

Freedom of Expression by Students in Schools

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Introduction

This is a large topic which includes a variety of controversial issues. As with search and seizure, some of these issues assume brief publicity when incidents happen in schools. There is recurring debate, for example, about whether compulsory uniforms may be imposed by a board of trustees, and there has been recent publicity about one school's "clean-shaven" rule and another school's (initial) refusal to permit a Muslim student to wear long trousers in deference to his religious belief. But, as with search and seizure, these issues do not fall to courts or tribunals for decision and so the legal position remains unclear.

In this paper I am considering students' rights and will not examine the rights of teachers to freedom of expression. That would be a worthwhile topic for another occasion, because it is likely to become controversial in the future if trends overseas are repeated here. The pending Canadian case of *Ross v Moncton School District No 15*¹ is a classic example. Mr Ross, an elementary school teacher in New Brunswick, writes "holocaust denial" literature and expresses anti-semitic views outside the classroom but, apparently, not in it. Parents complained to the Human Rights Commission about the failure of the school to remove a teacher whose presence, they argued, poisoned the school environment for Jewish children who knew what he stood for. A Human Rights Commission Board of Inquiry upheld the complaint and required the school board to transfer Ross to non-teaching duties. His first appeal was unsuccessful, but on his second appeal he was successful. A further appeal to the Supreme Court of Canada has been argued and a decision is due any day.

As to students' freedom of expression I shall proceed as follows. First, by way of introduction I briefly outline various ways in which freedom of expression problems might arise in schools. In Part 2 I set out the general principles which ought to guide school principals and Boards in this area. Here I consider what the concept of "freedom of expression" includes, and the extent to which the law will control a school's power to make rules or otherwise do things that interfere with that freedom. This involves us in considering the two principal sources of law which have a bearing on freedom of expression issues: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Finally in Part 3 I shall look more closely at some particular issues that might arise in schools.

1 (1993) 110 DLR (4th) 241 (NBCA). Since the seminar, the Supreme Court has reversed the New Brunswick Court of Appeal and restored the initial decision that Ross be transferred to non-teaching duties.

PART 1

HOW FREEDOM OF EXPRESSION ISSUES ARISE IN SCHOOLS

A number of separate areas can be identified:

- compulsory school uniforms: may a school impose a requirement that uniforms be worn?
- may a school impose dress codes short of a uniform requirement, by requiring or prohibiting certain forms of clothing? How much choice may be restricted through use of such codes?
- what, if any, restrictions may be placed on mode of hair style and the wearing of jewellery and decorative apparel?
- may a school control or limit the content of school newspapers, prepared by students? What is students meet the cost of the papers?
- questions of recognition or acceptance of students and clubs representing a “point of view”: may/must a school permit a religious club to meet on public property? What about a neo-Nazi interest group?
- may a school ban or regulate the wearing of T shirts which contain slogans or messages? Can the content of the messages be regulated?
- Are there legal controls on the selection or removal of school library books? What may be done about parent complaints that library books are unsuitable for children?

I take up some of these problems in Part 3. But because it is not going to be possible to deal with every possible expression issue, it is worth spending some time on general principles which might be applied to all cases.

PART 2

GENERAL PRINCIPLES

What is freedom of expression?

Section 14 of the New Zealand Bill of Rights Act 1990 provides as follows:

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.

It is well established in other jurisdictions with a longer Bill of Rights tradition that expression is wider than merely speech. It includes also expressive conduct. A paradigm case of expressive conduct is flag burning,² and indeed flag saluting.³

The test in American jurisprudence is whether there is a communicative element in conduct. One of the leading American cases arose out of a school dispute: the wearing of black armbands by students in an Iowa school as a Vietnam war protest was held to be “closely akin” to pure speech because of its symbolic quality.⁴

It is highly likely that symbolic expression and expressive conduct generally will be held to fall within the guarantee of freedom of expression in s 14 of our Bill of Rights. Although the context in s 14 – “freedom to seek receive and impart information and opinions” – might be thought to restrict it to verbal expression, there remains sufficient flexibility in the words “in any form” to bring expressive conduct within its terms.⁵

Where the Bill of Rights is invoked in relation to conduct rather than words the first inquiry must always be into whether the conduct is in fact protected. The wearing of armbands would, I think, be as clear a case in this country as it now is in the United States. Other school rules may impact upon protected expression, but less obviously so. Rules about appearance such as hair length and dress codes regulate conduct not speech. Even there, however, the weight of American law is that the appearance of a person, both as to clothing and hair style etc, is a matter of freedom of expression because, through appearance and clothing, students attempt to express themselves.

On the non-expressive side of the line would fall “conduct” which is not intended to carry any expressive meaning. A Canadian case gives the example of parking a car. Realistically, conduct which is not intended to convey a meaning is not going to be made the subject of complaint and litigation.

