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SHOULD GOD BE EXPELLED FROM OUR SCHOOLS A HUMAN RIGHTS ANALYSIS OF RELIGION'S PLACE IN NEW ZEALAND EDUCATION

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ABSTRACT

New Zealand's education framework allows religion a varied place in schools. Whereas no restrictions are placed on religious education of a 'secular' nature, religious activities that are designed to indoctrinate can occur in differing circumstances, as dictated by the type of school in which they are held: in state primary schools, education must be secular except for an optional period of about 30 minutes a week; in integrated schools, general classes can reflect schools' religious character; and in private schools and state secondary schools, only indirect limits are placed on religious instruction and observance through the demands of teaching a (suitable) curriculum. This arrangement is the result of (colonial) New Zealand's Judeo-Christian heritage. In 2006, however, the country's social fabric has radically changed. This paper explores whether the current education framework is appropriate in the context of a multicultural society. In particular, it considers whether the scheme is consistent with the religious freedom and anti-discrimination provisions of the New Zealand Bill of Rights Act 1990. The prima facie breaches raised by the education arrangements are identified. Because the legislative provisions under which they occur are unambiguous, they are not able to be interpreted so as to place a lesser limitation on the rights. The issue thus becomes whether the prima facie breaches are justified in a free and democratic society. Various political and philosophical arguments are considered, with the analysis ultimately grounded on a theory inspired by the liberal thinker Will Kymlicka. The paper concludes with a two-fold recommendation for legal reform: first, religious instruction and observances should be excluded from state schools; second, the state should fully fund integrated schools (which are allowed to hold such activities). This proposal would result in a situation where culturally appropriate education is available for all.

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 16 800 words.

Education – Religious Instruction and Observance – Secular – Education Act 1969 – Private Schools Conditional Integration Act 1975 – Education Act 1989 – Bill of Rights Act 1990

I INTRODUCTION

Education is a powerful factor in the construction of society. While it is mandatory for only a finite window in children's lives, its impact extends far beyond this period to shape their values and objectives. No wonder, then, that religion's place in education is so contested. Children's exposure to religion in schools constitutes far more than a fleeting experience; it represents a significant formative influence. To secure a place for religion in education, it would seem, is to secure a place for religion in the future.

The degree of contention that surrounds religion in schools was never more evident than during the recent furore over religious instruction and observances in state primary schools. In response to a "modest stream" of public complaints,[1] Ministry of Education ('the Ministry') officials informed Parliament's Education and Science Committee in August that new guidelines about religious activities were soon to be released. Among other things, these guidelines were to counsel against 'whole of school' religious activities, suggest that religious activities are best provided outside normal school hours, and replace the current exemption scheme (whereby students are 'opted out' of religious content) with an 'opt-in' model.[2] By early September, however, the government had "backed down" on the proposals.[3] This reversal occurred in the face of strong criticism from Anglican archbishops, who maintained that the guidelines would encroach upon parents' right to shape their children's religious beliefs.[4] That the Ministry should yield to pressure with such alacrity demonstrates the political sensitivity with which it feels that the issue must be treated.

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[1] Grant Fleming "Assembly prayers illegal, schools to be told" (23 August 2006) *The New Zealand Herald*.

[2] Fleming, above n 1.

[3] Errol Kiong "Government backs down on prayer rules" (4 September 2006) *The New Zealand Herald*.

[4] Kiong, above n 3.

Removed as it is from the political realm, this paper has the capacity to consider in a detached manner religion's place in New Zealand schools in light of the Bill of Rights Act 1990 ('the BORA'). It is important to acknowledge at the outset that the BORA is only one lens through which to analyse the education framework. Other approaches, such as an indigenous rights or Treaty of Waitangi analysis, would offer useful perspectives additional to those that this paper raises. Far from purporting to present the definitive word on religion in education, then, this paper presents one human rights analysis on which others can build.

To set the scene, Part II provides a brief history of religion's place in New Zealand education. The law as it stands is outlined in Part III, with Part IV drawing out some of the distinctions on which it is based. In preparation for the BORA analysis, Part V seeks clarity on whose rights are at issue. Whether the BORA applies to actors within New Zealand's education framework is investigated in Part VI. Part VII outlines the scope of the relevant rights and identifies a number of prima facie breaches. In Part VIII, the wording of relevant legislative provisions is examined in order to determine whether the prima facie breaches are saved in accordance with section 4. Having determined that they are, Part IX considers whether it is nevertheless open to the courts to issue declarations of inconsistency – an enquiry that involves establishing whether the prima facie breaches are demonstrably justified in a free and democratic society. In accordance with these findings, Part X details suggested legislative reforms. By making only relatively minor changes, every child's access to culturally appropriate education could be better ensured.

II HISTORICAL BACKGROUND

The provision of (Pākehā) education in post-colonial New Zealand was initially a private affair performed largely by churches. With the establishment of the provinces in 1852, however, the responsibility for education was transferred to

provincial governments.[5] The responses of these governments to existing schools varied. Whereas some provinces provided church schools with public funds, others directed their resources solely towards newly established public schools.[6] Among these schools, too, inconsistency reigned, with religious instruction sometimes emphasised, sometimes limited to Bible reading without comment, and sometimes forbidden altogether.[7]

By the time the soon-to-be Education Act reached Parliament in 1877, the priority was to establish a unified system. Consequently, religious matters became the subject of considerable compromise. As the then-Minister of Education ('the Minister') observed when introducing the Bill, the multi-denominational nature of Parliament rendered it incapable of settling upon "some general nondescript form of religion" to be taught in schools.[8] While only a minority of Parliamentarians were secularists, the two opposing camps of Catholics (who supported state aid for Catholic schools but opposed religious instruction in public schools) and Protestants (who wanted religious instruction in public schools but opposed state aid for Catholic schools) effectively cancelled each other out.[9] "[T]he only way to be absolutely fair", it seemed, was "to forbid teachers to give their pupils any religious instruction whatever."[10] Thus, the 1877 Act made no provision of aid for church schools, and required teaching to be "entirely of a secular character".[11]

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[5] Paul Rishworth "Religious Issues in State Schools" in John Hannan, Paul Rishworth, Patrick Walsh *Education Law* (New Zealand Law Society, May-June 2006) 87, 91.

[6] Colin McGeorge and Ivan Snook, "Church and State in New Zealand Education" in Colin McGeorge, Ivan Snook *Church, State and New Zealand Education* (Price Milburn, Wellington, 1981) 7, 7.

[7] McGeorge, Snook, above n 6, 8.

[8] Hon Charles C Bowen (24 July 1877) XXIV NZPD 36.

[9] RP Davis *Irish Issues in New Zealand Politics 1868-1922* (University of Otago Press, Dunedin, 1974) 79.

[10] Bowen, above n 8, 36.

[11] Education Act 1877, section 84(2).

Despite its strict wording, the 1877 Act did not operate to expel God from schools. Indeed, in introducing the Bill, the Minister was eager to clarify that such an expulsion was far from his mind:[12]

> ...while it is the duty of the State to take care that all children within its borders are educated, and to take charge of the secular education of the people, it is bound so to use its power that it may in no way tend to blunt or deaden that intuitive reverence for a higher power, that indestructible hope of immortality, which distinguishes us from the beasts that perish.

A number of public schools, it seems, were inspired by the Minister's passion. Not only did they refrain from blunting their students' religious faith, they discovered a legal loophole through which they could actively foster it. The 'secular clause', they noted, was located in the same section of the Act as that which specified school hours, requiring schools to be open five days a week "for at least four hours, two of which in the forenoon and two in the afternoon shall be consecutive".[13] The short-fall between the two consecutive hours of secular education, as required by the Act, and the three hours for which most public schools were open each morning, allowed them to devote either the first or the last hour of each morning to religious instruction while still operating (nominally) within the letter of the law.[14]

This scheme, which came to be known as the 'Nelson system' because of its successful introduction in that region in 1897, gradually spread throughout the country.[15] By 1960, it was operating in eighty percent of public schools.[16] However, the Nelson system's legality was never ascertained, and in 1962 the Currie Report recommended legislative reform permitting religious instruction and observances in certain prescribed situations.[17] Parliament adopted the report's findings, passing the Religious Instruction and Observances in Public Schools Act 1962 ('the 1962 Act')

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[12] Bowen, above n 8, 36.

