of Boards will then be examined, with discussion of the limitations imposed on Boards by the general law and by statutes other than the Education Act, such as the New Zealand Bill of Rights Act 1990. The legal enforceability of School Charters will be looked at. Finally, the remedies available to those who complain of the actions or inaction of a School Board will be surveyed, with comment made on the efficacy of these and the possible need for reform.

A brief overview of the statutory scheme

From 144 Sections when enacted, the Education Act 1989 has grown to a total of 367, of which some 270 relate to schools and/or Boards of Trustees. The powers and duties of School Boards in relation to admission, enrolment, attendance, suspension and expulsion of students and those in relation to employment of staff are all to be the subject of separate consideration, as are those in relation to curriculum. It is therefore possible largely to omit reference to the position of Boards under Parts I, II, III and VIII A of the Education Act. Analysis will concentrate on Parts VII, VIII and IX of the Act.

School Boards of Trustees were originally constituted under the now largely repealed School Trustees Act 1989.² The Boards of Trustees replaced the former School Committees (of Primary Schools) and Boards of Governors (of Secondary Schools) under the Education Act 1964. As is well known, the legislative changes introduced in 1989 - generally referred to as the "Tomorrow's Schools" reforms - involved a major redefinition of the role of School Boards, a move towards direct management by communities of their own local schools, and a consequent significant decrease in the managerial role of the State. The Education Act 1989 is by its long title, "an Act to reform the administration of education". The effect of the reforms has been summarised thus by Mr Justice Williams in *Maddever v The Umawera School Board of Trustees*:³

The statute brought about a marked devolution of decision-making away from the Minister of Education and the Department of Education so that schools became the basic unit of education administration. The primary mechanisms in the statute to achieve the legislative objectives were the novel concept of Boards of Trustees who were given by S75 broad powers to manage schools and the idea of the School Charter.

1. Constitution and Composition of Boards of Trustees

School Boards of Trustees are now constituted under Part IX of the Education Act 1989. Generally, and by contrast with the previous regime, the aim is that there should be a Board of Trustees for every state school.⁴ With minor variations, the same regime applies to private schools which have integrated under the Private Schools Integration Act 1975.⁵ Boards of Trustees are constituted as bodies corporate.⁶

Considerable attention has been paid to the composition of School Boards.⁷ There is a number of categories of person who are not eligible to be School Trustees.⁸ As a general rule, in the case of a "lone Board" of a state school - one which administers one school only - a Board of Trustees will consist of five parent⁹ representatives, the Principal, a staff representative, a student representative and (if the Board so chooses) up to four co-opted trustees. However, that basic pattern of membership is open to a large number of variables, many of which can be determined by Boards themselves. As the relevant provisions, largely introduced by amendment in 1991, are quite complex, they are summarised:

- (i) While the "normal" number of parent representatives is five in the case of the lone Board of a state school, such a Board may decide that it shall comprise not less than three but not more than seven parent representatives¹⁰ There is special provision in relation to the composition of Boards that administer more than two schools, Boards of integrated schools, and Boards of "special institutions".¹¹ The way in which parent representatives are elected is spelled out in detail.¹²
- (ii) Staff representatives must be members of the staff of the particular Board and elected by such members (excluding the Principal). Staff representatives are, like parent representatives, elected triennially.¹³
- (iii) Student representatives must be full-time students and must be elected by students (other than adult students) enrolled full-time in a class above form 3 at the school in question.¹⁴ In other words, only fourth formers and above are able to vote and to stand for the election of a student representative. It follows that primary and intermediate school Boards of Trustees do not have student representatives.¹⁵ Student elections are held annually.¹⁶ By amendment introduced in 1991, Boards are now able to decide not to have a student representative.¹⁷
- (iv) Boards have a discretion whether or not to co-opt additional trustees. A Board may not co-opt a number of trustees in excess of one less than its number of parent representatives.¹⁸ In other words, if the Board has the "normal" complement of five parent representatives, it may co-opt up to four additional trustees. An increase in the number of parent representatives up to the maximum of seven would enable a corresponding increase in the number of co-options. A variation on direct Board co-option was introduced in 1991. Boards are now able to approve a body corporate for the purpose of appointing a specified number of trustees to the Board.¹⁹ This gives Boards the ability to provide direct Board representation to an outside body such as the local marae, the P.T.A., or an Old Boys/Girls Association. Note however that, if such an approval is given, the approving Board does not appear, short (perhaps) of formally modifying or withdrawing the

approval, to be able to reject the choice made by the Board's appointee.²⁰ Boards when co-opting (or appointing) trustees must have regard to certain criteria aimed at making the Board reflect an appropriate gender, ethnic and socio-economic balance in relation to the character of the school and its community.²¹

- (v) While Boards now have increased powers to vary the way they are constituted - that is, to increase or decrease the number of parent representatives; to empower a body corporate to appoint a trustee or trustees to the Board; to set the number of co-opted trustees; and to dispense with having a student representative - it should be noted that Section 94B specifies a strict procedure for this. In particular, Boards contemplating such decisions must take reasonable steps to ensure that parents of students have proper notice of, and the right to be present at, the Board meeting at which the decision is to be made.

2. *Control and Management of Schools*

Control and management of state schools is dealt with in Part VII of the Education Act 1989. Financial administration of schools (other than in relation to teachers' salaries) is dealt with in Part VIII of the Act.

The Education Act 1989 vests Boards of Trustees with full powers of management of their schools. These powers are subject to certain important controls and restrictions, and to some significant exceptions in relation to employment of staff.²² The key provisions are Sections 72, 75 and 76. Their scope will be examined in detail later. At this stage, it is enough to note that, subject to other enactments and the general law of New Zealand, Boards have been given "complete discretion to control the management" of their school "as [they think] fit".²³ School Boards also have the power, "subject to any enactment, the general law of New Zealand, and the school's charter", to make for the school "any bylaws the Board thinks necessary or desirable for the control and management of the school".²⁴ As well as bylaws, Boards are empowered to give "general policy directions".²⁵ In addition, they are able, to a significant extent, to control the aims, objectives and indeed the management of a school, by means of the school's Charter.

The very broad discretions entrusted to Boards of Trustees have their counter-balance in Section 78, which empowers the making of statutory regulations for "the control, management, organisation, conduct and administration of schools". To date, the only regulations enacted under this provision have been an inconsequential re-enactment of an earlier set of regulations dealing very generally with secondary school curriculum and examinations.²⁶ Nevertheless, there is clearly potential for a government to use Section 78 to claw back to a significant extent the autonomy which has been granted Boards of Trustees in terms of the overall legislative framework.

3. *School Charters*

School Charters, as noted by Williams J in the passage from *Maddever* earlier quoted, are one of the significant innovations of the Tomorrow's Schools reforms.

The Act requires every state school to have "a written charter of aims, purposes and objectives". The Charter must be prepared and approved in terms of Sections 61, 62 and

63 of the Act. A Charter will contain what is in effect a mixture of mandatory content and locally-generated content - the latter subject to ministerial approval. Both the preparation of a Charter and the process of amendment of an existing Charter require the Board concerned to consult *in advance* with the school's community.²⁷ Williams J in *Maddever*²⁸ describes the process of Charter formulation, as follows:

It is thus clear that the Act contemplates that the Board, in consultation with the Minister, should have a significant role in determining the school's educational goals and a degree of independence in deciding how those goals should be achieved. While the Ministry of Education influences a school's broad objectives through the application of the National Educational Guidelines established under S60A... and the Minister also has a power of approval of school charters, the guidance thus provided is in rather general terms. It is for the parents, staff and other persons to largely determine the distinctive character of the charter for a particular school.

Overall, the legislative reforms clearly envisage that the process of creating a school Charter will instill a considerable community input into the direction and management of the school. This input will occur both directly, through a representatively constituted Board of Trustees and indirectly, through the requirement of advance consultation with the school's community before preparation or amendment of a Charter. The Charter when approved binds the Board to take all reasonable steps to ensure that the school is managed for the purposes and with the aims and objectives set out in the Charter.²⁹

The Act stipulates a certain amount of mandatory content for School Charters:

- (i) Every Charter is deemed to contain the aim of achieving, meeting and following (as the case may be) the national education guidelines under Section 60A(c)³⁰
- (ii) Every Charter is deemed to contain 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.³¹
- (iii) Every Charter is deemed to contain 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 full-time students whose parents ask for it.³²

In addition to the mandatory statutory content, there is a second level of "compulsory" Charter content. Purportedly acting pursuant to Sections 60 and 61 (sic)³³ of the Education Act 1989, the Minister of Education has specified certain "national education guidelines" as "core charter elements". The guidelines are dated 19 December 1989 and have been gazetted.³⁴ They begin by stating:

"In terms of section 61 (sic) these guidelines are deemed to be part of the charter of every state and integrated school in New Zealand and are to apply to the Board of Trustees and Principal of every state and integrated school."

Even assuming the Gazette Notice specifying the core Charter elements to have been made under Section 60A rather than under Sections 60 and 61 as stated, there are some serious doubts as to the Minister's power to specify a compulsory core content for school Charters in the way which has been done. First, it is open to argument whether the core

Charter elements can accurately be described as constituting “national education goals” or “national curriculum statements” or “national administration guidelines”, in terms of Section 60A. Secondly, the scheme of Sections 61 - 63 of the Act suggests that the 1989 Act itself has specified, to the extent that the legislature considered necessary, the mandatory content of school Charters. As to those parts of a school Charter which are not compulsory under statute, the Minister has under Section 61(5)-(7) a power of approval and a discretion to amend. It is arguable that the Minister has, by stipulating such a large body of compulsory core Charter content, effectively - and impermissibly - prevented himself from exercising his discretionary powers in this area.³⁵

Be all that as it may, the result of the imposition of the core Charter elements by means of national education guidelines is effectively two-fold. Boards of Trustees are required both to pursue a number of specified curriculum and equity goals, and to develop in addition specific detailed policies of their own in these and a number of other areas. These Board-developed policies, combined with the school’s Charter and the provisions of the Education Act 1989 and indeed other statutes, provide an extremely wide-ranging web of legal obligation with which Boards have to comply.

Specifically included among the core Charter elements are the “Guiding Principles”. These deserve to be set out here:

The Board of Trustees accepts that all students in any school or schools under its control are given an education which enhances their learning, builds on their needs and respects their dignity.

This education shall challenge them to achieve personal standards of excellence and to reach their full potential. All school activities will be designed to advance these purposes.

Particularly significant in terms of the broader responsibilities of Boards of Trustees are the core Charter provisions dealing with community partnership goals and objectives. These require Boards to enhance learning “by establishing a partnership with the school’s community” and to be “responsive to the educational needs and wishes” of that community. These goals and objectives along with others are designed to ensure that public consultation by a school and in particular its Board of Trustees is an ongoing process. The duty to consult, under Tomorrow’s Schools, is therefore to be seen as an important and continuing one, designed to ensure that Boards both seek and are responsive to community views as to the school’s objectives and the methods of achieving them.

Other Responsibilities of Boards

An important duty imposed on Boards (through the Principal) is contained in Section 77 of the Act, which provides that the Principal shall take all reasonable steps to ensure that students receive good guidance and counselling, and that a student’s parents are informed of difficulties which the student is having, whether academic or interpersonal.