The starting point, then, is that freedom of expression is a wide concept and is definitely implicated in matters of student dress and appearance as well as in pure speech and symbolic expression. Thus, in all of the examples given above, there is no doubt that student freedom is restricted to some extent.

Having determined that a rule or edict in a school affects a protected right in the Bill of Rights, the matter is far from ended. The Bill of Rights expressly recognises, in s 5, that the rights it contains may be subjected to “reasonable limits”, which are “prescribed by law” and are “demonstrably justified in a free and democratic society”. In this our Bill of Rights accords with all major modern bills of rights and international instruments. Even

2 See *Texas v Johnson* 491 US 397 (1989).

3 *West Virginia State Board of Education v Barnette* 319 US 624 (1943), a case cited in this country on a matter of general principle by Williams J in *Maddever v Umawera School Board of Trustees* below, note 9.

4 *Tinker v Des Moines Independent Community School District* 393 US 503 (1969).

5 In *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 the High Court readily accepted that a swastika painted on a side of the house was “expression”, and that is plainly correct.

in the United States, whose Bill of Rights does not expressly say that it allows reasonable limits, that proposition is firmly established. Few if any rights are absolute in the sense that a compelling reason for limiting them may not even be conceived.

The concept of reasonable limits has a fixed and relatively settled meaning in Canada, whence the expression in s 5 of our Bill of Rights was derived, but this is not to say that its application to specific circumstances is going to be easy. It is worth spending a little time on how the reasonableness of limits on rights is to be assessed in this country.

First, as is well known the New Zealand Bill of Rights Act 1990 is not entrenched as a supreme or higher law, which means that unlike its counterparts in other countries it can never be invoked to invalidate legislation enacted by Parliament. This so-called “weakness” of our Bill of Rights is, however, of little moment in the school rule context. If a school rule or even an ad hoc edict of a principal, board or teacher breaches one of the rights in the Bill of Rights, no-one can claim that the rule or edict is equivalent to Parliamentary legislation so as to be immune from being invalidated. Quite the reverse applies. The Bill of Rights could undoubtedly be invoked in a suitable case to hold that a school rule or practice is unlawful because it violates, unreasonably, rights in the Act.

This proposition flows from the analysis of the Education Act provisions about “control and management” which are discussed in my paper on search and seizure. The statutory conferral of power to control and manage schools is expressly made subject to any enactment, and the New Zealand Bill of Rights Act 1990 is one such enactment. Hence control and management must be consistent with the Bill of Rights, or else it is unlawful. This makes it crucial to determine what “consistency” with the Bill of Rights actually means. In the present context the question becomes how one decides whether a rule apparently limiting freedom of expression is nonetheless permitted because the limit is “reasonable in a free and democratic society”.

So the test for reasonableness is highly significant in the school context. How does it apply? Canadian jurisprudence, which has on this point been substantially adopted in New Zealand cases to date, indicates that the following is the approach.⁶

1. Once a person has shown that a right protected by the Bill of Rights is affected by the rule or practice, then the onus falls upon the party seeking to impose the limit to show that it is reasonable in terms of s 5. Here that would be the school.

⁶ The cases in which s 5 is discussed are surprisingly few. The leading case remains *Ministry of Transport v Noort* [1992] 3 NZLR 260. Reasonableness is also discussed in *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 and *Zdrahal v Wellington City Council* [1995] 1 NZLR 700. The *Noort* case, especially the judgment of Richardson J, refers approvingly to the *Oakes* formulation (though not citing the *Oakes* case itself but another case in which the *Oakes* test was repeated) and then restates a form of s 5 test for New Zealand. That restatement is pitched at a rather higher level of abstraction than the *Oakes* test itself and does not lend itself to ready application in other cases. Hence it is no surprise that later cases tend to refer to Richardson J’s formulation but go on to apply the *Oakes* test itself. In this there is, I think, no harm as it does not appear that Richardson J intended his own restatement of the s 5 issue to differ in any significant way from the *Oakes* test.

2. A threshold question is whether the limit on rights which the rule imposes is “prescribed by law”. The aim of this requirement in s5, and in its counterpart provisions in the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights, is to require that limits on rights be fixed in advance and be capable of determination by the citizenry with reasonable certainty. A rule, for example, which reposed complete discretion in a principal as to what was acceptable in a school by way of dress would tend toward the arbitrary and capricious end of the scale and not be capable of being defended as a limit “prescribed by law”.

In the context of the Education Act 1989 which empowers principals and Boards of Trustees to control and manage the schools in their charge, any rule must first be justified as an aspect of that control and management. If it is so justified, then it is in my opinion a rule “prescribed by law” in that the Education Act empowers such a rule.

Hence there is in the school context no difficulty with the words “prescribed by law”.

Next, is the limit “reasonable in a free and democratic society”?