[13] Education Act 1877, section 84(2).

[14] Rishworth, above n 5, 91. And see ILM Richardson *Religion and the Law* (Wellington, Sweet & Maxwell, 1962) 22.

[15] McGeorge and Snook, above n 6, 15-16.

[16] McGeorge and Snook, above n 6, 16.

[17] Rishworth, above n 14, 91-92.

with "remarkably little fuss".[18] This Act allowed religious instruction to be held during school hours, but not as part of the official curriculum. Its provisions were soon incorporated into the Education Act 1964, the relevant sections of which are outlined below.[19]

Just as the secular character that the 1877 Act required of public schools was compromised, so too was the decision not to provide state aid for church schools overturned. From the 1940s, gradual concessions were made on the provision of milk, textbooks, transport, heating and furniture.[20] By 1969, the financial plight of Catholic schools was such as to foster a degree of political consensus around the issue, with both Labour and National pledging aid to private schools.[21] Simultaneously, the notion of 'integrating' private schools into the public school system gained ascendance. A working party on the issue was formed, and the Private Schools Conditional Integration Act (outlined below)[22] was passed with little criticism from either the public or from professional organisations in 1975.[23]

That "[t]he case for [secular] public schooling was lost" without a fight is a matter of great annoyance for pro-secular groups such as the Society for the Protection of Public Education.[24] The passing of the 1962 and 1975 Acts can be attributed in part to a rapprochement between Protestant and Catholic groups, to the extent that a unified voice sometimes emerged.[25] With regard to the 1975 Act, pro-secular groups have also pointed to the "secrecy" surrounding the integration

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[18] McGeorge and Snook, above n 6, 18.

[19] See Part III A State Primary Schools.

[20] Ivan Snook "The Integration Act and its Aftermath" in Colin McGeorge, Ivan Snook *Church, State, and New Zealand Education* (Price Milburn, Wellington, 1981) 45, 45-46.

[21] Snook, above n 20, 46; John Hannan "Integrated Schools" in John Hannan, Patrick Walsh and Paul Rishworth *Education Law – continuing challenges* (New Zealand Law Society, May 2004) 131.

[22] See Part III B Integrated Primary Schools.

[23] Snook, above n 20, 47; and see Hon P A Amos (23 July 1975) 400 3326.

[24] Jack Mulheron *State Aid, Integration and New Zealand's Public Schools* (Paerangi Books, Wellington, 1987) 4.

[25] Snook, above n 23, 45.

negotiations, suggesting that the education profession's silence was "not that of approval but of ignorance".[26] Any bitterness was fuelled by the 1975 Act's supposedly "consequential amendment" to the 1964 Act, allowing the Minister to authorise religious instruction in state schools beyond that held under the Nelson system.[27] Of complete irrelevance to integration, this amendment has been argued by some critics to form part of the trade-off whereby Protestant groups desisted from opposing state aid for Catholic schools.[28] After almost one hundred years of supposedly secular education, God was enjoying an increased presence in New Zealand classrooms.

III THE LAW AS IT STANDS

As the historical overview indicates, the extent to which the law allows religion to play a part in children's education varies markedly between different types of schools. Whereas education is compulsory for all children between six and 16,[29] there are no legislative requirements about what type of school children attend: public or private schools are equally satisfactory.[30] Further, parents can request the Minister to exempt their children from such requirements in order for them to be home-schooled –[31] an area that is beyond this paper's scope. This section outlines the relevant legislation and (New Zealand) case law relating to religious activities in state primary schools, integrated primary schools, private primary schools, and secondary schools.

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[26] Snook, above n 20, 48.

[27] Private Schools Conditional Integration Act 1975, section 83(8); Education Act 1964, section 78A; see Part III A State Primary Schools.

[28] Mulheron, above n 24, 17.

[29] Education Act 1989, section 20.

[30] This situation is the effect of section 20 and section 35A of the 1989 Act. See Paul Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum" in Legal Research Foundation *Education and the Law in New Zealand* (University of Auckland, Auckland, 20 April 1993) 14.

[31] Education Act 1989, section 21(1).

A State Primary Schools

The religious instruction provisions relating to state primary schools are located in the 1964 Act. Section 77 requires that teaching at such schools "shall be entirely of a secular character". This requirement is limited, however, by sections 78 and 78A. Section 78 legalises the Nelson system, providing that school boards of trustees, after consulting with their principal, can decide to close their schools for up to 60 minutes a week (not exceeding 20 hours a year) for the purposes of religious instruction and observance. Section 78A extends beyond the Nelson system, allowing the Minister to approve additional religious activity in specific schools if he or she is satisfied that it has the support of the majority of parents and that it will not be detrimental to the normal curriculum of the school. Such additional religious activities can be "up to such an amount and subject to such conditions" as the Minister thinks fit.[32]

Section 79(1) allows parents to withdraw their children from religious instruction and observances by informing the school's principal of their wishes in writing. This scheme applies to religious activities held under either section 78 or section 78A. With regard to those held under section 78, the process is nonsensical. In light of the fact that schools are officially closed during such activities, it seems that children's attendance ought to be less a matter of 'opting out' than 'opting *in*'. A similar opt out scheme is also available for activities that do not amount to religious instruction or observance but that parents do not wish their children to attend on religious or cultural grounds. Provided by section 25A of the Education Act 1989 ("the 1989 Act"), this exemption can be requested with regard to any aspect of the curriculum.

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[32] Education Act 1964, section 78A.

B Integrated Primary Schools

Integrated schools are schools set up to provide "education with a special character" that have either integrated into the public system or been established under the 1975 Act.[33] While integrated schools are thus part of the state system, for clarity of definition this paper refers to state schools as excluding integrated schools. All integrated schools must have an "integration agreement" with the Minister that records the terms and conditions of integration.[34] While nearly all expenses (including teacher salaries, maintenance, caretaking and heating) are met by the state,[35] integrated schools must provide their grounds and buildings.[36] In order to meet these costs, they can charge "attendance dues" if their integration agreements so provide.[37]

As provided by section 3(2), integration shall not jeopardise the special character of an integrated school. Thus, while integrated schools must comply with the provisions governing all state schools,[38] and while they must teach the national curriculum,[39] these requirements are subject to the express provisions of the 1975 Act.[40] Most significantly, this means that the general school programme of integrated schools may reflect their special character.[41] With regard to schools for which religion forms part of that special character, religious examples may be used to reinforce teaching throughout the school day.[42] Further, religious instruction and

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[33] Private Schools Conditional Integration Act 1975, section 3(1).

[34] Private Schools Conditional Integration Act 1975, section 7(5).

[35] Private Schools Conditional Integration Act 1975, section 4(1); Education Act 1989, section 3.

[36] Private Schools Conditional Integration Act 1975, section 40(2).

[37] Private Schools Conditional Integration Act 1975, section 36(1).

[38] Private Schools Conditional Integration Act 1975, section 4(1)(b).

[39] Private Schools Conditional Integration Act 1975, section 31.

[40] Private Schools Conditional Integration Act 1975, section 80(1)(a).

[41] Private Schools Conditional Integration Act 1975, sections 3(1), 31.