The 1989 Act contains a series of provisions empowering or obligating Boards of Trustees which here need only be mentioned in passing: provisions dealing with the opening of schools and the organisation of the school year³⁶; provisions empowering

Boards to appoint special committees and to delegate³⁷; and provisions dealing with the management by Boards of property and finances.³⁸

The final duty imposed on Boards by the 1989 Act which is worthy of separate note is a significant one. It has, indirectly, major implications for Board management of school finances. Section 3 of the Act states:

“Right to free primary and secondary education -Except as provided in this Act or the Private Schools Conditional Integration Act 1975, every person who is not a foreign student is entitled to free enrolment and free education at any state school during the period beginning on the person’s 5th birthday and ending on the 1st day of January after the person’s 19th birthday.”

As every Board member knows, there exists considerable tension between this provision on the one hand, and the severe financial constraints which Boards are currently required to operate under, combined with the new found ability of Boards to operate an enrolment policy which may well restrict entry to the school, on the other. The point has now been reached where education at State schools is “free”, in theory only. Depending on the school, it can be prohibitively expensive, in practice. In strict legal terms, it remains the case that those students gaining entry who will not, or can not, pay cannot be forced to do so. Yet in many if not most Schools and in respect of the majority of students, Section 3 is, by means of the fiction that the substantial School fees now being charged under Tomorrow’s Schools are merely “voluntary”, honoured largely in the breach.

While the Education Act 1964 is almost entirely repealed, there remains in force the occasional provision of relevance to School Boards of Trustees. In particular, Sections 77 - 81 regulating religious instruction and observances in state primary schools remain in force. So, too, do Sections 105C and 105D dealing with the teaching of health education in schools and the right of parents and guardians to have their child excluded from health education classes.³⁹ It is to be hoped that, in due course, these provisions will be reviewed in the light of the current system and, to the extent appropriate, included in the 1989 Act.

Specific areas meriting further examination

1. *Limitations on the Powers of Management of Boards of Trustees*

Two separate but related issues arise in relation to the extent of a Board’s power to manage its school. One issue relates to the extent of a Board’s legal powers as against third parties. Clearly, school rules, Board bylaws or policies, and other acts or omissions by a school Board may impinge on the rights, freedoms and interests of others. These others may well be students of the school, but may equally well be staff, parents or the general public. The second issue can be seen as one of power and authority internal to the Board, namely, where does a Board’s power end and the Principal’s begin? This second question will be separately considered in the next section of this paper.

The provisions of the 1989 Act relevant to the first issue are Sections 72, 75 and 76. They need to be read together:

72. Bylaws - Subject to any enactment, the general law of New Zealand, and the school’s charter, a school’s Board may make for the school any bylaws the Board

thinks necessary or desirable for the control and management of the school.

75. Boards to control management of schools - 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.

76. Principals - (1) A school's principal is the Board's chief executive in relation to the school's control and management.

(2) Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, the principal -

- (a) Shall comply with the Board's general policy directions; and
- (b) Subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day to day administration.

It is instructive to contrast the relevant provisions of the now largely repealed Education Act 1964 relating to the former Boards of Governors of secondary schools⁴⁰

“61. General powers of governing bodies of secondary schools - (1) Subject to the provisions of this Act and of any regulations made thereunder, the governing body of every secondary school -

- (a) Shall have the control and management of the school

...

- (e) Shall generally have and exercise all the duties and functions conferred on governing bodies of secondary schools by this Act or by any regulations made thereunder.

(2) Subject to the provisions of this Act and any regulations made thereunder, the governing body of every secondary school may make such bylaws as are necessary or desirable to enable it to exercise the duties and functions conferred on it by this Act, and to direct and control its Secretary, teachers, and other officers, and the school.”

The comparison supplies a number of points worthy of note:

(i) Under the 1964 Act, Boards of Governors had “the control and management of the school”. Under the 1989 Act, Boards of Trustees have been given “complete discretion to control the management of the school as [they think] fit”. The Principal for his or her part has been given “complete discretion to manage as the principal thinks fit the school's day to day administration”.

(ii) Subject to the comment which immediately follows, the bylaw-making power under Section 72 of the 1989 Act would appear to be more comprehensive than that of the former Section 61(2).

(iii) Overall, the general words of statutory empowerment are broader under the 1989 Act, stipulating as they do the “complete discretion” of both Board and Principal within their respective spheres. But importantly, it should be noted, the qualifying words which limit the legal powers are also significantly broader. Whereas under the 1964 Act, the power of control and management and the power to make bylaws was made subject

to the provisions of the 1964 Act and of any Regulations made under that Act, under the 1989 Act the respective powers of Board and Principal to manage the school are each stated to operate “except to the extent that any enactment or the general law of New Zealand provides otherwise”.⁴¹ The bylaw-making power under Section 72 operates subject to any enactment, the general law of New Zealand, and (in addition) the school’s Charter.⁴² That the powers of Boards of Trustees and Principals are subject to any enactment to the contrary is scarcely surprising. The further restriction in relation to the “general law of New Zealand” is potentially more significant. Both will be discussed further in due course.

Sections 75 and 76 of the 1989 Act have been discussed in two unreported High Court decisions. In *McManus and Another v Syms and the Board of Trustees of Palmerston North Boys’ High School*, a case concerning suspension and expulsion of students and one therefore falling largely outside the scope of this paper, McGechan J commented in passing:⁴³

School boards and principals have wide powers under s75 and 76 in relation to the management and administration of schools.

At issue in *McManus* were school rules dealing with the consumption of alcohol by students engaged in school activity. The appropriateness of having such rules was not at issue, but rather the manner in which the rules should be applied and enforced. It was not therefore necessary for McGechan J to examine in any detail the extent of the power to manage.

The second case arising under the 1989 Act is *Maddever v Umawera School Board of Trustees*.⁴⁴ That case involved an application for judicial review of various decisions made by the Respondent Board and its Principal. At issue was the way the Principal and the Board had handled a minor playground incident involving an assault by the Applicants’ son on another student and its aftermath. The decision will be analyzed in detail in a subsequent section dealing with judicial review. While the case was not one in which it was necessary to examine the precise outer limits of a Board’s and a Principal’s powers of management, the judgment contains⁴⁵ a most useful extended discussion of the scope of the 1989 reforms and the relevant statutory provisions, extracts from which have earlier been quoted in this paper.

There are two reported decisions of importance in relation to the legal powers of a Board of Governors under the Education Act 1964. These are the decisions of the Court of Appeal in *Rich v Christchurch Girls’ High School Board of Governors (No.1)*⁴⁶ and *Edwards v Onehunga High School Board*.⁴⁷ Both involved school discipline.

In *Rich v Christchurch Girls’ High School*, a central issue was whether the Board had the legal power to authorise religious observances at school assemblies and to require pupils to attend these. The particular religious observances were a tradition of long standing at the school, but were tempered by a “readiness on the part of the Principal to exempt on request those whose conscience made it difficult for them to attend”.⁴⁸ Because of this it was not argued on behalf of the student, who had been expelled for in effect organising a protest campaign against the religious observances, that the School’s rules and practices

in relation to religious observance were unreasonable.⁴⁹ It was instead argued in support of the appeal that express statutory provision was necessary to enable the Board to authorise religious observances and require pupils to attend these. In response to that argument, McCarthy J. stated:⁵⁰

I think that [the trial Judge] was right in holding that the necessary power is to be implied from the wide and unrestricted words of s 61. Indeed I think that conclusion inescapable. In the operation of any school there are frequently difficult decisions to be made. Questions involving religious issues are often the most difficult; people feel strongly about them and are apt to adopt attitudes. So someone has to decide. The making of such decisions in the absence of direct statutory direction must be a part of management. Parliament has left that management in this school to the board.

White J. agreed that the general powers contained in Section 61(1)(a) of the 1964 Act were wide enough to entitle the Board to include or approve a form of religious observance during the daily school assembly, but expressed no concluded view as to the right of the school to make attendance during such observances compulsory, as on the evidence no question of compulsion arose.⁵¹

Edwards v Onehunga High School involved the suspension of a student for breach of a Board resolution governing the length of hair for boys. The Board's power to pass such a resolution pursuant to the bylaw-making power contained in the former Section 61(2), already quoted, was challenged on behalf of the student.⁵²

The Court of Appeal considered the Board resolution to have been a valid exercise of the bylaw-making power. Speight J. delivering the judgment of the Court stated:⁵³

It appears to this Court that 'control and management of the school' are wide and substantial topics including in their scope, of course, the control and management of pupils. The behavioural checks necessary, let alone desirable for such control in the day to day running of the school may be infinite and incapable of complete codification; but it certainly appears to us that a reasonable governing of appearance and dress fall properly within the ambit of matters authorised to be so controlled. A rule which restricts undue eccentricity of personal appearance is not demonstrated to us as being outside the purpose of the authorisation.

The Court of Appeal went on to consider whether the particular restrictions, while satisfying the "primary test" of having a subject matter falling within the general scope of the bylaw-making power, had themselves been shown to be justified. The Court held that the test of the actions of the Board was an objective rather than a subjective one. This test - presumably based on a standard of reasonableness, although this is not made explicit - must, the Court stated, be approached on the basis that the Board is presumed to have acted within its powers. The evidential onus and the onus of persuasion lie on the party challenging the validity of the bylaw. The Court emphasised that a School Board representative of parents from within the school's locality had considered it necessary to impose the particular restriction on hair length, noted the absence of evidence tending to the contrary, and concluded that the presumption of validity of the bylaw had not been displaced.⁵⁴

It should not be too readily assumed that *Rich* and *Edwards* would necessarily be decided

the same way today as regards the particular issues with which they were concerned.⁵⁵ However, these decisions demonstrate that the words “control and management” in the former Section 61(1) are of wide application. The wording of the present Sections 75 and 76, with their references to “complete discretion” and to “as [the Board or the Principal] thinks fit” is clearly, if anything, even broader and more open-ended (or subjective). By contrast with Sections 75 and 76, the present Section 72 dealing with the power to make bylaws is somewhat less broadly couched. Although the contrary is arguable,⁵⁶ it is submitted that the test of validity of Board bylaws made under Section 72 will be the objective test contemplated in the cases of *Rich* and *Edwards*.

“Control and management” of a school will therefore receive a broad interpretation.⁵⁷ However, it is further submitted that any bylaw made or other action taken by a Board of Trustees must in fact be made or taken *for the purpose* of control and management of the school, and not for some other, unrelated purpose. Moreover, it must be able to be related *objectively and in a substantial way* to the control and management of the school. Finally, if a bylaw, it must not be contrary to the school’s Charter; and the decision or action of the Board must furthermore be a reasonable attempt at compliance with any relevant provisions of the school’s Charter.

There are two further overall limitations on the powers of Boards of Trustees which must now be addressed. As we have already seen, a Board’s powers in relation to control and management are also limited to the extent that (i) any enactment and (ii) the general law of New Zealand provides otherwise. Each needs to be discussed in turn.

As to the first of these, “enactment” includes not only a statute, but also statutory regulations and other forms of subordinate legislation.⁵⁸ The expression therefore covers other contrary provisions in the Education Act 1989 itself and in Regulations made under that Act and, significantly, other statutes of general application which in their terms apply to Boards of Trustees. Such statutes will include the Official Information Act 1981, the Local Government Official Information and Meetings Act 1987, the Race Relations Act 1971, the Human Rights Commission Act 1977, and (significantly), it will be argued, the New Zealand Bill of Rights Act 1990. All of these will be further discussed later in this paper.