Canadian courts have evolved a test for determining reasonableness which has generally been cited with approval in New Zealand cases, although opportunity for the test to be actually employed does not arise very often here. The Canadian test is known by the name of the case in which it was first articulated back in 1986, *R v Oakes*.⁷ The *Oakes* test is this:

- (a) Is there a sufficiently important objective for the law/rule, justifying the need to restrict rights to some extent?
- (b) Is the means chosen (ie what the law/rule actually says) rationally connected to attaining that objective?
- (c) Assuming (a) and (b) are satisfied, is the means chosen the “least drastic means” – or as some later Canadian cases say, a reasonable means – of attaining that objective? Another way of putting this requirement is that the means must impair the right no more than is necessary to attain the objective.
- (d) The law/rule must not have a disproportionately severe effect on persons to whom it applies.

This test can be summarised simply by saying it is concerned with (i) rationality and (ii) proportionality between means and effect.

In practice it is step (c) which is determinative of most cases. If a law/rule satisfies (a) to (c) then it will virtually never offend step (d).⁸ And as to step (a) courts have understand-

⁷ (1986) 26 DLR 4th 200.

⁸ See Hogg, *Constitutional Law of Canada* (3rd ed, 1992), para 35.9 (a) et seq.

ably been unwilling to hold that the objective of a law or rule which has been laid down by the appropriate authority is simply not important enough to justify at least some infringement of a right. The very enactment of a law should prove it is important enough. And since most laws are rationally connected to their aims and satisfy step (b), it is step (c) which is the most fertile ground of attack for those seeking to argue that a law or a rule is not reasonable and demonstrably justified. Was there a way of attaining the objective which impaired the right less?

In countries with higher law constitutions the judiciary's approach to this question – whether they will be ruthless in holding legislatures and other public actors to the truly least drastic means – is a measure of how “activist” the judiciary is. This is a critical constitutional question in such countries. It raises questions about the legitimacy of judges who are not elected by the people substituting their own view as to the reasonableness of laws for the views of those who are elected and politically accountable for their decisions. Even where the focus of the attack is not a law enacted by Parliament but a school board decision, the same issue arises. Given that the school board is accountable to its community, and presumably makes its decisions on the basis of its intimate knowledge of its school and community, when can a court intervene and say that the decision is unreasonable?

It is significant indeed that the very first reported case in New Zealand on the Education Act 1989, *Maddever v Umawera School Board of Trustees*,⁹ was a case which discussed precisely this constitutional issue in some depth. I shall be coming to that case shortly, but before doing so a little more setting of the scene is necessary.

As applied to school boards of trustees and principals, the issues described above come down to this:

First, there may be school rules and school discipline decisions which interfere with student freedoms to some extent.

Second, when legal challenges are made to those rules or decisions, it is for schools to show that the restrictions imposed are reasonable in a free and democratic society.

Third, it is the very nature of a legal challenge that the matter may fall ultimately to one or more judges to decide.

Fourth, assuming that other less controversial aspects of the reasonableness test are satisfied, the key question is likely to be whether or not the limitation on expression is the “least drastic means” or at least a means reasonably capable of being chosen by the school to further its objectives.

At that fourth stage the question comes down to how much deference a court believes it

should pay to the primary decision already made by the school authorities. If that decision is, say, a decision to impose uniforms, the attitude taken by a court is likely to be determinative. Assume that the aim of uniform law is to foster neatness and pride in appearance and to minimise student “competition” amongst themselves as to how expensive or trendy their clothes are. If a court were to say that these aims, though good aims, could be equally met by other steps short of compulsory uniforms – such as a non-uniform dress code allied with education about non-competitiveness in attire – then the school decision would have failed the reasonableness test. If on the other hand the court was to say that this is a decision which a school board could legitimately make, and that it was not outside the range of acceptable decisions, then the decision would stand.

So it is ultimately a question of how much deference a court should pay to the choices made through the political process which prevails in school government. Where is the line which, if crossed, means that even majoritarian decisions have to be countermanded in order to uphold minority rights? These are important questions which arise across the board, not just in education.

Another way of putting the same point is this: section 14 of our Bill of Rights, like bills of rights generally, is broadly worded and hence extremely vague. It certainly does not speak clearly on the school uniform issue, nor on whether a Christian or a Yoga club or a gay/lesbian club can be held in school, nor on anything else. It is a statement of broad principle, and its impact in a school has to be worked out, as does its impact in other areas of the community. In our present educational regime, the body with the primary responsibility of working out what freedom of expression means is the school board of trustees or, as the case may be, principal. Typically, where there is a contentious issue, the school will say one thing and a student or parent the other. The Board will say that its decision is reasonable; a parent or group of parents that it is unreasonable. (Almost by definition, if *all* parents think a board decision unreasonable the dispute is unlikely to require the attention of the court.)