[42] Private Schools Conditional integration Act 1975, section 31.

observance may be conducted in accordance with the terms and conditions prescribed in integration agreements.[43]

The extent to which the 1975 Act allows integrated schools to require attendance at religious activities is the subject of some inconsistency. Section 30 provides that, by enrolling a pupil at an integrated school, parents "shall accept as a condition of enrolment that the pupil is to participate in the general school programme that gives the school its special character". On reading this provision, it seems that integrated schools may make participation in religious activities compulsory. Yet this suggestion is dispelled by section 32(2), which provides that integrated schools must be sensitive to the needs of "pupils and parents of different religions or philosophical affiliations", and shall not require pupils to participate in religious activities if exempted by their parents. As in state primary schools, then, parents may opt their children out of religious activities in integrated schools. It is unlikely, however, that it would be possible for students to attend an integrated school of a religious character without coming into contact with the particular religion that it reflects, as the opt out provision does not extend to standard classes in which religious examples are used to reinforce the national curriculum.[44] Section 25A of the 1989 Act, which allows students to be opted out of any class on the basis of religious or cultural reasons, does not apply to integrated schools.[45]

C Private Primary Schools

The provisions relating to religious instruction and observance in the 1964 Act do not apply to schools other than state primary schools.[46] While 'private' (or 'independent') schools must be registered or provisionally registered, [47] this

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[43] Private Schools Conditional Integration Act 1975, section 32(1).

[44] Private Schools Conditional Integration Act 1975, section 31.

[45] Education Act 1989, section 25A(1B).

[46] Education Act 1964, section 81.

[47] Education Act 1989, section 35A.

requirement does not render them part of the state education system. Further, such schools are not required to operate under the National Curriculum Guidelines.[48] In order to be registered, however, private schools must have a "suitable … curriculum" – a requirement that academics have interpreted to amount to a curriculum that is "not too different" to that of state schools.[49] In practice, this requirement limits the amount of religious activities that can be held in private schools.

D Secondary Schools

Like private primary schools, secondary schools are not required to comply with the 1964 Act's scheme pertaining to religious observance and instruction.[50] Indeed, no legislative provisions limit secondary schools' freedom with regard to religious activities. Just like state primary schools, however, students may be exempted from particular classes on religious or cultural grounds.[51]

The matter of whether limits should be imposed on religious activities in secondary schools was considered by the Court of Appeal in *Rich v Christchurch Girls' High School Board of Governors*.[52] In that case, two students were expelled after organising a protest in which 30 students walked out of assembly in reaction to its indoctrinating religious content.[53] School policy allowed students to be excused from the religious part of the assembly if they obtained a letter from their parents to that effect – a step which neither of the two students had taken. Counsel for the students argued that the school board was not entitled to make attendance at the

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[48] Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum", above n 30, 19.

[49] Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum", above n 30, 19.

[50] Education Act 1964, section 81.

[51] Education Act 1989, section 25A.

[52] *Rich v Christchurch Girls' High School Board of Governors (No 1)* [1974] 1 NZLR 1; *Rich v Christchurch Girls' High School Board of Governors (No 2)* [1974] 1 NZLR 21.

[53] The assembly included hymns, a Bible reading, a short prayer, and the singing of the Lord's Prayer. See *Rich v Christchurch Girls' High School Board of Governors (No 1)*, above n 52, 3.

religious part of the assembly compulsory (bar a letter from students' parents).[54] This argument did not find favour with the Court. While White J found it unnecessary to determine the point,[55] McCarthy J held that secondary school boards have the power to hold religious observances providing that there is a procedure whereby students can be exempted.[56] It is important to note that the decision was delivered before the introduction of the BORA.

IV EDUCATION VERSUS INDOCTRINATION: AN IMPORTANT DISTINCTION?

Having outlined the relevant law, it is useful to identify the concepts on which it is based. In referring to such phrases as "religious instruction and observances" and "secular character", the legislative provisions implicitly rely on a distinction between religion and secularism. Yet what is the basis of this binary? Is all content that refers to religion necessarily precluded from being secular?

In its advice to schools, the Ministry has adopted the traditional liberal stance on this issue. The concept of secularism, it argues, should be sufficiently broad to include "a natural, unembarrassed reference to religion and religious history ... in appropriate parts of the [curriculum]".[57] In other words, education is "secular" if it does not promote one particular religion but rather informs children about different cultures and values. By contrast, activities amount to "religious instruction and observances" if they are of an indoctrinating nature, not only informing students about religious values but also actively encouraging worship in accordance with them. Whereas *education about* religion is secular, *instruction in* religion is not.

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[54] *Rich v Christchurch Girls' High School Board of Governors (No 1)*, above n 52, 6.

[55] *Rich v Christchurch Girls' High School Board of Governors (No 1)*, above n 52, 16.

[56] *Rich v Christchurch Girls' High School Board of Governors (No 1)*, above n 52, 6.

[57] Department of Education Circular "Religious Instruction and Observances in State Primary Schools" (13 February 1987) E30/2/13 (Obtained under Official Information Act 1982 Request to the Ministry of Education); Norman La Rocque, Senior Manager Education Management Policy to the Minister of Education "Religious Instruction in State Schools" (31 March 1999) Letter (Obtained under Official Information Act 1982 Request to the Ministry of Education).

Because the distinction is well established in New Zealand, this paper will adopt its terminology in the interest of clarity. Despite the Ministry's long-standing reliance on the distinction, however, it is by no means clear-cut. Several complications with the "purported dichotomy" are examined below.[58] By way of foreshadowing this discussion, suffice it to say that the distinction serves to equate the concepts of secularism and neutrality in a manner that does not withstand scrutiny.

V WHOSE RIGHTS ARE AT STAKE?

The purpose of this paper is to assess religion's place in education in light of the BORA. Before embarking upon this analysis, however, it is necessary to clarify just whose rights are at stake. At present, the power to decide the religious activities in which children partake is generally granted to parents. In state primary schools,[59] integrated schools[60] and even secondary schools,[61] statements of law purport to allow students' exemption only at their parents' instruction.[62] Yet is it correct to conceive of religion in education primarily as a 'parental rights' issue? Should not children's rights also have a role to play? When children want to attend religious instruction classes, for instance, but their parents wish to prevent this attendance, whose opinion should prevail?

The Care of Children Act 2004 ('the CCA') requires that the "first and paramount consideration" in decisions relating to children is the "welfare and best

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[58] Nomi Maya Stolzenberg "He Drew a Circle That Shut Me Out: Assimilation, Indoctrination and the Paradox of a Liberal Education" (1993) 106 Harv L Rev 581, 611.

[59] Education Act 1964, section 79.

[60] Private Schools Conditional Integration Act 1975, section 32(2).

[61] *Rich v Christchurch Girls' High School Board of Governors (No 1)*, above n 52.

[62] The one exception regards the opting out of standard classes in state schools on religious or cultural grounds, when students aged 16 or above are empowered to seek exemption on their own behalf. See Education Act 1989, section 25A.

interests of the child".[63] While this starting point is beyond reproach, it does not get one very far in considering religion in schools, for it does nothing to clarify who, within the family, gets to decide what the child's welfare and best interests constitute. In order to resolve this issue, it is necessary to consider New Zealand's care of children framework in light of international obligations[64] and jurisprudence.

In New Zealand, 'guardianship' is the core legal notion relating to the raising of children. When the education provisions refer to the role of parents, they are presumably intended to refer to guardians. As specified in the CCA, guardianship includes "deciding for, or with the child" all matters relating to education.[65] That this role amounts to a strong 'right' is supported by article 13(3) of the International Covenant on Economic, Social and Cultural Rights[66] and article 26(3) of the Universal Declaration of Human Rights, the latter of which provides that "parents have a prior right to choose the kind of education that shall be given to their children".[67]

Yet just as there are international provisions emphasising the importance of parents' wishes regarding their children's religious education, so too does international law recognise children's right to influence such decisions. Unlike earlier international declarations, which were concerned solely with children's 'care and

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[63] Care of Children Act 2004, section 4.

[64] In *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 265-266 (CA) Cooke P for the Court, it was stated that any argument purporting to allow the executive to ignore international instruments is "unattractive".