As we have seen, the provisions which expressly make the powers of Boards of Trustees and Principals subject to “the general law of New Zealand” are new. Given the width of the term “enactment”, the expression “the general law of New Zealand” must necessarily, it is submitted, include the common law. What then are the implications of this? An argument may be advanced that the words of qualification presently under discussion were inserted purely out of an abundance of caution, merely as a reminder to Boards and Principals that, notwithstanding the breadth of their discretion(s) to manage the school, they nevertheless have to obey the law. They must therefore comply with awards and employment contracts, honour commercial contracts, and observe administrative law standards such as the principles of natural justice.

However, it is arguable that the effect of the subjugation of Boards and Principals to the general (common) law may extend further than these obvious propositions. The “general law” must include for example rights of personal integrity (freedom from assault),

freedom of movement (freedom from wrongful detention or “false imprisonment”) and rights of personal property. While at least for the present, corporal punishment - or more specifically, the use on students by the employees or agents of a Board of “force, by way of correction or punishment” - has been outlawed in our schools⁵⁹ a host of related issues arise.

There is the possibility of occurrences of force (or indeed physical contact with or restraint of a student falling short of force) *other than* for the purpose of correction or punishment. There is the basic question of detention of students at school against their will. Physical dealings with the person or property of students may arise in a variety of ways, not all of which involve either force or indeed correction or punishment. Searching of students for suspected drugs or other contraband on their person or in a bag or private locker is one example.⁶⁰ Confiscation of dangerous or indeed merely unsuitable items of personal property brought to school is another.

All of these actions could be said in a sense to be potentially in breach of the “general law” - although confiscation of items possession of which by a student is either a criminal offence or a threat to good order is arguably less so. Obviously, as we have seen, a school Board and a school Principal have the authority, under the general power of management and control, to keep order and enforce discipline within the school. However, it is submitted that a line may be crossed and the statutory powers exceeded at the point where the action taken by the school constitutes an otherwise actionable civil wrong. This would arguably amount to a situation where “the general law ... provides otherwise” - although it is accepted that the latter expression is not without ambiguity.

A counter-argument to this line of reasoning is that school Principals and Boards possess inherent (common law) disciplinary powers over students, powers which exist by virtue of the teacher-student relationship itself. Such powers if well-founded in law could also be seen as part of the “general laws of New Zealand” and as justifying what otherwise might be illegal. This argument involves the contention that the ancient doctrine of *in loco parentis* (“in the place of a parent”) still forms part of our law.⁶¹ However, given that state education in this country has been comprehensively regulated by statute since before the turn of the century, with attendance at schools compulsory for much of a student’s schooling, to apply to “today’s schools” a doctrine dating back to the 18th Century which is based on the fiction that teachers are even today the recipients of a form of implied authority from parents to discipline students appears distinctly artificial.⁶²

For the present, therefore, it can only be said that the extent to which the “general laws of New Zealand” impose any real limitations on the otherwise broad powers of Boards of Trustees and School Principals awaits judicial clarification.

2 *The Respective Roles Of Board And Principal*

In considering the possibility of legal challenge by third parties to the actions of a Board of Trustees and its Principal, it is generally not necessary to consider the respective roles and powers of the Board as against those of the Principal.⁶³ This is particularly so, given that under the 1989 Act, the Principal is a member of the Board. However, as between the Board and the Principal and in the event of serious dispute as to whose is the final say-

so in respect of a particular issue, the question of the proper lines of Board/Principal demarcation can raise itself in an acute form. The emergence of this issue appears to have been a byproduct of the Tomorrow's Schools reforms. It has already shown itself to be the cause of some uncertainty and even internal strife for Boards and Principals.

So far as the statutory provisions are concerned, resolution turns on the wording of Sections 72, 75 and 76, already reproduced. On the one hand, the Board has the power to make bylaws for the control and management of the school, and has "complete discretion" to "*control the management*" of the school "as it thinks fit". On the other hand, the Principal is "the Board's Chief Executive in relation to the school's control and management". He or she "shall comply with the Board's general policy directions"; but subject to his or her so doing, has "complete discretion" to "*manage ... the school's day to day administration*" as he or she thinks fit.

It is possible to argue - and some beleaguered Principals have - that the Principal's role as the Board's Chief Executive and the conferring by statute of a complete discretion to manage the school's day to day administration result in a strict line of demarcation. A distinction, it is said, can and should be drawn between day-by-day management and administration, including what School Charters refer to as "the professional leadership of the school" - the sole province of the Principal - and management at a level of policy decision making - the sole prerogative of the Board. To the contrary, however, it is submitted that the statutory provisions do not impose such a dichotomy, or any other dichotomy for that matter. The Principal cannot be seen as standing somewhere apart from the Board of which he or she is a member. The management and control of a school cannot be arbitrarily categorised into day to day administration on the one hand, and management at a policy level on the other. The management of a school pursuant to the 1989 Act and the school's Charter is quite plainly, it is submitted, a consultative and a co-operative process. It involves a continuum or spectrum of shared power. It cannot be characterised as a form of continuing demarcation dispute.

To illustrate: it may be possible on one level to classify a really minor decision as involving day to day administration, in which a Board of Trustees should not involve itself. The make-up of the school's stationery order, and whether to permit a teacher to have the day off sick, are examples. Yet the particular instance can give rise to wider concerns, with which a Board would be entitled to involve itself. The stationery order may raise issues as to inefficient administration of the school's budget. The granting of sick leave could give rise to allegations of partiality or inconsistency on the part of the Principal, requiring Board involvement and perhaps the formulation of a policy.

There are two further dimensions to the legal analysis. The content of the school's Charter may also be relevant, although it is suggested that the core content, at least, does not assist much in this regard.⁶⁴ Secondly, given that the Principal is an employee as well as a member of the Board of Trustees, this further gives rise to a contractual dimension. It is in general an implied term of any employment contract that the employee must obey the employer's lawful and reasonable directions.⁶⁵ Under Tomorrow's Schools, the content of Principals' employment contracts is a matter for individual Boards and Principals, subject to State Services Commission final approval. However, most if not all such

contracts contain standard form provisions obligating the Board to “act as a good employer in all its dealings with the Principal”, and obligating the Principal to “honestly and diligently carry out the duties and responsibilities of the Principal” as set out in the job description forming part of the contract. The specific responsibilities of the job description may therefore also be highly relevant to the scope of the Principal’s authority. But it is unlikely that a Principal will not be bound by contract to comply with the basic duty to obey the employer’s lawful and reasonable directions.

In the ultimate resort, therefore, it is submitted that the Board’s authority as both employer of the Principal and as overall controller of the management of the school must necessarily be paramount. School Principals are of course entrusted with, and best left by Boards to get on with, the day to day administration and management of the school. But that does not mean that they are not answerable to their Board in these areas, and indeed subject therein to direction, in those hopefully rare cases where a Board sees fit to treat a particular issue of administration as one of principle. The following words on this topic by the present President of the New Zealand School Trustees Association are, it is suggested, both sound and sage:⁶⁶

“The essence of Tomorrow’s Schools is that a management partnership exists within the structure of the board of trustees. Boards have a responsibility to conduct the policy of the school (to govern) but also a set of legal responsibilities as employers, where they must clearly have executive control (manage).

The present legal definition of the board’s role, to control the management of the school, emphasises both of these aspects of the board’s responsibilities. ...

It seems that in many respects NZSTA agrees with the recent Secondary Principals’ Association publication *Managing with Boards of Trustees*. In this publication Linda Braun the SPANZ Vice President argues ‘The best schools have an effective principal and an effective board and each will contribute to building a productive partnership. There is little room in a school for autocracy, whether of the board or by the senior staff.’ and ‘A proficient, dedicated board and staff working together for the good of the school, achieving the results required by the nation, is the ideal we all seek.’

She continues: ‘Simplistic statements about the board making policy and the principal executing it are of no help, particularly when one is familiar with the realities of policy making in schools.’ The principal is part of the board. Parent trustees, the staff trustee and the principal control the management of school, in a collaborative partnership. Boards do not just make policy, they implement it, by virtue of the principal being a board member. Once the decisions are made, then the principal controls the day to day management of implementing the full board’s management direction. The term ‘governance’ tends to obscure this partnership, and is unhelpful as it implies that the principal is not part of this process.”

3. *The Legal Status and Enforceability of School Charters*

The requirement that each school formulate by means of public consultation and have in place its own Charter is as we have seen one of the most important features of the Tomorrow’s Schools regime. Given this importance and the detailed content of any approved School Charter, containing as it will at the minimum the mandatory content specified in the Act and the core Charter elements, questions arise as to the legal status

and enforceability of school Charters. These questions are to some extent answered by Section 64 of the 1989 Act, which requires to be set out in full:

“Effect of charter - (1) Subject to subsection (3) of this section, every charter has effect as an undertaking by the Board to the Minister to take all reasonable steps (not inconsistent with any enactment, or the general law of New Zealand) to ensure that -

(a) The school is managed, organised, conducted and administered for the purposes set out or deemed to be contained in the charter; and

(b) The school, and its students and community, achieve the aims and objectives set out or deemed to be contained in the charter.

(2) The Secretary is hereby empowered to take, on the Minister’s behalf, proceedings having or intended to have the effect of enforcing a charter or constraining a Board from taking any action that is contrary to a charter.

(3) No person other than the Secretary has power to take proceedings having or intended to have the effect of enforcing a charter or constraining a Board from taking any action that is contrary to a charter.

(4) The Secretary shall not commence proceedings under this section without first consulting the Chief Review Officer.”

Effectively, therefore, a School Charter operates as an undertaking by a Board of Trustees to the Minister to take all reasonable steps to fulfil the Charter’s purposes, aims and objectives. This obligation is subject to the further qualification that the steps are to be “not inconsistent with any enactment, or the general law of New Zealand”, as to which see earlier discussion. The “Secretary” - the Chief Executive of the Ministry of Education - is the only person authorised to take legal proceedings for the purpose of enforcing a Charter.

Section 64 can be seen as creating a limited statutory right of enforcement in its particular terms; or in other words, a right of action for breach of statutory duty, at the suit of the Secretary taken on behalf of the Minister. A school Charter is therefore legally binding, but only in one direction. It is binding on a Board of Trustees, as an undertaking by the Board to the Minister. It is not therefore a form of statutory contract, such as might give a Board of Trustees rights against the Minister or the Crown, for example to provide sufficient resources to enable the Board to perform its Charter obligations. It is submitted that the history of the 1989 reforms confirms this approach. Thus while the Picot Report⁶⁷ and the Tomorrow’s School Report itself⁶⁸ appear to have envisaged that School Charters would operate as a contract both between the state and the school and between the school and its community, this contractual model was explicitly departed from by Government, when the legislation came to be enacted.⁶⁹

Despite the foregoing, it has been argued that a School Charter should be seen as a form of contract between the Minister and the individual Board of Trustees and, further, that the resulting contract may be enforceable at the suit of third parties, pursuant to the Contracts (Privity) Act 1982.⁷⁰ However, it is respectfully submitted that the Charter obligation is correctly seen as a unilateral statutory obligation owed by Boards to the Minister, and not a bilateral series of obligations arising under common law. Further-

more, the notion that a School Charter could be enforceable at the suit of a third party to it not only flies in the face of Section 64(3). It also runs counter to the longstanding legal principle recognised in a string of cases, including *Pasmore v Oswaldtwistle Urban Council*⁷¹, namely:

The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v Bridges* [(1831) 1 B. & Ad. 847, 859]. He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'

Notwithstanding the wording of Section 64(3), there is one possible way in which indirect enforcement of Charter obligations may be available to a third party. Subject to the difficult question of whether a Board of Trustees can be said to be exercising a statutory power or statutory power of decision in any given instance,⁷² it must surely be the case that a Board of Trustees is required as a matter of law, when exercising its powers and making decisions, to have regard to the relevant provisions of its School Charter. It would normally follow that a Board which failed to do so will be said to have acted "illegally", in the administrative law sense. The resultant action or decision could therefore arguably be subject to judicial review by a person whose interests have been affected.