As with all contentious matters, the courts may ultimately be asked to adjudicate – as they were in the *Edwards* case in 1974 over whether hair length could be regulated.¹⁰ When the matter comes before a court the words of the Bill of Rights are still no less vague. Is the imposition of a uniform or a dress code a reasonable limit? The school board will plainly have thought that it was: the question for the court is whether the school board’s determination of what is reasonable ought to prevail, or whether the court should substitute its own determination. How willing will the courts be to resolve contentious matters of school administration? Certainly the two cases we have to date, the *Rich* and the *Edwards* cases in 1974, indicate considerable latitude was then given to schools to promulgate their own rules without judicial interference. But those cases were before the Bill of Rights.

The Maddever case

Significantly, the post-Bill of Rights decision in *Maddever v Umawera District School* in 1993 discussed these questions in some depth – admittedly not in the context of freedom of expression but as a general matter.

That case arose out of a playground incident between children which led to the Maddevers' son being spoken to by the principal. The parents complained about the principal's conduct. The child was withdrawn from the school by the parents and re-enrolled elsewhere, but the parents complained to the Ombudsman about the principal's and Board's handling of both the incident and the parents' complaint. When it appeared the Ombudsman supported the school, legal proceedings were filed by the parents seeking a declaration that certain decisions taken by the School Board of Trustees were illegal for breach of the rules of natural justice. The case came to court on the Board's application to have it struck out as incapable of success and frivolous and vexatious.¹¹

The action was duly struck out on a number of different grounds. Of particular interest is the discussion in the judgment under the heading "Unsuitability of judicial review in relation to managerial role of school boards".¹² Justice Williams made what he described as a strong case for saying that the remedy of judicial review ought to be "sparingly utilised in the context of the Education Act 1989". Essentially, his reasoning was that the 1989 Act embodied a participatory scheme of school governance whereby matters were to be resolved at local level by elected representatives of parents. The accountability of school boards for their decisions lay in the process of reporting to the community and periodic elections. He concluded, after a fairly lengthy statement of his reasons:¹³

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. ... If such matters become contentious they should be negotiated, mediated and resolved at the local level. The legislation [the 1989 Act] 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. ...

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

11 This case cries out for the description "storm in a teacup", but in the educational field it is important not to apply this description too liberally. Many cases seem trivial in the overall scheme of things. Their importance lies in the underlying principles, such as whether a school board is entitled to exercise control. There can be no principle, for example, along the lines that trivial rules cannot be enforced through punishment of disobedience, since the result could be anarchy in schools. Therefore when a trivial rule or practice is challenged, it is no answer to say that the court's time should not be wasted on trivial matters. What is at stake is schools' power of governance.

12 Page 504.

13 Pages 506-507.

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.

The above comments are animated by precisely the institutional concerns described above: that the proper judicial role is to allow leeway to the judgment made by primary decision-makers as to how schools should be run. Judicial intervention ought to be reserved for cases where things have gone clearly wrong.

This approach, and its legitimacy, are of central importance to the freedom of expression area, involving as it does a range of issues some of which are central to the core of expression while others are somewhat remote and more readily outweighed by competing considerations. The *Maddever* case suggests that judicial intervention ought to be reserved for clear cases affecting student rights, with the implication being that the effect must be substantial. Short of that, matters should be resolved as intended, through local educational political channels.

Similar sentiments, though not articulated so cogently, animate the judgment in the 1974 *Edwards* case where there is a palpable and understandable reluctance of the Court of Appeal to be drawn into debates about whether hair can properly be required to be worn above the collar. These are matters which ought to be resolved through the political process established by schools – by representations to boards that their policies be changed, and by elections. But short of a substantial intrusion into student rights, it ought not to be expected that courts should draw lines where there are respectable opinions to be taken on either side of an issue. This comes through in the 1974 *Edwards* decision in the following passage:¹⁴

We start then with the presumption that the board acted within its powers. What evidence was there then that making provision for the length of boys' hair was not necessary or desirable in the interests of the control and management of the school? There is none. The appellant at no time sought to put evidence on this matter before the Court. On the other hand, we have the evidentiary fact that a school board comprised of parents, men and women, presumably of the locality in which the school is situated, with all their experience as parents and members of the board, thought it was necessary to prescribe hair length. And that this was a decision of recent date, modifying previously more stringent requirements, is a strong indication, we think, of an up to date assessment of desirability by people appropriate to hold such views.