[65] Care of Children Act 2004, sections 16(1)(c), 16(2).

[66] International Covenant on Economic, Cultural and Social Rights (3 January 1976) 993 UNTS 3, art 13(3) requires states to:

...undertake to have respect for the liberty of parents, and, when applicable, legal guardians, to choose for their children, schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and that ensure the religious and moral education of their children in conformity with their own convictions.

[67] UNGA Universal Declaration of Human Rights Resolution 217A (III) (10 December 1948) art 26(3).

protection' rights,[68] the United Nations Convention on the Rights of the Child ('the UNCROC') incorporates the notion of autonomy-based "individual personality rights" for children.[69] In particular, article 14 guarantees a child's right to "freedom of thought, conscience and religion".[70] As the UNCROC specifies, with this rise in children's rights comes a decrease in the rights of parents and guardians. While article 5 protects parental rights to some extent, these rights are limited to "a manner consistent with the evolving capacities of the child".[71] Specifically with regard to religious upbringing, article 14 respects parents' rights to raise their child in accordance with their religion, but again only "in a manner consistent with the evolving capacities of the child".[72]

This 'evolving capacities' approach towards children's rights is reflected in the international jurisprudence. In the landmark case of *Gillick v West Norfolk and Wisbech AHA*, the House of Lords held that parental rights derive from parental duty, and exist only so long as they are needed for the protection of the person and property of the child.[73] As soon as the child has attained "a sufficient understanding and intelligence to enable him or her to understand fully what is proposed" in a particular situation – the test of so-called '*Gillick*-competence' – then any parental rights with regard to that situation cease. Even if both guardians and the courts consider the *Gillick*-competent child's decision to be contrary to his or her best interests, the child's decision must still be upheld. The Supreme Court of Canada has applied this principle to religious activities in *DP v CS*.[74] While *Gillick* is not referred to, the Court found that, "subject to … the child's best interests, custodial rights include the

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[68] These declarations include the League of Nations Declaration on the Rights of the Child (1924) and the United Nations General Assembly Declaration on the Rights of the Child (1959). See Bruce Hafen and Jonathon Hafen "Abandoning Children to their Autonomy: the United Nations Convention on the Rights of the Child" (1996) 37 Harv Int'l LJ 449, 459.

[69] Hafen, above n 68, 459.

[70] United Nations Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, art 14(1).

[71] United Nations Convention on the Rights of the Child, above n 70, art 5.

[72] United Nations Convention on the Rights of the Child, above n 70, art 14(2).

[73] *Gillick v West Norfolk and Wisbech AHA* [1985] AC 112, 188-189 (HL) Lord Scarman.

[74] *DP v CS* [1993] 4 SCR 141.

right to decide upon the child's religious education, *until he or she is in a position to make his or her own choice*".[75]

It is uncertain whether *Gillick* applies in New Zealand. As one commentator has noted, any attempt to implement the approach is "noticeably absent" in the CCA, which retains arbitrary age cut-off rules.[76] The courts, too, are yet to adopt *Gillick*, although it is open for them to do so in the future. Indeed, it could be argued that such an approach is required. Not only is it supported by New Zealand's ratification of the UNCROC (and hence the 'evolving capacities' approach therein), but it is more consistent with the BORA provisions on age discrimination[77] and freedom of expression.[78] A more comprehensive analysis of *Gillick*'s status in New Zealand is not within the scope of this paper.

Although complicated, it would be possible to apply *Gillick* to children's enrolment in schools – and, within schools, to their participation in religious activities. The issue could be addressed in initial meetings between children, their guardians, and principals before a child is admitted to a school. There, principals could take on the role performed by doctors in England in determining whether children are *Gillick*-competent. When verdicts of competence are reached, principals would follow the wishes of the child, whereas findings of incompetence would direct them to seek the wishes of children's guardians. While this scheme may be particularly problematic in integrated and private schools, where principals may be loath to forego attendance dues by refusing to enrol irreligious, *Gillick*-competent children, it can surely be trusted that principals will carry out the assessment in good faith.

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[75] *DP v CS*, above n 74, 162 L'Heureux-Dubé (my emphasis).

[76] Bill Atkin "The Care of Children Bill – Alright But Only So Far As It Goes" (Developing Child/Youth Law and Policy, November 2003) <www.conferenz.co.nz> (last accessed 28 September 2006).

[77] New Zealand Bill of Rights Act 1990, section 14; Atkin, above n 76.

[78] New Zealand Bill of Rights Act 1990, section 19; Human Rights Act 1993, section 21(1)(i).

Such a process would provide an appropriate solution to conflicts between the opinions of children and their guardians. If *Gillick* applies, it places a limit on guardians' legal power to exempt children from religious activities and determine which schools they attend. In effect, *Gillick* would require that, once a child is *Gillick*-competent, guardians must exercise their power in a manner that accords with the views of the child. As such, guardians would essentially constitute the *agents* of *Gillick*-competent children for the purposes of decisions pertaining to religion in schools. If *Gillick* does not apply, however, then the full power of decision remains with guardians. The matter of whose rights are at stake is thus highly contestable. Consequently, this paper will refer to the rights of 'children and guardians' when considering BORA issues. It is to this analysis that the paper now turns.

VI DOES THE BORA APPLY?

As provided by section 3 of the BORA, in order for the BORA to apply, the relevant act must be performed either:[79]

> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
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> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

With regard to religion in schools, there are several relevant actors. First, there is the state, which has legislated to allow both for particular content in schools (such as religious activities and other material that is incompatible with certain religious beliefs) and for the existence of integrated schools. Of course, there is no substantive section 3 issue here: that the BORA applies to the legislative branch of government is stated in section 3(a).

Second, there are the schools in which the religious (and irreligious) content is taught. For the purposes of the BORA analysis, a school's actions are to be attributed

[79] New Zealand Bill of Rights Act 1990, section 3.

to its governing body. In state primary schools, integrated schools and secondary schools, this body is referred to as the board of trustees. As provided by section 75 of the 1989 Act, a school's board has "complete discretion to control the management of the school as it thinks fit" (except to the extent that legislation provides otherwise).[80] Thus, all decisions that schools have jurisdiction to make are to be attributed to school boards. While private schools are not required by statute to have boards,[81] this paper will assume for convenience that their governing bodies are also referred to as boards. Having identified the relevant actors, it falls to be determined whether the BORA applies to them. This Part considers sections 3(a) and 3(b) in turn.

A Section 3(a)

That school boards are not part of the legislative or judicial branches of government is clear. The question of whether they are part of 'the executive', however, is more contentious. To date, New Zealand courts have tended to give the phrase a relatively narrow meaning, determining a body to be within its ambit only if it is part of the government's departmental structure.[82] As all school boards are self-governing, they are not part of the Ministry. According to this approach, then, school boards are not part of New Zealand's executive branch of government.

An alternative approach was taken in *M v Board of Trustees of Palmerston North Boys High School*.[83] There, the issue was whether the board's decision to expel a pupil from the boarding school (allowing him to remain as a day pupil) was subject to the BORA. In her judgment, Goddard J extended the definition of 'the executive' from acts performed directly by that branch of government to, "arguably, ... the acts of an *agent*" of that branch of government "where there is evidence of a close and

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[80] Education Act 1989, section 75.

[81] Section 75 of the Education Act 1989 does not apply to private schools.

[82] *Federated Farmers v New Zealand Post* [1990-92] 3 NZBORR 339 (HC). See Andrew Butler and Petra Butler *The New Zealand Bill of Rights: A Commentary* (Lexis Nexis NZ, Wellington, 2005) 92.