To put the argument another way: when deciding any matter, a Board of Trustees must be obligated as part of its undertaking to the Minister to have regard to its Charter, and to take all reasonable steps to comply therewith in relation to the subject matter of decision. It would seem a curious position for a Board to be in in relation to its decision-making, if as against the Minister, the Board is obliged to have regard to its Charter; but as against all other parties, it is not. One way around this apparent dilemma is if Section 64(3) is interpreted as limited to proceedings having the *direct* effect of enforcing a Charter or restraining its breach. Judicial review aimed at overturning a particular Board decision or action, where the Charter obligation has not been taken into account, is at best an indirect enforcement of the Charter. Indeed, it is perhaps more accurately characterised as no more than invalidation of an existing flawed decision, while at the same time requiring the offending Board to have due regard to its Charter. This does not necessarily see the Charter enforced, but will ensure that it is properly taken into consideration in Board decision-making.

4. *The Duty of Boards of Trustees to Consult*

The 1989 Act, and School Charters themselves, impose on Boards of Trustees very wide-ranging obligations to consult with parents, school staff and the wider community.⁷³ Section 61(3) imposes a duty to consult with named groups, effectively the school's immediate community, when preparing and seeking to amend a School Charter. Section 62, while not framed expressly in terms of consultation, imposes a duty on Boards to consult Maori communities in the school's geographical area. As we have seen, there may also arise duties of consultation over the content of a school's health education syllabus.⁷⁴

Contrariwise, Boards of Trustees have a right to be consulted by the Minister, in the event that the Minister proposes any amendment to the school's Charter as formulated by the Board.⁷⁵ There are also express duties of consultation with the proprietors of an integrated school when replacement of its Board is contemplated⁷⁶ and, it is suggested, comparable obligations at common law when action to dissolve a Board is contemplated under either Section 106 or 107 of the Act.

It is therefore necessary to explore precisely what is involved in the performance of a "duty to consult". The leading authority is the recent Court of Appeal decision in *Wellington International Airport Limited v Air New Zealand Limited and Others*⁷⁷ In that case, the new Wellington airport company had been empowered by statute to fix landing fees and other charges, after consultation with airlines which use the Airport. In the High Court, McGechan J. held that the airport company had failed to comply with its statutory duty to consult. On appeal, the Court of Appeal disagreed with this conclusion on the facts, holding that there had been adequate consultation by the Airport company in the circumstances. However, the Court of Appeal cited with apparent approval the following lengthy statement by McGechan J. as to the legal nature of consultation:⁷⁸

Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade. The concept is grasped most clearly by an approach in principle. To "consult" is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion. Despite its somewhat impromptu nature, I cannot improve on the attempt at description which I made in *West Coast United Council v Prebble* [(1988) 12 NZTPA 399, 405]

Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.

McKay J. delivering the judgment of the Court of Appeal further stated:⁷⁹

"It was further submitted WIAL had excluded the Airlines from the formative stage of its thinking, and from arguing whether or not it should review its fees at all, and whether any increase in charges was justified. There was no obligation on WIAL to do more than consult properly and with an open mind before making any final decision. On the Judge's findings, which in our view were fully supported by the evidence, it did this."

In short, the requirement of consultation is no mere formality. Boards of Trustees when

consulting must do so in a meaningful way; and with an open mind - that is, before any final decision has been made by them. A prerequisite to meaningful consultation is the provision to those being consulted of adequate information concerning the subject matter of the consultation process. Providing these basic elements are satisfied, consultation does not need to be carried out in any particular manner, or with any great formality. As a rule, however, it is suggested that it is desirable that the consultation over School Charters be carried out by means of advance written notice to the school's community, or at the very least the staff and parents, of what is proposed.⁸⁰

5. *The Application to Boards of Trustees of the New Zealand Bill of Rights Act 1990*

The New Zealand Bill of Rights Act 1990 ("the Bill of Rights") is a vast topic in itself. The general principles will have been more than competently explained in the paper already delivered by Mr P.T. Rishworth. This paper must necessarily be limited to a bare outline of its overall effect. This outline will be followed by a more detailed discussion of the possible implications of the Bill for schools and School Boards.

The long title of the Bill of Rights states it to be an Act:

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

Part II of the Bill of Rights lists a number of civil and political rights. The Bill does not empower a Court to overturn or to decline to apply any enactment⁸¹ by reason of inconsistency with any provision of the Bill, but where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill, that meaning is to be preferred. The Bill of Rights also applies as provided by Section 3 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, powers, or duty conferred or imposed on that person or body by or pursuant to law."

The Bill of Rights therefore applies to executive or administrative actions by the state, whether pursuant to statutory authority or not, and to the actions of persons or bodies coming within (b), immediately above. Importantly, however, the rights and freedoms set out in the Bill are not absolute in their application, either in relation to interpretation of other enactments or when applied to "acts done". They are to be applied subject (only) "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".⁸²

It seems clear that Boards of Trustees and school Principals, when exercising their functions and powers under the Education Acts of 1989 and 1964, are subject to the Bill of Rights.⁸³

In a recent decision, *Federated Farmers of New Zealand Inc. v New Zealand Post*

*Limited*⁸⁴ McGechan J., holding that Section 14 of the Bill (freedom of expression) applied to the mail-handling activities of New Zealand Post, stated:

“I have no difficulty regarding mail-handling as a ‘public function’. It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and controlled by the Crown: a ‘State Owned Enterprise’. For Bill of Rights purposes and as an ordinary use of language NZP can and should be regarded as exercising ‘public functions’. I do not encourage fine distinctions amongst those functions.”

Thus while it could be argued that some functions of a School Board, for example its functions as an employer, are “private” rather than “public” functions, that would it is submitted be to draw an inappropriately “fine distinction”.⁸⁵

Indeed, the Bill of Rights may well also apply in terms of Section 3(b) of the Act to Boards, Principals and teaching staff, to the extent (if any) that they are empowered “by or pursuant to [common] law” to perform functions connected with the running of schools and the delivery of public education. For example, in the case of Boards, there are functions flowing from their general empowerment as bodies corporate⁸⁶ and, in the case of Boards, Principals and teaching staff, functions arising out of their common law powers, *if indeed any*, under the doctrine of *in loco parentis*, discussed earlier.

The applicability in principle of the Bill of Rights to Boards of Trustees carries significant implications. There are a number of provisions in Part II of the Bill of Rights which have the potential to apply to the activities of schools. Some of these will have already been discussed by Mr Rishworth in his paper. I list the following provisions as having the greatest potential applicability.⁸⁷

“9. **Right not to be subjected to torture or cruel treatment** - *Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.*

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 freedom to seek, receive, and impart information and opinions of any kind in any form.

15. **Manifestation of religion and belief** - Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. **Freedom of peaceful assembly** - Everyone has the right to freedom of peaceful assembly.

19. **Freedom from discrimination** - (1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or

national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

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.

21. **Unreasonable search and seizure** - Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. **Liberty of the person** - *Everyone has the right not to be arbitrarily arrested or detained.*

23. **Rights of persons arrested or detained** - ...

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

27. **Right to justice** - (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law."

(Emphasis has been added.)

The implications of some of these provisions in the area of school curriculum have been explored by Mr Rishworth in his paper. Outside of that area, a number of the provisions have obvious implications in relation to school discipline, in particular Sections 9, 14, 21 and 27(1). For example, as already argued,⁸⁸ the actual result in both of the leading authorities on school discipline and the powers of School Boards under the 1964 Act could be different in the light of the Bill of Rights.

Thus the school rule regulating to the length of hair for boys at a co-educational school, in issue in *Edwards v Onehunga High School*⁸⁹ now might well not withstand a Bill of Rights challenge based on either or both of Section 14 (freedom of expression) or Section 19 (freedom from discrimination on the ground of sex). That is not to say that School Boards entirely lack the power to prescribe reasonable rules dealing with personal appearance of students which do not discriminate on the grounds of sex. It is less certain perhaps whether school rules imposing strict standards of dress and appearance (for example, stipulating a compulsory school uniform) could be the subject of successful challenge on the grounds of unreasonable infringement of (student) freedom of expression. The issue might well turn on an examination of the traditions and community expectations of the particular school.⁹⁰

Likewise, the outcome in *Rich v Christchurch Girls' High School*⁹¹ could well be different today. Issues would arise under Sections 13, 14, 15 and 19 of the Bill of Rights. The "offence" of organising a protest walk-out from a school assembly would have to be judged in the light of Section 14 (freedom of expression).⁹² So far as the conducting of religious observances in state secondary schools (but not "integrated schools") is concerned, there are serious questions which arise when such schools effectively permit

the religious observances of a particular faith to receive “official” sanction, arising particularly under Sections 13 (freedom of thought, conscience and religion) and 15 (manifestation of religion and belief) of the Bill of Rights.⁹³

A further significant consequence of the applicability of the Bill of Rights to Boards of Trustees is the express recognition under Section 27(1) of the duty of a Board (or its delegate) to observe the principles of natural justice, where the Board is making a determination in respect of a person’s “rights, obligations or interests protected or recognised by law”. To some extent at least, this provision may be merely declaratory of common law obligations owed independently by Boards of Trustees and Principals. It is important also to stress that not every action taken or decision made by a Board or Principal will require observance of the principles of natural justice, either under the Bill of Rights or at common law.⁹⁴ It is beyond the scope of this paper to embark on detailed discussion of this issue. But it may be of assistance to lay readers of this paper (if any), if the key principles of natural justice relevant to schools are briefly summarised. They can be stated as follows:⁹⁵

- (i) The right to adequate notice of hearing. This includes adequate advance notice of the time and place of hearing - giving persons affected adequate time to prepare for it; adequate detail as to the “charges” faced or issues to be discussed; and disclosure by the Board or Principal of information which may be prejudicial to the party concerned.
- (ii) The right to a procedurally fair hearing. This includes affording persons concerned a full opportunity to state their case; and may well in the context of many of the more important decisions to be taken by Boards or Principals include a right to legal representation (if requested).
- (iii) The right to a hearing and a decision free of bias and prejudice. As well as the obvious duty of a decision-maker to refrain from making a decision until all parties have been heard, this involves a Board ensuring that, to the extent permitted by law, Board members who are “too close to” a particular issue do not participate in the hearing and in particular the decision-making.⁹⁶

While there is academic support for and so far no judicial dissent from the proposition that the Bill of Rights applies to administrative decision-making such as that engaged in by Boards of Trustees and school Principals, there is as yet no case-law which indicates what the consequences of an established breach of the Bill of Rights will be. It has been argued that the effect of breach of the Bill of Rights is to produce a “constitutional trump” which necessarily and automatically invalidates the offending act or decision.⁹⁷ Certainly, even in conventional administrative law terms, breach of the Bill of Rights is likely to result in the action or decision taken being declared invalid. In an appropriate case, it may well be also that breach of the Bill of Rights would lay a Board of Trustees open to a civil claim for damages.⁹⁸

6. *Other Statutes Particularly Applicable to Boards of Trustees*

Aside from the New Zealand Bill of Rights Act 1990 and statutes applying to Boards of

Trustees in their role as employer, there are a number of other statutes particularly relevant to the duties of Boards of Trustees, in particular the Race Relations Act 1971, the Human Rights Commission Act 1977, the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. The effect of each of these Acts will be touched upon in turn. (The Ombudsmen Act 1975 also has some application to Boards of Trustees, but is more appropriately dealt with in the final section of this paper.)