Of course, as both the 1974 and 1993 cases would assuredly recognise, there comes a point at which judicial supervision of the conduct of schools will require intervention to invalidate a rule or declare a practice illegal. The location of that line might be itself

controversial. But one important principle which will assist is that if the personal liberty of a student is invaded in a significant way, the courts ought to be prepared to intervene. It would be no answer for a school to say that a search, though unreasonable, was within the range of acceptable conduct for a school. Plainly that can not be right. And so courts are required to adjudicate such matters. But on issues which are not central to bodily integrity or personal freedom, there ought to be room for substantial deference to the school's own assessment of what a reasonable limit is, of how the Bill of Rights is to be integrated into their community. As I discuss in Part 3, a uniform rule seems to me to be a perfectly acceptable school board policy and the interference with freedom of expression involved is, relatively speaking, at the periphery of freedom of expression. (I should add that a decision not to have a uniform would equally be reasonable.) But in other matters the rights involved will be more pressing. Political speech, as in *Tinker v Des Moines*, is at the heart of freedom of expression. I would be much less happy about a court deferring to a school board decision to prohibit pure political speech in a school, absent a cogent and compelling reason. I do not think the two New Zealand cases I have discussed would disagree with that proposition. Even there, however, the critical question may be how much regard is to be had to the school board's own assertion that its speech restrictions are based on cogent and compelling reasons. There will be, in effect, a sliding scale of deference to school decisions. The closer expression is to the "core" of that concept, the more alert one can expect the courts to be to ensure that student rights are not impaired unreasonably. Deferring to what a local community want in relation to uniforms is one thing; deferring in relation to political speech is quite another.

I will look at some further examples in Part 3. The point I have been seeking to make here is that the extent of judicial intervention into school decisions will be tailored to the importance of the particular right asserted in its context. In general, a large measure of deference ought to be paid to the school board's determination of its policy, since that represents the democratic will in the district and is to be altered primarily through the political process. Courts ought to intervene only when things are seriously wrong. They will be seriously wrong when schools attempt to limit the content of student expression on, say, political matters absent a strong countervailing reason.

The Human Rights Act 1993

This enactment also has a potential bearing on freedom of expression in schools. But it will operate in a different way, and it is important that this distinction be appreciated in schools.

First, consider an example of how the Human Rights Act 1993 might be invoked to protect expression in school. There has recently been a case in which a Human Rights Commission complaint was made about a school's refusal to relax its uniform rule at the request of a Muslim student who sought to wear long trousers for religious reasons. This case could have been conceived as a case based upon freedom of religion in s 15 of the New Zealand Bill of Rights Act 1990, or of freedom of expression under s 14. But it was not advanced that way. Instead it was put as a case of discrimination under s 57 of the Human Rights Act 1993. That section provides:

57 Educational establishments— (1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an educational establishment,—

- (a) To refuse or fail to admit a person as a pupil or student; or
 - (b) To admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or
 - (c) To deny or restrict access to any benefits or services provided by the establishment; or
 - (d) To exclude a person as pupil or a student or subject him or her to any other detriment,—
- by reason of any of the prohibited grounds of discrimination.

(2) In this section “educational establishment” includes an establishment offering any form of training or instruction and an educational establishment under the control of an organisation or association referred to in section 40 of this Act.

In order to make sense out of that provision, one needs of course to know what the prohibited grounds of discrimination are: they are set out in s 21 and include religious belief along with a range of other matters such as age (over 16), sex, political opinion, sexual orientation, family status and race.

In contrast to the Bill of Rights, the Human Rights Act 1993 is a reasonably detailed and explicit code as to what may or may not be done by schools and others. Here it is not a question of a court deferring to schools' determinations of policy. Schools may be the experts in education, but the Human Rights Act 1993 is the law of the land and it provides that they may not treat people differently by reason of a prohibited ground of discrimination. If they do, there are grounds for a Human Rights Act 1993 complaint (unless one of the exceptions in the Act applies).

While s 14 of the Bill of Rights also limits what schools may do, we have seen that it does so in a manner which leaves room for a variety of views as to how that freedom is to be integrated into school rules and decisions. Courts can be expected to be slow to second-guess a board decision absent a serious invasion of rights. The Human Rights Act 1993 invites a very different approach: the question is simply whether the school has subjected a student to a detriment by reason of her religion, and so on. If so, the Act has been offended. So, while an initial uniform decision is in my opinion a decision well within the range of reasonable board decisions, the question whether religious or other exemptions from a uniform code are to be allowed is not simply a matter for boards to decide: it is likely to be compelled by the Human Rights Act 1993.

Note that complaints under the Human Rights Act 1993 go not to a court but to the Human Rights Commission, whose initial task is to attempt to mediate the complaint. Only if no settlement is possible does the matter proceed further to the Complaints Review Tribunal. The ultimate question in Human Rights cases is whether a breach of the Act has taken place, and money penalties may be awarded.

In the case studies to follow I consider two hypothetical examples where freedom of expression is affected by school decisions and where the Human Rights Act 1993 is the obvious port of call for an affected student, rather than the Bill of Rights.

The above are general principles applicable in the area of freedom of expression. I now turn to some specific examples.