[83] *M v Board of Trustees of Palmerston North Boys High School* [1997] 2 NZLR 60 (HC).

direct relationship of agency".[84] Yet instead of holding that boards, as self-governing entities, act as the 'agent' of the Ministry, Goddard J found that the statutory powers of school boards do not bring them into a "sufficiently close and direct agency relationship with the government".[85] Even under a broad interpretation of 'the executive', then, school boards are not caught by section 3(a).

B Section 3(b)

If boards' decision to allow religious activities and other material that is incompatible with certain religious beliefs is subject to the BORA, it must fit the requirements of section 3(b). That is, in making the relevant decision, boards must be exercising a "public function, power or duty conferred or imposed on [them] by or pursuant to law".[86]

As yet there is scant case law applying section 3(b) to the education sector. In *Rose v Te Wānanga o Aotearoa*, the parties agreed that the defendant university was bound by the BORA. Hence, the matter was not the subject of substantive analysis, with Gendall AJ merely stating that "the defendant is a body which performs a public function, namely education, and its right to do so is conferred by law namely, the Education Act 1989".[87] In *Palmerston North Boys*, however, the issue was considered in more detail. While it was implicit that the board was sometimes performing a public function, it was decided that the contract for boarding was a "private commercial arrangement", and hence did not involve the exercise of a public

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[84] *M v Board of Trustees of Palmerston North Boys High School*, above n 83, 70 Goddard J (my emphasis).

[85] *M v Board of Trustees of Palmerston North Boys High School*, above n 83, 70 Goddard J.

[86] New Zealand Bill of Rights Act 1990, section 3(b).

[87] *Rose v Te Wānanga o Aotearoa* (30 September 2004) High Court Wellington CIV 2003-485-2481 Gendall AJ; and see Butler and Butler, above n 82, 102.

function.[88] Emphasis was also placed on the fact that the board was not making a statutory power of decision when it removed the student from the boarding house.[89]

In light of the reasoning in *Palmerston North Boys*, it seems that, contrary to the result in that case, school boards are performing a 'public function' under section 3(b) when deciding to hold an impugned class or activity. In contrast to the situation at issue in *Palmerston North Boys*, which revolved around a private commercial agreement, students' participation in religious activities constitutes a component of their education – the very public function that it is the role of schools to perform. Thus, it seems that the decision of all school boards to allow religious activities is subject to the BORA.

With regard to state primary schools' holding of religious instruction and observances, there is the added complication that section 78 of the 1964 Act provides that they are closed during such activities. In light of this fact, it could be argued that the board's decision to hold them does not constitute a 'public function' as the classes do not technically form part of the school day. This argument is not convincing: just because an activity takes place outside normal class hours does not mean that it serves no educative purpose (and, thus, no public function). Yet even if it is correct, state primary schools are still caught by section 3(b). Unlike the board in *Palmerston North Boys*, a state primary school board *is* making a 'statutory power of decision' when closing the school for religious activities – namely, that provided for by section 78 of the 1964 Act. Thus, a state primary school board's decision to hold religious instruction and observance is subject to the BORA.

An issue also arises with regard to private schools. In *Bishop of Roman Catholic Diocese of Port Louis v Tengur*, the Privy Council held (respecting the Mauritius Constitution) that private schools do not perform a public function if they

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[88] *Palmerston North Boys High School*, above n 83, 67 Goddard J.

[89] *Palmerston North Boys High School*, above n 83, 68 Goddard J.

are "entirely self-financing".[90] Under this test, the BORA would apply only to those private schools that receive grants from the government. Paul Rishworth, however, takes an even narrower approach, suggesting that the BORA does not apply to any private schools, regardless of whether or not they receive state grants.[91] Neither Rishworth nor the Privy Council provide substantive reasons as to why private schools are not exercising a public function. What is more, their reasoning is difficult to surmise: contrary to their conclusions, the fact that (in New Zealand, at least) attendance of private schools satisfies the compulsory education requirement seems to indicate that they do perform the public function of providing education.[92] Private school boards are effectively, as Randerson J expresses it in *Ransfield v Radio Network Ltd*, 'standing in the shoes of government' when they educate children.[93] This paper will proceed on the basis that the BORA also applies to private school boards.

VII WHAT DO THE SUBSTANTIVE PROVISIONS OF THE BORA REQUIRE?

Having determined that the BORA applies to both the state and school boards, it falls to be considered whether they have breached the rights and freedoms that the BORA affirms. The process by which this analysis should be conducted is not set in stone. A comprehensive approach is suggested by Tipping J in *Moonen v Film and Literature Board of Review*,[94] although he was clear that it is not prescriptive.[95] Nevertheless, as the leading approach to date, Tipping J's process is followed by this paper.

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[90] *Bishop of Roman Catholic Diocese of Port Louis v Tengur* (2004) 16 BHRC 21, para 21 (PC) Lord Bingham of Cornhill.

[91] Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum", above n 30, 19.

[92] See Andrew S Butler "Is This A Public Law Case?" (2000) 31 VUWLR 747, 768-769.

[93] *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, 247 (HC) Randerson J.

[94] *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9, 16-17 (CA).

[95] *Moonen v Film and Literature Board of Review (No 1)*, above n 94, 16; and see *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, 760 (CA) Richardson P.

The preliminary step is to "determin[e] the scope of the relevant right or freedom", thereby identifying prima facie breaches.[96] This Part will consider four matters that potentially give rise to breaches of religious freedom and anti-discrimination rights. Section A considers schools' holding of religious instruction or observance. The implications of religious education and other 'secular' classes that are not designed to indoctrinate are explored in section B. Sections C and D each relate to the state's decision to partially fund integrated schools; whereas Section C analyses the issue in light of the state's omission to provide full funding, Section D considers the ramifications of the decision to provide some funding. Far from co-existing harmoniously, the various prima facie breaches that these matters identify reflect the many competing and conflicting rights that are at stake. Accordingly, Section E considers how this tension is to be addressed.

A Does the Holding of Religious Observance or Instruction Constitute a Prima Facie Breach?

1 Section 13: Freedom of religion

Section 13 provides that "[e]veryone has the right to freedom of thought, conscience, religion, and belief, including the right to hold opinions without interference". As yet, the section has been the subject of only very limited case law.[97] As the wording of the section itself makes clear, however, its ambit extends not only to the freedom to adopt such religious and philosophical beliefs as a person chooses, but also to the right to hold those beliefs free of coercion or restraint – specifically, "without interference".[98] This latter right is of particular relevance to religious

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[96] *Moonen v Film and Literature Board of Review*, above n 94, 16.

[97] *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) Keith J for the Court. See Part VII C Does the State's Omission to Fully Fund Integrated Schools of a Religious Character Constitute a Prima Facie Breach?

[98] Butler and Butler, above n 82, 407.

observance and instruction in schools, as such activities may have the potential to interfere with the religious and philosophical beliefs of students.

International case law is of assistance in predicting what courts may hold the right to hold one's beliefs "without interference" to mean. In *R v Big M Drug Mart Ltd*, the Supreme Court of Canada held that "freedom" of religion is primarily characterised by an absence of "coercion" to change one's religious and ethical beliefs.[99] Such coercion includes "indirect forms of control which determine or limit courses of conduct available to others".[100] In other words, the Charter guarantees freedom both of *and from* religion.[101]

This Canadian jurisprudence is reinforced by European case law. Both *Kokkinakis v Greece*[102] and *Larissis v Greece*[103] involved applications to the European Court of Human Rights ("the ECtHR") seeking declarations that convictions under Greece's anti-proselytism laws contravened the applicants' freedom of religion, as protected by article 9 of the European Convention on Human Rights.[104] In *Kokkinakis*, the applicant was a man of the Jehovah's Witness religion who had been arrested more than 60 times for proselytism. While the ECtHR upheld the complaint, finding that the right of individuals to "bea[r] Christian witness" is protected by article 9, it was noted that "improper proselytism" is not protected.[105] Such proselytism includes actions designed to inappropriately influence individuals

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[99] *R v Big Drug Mart Ltd* [1985] 18 DLR (4th) 321, 354 (SCC) Dickson J.