(a) Race Relations Act 1971 and Human Rights Commission Act 1977

Given Section 63 of the Education Act 1989, the core charter elements imposed by way of national education guidelines, and the Equal Employment Opportunity obligations imposed by Part VIIA of the State Sector Act 1988, as well as the Bill of Rights obligations just outlined, Boards of Trustees are unlikely to be unaware of their wide-ranging obligations across the whole range of the social equity issues. In addition, Boards are subject to the provisions of the Race Relations Act 1971 and Human Rights Commission Act 1977.

Read together, these two statutes outlaw discrimination on the grounds of colour, race, ethnic or national origin, sex, marital status, religious or ethical belief, across a wide range of activities, in particular in respect of employment, provision of goods and services, and access to public places and facilities. Section 26 of the Human Rights Commission Act 1977 makes in addition specific provision relating to educational establishments, including schools. It is thus unlawful for schools to refuse students admission, to admit them on less favourable terms than otherwise would apply, to deny or restrict access by a student to any benefits or services provided by the establishment or to exclude a student or subject him or her to any other detriment, on any of the discriminatory grounds listed above. There are provisions protecting educational establishments maintained wholly or principally for students of the one sex, race or religious belief from liability for refusal to admit students of a different sex, race or religious belief.⁹⁹

While much of this is a duplication of the Charter obligations owed by Boards of Trustees, additional significance lies in the remedies provided under the Race Relations Act and the Human Rights Commission Act, namely complaint to the Race Relations Conciliator or Human Rights Commission as the case may be, with the possibility of enforcement proceedings (including a claim for damages) before the Equal Opportunities Tribunal if the matter is not resolved at an earlier stage.

(b) Official Information Act 1982

School Boards of Trustees are subject to the Official Information Act 1982, being organisations named in the First Schedule to that Act. Treatment of the Official Information regime is beyond the scope of this paper.¹⁰⁰ In their latest annual report, the Ombudsmen note that School Boards of Trustees, particularly those of primary schools, have particular difficulties in operating under the Official Information legislation. The Ombudsmen note that they have found it necessary to remind Boards of the following:¹⁰¹

- (a) Parents, children, teachers and other persons have a right to information about themselves, subject only to the limited withholding provisions of s.27.

- (b) Opinion information generated by Board members in their capacity as Board members should not normally need to be withheld in order to protect members' privacy.
- (c) There is a strong public interest in the accountability of Boards to the school community. If that community is to assess the effectiveness of its Board, it needs access to information on which to make that assessment and such information will include information about the Board's conduct of contentious business.

In the light of those comments, it is perhaps also appropriate to remind Boards of Trustees that they are under a duty to give reasonable assistance to persons making Official Information requests, including the re-direction or transfer of an inappropriately addressed request as necessary.¹⁰²

(c) The Local Government Official Information and Meetings Act 1987

Boards of Trustees are subject to Part VII of the Local Government Official Information and Meetings Act 1987; that is, the Act's provisions dealing with meetings.¹⁰³ As a consequence, Boards must publicly notify in advance their meetings,¹⁰⁴ and must make available to members of the public without charge in advance of meetings all agendas and associated reports which their members have received and which relate to the meeting.¹⁰⁵ Except to the extent that disclosure may properly be resisted in terms of the Official Information Act 1982, members of the public have a right to inspect and to receive copies of the minutes of Board meetings.¹⁰⁶ Boards of Trustees may exclude the public from their meetings upon certain specified grounds, by passing a resolution to that effect in the form prescribed, but except to the extent that there is lawful and proper cause to exclude the public, meetings must be open to the public.¹⁰⁷ Note that the fact that the public was excluded from a meeting or part of a meeting pursuant to these provisions will not necessarily mean that good reason exists under the Official Information Act for resisting a request for minutes of the meeting or other information.¹⁰⁸

School Boards of Trustees : accountability/remedies

This section reviews the accountability of, and the legal remedies available against, Boards of Trustees. Obviously, accountability and legal remedy are by no means necessarily the same. It is proposed first to examine the mechanisms existing within the Education Act 1989 which might perhaps be thought to deliver "accountability"; then to discuss briefly the applicability of the Ombudsmen system to Boards; and, finally, to examine the availability of both ordinary civil remedies and judicial review as against School Boards.

1. *Procedures Available Under the Education Act 1989*

These are most usefully summarised by Williams J. in *Maddever*.¹⁰⁹ His Honour notes, first, that accountability of School Boards is achieved by the requirement that they must adhere to their school's Charter, coupled with the requirement of Boards to provide pursuant to Section 87 annual reports on their operations for the previous year. Secondly, His Honour draws attention to the provisions ensuring financial accountability of Boards earlier referred to.¹¹⁰ Williams J. goes on to summarise the other provisions of the Act as follows:

Thirdly, under S 230 of the Act, the Chief Review Officer of the Education Review Office is required at intervals of not less than three years to enquire into and report to the Minister on the extent to which schools have eliminated "...unnecessary barriers to the progress of students", and achieved certain other stated objects.

Fourthly, under S 106, the Secretary of Education has the power to dissolve a School Board if it is found to be inactive or has too few trustees. Finally, the Minister may dissolve a Board under S 107 by reason of mismanagement, dishonesty, disharmony, incompetence or inaction or for unlawful behaviour.

As to the accountability of School Boards to parents, this is provided for in the following ways. First, there must be is (sic) an annual meeting every year: S 100. Secondly, the Boards themselves must, pursuant to S 96, contain parent representatives. Thirdly, Boards are accountable to the parents by means of elections which are held essentially on a staggered basis every two (sic) years: Ss 101 and 102. This means in effect that by annual reports, annual meetings, and elections, the control of the school is substantially influenced by the parents, especially since under S 94 the parents substantially predominate Boards on a numerical basis.

It is true that there is no direct appeal or review avenue to another education agency for a parent who is not satisfied with a decision by a Board in relation to school management or administration. However, this appears to have been a deliberate legislative policy based on a decision to implement the Picot Report with its concept of the self-managing school which is made accountable in the various ways I have mentioned.

To that list can be added both the continuing duty laid upon School Boards to consult with their school communities already referred to - itself a significant form of accountability - and also (where they exist) a Board of Trustees' own internal procedures for dealing with complaints.

2. *The Jurisdiction of the Ombudsmen*

In *Maddever*, the aggrieved parents had, before applying for judicial review, taken a number of their complaints to the Ombudsmen.¹¹¹ It appears that an Ombudsman fully investigated the complaints, rejecting them. This led the Respondents to the application for review to argue that, at a discretionary level, the Court would necessarily be bound to refuse relief to the Applicants, given the alternative remedy which they had already pursued and its outcome. While not appearing to decide this argument one way or another, Williams J. commented favourably on resort to the Ombudsmen as being a more appropriate procedure in disputes with School Boards than judicial review:¹¹²

There is a strong argument for saying that [resort to the Ombudsmen] is a much preferable remedy in many cases, even though the Ombudsmen have the power only to report and comment. Indeed the abolition of the Parents' Advisory Council seems to have been driven partially by a view that that Council was an unnecessary expensive addition to the structure of the Education Act and that a more appropriate remedy was a complaint to the Ombudsman or the Human Rights Commission; see (1991) 517 NZPD 3549. The technical legal procedures for judicial review are a cumbersome way of dealing with issues of the kind which arose in this case which can be much more effectively investigated after a complaint to the Ombudsman.

Despite Williams J's comments and the apparent willingness of the Ombudsman to carry

out a full investigation into the actions of the School Board in the *Maddever* case, it appears that the Ombudsmen now take a different view of their jurisdiction under the Ombudsmen Act 1975 in relation to School Boards of Trustees. In general terms, the Ombudsmen have jurisdiction to investigate decisions, recommendations and acts done or omitted "relating to a matter of administration and affecting any person or body of persons in his or its personal capacity" by Departments or organisations subject to their jurisdiction. However, in their latest annual report¹¹³, the Ombudsmen point out that their jurisdiction to investigate under the Ombudsmen Act is limited by Section 13(1) of that Act to investigation of the acts and decisions of committees, other than committees of the whole, sub-committees, Officers, employees and members of Boards of Trustees, but does not include the actions and decisions of Boards of Trustees themselves. This is because Boards of Trustees are named in Part III of the First Schedule to the Ombudsman Act (which lists so-called local organisations subject to the Act), rather than in Parts I or II of the First Schedule, which list a number of other Governmental and quasi-Governmental organisations.

Their Report comments on this anomaly as follows:

There are some 2700 Boards of Trustees whose members are concerned principally with the running of their particular school and who, for the most part, are quite unfamiliar with the role and functions of the Ombudsmen and the requirements of the Ombudsmen Act, the Official Information Act and the Local Government Official Information and Meetings Act, to all of which they are subject. The Boards make decisions which may affect not only teachers, pupils and parents, but suppliers of services and others in the community (eg neighbouring property owners), but if the decision complained of was made by the full Board acting as a committee of the whole, any investigation by an Ombudsman into such a decision is limited to examining the advice and recommendations made to the Board in terms of s.13(1) and (2) of the Ombudsmen Act. If at the conclusion of such an investigation, the Ombudsman concerned forms the view that the advice etc was deficient, the most he or she can do is recommend that the matter be referred back to the Board for reconsideration in the light of the facts identified by the investigation as justifying further assessment. However, the Ombudsman has no power to make a recommendation to the Board.

The Ombudsmen's Report goes on to state that detailed submissions in favour of amending the Ombudsmen Act to give a full jurisdiction over Boards of Trustees - in line with the similar jurisdiction possessed over tertiary institutions - were rejected by the Minister of Education.

The Education Act 1989 governs the activities of primary, secondary and tertiary institutions. It is plainly anomalous that tertiary institutions are fully subject to the jurisdiction of the Ombudsmen, while primary and secondary schools are not. If anything, a wider range of people is more significantly affected by the activities of School Boards than those of tertiary institutions. As Williams J in *Maddever* clearly recognizes, the remedy of a complaint to the Ombudsmen is a valuable one which is in general preferable to forcing parties to litigate their differences in Court. It is submitted that the Government should revisit the Ombudsmen's suggestions for legislative reform in this area, and rectify an obvious omission.

3. *Civil Remedies and Boards of Trustees*

Save in relation to proceedings aimed at enforcing school Charters,¹¹⁴ Boards of Trustees as bodies corporate are able to be sued (or to sue).¹¹⁵ Boards are therefore as one would expect accountable in respect of any civil wrongdoing which they may commit.