Part 3 Some Examples

1 Student expression of ideas

The guiding principle here is that the expression of ideas, especially political ideas, is at the core of freedom of expression in a democratic country. Any restriction of that freedom in a school must be premised on a countervailing educational need. There is a considerable amount of American jurisprudence on this topic.¹⁵ While freedom of expression is not accorded the same priority in this country as it is in the United States – the racial disharmony provisions of the old Race Relations Act 1971 and the new Human Rights Act 1993, for example, can have no counterpart in American law – there is no reason to think that courts in this country would be less solicitous in protecting freedom of political speech in schools.

The wearing of armbands and buttons with political or other viewpoints upon them could only be prevented if the maintenance of a proper educational environment justified suppression of such expression. This is unlikely to be the case with the wearing of buttons and armbands. They are not likely to be inherently disruptive. The prospect of disturbance caused by *opponents* of the message is not a justification for restraining the message; not at least without seeking another means of maintaining the educational environment so as to permit the expression while removing the disturbance.¹⁶ But there will ultimately come a point at which the agitation introduced into school by expression and counter-expression on a particular matter justifies a prohibition on all expression on that topic. That would be a case where there was a compelling need for a restriction on freedom of expression.

Similar principles ought to govern the distribution of literature. This is potentially more disruptive of an educational environment because the organisational efforts to distribute literature in schools might mean that the process intrudes in various ways on the school's educational mission. But again, the initial starting point ought to be that this is permitted unless there is a strong compelling interest in prohibition. The American position is that where speech is not disruptive or vulgar, it ought not to be restricted on the basis of its

15 See, for example, *Sullivan v Houston Independent School District* 307 F Supp 1328 (1969); *Butts v Dallas Independent School District* 436 F 2d 728 (5th Cir, 1971).

16 See *Shanley v Northeast Independent School District* 462 F 2d 960 (5th Cir, 1972). Here the school board had purported to control the off campus speech of students, and this was a plain violation of the First Amendment.

content. I believe the New Zealand position ought to be the same, save that it is likely a further restriction could lawfully be imposed in this country - that speech deemed to be threatening or harassing of others might be restricted. I will come to that after discussing vulgar speech.

2 Lewd or suggestive expression

Free speech concerns have been held to impose few restrictions on schools to regulate "vulgar" speech. The leading Supreme Court case concerned a student's speech in a student election contest in which he worked his speech around an elaborate sexual metaphor. The Court affirmed the school power to discipline the speaker.¹⁷ There is clear reluctance to establish the courts as a forum for deciding how vulgar a particular form of expression must be and so deference is paid to a school board or principal's own determination of this issue.

One of the more amusing American cases on this issue concerned students with screen printing abilities who managed to come to school very day with a new slogan emblazoned on a T-shirt.¹⁸ The court's opening statement "it is easy to assume a tempest in a teapot is trivial unless you happen to be in the teapot" is a useful reminder that underneath amusing and trivial incidents lie important questions about school authority. The students' creations included shirts saying " See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick", another with " Coed Naked Band: Do it to the Rhythm", and then followed a series of shirts with suggestive sexual innuendos such as " Coed Naked Lacrosse: Ruff and Tuff in the Buff". Later as the saga developed the student had his T-shirt assessed every day for compliance with the dress code, and was sometimes asked to turn them inside out to obscure the message. The result in this case was that regulation and prohibition of vulgar T-shirts was permitted without need for any showing by the school that such was necessary to avoid substantial interference with the work of the school. The line which the school drew between T shirts which it let the student wear, and those which it insisted he remove, was not second-guessed by the court. In short there was considerable latitude allowed to the school to determine what lewd expression was, and to regulate it. The matter was not to be determined on the same basis as if the students were adults. Of course, absent lewdness, the stricter position as in *Tinker* applies: that any restriction must be justified by a finding that the speech impairs the mission of the school.

Similar reasoning would apply to possession of pornography in schools. Though a pornographic magazine may be legal in the sense that it has been through the Films Videos and Indecent Publications Act 1993 process, and is in the possession of persons who would be entitled to buy it in stores, a school will be justified in prohibiting it in the school. The school is entitled to maintain its own standards on such a matter, and its own interpretation of what is lewd or vulgar expression is unlikely to be countermanded by a court on the basis of student freedom of expression save where it is clearly unreasonable.

17 *Bethel School District no 403 v Fraser* 478 US 675 (1988).

18 *Pyle v South Hadley School Committee* 861 F Supp 157 (1994).

Here, unlike in the case of political speech, a school would not need to advance a cogent and compelling reason for the restriction beyond simply the desire to control lewd material in the school. Legal pornography which is confiscated in schools would remain the property of the student from whom it was taken and must be returned in order for it to be taken home.

3 Harrassing or demeaning expression

What if T-shirt messages contain not vulgar or political speech but offensive or demeaning speech directed to minority groups? (The categories may overlap, that is to say offensive and demeaning speech may also be political or vulgar in character).