[100] *R v Big Drug Mart Ltd*, above n 99, 321, 353.

[101] Rex Ahdar, *New Zealand and the Idea of a Christian State* in Rex Ahdar and Stenhouse (eds) *God and Government: the New Zealand Experience* (University of Otago Press, Dunedin, 2000) 72.

[102] *Kokkinakis v Greece* (1994) 17 EHRR 397 (ECtHR).

[103] *Larassis v Greece* (1998) 27 EHRR 329 (ECtHR).

[104] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 9(1) provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

[105] *Kokkinakis v Greece*, above n 102, 422.

to change their beliefs, whether this be through improper pressure,[106] taking advantage of individuals with a reduced capacity to choose,[107] or the negation of individual choice implied by "brainwashing".[108]

In *Larissis*, the appellants were officers in the Greek Air Force who had been convicted of attempting to convert certain subordinates and civilians to the Pentecostal Church. The majority of the ECtHR upheld the application in part, finding that the convictions with regard to the civilians were unsound but that the convictions concerning the subordinate airmen were justified. In so finding, the Court emphasised the position of power held by the officers over their subordinates:[109]

> ...the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him.

While the Court was careful to acknowledge that "not every discussion about religion or other sensitive matters between individuals of unequal rank" is actionable by the state,[110] it is important to note that *Larissis* upheld the right of the state, in certain situations, to *criminally sanction* individuals who attempt to interfere with others' beliefs. That the state itself might have a right to endorse such interference is clearly far from the Court's contemplation.

Applying these tests to the holding of religious observance and instruction in schools, they indicate that such activities constitute a prima facie breach of section 13. If only the dominant religion (say, Christianity) is reflected, then religious instruction and observances impose Christian observances upon non-Christian

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[106] *Kokkinakis v Greece*, above n 102, 422 Mr Loucaides.

[107] *Kokkinakis v Greece*, above n 102, 414.

[108] *Kokkinakis v Greece*, above n 102, 412.

[109] *Larassis v Greece*, above n 103, 362 Mr Martinez.

[110] *Larassis v Greece*, above n 103, 362 Mr Martinez.

pupils.[111] Moreover, like the relationship between the officers and airmen in *Larissis*, teachers are in a position of power over their students that makes it "difficult for [students] ... to withdraw from [classes] initiated by [teachers]".[112] Indeed, the age of school students (especially those at primary schools) can be argued to indicate that they have a reduced capacity to choose to the extent that they are particularly vulnerable to "brainwashing".[113]

Religious instruction and observances, then, have the potential to breach section 13. It remains to be seen whether the provision for students to be opted out of activities negates any coercion at play. International jurisprudence is divided on the issue. Turning first to that maintaining that the opt out policy is sufficient to remedy the potential breach, the Human Rights Committee ('the HRC') has noted that:[114]

> ...public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

This approach was applied by the HRC in *Leirvag and others v Norway*.[115] There, the applicants were contesting a new mandatory religious subject in the Norwegian school system entitled 'Christian Knowledge and Religious and Ethical Education' ("CKREE"). Provision was made for parents to exempt their children from "attending those parts of the teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life".[116] In finding that this partial exemption policy breached the freedom of religion provisions of the ICCPR, the Committee emphasised that the unpredictable nature of the CKREE class meant that, in practice,

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[111] See *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641, 652 (Ont CA) Brooke Blair, Goodman and Robins JJ; and see Butler and Butler, above n 82, 425.

[112] *Larassis v Greece*, above n 103, 362 Mr Martinez.

[113] *Kokkinakis v Greece*, above n 102, 412.

[114] United Nations Human Rights Committee, General Comment No 22 "The right to freedom of thought, conscience and religion" para 6.

[115] *Leirvag and others v Norway* (23 November 2004) CCPR/C/82/D/1155/2003.

[116] *Leirvag and others v Norway*, above n 115, 3.

the partial exemption policy did not operate in a "neutral and objective way" (a concept that is explored below). It was implicit that, in accordance with General Comment 22, provision for the full exemption of children from the CKREE class would not contravene article 18.4 of the Convention.

In Canada, however, the courts have taken a different approach. *Zylberberg v Sudbury Board of Education* involved regulation that allowed opening or closing religious exercises in state schools,[117] with an opt out provision much like that in New Zealand.[118] In striking down the regulation, the majority found that the opt out provision did not overcome the infringement of the Charter:[119]

> On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion.

In reaching this conclusion, much emphasis was placed on the "acute sensitiv[ity]" of children to peer pressure and class-room norms, which were found to "compel members of religious minorities to conform with majority religious practices".[120] Despite the allowance for students to be opted out of religious instruction and observances, the peer pressure of other children, the incentives (Easter eggs, the joys of 'colouring in'), and the lack of engaging alternatives (cleaning the PE shed) mean that the holding of such activities constitutes an indirect form of control under which students have limited courses of conduct available to them other than to attend.

In light of these conflicting approaches, New Zealand courts would have to elect which to follow. At face value, both authorities are persuasive: the BORA was enacted to affirm New Zealand's commitment to the ICCPR, [121] so HRC

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[117] *Zylberberg v Sudbury Board of Education*, above n 111, 644.

[118] Education Act 1964, section 79.

[119] *Zylberberg v Sudbury Board of Education*, above n 111, 656.

[120] *Zylberberg v Sudbury Board of Education*, above n 111, 655.

[121] The long title of the New Zealand Bill of Rights Act 1990 provides that it is 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.

jurisprudence must be given due weight; but the Canadian Charter provided the direct model for the BORA,[122] so Canadian case law is also of great value. Ultimately, it seems that the Ontario Court of Appeal's reasoning is the more robust of the two approaches. By addressing the reality of the primary school classroom, the judgment draws attention to the actual impact that the very holding of religious activities can have on children, even if they are exempted from them. This approach is supported by the New Zealand Court of Appeal's emphasis of the need to take a "broad and purposive" approach to defining rights.[123] Thus, despite the opt out provisions, the holding of religious activities breaches section 13.

2 *Section 19: Freedom from discrimination*

Also at issue is whether boards' decision to hold religious instruction and observances discriminate against students whose beliefs do not accord with the particular religion to which the activities adhere. Section 19(1) of the BORA provides that "everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993" ('the HRA'). These grounds include religious and ethical beliefs, the latter of which is defined as "the lack of a religious belief, whether in respect of a particular religion or religions or all religions".[124] While section 19 has been at issue in several cases before the courts, many unresolved issues remain.

The first substantive issue relates to the very meaning of 'discrimination' itself. Under one approach (the 'broad approach'), prima facie discrimination is understood to have occurred when three requirements are met. First, the impugned act must make a distinction between two comparable groups.[125] Second, this distinction must be made on the basis of a prohibited ground of discrimination. Third, the

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[122] Butler and Butler, above n 82, 81.

[123] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 269 (CA) Cooke P.

[124] New Zealand Human Rights Act, section 21(1)(c), (d).

[125] Butler and Butler, above n 82, 500.

distinction must involve disadvantage to the disfavoured group.[126] Whether a prima facie breach is justified is a separate question to be dealt with under section 5.[127] By contrast, an alternative approach (the 'narrow approach') incorporates the issue of whether different treatment is justified *within* the section 19 analysis. That is, in order for the relevant act or omission to constitute prima facie discrimination, it must involve "invidious treatment".[128] Under the narrow approach there is little or no room for a section 5 analysis, as invidious distinctions are inevitably unjustified in a free and democratic society.[129]

New Zealand case law is of little help in deciding which approach to apply. In the leading Court of Appeal authority of *Quilter v Attorney-General*, three of the five judges (including both majority and dissenting judges) adopted the narrow approach, and one judge applied the broad approach.[130] As academics agree, however, *Quilter* is "quite unsatisfactory and unlikely to stand the test of time as to the methodology used" –[131] yet these same academics themselves diverge on the best way forward.[132] In line with Ministry of Justice policy,[133] this paper adopts the broad approach to discrimination. While both approaches are viable when considering discrete issues that do not involve conflicts of rights, the multiple issues concerning education policy render the narrow approach inapplicable. It is nonsensical to consider justification at the prima facie stage when conducting a section 19 analysis, but later under section 5 when applying section 13. Such an approach would effectively create a hierarchy of

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[126] Butler and Butler, above n 82, 500.