However, individual trustees are under no personal liability for the acts or omissions of the Board of which they are a member, or indeed for any loss suffered by the Board arising out of their acts or omissions, if the act or omission was in good faith in pursuance or intended pursuance of the functions of the Board.¹¹⁶ The powers of the Board are not affected by irregularities or defects of appointment or election of its individual members.¹¹⁷

4. *Judicial Review of Boards of Trustees*

In broad terms, an administrative authority is bound to act “in accordance with the law, fairly and reasonably”.¹¹⁸ Behind this highly compressed dictum lurks a vast body of case law and academic writing.¹¹⁹ Judicial review is the process whereby executive and administrative authority is called to account for the legality, fairness and reasonableness (or as some prefer, rationality) of its actions.

School Boards of Trustees are, in general terms, amenable to judicial review. That is of course by no means the same thing as saying that attempts to review them will necessarily be successful. There have been two known attempts to review the actions of Boards of Trustees established under the 1989 reforms. In both cases, the High Court undertook a painstaking analysis of the legal and factual issues, so that the judgments are replete with much useful general guidance for Boards of Trustees. The first case, *McManus and Another v Palmerston North Boys High School*¹²⁰ concerned suspension and expulsion of two students, and was successful. Detailed analysis of this decision is left to the accompanying paper dealing with Discipline of Students.

The second case is *Maddever v Umawera School Board of Trustees*.¹²¹ The judgment of Williams J in this case has been referred to a number of times already. It is proposed to outline in general terms the key issues and holdings in the case, before turning to examine in greater detail three general issues of principle raised by the judgment which have particularly significant implications for the amenability to judicial review of Boards of Trustees.

On 18 October 1989 Jack Maddever, then aged 10 and a pupil at Umawera Primary School, a small country school located near Kaikohe, was involved in an incident in the school playground. Jack had punched another pupil. He was interviewed by the Principal, who spoke first to Jack, and then to Jack in the presence of his mother. Perhaps not unsurprisingly, the Principal made clear her disapproval of Jack’s behaviour. Later the same day, both parents complained to the Principal over her treatment of Jack in the course of the incident. In the light of the parents’ heated response and their complaints concerning her behaviour, the Principal convened an urgent meeting of the School Board for the following morning. The Board considered a written report by the Principal setting out her version of the events of the preceding day, resolved to support the Principal’s

actions and confirmed that violence at the school was unacceptable. No notice of that meeting was given to the Maddevers and they were not present at it.

Other than being spoken to by the Principal on the 18th October, no action was taken against Jack Maddever. He was withdrawn from the school by his parents that very day and never returned to it. His parents enrolled him shortly thereafter at another local school, and by the time of the hearing, he was a border at secondary school. Mr and Mrs Maddever lodged a formal complaint with the Board against the Principal. The Board appointed a special committee under Section 66 of the Education Act 1989, which investigated the parents' complaint and recommended to the Board that it support the Principal in the dispute. The matter subsequently came before the whole Board at its November 1989 monthly meeting. Both the Maddevers and the Principal were present, but when the matter of the sub-committee's report was reached, the Board went into committee in the absence of both. The Board considered the complaint and certain other material, and resolved unanimously to support the Principal. A request at that stage by Mr and Mrs Maddever to speak was declined.

Between November 1989 and June 1990, the Maddevers and their Solicitors took various steps in pursuit of their grievances. In June 1990, Mrs Maddever laid a complaint against the Board with the Ombudsman. After a thorough investigation taking some twelve months, the Ombudsman rejected one complaint outright, and found the other not proved.

On 13 August 1991, the Maddevers applied for judicial review against the Board of Trustees and the Principal.¹²² In pleadings described by Williams J as "labyrinthine", numerous grounds for review were put forward in respect of the actions of the Board and Principal at the October Board meeting on the day following the initial incident and the November Board meeting.¹²³ The nub of the allegations against the Board and the Principal was that the Board meeting of 19 October and the subsequent Board meeting were invalid for breach of the principles of natural justice. Failure to hear the Applicants was alleged, and the presence of the Principal at the 19 October meeting was said to be an invalidating factor. The Applicants also challenged both the Principal's decision to call the 19 October Board meeting, and the Board's jurisdiction to act in respect of the matter as at 19 October.

The response of the Board and the Principal - the latter having resigned partway through these events as a direct consequence of the pressure to which she was subjected - was to apply to strike out the entire proceeding on the grounds that it disclosed no reasonable cause of action, was frivolous, vexatious and an abuse of the Court's process.

In relation to the first three causes of action, Williams J held that the actions of the Principal and the Board in respect of the 19 October Board meeting were purely administrative and managerial. They did not therefore amount to the exercise of a statutory power or statutory power of decision and could not therefore be the subject of judicial review. Furthermore, given the nature of the meeting and of the functions being exercised, there was no legal obligation to give the parents prior notice of the meeting.¹²⁴

If every Board of Trustees had to do that the proper administration of schools would be wholly frustrated. Only when some serious or major matter arises, affecting the status or the educational options of the child, are such procedures required...

His Honour rejected as “not even arguable” the claim that the meeting of 19 October was tainted because of the presence of the Principal:¹²⁵

The principal is a member of the Board; Section 94(b). As such the principal has a right to attend unless the statute precluded attendance or unless some special circumstances existed which brought into play some aspect of the rules of natural justice. In my view the rules of natural justice had no application to the meeting of 19 October.

The fourth cause of action related to the decision of the Board at its November meeting to accept its sub-committee’s recommendations and reject the Applicants’ complaint against the Principal. The procedure that the Board had followed was in compliance with the provisions of the Primary Teachers’ Award dealing with complaints against teachers. Williams J concluded that it was arguable, although not strongly, that the Board may have breached the rules of natural justice in relation to the second meeting by failing to supply the Applicants with material in its possession relevant to their complaint.

His Honour then went on to consider whether it was inevitable that the discretionary relief which the applicants were seeking would be refused, even if they were able to make out a ground for review. He held that there were a number of reasons why it was inevitable that relief would be refused. First, the departure of the Applicants’ son from the school meant that the issues of controversy before the Court were no longer live ones. The Court would not grant relief when it was futile to do so. Secondly, the conduct of the Applicants in pursuing their unsuccessful complaint to the Ombudsman was a further factor militating against relief. Thirdly, any breach of natural justice, and indeed the entire dispute, were extremely trivial. Fourthly, the position and responsibilities of the Board in the scheme of the Education Act 1989 and the Tomorrow’s Schools reforms was considered to point in favour of a judicial reluctance to intervene in a case such as the present. Williams J saw these and other factors as cumulatively creating an overwhelming case for refusal of relief. His Honour held that the Respondents had made out their contention that no reasonable cause of action was disclosed, and that the continuation of the proceedings would be an abuse of process.¹²⁶ The claim was accordingly struck out.

Three features of His Honour’s judgment merit closer examination.

(a) Reviewability of decisions of boards and Principals

This comprises two separate but inter-related issues. The first is whether the administrative decision or action in question comes within the scope of the simplified procedure for judicial review contained in the Judicature Amendment Act 1972. The crucial question here is whether the action or decision taken falls within the statutory definitions of “statutory power” or “statutory power of decision” in the 1972 Act. The second issue is whether the subject matter of the decision or action taken is in law such that the Courts will enter upon the process of subjecting it to judicial review, whether under the 1972 Act or at common law;¹²⁷ and if so, upon what precise grounds of review.

Maddever was an application for judicial review under the 1972 Act. In respect of the first three causes of action, which involved acts and decisions of the Board and the Principal

the day following the initial incident, Williams J first sought to draw a distinction between “a power and a function”, citing *McGechan on Procedure*.¹²⁸

Power and function distinguished:

Not every action taken in the context of a statute will constitute a power or right although it may clearly involve the exercise of a statutory function: *N.Z. Stock Exchange v Listed Companies Association Inc.* [1984] 1 NZLR 699, 707 (C.A.).

Williams J went on to hold:¹²⁹

As to the first three causes of action I find that there was not a statutory power of decision involved in the meeting of 19 October and the communication of the views of the Board supporting the principal to the parents. It was a meeting called by the principal to report as to some developments with a parent or group of parents. Nothing was decided other than for the Board to take notice of what had happened and indicate their approval of the steps taken by the principal. Since no question of suspension or expulsion was involved there was not a statutory power of decision. The actions of the principal and the Board were purely administrative and managerial functions. The principal and the Board are given a complete discretion by Sections 75 and 76 as to how a school will be controlled and managed...Parliament could never have intended that the Board and the principal should have their day to day decisions - even contentious ones - subject to judicial review.

In respect of the fourth cause of action, which involved a challenge to the Board’s decision on the Applicants’ formal complaint consequent upon the appointment of a subcommittee and investigation in terms of the Primary School Teachers’ Award, His Honour considered it to be “fairly arguable” that the decision on the complaint involved the exercise of a statutory power of decision.¹³⁰

The approach adopted by Williams J. raises a number of matters worthy of comment.

First, it is respectfully suggested that the distinction between the exercise of a “statutory function” and the exercise of a statutory power or right is both unhelpful and illusory. Williams J appears to go so far as to conclude that, while decisions pursuant to specific statutory powers such as those dealing with suspension or expulsion of students will involve the exercise of a statutory power or statutory power of decision in terms of the Judicature Amendment Act 1972, the exercise by a Board and a Principal of their respective powers under Sections 75 and 76 of the 1989 Act will not, because these sections involve “purely administrative and managerial functions”.

One important element of the detailed definitions of both “statutory power” and “statutory power of decision” contained in the Judicature Amendment Act 1972 is the requirement of “a power or right conferred by or under any Act”.¹³¹ The authorities are clear that the crucial expression “by or under” is to be given a broad interpretation.¹³² In my submission, where School Boards and School Principals are acting pursuant to their respective general powers of management under Sections 75 and 76, they are quite plainly exercising powers or rights “conferred by or under” the Education act 1989. Labelling these powers as “functions” - which would appear simply to mean statutory powers or duties exercised on a continuing basis - merely distracts from the real issue of whether the

particular exercise of statutory power or duty should be, in point of principle, the subject of review.

Williams J. in *Maddever* correctly determined that the acts and decisions of Board and Principal on 19 October did not involve the exercise of a statutory power or statutory power of decision. But it is submitted that this was not because what was involved was only the exercise of “purely administrative and managerial functions” under Sections 75 and 76. It was because other crucial elements of the definitions of “statutory power” and “statutory power of decision” were lacking. Namely, the decisions and actions in question lacked any effective consequences for anyone, and in particular did not adversely affect the position of the Applicants or their son.¹³³ It follows, in my respectful submission, that day to day managerial decisions, particularly the “contentious ones”, may fall within the scope of the Judicature Amendment Act 1972 - if they have consequences which satisfy the elements of the definitions of “statutory power” or “statutory power of decision”.¹³⁴

The real issue, it is suggested, is the second of those identified at the outset of this discussion, that is, whether the decision or action taken should be subject to judicial review in accordance with established principles of administrative law. What this requires is a careful analysis of the nature and subject matter of the legal powers in issue (including the extent of discretion entrusted by law to the decision-maker), the subject matter of the particular decision or action in question, and the overall policy factors militating in favour of or against judicial review.¹³⁵ In other words, “reviewability” depends on an examination of the particular subject matter of review. In the present context, it cannot and should not be determined by labelling certain functions or discretions in advance as “unreviewable”.