It is likely that New Zealand and United States law will be held to differ over this point. In the American T-shirt case described above a dress code which attempted to prescribe the content of speech by banning “harassment” type speech – that which promoted racist or sexist or homophobic ideas – was held to fall foul of the constitutional guarantee of freedom of expression since it was essentially a regulation of the content of speech (as opposed to its mode). The court pointed out that one T-shirt worn by the student comprising a picture of two men kissing would not have violated the code, whereas a T-shirt which attempted to send a countervailing message about homosexuality would have been. This type of “view point” discrimination is generally impermissible in the United States. As the Supreme Court said in *RA V v City of St Paul*,¹⁹ there can be “no authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules”.

But, in this country, legislative policy is clearly different: the Human Rights Act 1993 provisions on sexual and racial harassment seek to prevent speech which is hurtful or offensive, and these provisions are expressly made to apply in the field of education.²⁰ Even if student expression fell short of the threshold at which it would offend the Human Rights Act 1993, I believe, for reasons I come to next, that a court would hold that a school may lawfully regulate it.

In addition to speech which is racially or sexually demeaning, it is arguable that the Human Rights Commission would have jurisdiction under s 57 of the Act in a case where a school fails to regulate student speech which is claimed to be “harrasment” on *any* of the grounds set out in the Human Rights Act 1993. The argument would be that students in the target group are not treated equally by a school which fails to regulate speech that is offensive to them. The result of the school’s failure to act may be the creation of an environment which is hostile to the minority concerned. This can be framed as a breach of s 57 of the Human Rights Act 1993. Hence my opinion is that a school which sought to control harrassing and demeaning speech through codes or sanctions would be lawfully

19 120 L Ed 2d 305(1992) per Scalia J for the Court.

20 See ss 62 and 63 of the Human Rights Act 1993.

entitled to do so. Any restrictions on free speech which this imposed would be held to be reasonable because they were imposed in pursuit of the goal of avoiding discrimination against minority groups. As I say above, it would not be critical that the outlawed speech or conduct may not have risen to the level of breaching ss 62 or 63 of the Human Rights Act 1993. It would be enough if the restriction was imposed for the purpose of ensuring that the school environment is not rendered hostile to minority groups in a manner which could contravene s 57. In making these determinations, schools will need to be aware of the full range of prohibited grounds of discrimination set out in s 21 of the Human Rights Act 1993.

Finally it should be noted that the imposition of speech restrictions is obviously not the only way in which a school can eradicate hostility to minority groups in schools. Education is another.

4 Student clubs

I have no information about whether this is a problem in New Zealand but in the United States the law reports are liberally scattered with cases about whether a Bible study group or similar might form a club within a school or use school rooms to meet. The view prevailing by force of statute is that if any clubs are allowed, then schools may not refuse permission to religious ones.²¹

In New Zealand the same principle is effectively enforced by the Human Rights Act 1993, and here of course there is not the same concern as in the United States that propagation of religion on school property might amount to an impermissible establishment of religion.

Note that similar principles would apply across the range of grounds of discrimination. However, it should be noted that the Human Rights Act prohibits only differential treatment "by reason of" a prohibited ground of discrimination. There may be valid grounds for refusal to approve some groups which are premised on other competing considerations. Hence, for example, a neo-Nazi group would be based on "political opinion" yet still might be denied the right to meet at school because of concerns for the school environment and school obligations to other minorities present in the student population. These are legally complex issues and schools should get advice if they arise.

5 School library decisions

From time to time there are complaints aired about particular books which are used in schools or available in school libraries. If a book is removed from a school library by a principal or board, the question arises whether this is a decision which could be held unlawful by a court as being a breach of the Bill of Rights. Difficult as it may be to imagine

21 Equal Access Act (United States).

litigation about such a topic, it happens in the United States.²² And removal of library books is, I understand, not unknown here. The only thing preventing litigation is the New Zealand culture which does not see the courts as the forum for such disputes as these.

There are deep waters in this type of dispute, and in the absence of keenly fought debate about the matter it is premature to enter into them. Library decisions is simply one aspect of the wider issue about the curriculum as a whole: American litigation over school choice of student readers is similarly voluminous.²³

6 School uniforms

The question whether a School Board might resolve to introduce school uniforms on a compulsory basis has been raised by the Youth Law Project in its publication “School Uniforms” (August 1993). This makes the proper point that schools have no obligation to introduce or maintain school uniforms, and that any decision to introduce them ought to take into account the time frame needed for preparation, and the expense. The Youth Law Project expresses the view that the law is not clear on whether schools have the power to impose uniforms. This is certainly correct in the sense that the matter has never been legally tested or settled. However my view is that a policy decision to introduce a uniform is a paradigm example of an issue upon which reasonable people might differ, but in respect of which a school board decision ought not to be “second guessed” by a court on a judicial review application. I would therefore be confident that schools may lawfully maintain or introduce a compulsory uniform policy. The method by which it settles such a policy, and the detailed content of it, may be matters upon which there is room for legal challenge. But the overall merits of uniforms as opposed to no uniforms is likely to be left to schools.²⁴

Having said this, a school may have to decide one way or the other. While its decision is unlikely to be successfully challenged on the merits, its decision plainly must be carefully considered and procedurally correct. In particular, regard must be had to exemptions mandated by the Human Rights Act 1993.