[127] *Quilter v Attorney-General* [1998] 1 NZLR 523, 576 (CA) Tipping J.

[128] Huscroft, above n 131, 376.

[129] *Quilter v Attorney-General*, above n 127, 540 Thomas J.

[130] The narrow approach was taken by Gault J, Keith J and Thomas J dissenting. Tipping J ultimately favours the broad approach. Richardson P, in a very short concurring judgment, did not state which approach he was taking.

[131] Butler and Butler, above n 82, 490; see also Grant Huscroft "Freedom from Discrimination" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) 366, 376 – 377.

[132] Butler and Butler, above n 82, 500; but see Huscroft, above n 131, 375-376.

[133] See, for instance, Ministry of Justice "Applying the Bill of Rights Act Non-Discrimination Standard" (March 2002) <www.justice.govt.nz> (last accessed 27 September 2006).

rights, as the justificatory issues regarding section 19 would 'get in first' before those regarding section 13.

Applying the broad approach's first step (namely, whether there is a distinction between two comparable groups) to religious activities in schools, a further issue regarding discrimination's meaning arises. In holding such activities, school boards are not making a formal distinction between students on the ground of their religious or ethical belief. The problem is not that schools are treating students' religious beliefs as a basis upon which to differentiate between them; rather, it is that they are *failing* to take students' different beliefs into account when holding instruction or observances in accordance with only one religion. In other words, while boards' decision to hold religious activities does not make a *direct* distinction between students on the basis of their religious or ethical beliefs, it does make an *indirect* distinction; the *effect* of the decision is to make a distinction between those students who receive instruction in accordance with their religious beliefs and those who do not.

New Zealand case law is unclear as to whether indirect distinctions are prohibited by section 19. In *Northern Regional Health Authority v Human Rights Commission* (a judgment that has been declared the "one bright spot" in this country's section 19 jurisprudence),[134] Cartwright J held that both direct and indirect discrimination are proscribed by section 19.[135] This approach was not unanimously adopted in *Quilter*; whereas Thomas and Tipping JJ followed Cartwright J,[136] Gault J applied a strictly formalistic approach[137] and Richardson P and Keith J failed to determine the point. The resulting ambiguity does not afflict international jurisprudence. In Canada, for instance, Charter jurisprudence is settled that indirect

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[134] Butler and Butler, above n 82, 499.

[135] *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, 236 (HC) Cartwright J.

[136] *Quilter*, above n 127, 531, 574.

[137] *Quilter*, above n 127, 527.

distinctions suffice –[138] a position with which New Zealand academics agree.[139] In light of the general consensus, this paper assumes that indirect discrimination constitutes discrimination for the purpose of section 19. In accordance with the above analysis, it follows that the first requirement is met.

The second step involves determining whether the distinction is made on the basis of a prohibited ground. This requirement is also satisfied. As noted above, the effect of the religious activities is to make a distinction between students on the basis of their religious or ethical belief. Such beliefs constitute a prohibited ground of discrimination, as enumerated by sections 21(1)(c) and (d) of the HRA.

Finally, it must be considered whether the distinction involves disadvantage to the disfavoured group.[140] Canadian authority demonstrates that disadvantage can involve either imposing a burden or withholding a benefit.[141] Here, school boards' decision to hold religious instruction or observance does both. First, the fact that students outside the dominant religion do not have the opportunity to be taught about their religious or ethical belief in school constitutes the withholding of a benefit: such students do not have the same opportunity as members of the dominant faith to integrate into their culture.

Second, by requiring students (or, perhaps, students' guardians) to take a positive step for exclusion, the current opt out procedure imposes a burden on students who do not share the beliefs of the dominant religion.[142] In *Leirvag*

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[138] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 524 (SC) Iacobucci J.

[139] Butler and Butler, above n 82, 502; Huscroft, above n 131, 386-388.

[140] Butler and Butler, above n 82, 500.

[141] *Law v Canada (Minister of Employment and Immigration)*, above n 138, 547-548.

[142] See the appellants' arguments in *Canadian Civil Liberties v Ontario (Education Minister)* (1990) 71 OR (2d) 341, 379 (Ont CA).

(above),[143] the HCR held that the partial exemption policy regarding the CKREE class was discriminatory: [144]

> ...the present system ... imposes a considerable burden on persons in the position of the authors, in so far as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek- and justify-exemption from.

While it was implicit that a blanket exemption policy (as operates in New Zealand schools) would not be found to be discriminatory, there seems to be no reason why the slightly lesser onus of opting out of the whole class (rather than carefully selected parts of it) fails to impose an (albeit less severe) burden on children and their guardians. Thus, the holding of religious activities fails to differentiate between children of different religions in a manner that involves disadvantage to those students whose beliefs do not accord with the particular religion that the activities reflect. It therefore constitutes a prima facie breach of section 19.

B Does the Teaching of Religious Education and Other 'Non-Indoctrinating' Subjects Constitute a Prima Facie Breach?

Thus far, this Part has found that school activities of an overtly religious and indoctrinating character constitute a prima facie breach of sections 13 and 19. Yet what of avowedly 'secular' education that aims to inform students about the different religions of the world or different conceptions of the good life? In the United States, this question has been raised by fundamentalist communities uncomfortable with the increasingly multicultural values promoted by state schools. However, the issue's implications extend far beyond fundamentalist communities to the very underpinnings of education itself: if 'secular' education is not neutral, then all education is indoctrination.

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[143] See Part VII A 1 Section 13: Freedom of religion.

[144] *Leirvag and others v Norway*, above n 115, 15.

The overwhelming majority of international jurisprudence presumes that 'secular' education is neutral. While religious education exposes children to different religions and cultural practices, for instance, it is generally understood to do so in an 'objective' manner, allowing each individual child to 'critique' the available life-options. As such, it is thought that secular teaching cannot encroach on students' right to "hold opinions without interference"[145] or to be free from coercion to change their religious or ethical beliefs.[146]

This approach is exemplified by the HRC General Comment on the ICCPR freedom of religion provisions. While article 18.4 requires states to respect parents' right to educate their children in accordance with their religious convictions,[147] the Committee maintains that this requirement does not preclude everything of religious subject matter being taught in schools. Rather, "article 18.4 permits public school instruction in subjects such as the general history of religions and ethics *if it is given in a neutral and objective way*".[148] Similarly, the Ontario Court of Appeal has stated that "the Canadian Charter prohibits religious indoctrination but it does not prohibit education about religion".[149]

Although this equivalence between 'secular' and 'neutral' has significant support, it is by no means impregnable. Indeed, to members of some religions, the 'critical' or 'objective' approach to life options that it is an aim of secular education

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[145] New Zealand Bill of Rights Act 1990, section 13.

[146] *R v Big Drug Mart Ltd*, above n 99, 354.

[147] International Covenant on Civil and Political Rights, above n 104, art 18.4 provides:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[148] United Nations Human Rights Committee, above n 114, para 6 (my emphasis).

[149] *Canadian Civil Liberties v Ontario*, above n 142, 367.

to encourage is the very thing that they believe their religions prohibit.[150] To these (fundamentalist) religious minorities, cultivation of individual judgement and rational thought is itself a form of indoctrination, because it imposes values on their children that are contrary to their religious beliefs. As an American academic notes, this concept is by no means easy to understand:[151]

> The fundamentalists' argument against exposure [to critical thought] is truly difficult for one raised in the liberal tradition to grasp, because it relies on a dizzying subversion of the contrast between the objective and inculcative methods of education. ... Such a viewpoint challenges the conventional wisdom that critical reflection, rational thought and individual choice are the antithesis of, and the best safeguards against, indoctrination.