(b) Boards of Trustees and Fairness

Williams J in *Maddever* rejected arguments that the Applicants had any legal right to advance notice of the Board’s first emergency meeting; that the presence of the Principal at that meeting invalidated it; and that the Board had demonstrated bias or predetermination when subsequently affirming its earlier decisions.¹³⁶ These rulings were with respect clearly correct. They demonstrate that the Courts will in the area of day to day decision-making steer well away from imposing unrealistic or unworkable standards of fairness on Boards of Trustees and Principals. For all that, however, it is suggested that Boards of Trustees and Principals need to retain a strong awareness of the content of the principles of natural justice, whether these are in law strictly applicable or not. They should therefore err on the safe side in terms of affording a hearing, when dealing with issues which are either of significance to individuals or involve potentially contentious issues of principle.

(c) The Court’s Discretion to Refuse Relief by Way of Judicial Review

As we have seen, Williams J in *Maddever* stressed various features special to that case - the futility of granting relief, the minor nature of the alleged breaches by Respondents, and the conduct of the Applicants - as reasons why the Court would inevitably decline in the exercise of its discretion to grant the Applicants relief, even if their claims had been legally well-founded. In addition, however, His Honour made some more general comments regarding the “unsuitability” of judicial review in relation to the managerial

role of School Boards. After stating that there was “a strong case for saying that the remedy of judicial review should be sparingly utilised in the context of the Education Act 1989”, he went on to review the various ways which the legislation itself made School Boards of Trustees accountable and concluded:¹³⁷

Against this statutory background it seems clear that outside of those areas where the status or educational options of the child are involved and specific rights are explicitly recognised (for example Ss 10, 14, 15, 18, 19 and 21, discussed above), there is no warrant for an expansive approach to judicial review. Accountability of School Boards is to be secured through other methods of oversight. In this statutory setting, the Court should respect the evident “trade-off” between reduced judicial review in return for wider public (i.e. parent) participation in school board decision-making: see Aronson & Franklin *Review of Administrative Action*, (1987) 10-11. Therefore, in other than the sensitive designated areas I have mentioned, supervision of the managerial performance of School Boards by way of judicial review, should be infrequent. Boards of Trustees obviously have a very important role to play and their work should not be impeded by frivolous litigation. Such a restrained approach is indeed in line with discernible recent trends... .

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* [1974] 2 NZLR 238 at 244-5. 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 decisions 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 Barnett* (1943) 319 U.S. 624, 646, 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 own 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 Educational Guidelines.

His Honour’s judgment concludes with some sympathetic comments on the cost implications of judicial review proceedings for financially strapped Boards of Trustees and a strong plea for the use of mediation and Alternative Dispute Resolution in relation to disputes such as that before him.¹³⁸

There can be no doubt that Williams J in *Maddever*, in the lengthy passage quoted above, accurately expounds a longstanding judicial philosophy of reluctance to intervene in the affairs of schools. Such reluctance is in my view entirely proper, for the reasons which Williams J expounds, and His Honour’s remarks constitute a well-aimed warning shot

across the bows of those who would contemplate too-ready resort to the sledge hammer of judicial review when faced with some relatively minor internal dispute over school management. However, lest School Boards and Principals begin to think of themselves as immune from judicial review in the area of general school management, I fire two counter-shots of warning - needless to say, of much smaller calibre.

First, Williams J's comments need to be read taking into account their immediate subject matter: attempts to bring judicial proceedings against Boards and Principals "in relation to purely managerial or administrative matters not seriously affecting the rights of students". Secondly, Williams J does not appear to have had brought to his attention the provisions of Section 27(2) of the New Zealand Bill of Rights Act 1990:

Every person whose rights, obligations, or interests protected or recognized by law have been affected by a determination of any Tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

On the basis that the Bill of Rights applies to Boards of Trustees and school Principals, this provision may suggest that a principle of judicial reluctance to intervene in school affairs cannot and should not be taken to extremes.

Conclusions

The broad powers and duties of School Boards of Trustees arise out of, and are constrained by, a complex mosaic of law regulating their activities, flowing not only from the Education Act 1989 but also from other statutes, statutory regulations, the School Charter and even contractual obligation. Lay Boards of Trustees are having to walk something of a legal tightrope, often without the safety net of readily available legal advice. At the same time, many of the decisions taken by Boards of Trustees carry significant repercussions for individuals affected by them and for the wider community which they serve. However, separate funding to Boards for legal advice or the provision of an independent legal advice service appears unlikely in the present political climate.

Quite plainly, Boards of Trustees need to be accountable for their actions, and in particular, legally accountable when they overstep the mark. Legal accountability is in my view in the interests both of Boards and those they serve. However, accountability in the courts of law should usually be a last resort. But it can only be a last resort if there exists some other, effective first resort. For that reason, the present restricted jurisdiction over School Boards of Trustees possessed by the Ombudsmen is neither satisfactory nor appropriate. Reform of this anomaly would be to benefit both of School Boards and of those who have dealings with them.

- 1 At least in those cases where a particular Board has not been fortunate or prudent enough to have taken
out insurance cover.
- 2 Apart from its transitional provisions, most of the Act has found its way into the Education Act 1989.
3 High Court, Whangarei Registry, CP49/91, 24 September 1992, at p.39.
- 4 Section 93(1). In certain circumstances, Boards of separate schools may combine to form a single
Board: Sections 110-116.
- 5 See Sections 2(3)(b), 4 and 80 of the Private Schools Conditional Integration Act 1975. The effect
of these provisions is that integrated schools are, except to the extent that the 1975 Act provides to the
contrary, deemed to be “state schools” and subject to the Education Acts of 1964 and 1989 and the
regulations made under those Acts. While therefore there may be occasional differences in the position
of integrated schools, it is not proposed to give these detailed separate treatment in this paper. The
expression “state school” should be generally read as including an integrated school.
- 6 Education Act 1989, Sixth Schedule, Clause 1. This Schedule operates by way of an addendum to Part
IX of the Act and deals with a number of machinery and procedural matters in relation to Boards.
7 Sections 94, 94A-C, 96, 97, 98 and 99.
8 Section 103.
- 9 “Parent” is very broadly defined for the purposes of the Act, and includes guardians and caregivers:
Sections 60, 92.
- 10 Sections 94(2) and 94B(1)(a), (b). See also Section 94B(4) - (6) for the consequences of a decision
to decrease the number of parent representatives.
- 11 See Sections 94(2), 94A and 95 of the Act.
- 12 See Education Act 1989, Sections 96, 101, 102, 118(3) and the Education (Trustees Elections)
Regulations 1992 (SR 1992/78). The Act also contains provision for the filling of casual vacancies:
Sections 104, 105.
13 Sections 97(1), 101(3).
14 Section 97(2).
15 See also Section 19(1)(f).
16 Section 101(1) and (2), 102.
17 Section 94B(1).
18 Section 94C.
19 Sections 94(1)(d)(ii), 94B(1)(c) - (f).
20 Section 94B(1)(d), (e), (f).
21 Section 99.
- 22 Refer the accompanying paper by Mr R.L. Towner.
23 Section 75.
24 Section 72.
25 Section 76(2)(a).
26 The Secondary School Boards Regulations 1989 (SR 1989/353).
27 Section 61(3),(4). See also Section 62 as to consultation with Maori communities living in the
geographical area served by the school. The extent of the duty to consult is examined later in this paper.
- 28 *Supra* at p.40.
29 See Section 64 of the Act; and *infra*.
30 Section 61(2).
31 Section 63(a).
32 Section 63(b).
33 The reference to Section 60 should clearly be a reference to Section 60A. The reference to Section
61 would appear otiose as, if the guidelines are mandatory under Section 60A, it would not appear to
be a case of the Minister “approving” their content in terms of the Minister’s powers under Section 61
(5)-(7).
34 See 1990 New Zealand Gazette No. 1, 11 January 1990, p.6-9.
35 There is some inferential support for this argument in the second of the two passages from the judgment
of Williams J. in *Maddever*, quoted earlier.
36 Sections 65A - 65G.
37 Sections 66, 66A. See also *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992]
3 ERNZ 243, 269-271.
- 38 Sections 67, 67A, 67B, 68, 69, 70, 73, 74 and Part VIII of the Act. Note also Section 90, which declares
a Board of Trustees to be a “Crown entity” for the purposes of the Public Finance Act 1989. This
renders Boards subject to the significant additional reporting and other financial responsibilities of that
Act.
39 Obviously, in the present context, for “health” read “sex”.
40 The comparable provision in the 1964 Act dealing with school committees of State primary schools

was considerably narrower than Section 61 of the 1964 Act: see Section 46. Note that there was no provision in the 1964 Act detailing the responsibilities of a school Principal.

- 41 Note also the similar words of qualification in Section 64(1) dealing with the effect of School Charters.
 42 It is suggested that the additional restriction in Section 72 is intended to make it plain that the bylaw-making power cannot be used to evade or over-ride the obligations of the Board under the school's Charter. No bylaw can be introduced which conflicts with the Charter. Sections 75 and 76 on the other hand are not subjugated to the school's Charter, because the Board's and Principal's compliance obligation in respect of the Charter is not an absolute one, but only one to "take all reasonable steps" to ensure compliance: Section 64(1).
- 43 High Court, Palmerston North Registry, CP 302 & 303/90, 5 December 1990, at p.28.
 44 Supra.
 45 At p.38 - 46. Note also the discussion of the role of Boards of Trustees by the Employment Court (Colgan J.) in *NZEI v Auckland Normal Intermediate*, supra, p.268-9.
 46 [1974] 1 NZLR 1.
 47 [1974] 2 NZLR 238.
 48 Supra, p.6, per McCarthy J.
 49 McCarthy J. at p.6 was prepared to assume without necessarily deciding that "when issuing rules or orders relating to attendance at assembly or at classes, [a] board is required, like many subordinate legislatures, to act reasonably, and that the validity of its rules can be subjected to [a] test of reasonableness."
 50 Ibid, p.6. Richmond J. concurred in the reasons given by both McCarthy J. and by White J.
 51 Ibid, p.16. It should not necessarily be assumed that the actual result in this case would be the same today. The impact of Section 26 of the Human Rights Commission Act 1977 and Sections 13, 15 and 19(1) of the New Zealand Bill of Rights Act 1990 would also need to be considered. See the further discussion of this issue in the separate section dealing with the New Zealand Bill of Rights Act 1990.
 52 It does not appear to have been argued that the passing of such a bylaw, at a co-educational Secondary School, was unreasonable as involving a discrimination on the grounds of sex. At the present time, both the Human Rights Commission Act 1977 and Section 19(1) of the New Zealand Bill of Rights Act 1990 would lend much force to such an argument. See also *Van Gorkom v Attorney-General* [1978] 2 NZLR 387, and the later discussion of this case in the Section dealing with the New Zealand Bill of Rights Act 1990.
 53 Supra, p.243.
 54 Ibid, p.243-4.
 55 See footnotes 51 and 52, supra, and the subsequent discussion in the section dealing with the New Zealand Bill of Rights Act 1990.
 56 There are some differences in the language of Section 72 compared with the former provision which could support a subjective approach, particularly the reference to "any bylaw the Board thinks necessary or desirable".
 57 But contrast the discussion in *McLean, Rishworth and Taggart, 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, August 1990, p.93-94.*
 58 *Black v Fulcher* [1988] 1 NZLR 417 (CA).
 59 Section 139A of the Act.
 60 The question of a school Board's or a school Principal's entitlement to search a student for drugs, either directly by physical search or indirectly by ordering the student to strip or to disgorge property against his or her will, by "do-it-yourself" search, has arisen on two recent occasions. The issue gives rise to potential difficulties for schools, both under the New Zealand Bill of Rights Act and under the "general law". For reasons which are expressed in detail in a Report which I prepared for the Auckland District Law Society's Public Issues Committee, "Schools and Searching for Drugs", published 18 July 1991, I consider that there is considerable legal doubt as to the authority of schools and school Principals to search their students for drugs, and almost certainly, no right to strip search. The Report discusses a Canadian authority which supports the existence of a power to search, *Regina v J.M.G.* (1986) 56 O.R. (2d) 705. See further for commentary on that decision, A.W. MacKay, "Students as Second Class Citizens under the Charter" (1986) 54 C.R. (3d) 390, and the literature referred to in footnote 84, infra.
 61 For discussion of the *in loco parentis* principle, see *Hansen v Cole* (1890) 9 NZLR 272; *Ramsay v Larsen* (1964) 111 C.L.R. 16, 29, 34-35; *Trindade and Cain, "The Law of Torts in Australia"* (1985), p.209-211; H. Crook, "In Loco Parentis: Time for a Reappraisal?" November [1989] *Fam Law* 447. See also the accompanying paper by Ms J. Breakwell, and "Schools and Searching for Drugs", supra, at p. 14-15.
 62 In *Gillick v West Norfolk Area Health Authority* [1986] AC 112, the House of Lords held that parental rights of control of a child who is a minor are "dwindling rights", which exist only insofar as required