7 Religious expression and exemptions from uniform codes

There has recently been a complaint resolved in the Human Rights Commission of a Muslim child who sought and was initially denied the right to wear long trousers instead

22 *Board of Education v Picot* 457 US 853 (1982) (SCC) discussed in McLean, Rishworth, Taggart, “The Impact of the New Zealand Bill of Rights Act 1990 on Administrative Law” in *The New Zealand Bill of Rights Act 1990* (LRF Seminar, 1992), 93.

23 See my “Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum” in *Education and the Law* (1993) for a lengthier discussion of this issue.

24 I observe that the constitutionality of uniforms in public schools is hotly debated in the United States: see Ray, “A Nation of Robots? The Unconstitutionality of Public School Uniform Codes” (1995) 28 *J Marshall L Rev* 645.

of short. The school countered, in the Human Rights Commission mediation process, with expert evidence that the Islamic dress code was not mandatory in Islam and that a uniform code was required to treat people equally.

A number of important points emerge from this decision, although it is not a publicly available decision since the complaint was resolved without recourse to the Complaints Review Tribunal. My information about it comes from the account written by the Human Rights Commission appearing in *Human Rights Law & Practice*.²⁵

First, if a student invokes religious belief as a basis for a claim of differential treatment, is it permissible to seek to argue that the student is in fact mistaken about the clothing requirements of his or her religion? This is a reasonably well examined question in American freedom of religion law and the answer is clear that, subject to the need to examine bona fides, a complainant's own assertion of what his or her religious beliefs require ought to be accepted. Accordingly, the reported attempt to argue that the student was mistaken about the Islamic dress code was, in my opinion, beside the point. If there is one thing clear in the religious universe, it is that no one expression of faith, even within the major religious traditions, is demonstrably correct.

Next, the issue became whether or not a uniform code should be rigidly enforced so as to ensure equal treatment in which religious differences were hidden beneath similarity of outside appearance. Here I think it can properly be argued that one of the benefits of uniform codes is indeed to promote equality through dress. But equally clearly, that aim can be accommodated even if limited exemptions are made to those whose religion or conscience requires some departure from the norm. The question then becomes how wide the exemption is to be drawn, and if there were to be wholesale granting of exemptions a point would be reached at which a uniform code becomes impossible. I think that exemptions for religious or health reasons is a defensible policy which preserves the integrity of the basic requirement of a uniform code, while permitting limited exemptions which students will not be rushing to claim.

A third point to note about this decision is that it is based on s 57 together with s 65: the indirect discrimination provision. The reasoning of the Human Rights Commission was, it would appear, that the uniform code was applied equally to all without any discrimination on its face. However it operated unequally in that it affected Muslim students in a way that it did not affect others: those with no religious beliefs or other beliefs could wear the uniform without difficulty. Under s 65 of the Act it will be discrimination if apparently neutral rules operate in effect on a differential basis, unless "good reason" can be advanced for the rule. This section presumably means that good reason must be advanced both for the rule and for the failure of the rule to exempt those to whom it applies unequally.

The expression "good reason" in s 65 has not been judicially explored, although there has

25 The description of the case given is *K v M (C149/94)* (1995) 1 HRLP 34.

been academic commentary.²⁶ It will most likely be interpreted to require a rationality and proportionality between the goals of a rule and its unequal effects, in much the same way as the s 5 inquiry described above. In the school uniform context, I would agree with the Human Rights Commission opinion that good reason could not be established there.

Conclusion

The above brief account of freedom of expression issues serves as a basic orientation to the problem. We have considered two enactments of relevance, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Different considerations arise under each. So far as the former is concerned, the guiding principle in attempting to regulate expression in schools is this: the closer any regulated expression is to the core of expression, the more cogent must be the reasons for regulation. Expression of opinions on political matters is at the core; lewd, vulgar and pornographic speech is far from the core.

As to the Human Rights Act 1993, the overriding concern is with the impact which any regulation has on groups sharing a characteristic which is a prohibited ground of discrimination. Schools need to be aware of those grounds of discrimination set out in the Act. Rules which though applied equally have a disparate impact on such groups may have to be justified under s 65 which allows indirect discrimination only on a showing of "good reason."

In matters of freedom of expression there will generally be ample time for schools to reflect and take legal advice before acting. Hasty action may turn out to be ill-advised and is to be avoided whenever possible.

26 See McLean, "Equality and Anti-Discrimination Law: Are they the same?" in Huscroft & Rishworth, *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995), ch 7.