- for the child's benefit and protection. When the parental right itself has long since ceased to be absolute, the notion that teachers have some kind of implied authority from parents to discipline their children seems even more suspect.
- 63 An exception is suspension and expulsion of students, where the respective roles of Principal and Board are carefully delineated.
- 64 Core Charter Elements, National Education Guidelines of 19 December 1989, *supra*, Codes of Conduct for Board of Trustees and for Principal. The Code of Conduct for Trustees refers to the role of a Board as "governance of its school". However, the use of this expression which is not used in the Act itself could not possibly have the effect in law of narrowing the breadth of the statutory provisions already discussed.
- 65 See A. Szakats, *Law of Employment* (3rd ed. 1988) p. 170 and following.
- 66 L. Maxwell, "Boards to Control the Management of Schools", *STA News* (No. 32), November-December 1992.
- 67 "Administering for Excellence: The Report of the Task Force to Review Education Administration" (1988) at p.46.
- 68 "Tomorrow's Schools - The Reform of Education Administration in New Zealand" (August 1988).
- 69 See Codd and Gordon, "School Charters: The Contractualist State and Education Policy" (1991) 26 *NZJES* 21, 25 and following; R.S. Browning, "School Boards of Trustees - Their Responsibility and Authority with Respect to Curriculum Choice" LLB (Honours) dissertation, Auckland (January 1993), p.19-22.
- 70 See Browning, *supra*, p. 22-25.
- 71 [1898] AC 387, 394, per Lord Halsbury.
- 72 See later discussion of judicial review of Boards of Trustees.
- 73 Including, it is submitted, students.
- 74 Section 105C, Education Act 1964.
- 75 Section 61(7).
- 76 Section 108.
- 77 CA 23/92, 24 September 1992. For a case involving breach by a School Board of its own policy to consult, see *Bezaire v Windsor Roman Catholic Separate School Board* (1992) 94 DLR (4th) 310.
- 78 *Ibid*, p.28.
- 79 *Ibid*, p.44.
- 80 The Ministry of Education has issued detailed "Guidelines for Success in Consultation" aimed at Boards of Trustees (Learning Media, Ministry of Education, 1990).
- 81 See call to footnote 58, *supra*.
- 82 Bill of Rights, Section 5.
- 83 For discussion, see P.T. Rishworth, "The New Zealand Bill of Rights Act 1990: The First Fifteen Months", in *Essays on the New Zealand Bill of Rights Act 1990*, Legal Research Foundation, 1992, at p.18; McLean, Rishworth and Taggart, *supra*, p.93; R.A. MacDonald, "The New Zealand Bill of Rights Act: How Far Does It Or Should It Stretch?", in *The Law and Politics, 1993 New Zealand Law Conference Papers Vol. 1* at p.179.
- 84 High Court, Wellington CP 661/92, 1 December 1992, at p.55.
- 85 There has been much recent academic writing on the illusory nature of the distinction between "public" and "private" legal functions. See for example Woolf, "Public Law - Private Law: Why the Divide?" [1986] *Public Law* 220 Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77, 94-96; Airo-Farulla, "'Public' and 'Private' in Australian Administrative Law" (1992) 3 *Public Law Review* 186.
- 86 Refer Education Act 1989, Sixth Schedule, clause 1.
- 87 For useful general discussions of a largely comparable range of issues arising for schools in the context of the Canadian Charter of rights and freedoms, see D.A. Schmeiser and R.J. Wood, "Student Rights Under the Charter" (1984-85) 49 *Saskatchewan Law Review* No. 1, p.49; R.F. Magsino, "Student Rights and the Charter: An Analysis of Legal and Extra-Legal Considerations" (1988) 1 *Education Law Journal* 233.
- 88 See footnotes 51 and 52, *supra*.
- 89 *Supra*.
- 90 But see *Maddever*, *supra*, at p.37-8 and the American authority there cited. "Integrated schools" are less likely to be in jeopardy in this area, given their special position under the Private Schools Conditional Integration Act 1975.
- 91 *Supra*.
- 92 It could not however be seriously argued that Section 16 (freedom of peaceful assembly) would assist!
- 93 See especially McLean, Rishworth and Taggart, *supra*, p. 88-92, 94-95; *Manitoba Association for Rights and Liberties v Government of Manitoba* (1992) 94 DLR (4th) 678. See also R.F. Magsino,

- supra, p.238-240, 246-7; D.A. Schmeiser and R.J. Wood, supra, p.55-60.
- 94 See also the discussion of this issue in *Maddever v Umawera School Board of Trustees*, in the section dealing with judicial review.
- 95 For extended discussion, see G.D.S. Taylor, *Judicial Review* (1991), p.251 and following. It should be stressed that the principles of natural justice are flexible and their content is extremely difficult to lay down in advance. Some may claim my list is too wide; others, that it is too narrow. It is as already stated, merely to provide some guidance for lay readers.
- 96 For discussions of bias or pre-determination in the context of Boards of Trustees, see *Maddever v Umawera School Board of Trustees* supra, p. 26 - 29, 31 - 33; *NZPPTA v Kelston Boys High School Board of Trustees* (No. 1) [1992] 2 ERNZ 793; *NZEI v Auckland Normal Intermediate School*, supra.
- 97 McLean, *Rishworth and Taggart*, supra, p.67-69.
- 98 For discussion of invalidity and the possibility of a damages claim, see D.M. Paciocco, "Remedies for Violations of the New Zealand Bill of Rights Act 1990", in *Essays on the New Zealand Bill of Rights Act 1990*, supra, at p.40; *Ministry of Transport v Noort* (1992) 8 CRNZ 114, 120, 129, per Cooke P.
- 99 *Human Rights Commission Act 1977*, Section 26(2). See also Section 29.
- 100 See Taylor, supra, p.137 - 211; Eagles, Taggart and Liddell, *Freedom of Information in New Zealand* (1992).
- 101 "Report of the Ombudsmen for the Year Ended 30 June 1992", p.31.
- 102 *Official Information Act 1982*, Sections 13, 14.
- 103 For detailed treatment, see Eagles, Taggart and Liddell, supra, p.633 and following.
- 104 *LGOIM Act*, Section 46.
- 105 *LGOIM Act*, Section 46A.
- 106 *LGOIM Act*, Section 51.
- 107 *GOIM Act*, Sections 47, 48 and Schedule 2A.
- 108 *LGOIM Act*, Section 51(3); and see *Ombudsmen's Annual Report*, supra, p.31 - 33.
- 109 Supra at p.40-42.
- 110 The provisions referred to by His Honour at p.41 have since been repealed or amended. Refer now to the provisions listed in footnote 38, supra.
- 111 See supra at p.15-17, 36-37.
- 112 *Ibid*, p.37.
- 113 Supra, p.17-19.
- 114 See *Education Act 1989*, Section 64 and discussion concerning enforceability of school Charters, supra.
- 115 *Education Act 1989*, 6th Schedule, Clause 1.
- 116 *Ibid*, clause 4.
- 117 *Ibid*, clause 6.
- 118 *N.Z. Fishing Industries Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552, per Cooke P.
- 119 For general reference, see Taylor, supra; R.E. Harrison, "Judicial Review of Administrative Action: Some Recent Developments and Trends" [1992] NZLJ 200, 246.
- 120 Supra, footnote 43.
- 121 Supra, footnote 3.
- 122 There were other respondents to the application including the Ministry of Education and the Attorney-General; for present purposes their involvement needs no further discussion.
- 123 There were additional grounds concerning other events, but these need not detain us here.
- 124 Supra, p.25.
- 125 *Ibid*, p.26.
- 126 *Ibid*, p.48.
- 127 In other words, the *Judicature Amendment Act 1972* procedure is not the only procedure whereby judicial review can be obtained, although it is by far the more common one. The alternative procedure involves proceedings for the historic "prerogative writs" and/or declaration, pursuant to Parts IV and VII of the *High Court Rules*.
- 128 Supra, p.23.
- 129 *Ibid*, p.25.
- 130 *Ibid*, p 29.
- 131 The scope of the definitions is significantly wider than powers and rights conferred by or under any Act. They include also powers or rights conferred by or under "the constitution or other instrument of incorporation, rules, or bylaws of any body corporate". This would clearly include bylaws made by Board of Trustees pursuant to Section 72 of the *Education Act 1989*. Query whether it would extend to a School Charter.
- 132 The leading authorities remain the two decisions in *Webster v Auckland Harbour Board* [1983] NZLR

- 464 (C.A.), [1987] 2 NZLR 129 (C.A.). See also as to the approach to interpretation of the 1972 Act, *Re Erebus* (No.2) [1981] 1 NZLR 618, 627.
- 133 That is, the elements set out in paragraph (a) - (e) of the definition of "statutory power" and in paragraphs (a) and (b) of the definition of "statutory power of decision" were not satisfied in respect of the actions and decisions under review.
- 134 As to the possibility of judicial review of day to day operations of bodies corporate existing under statute, contrast *N.Z. Stock Exchange v Listed Companies Association* supra, 706 -7; *Budget Rent A Car v A.R.A.* [1985] 2 NZLR 414, 417-8; *Northland Milk Vendors Association Inc. v Northern Milk Limited* [1988] 1 NZLR 530, 543.
- 135 For more detailed analysis, see Harrison, supra, p.200 -205.
- 136 The decision contains a useful extended discussion of the latter two issues in particular: see at p.26 - 29, 31 - 33.
- 137 Supra, p.38, 42 - 46.
- 138 *Ibid*, p.46 - 50.