Taken to its logical conclusion, the contention is that *all* education is indoctrination.[152]

The fundamentalists' attempt to exempt their children from perceived secular indoctrination has been advanced in several American cases with varying success. In *Wisconsin v Yoder*,[153] members of an Old Order Amish community argued that their children should not have to attend school beyond age fourteen, as required by a state compulsory education law. Attending secondary school, it was argued, "tends to emphasise intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students" – values that the Amish consider contrary to their religion.[154] Upholding the plaintiffs' case, the United States Supreme Court found that the state's interest in compelling Amish children's school attendance until age 16 did not outweigh the plaintiffs' religious

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[150] Stolzenberg, above n 58, 591.

[151] Stolzenberg, above n 58, 613.

[152] Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum", above n 30, 40.

[153] *Wisconsin v Yoder* [1972] 406 US 205 (USSC).

[154] *Wisconsin v Yoder*, above n 153, 211 Burger CJ for the Court.

rights. In so doing, it emphasised the "static" [155] and "self-sufficient" nature of the Amish culture,[156] and the fact that it is "separated from the outside world".[157]

In *Mozert v Hawkins County School Board*,[158] the plaintiffs' claim met with less success. There, fundamentalist Christian parents did not want to remove their children from the public school system; rather, they wanted the public school system to accommodate their religious beliefs. Specifically, the plaintiffs objected to the reading curriculum at their children's state school, believing it to depict a wide variety of 'anti-Christian' ideas including witchcraft and mental telepathy. Seeking an exemption for their children, the plaintiffs submitted that, in exposing their children to a diversity of values and beliefs, the curriculum infringed their children's religious rights. This argument was not accepted by the courts, however, who interpreted the plaintiffs' case as amounting to a plea for immunity from "mere offence" – a protection that is not encompassed by the right of religious freedom.[159] As the above discussion demonstrates, however, the judges' analysis failed to grasp the essence of the plaintiffs' argument: in seeking the right to exempt their children from class, the plaintiffs wished to protect their children not just from offence but from indoctrination.[160]

Thus, while the American jurisprudence suggests that 'secular indoctrination' arguments can only constitute a prima facie breach of the right to religious freedom when they emanate from isolated, self-sufficient communities, this approach is based on a misunderstanding of the argument at stake. In direct contrast to the approach of the HRC and Canadian courts, it seems that there is no 'bright line' between education and indoctrination; just as instruction in religion can operate to coerce

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[155] *Wisconsin v Yoder*, above n 154, 229, 234 Burger CJ for the Court.

[156] *Wisconsin v Yoder*, above n 154, 222 Burger CJ for the Court.

[157] *Wisconsin v Yoder*, above n 153, 217 Burger CJ for the Court.

[158] *Mozert v Hawkins County School* (1987) 827 F 2d 1066 (6th Cir).

[159] Rishworth, above n 30, 40.

[160] See Stolzenberg, above n 58, 613.

children to adopt the religious beliefs of the majority, so too can education about religion coerce children to adopt the 'objective', 'rational' approach that is at the heart of the 'secular education' ethos – an ethos that is itself anathema to some religions. While, as with religious instruction and observance, the legislature has provided parents with the opportunity to opt their children out of a particular class or subject on religious or cultural grounds, for the reasons stated above this procedure does not remove the element of coercion that it is the role of section 13 to prevent.[161] Despite international jurisprudence to the contrary, a failure to recognise that avowedly 'secular' education has the potential to constitute a prima facie breach of section 13 would be unprincipled.

2 *Section 19: Freedom from discrimination*

Just as religious education and other 'secular' classes have the potential to breach children's and guardians' religious freedom rights, so too can they be seen to violate section 19. First (applying the approach to discrimination discussed above), the effect of such education is to make a distinction between students whose beliefs allow them to participate in the particular class at issue and students whose beliefs preclude such participation. Second, this distinction is on the basis of a prohibited ground – namely, religious and ethical belief.[162] Third, the distinction involves disadvantage towards the disfavoured group: the educational value of the particular class is withheld from students whose religious beliefs prevent their attendance. If multiple classes are at issue, students may be unable to attend (secular) state education at all. Where this situation applies, students and their families will incur the burden (both practical and economic) of attending private schools. A prima facie breach is therefore made out.

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[161] See Part VII A 1 Section 13: Freedom of religion.

[162] New Zealand Human Rights Act 1993, section 21(1)(c), (d).

C *Does the State's Omission to Fully Fund Integrated Schools of a Religious Character Constitute a Prima Facie Breach?*

Distinct from the issue of daily school content's compatibility with religious beliefs is the matter of the state's right (or duty) to provide for religious schools within the state system. That children and guardians have a right to attend religious schools of their choice is well established in international jurisprudence.[163] However, does the state have a duty to fund religious schools that agree to be part of the state system? As the law stands, the state covers all integrated schools' expenses except for land and buildings. Ought the state to also provide for these necessities?

1 *Section 13: Freedom of religion*

As outlined above, international religious freedom jurisprudence interprets the right to hold religious and ethical beliefs without interference in a broad sense, finding it to include indirect forms of control that can coerce people to change their beliefs. Whether this approach applies in New Zealand is yet to be determined. However, the possibility that section 13 might impose a "general positive duty" on the state to protect religious has already been ruled out.[164] In *Mendelssohn v Attorney-General*, the Court of Appeal found section 13 to amount only to a negative duty; it protects an individual's right to hold religious and ethical beliefs free from (direct) state interference.[165] While the Court acknowledges that there may be situations in which the state is obliged to legislate in order to protect religion (the international obligation to proscribe religious hate speech constituting one example),[166] such an obligation is stated not to apply to education.[167] Referring specifically to the 1975 Act, the Court argues that it does not support the existence of a positive duty to

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[163] See, for instance, *Adler v Ontario* [1996] 3 SCR 609 (SCC) 699-700 Sopinka J; International Covenant on Economic, Cultural and Social Rights, above n 66, art 13.3.

[164] *Mendelssohn v Attorney-General*, above n 97, 276.

[165] *Mendelssohn v Attorney-General*, above n 97, 273.

[166] International Covenant on Civil and Political Rights, above n 104, art 20(2).

[167] *Mendelssohn v Attorney-General*, above n 97, 275.

protect religion[168] but rather demonstrates the *power* of the state to exercise such protection when it chooses to do so.[169]

This approach is supported by Canadian authorities, which directly address the issue of whether the state's omission to fund private religious schools breaches the religious freedom provision of the Charter. In *Adler v Ontario*, the justices of the Supreme Court who deal with the issue agree that the right to religious freedom does not require the state to fund religious schools.[170] It is maintained that parents are not *compelled* to send their children to (secular) state schools, and hence that their religious freedom is not compromised:[171]

> The burden complained of by the appellants, *viz.* the cost of sending their children to private schools, being not a prohibition of a religious practice but rather the absence of funding for one, has not historically been considered a violation of the freedom of religion.

Despite the consensus between New Zealand and Canadian courts, one suspects that the operating word in this passage may soon be "historically". There seems to be some inconsistency between the (Canadian) assertion that, on the one hand, the nub of religious freedom is the right to hold beliefs without indirect interference, and that, on the other hand, the state's omission to fund religious schools does not amount to coercion. Indeed, the state's provision of free secular education can be conceptualised as an economic incentive that does in fact compel people to attend (secular) state schools, thereby rendering their religious beliefs vulnerable. According to this approach, the state's failure to fully fund integrated schools could amount to a prima facie breach of the right to religious freedom, not because the state has a positive obligation to protect religion but because the omission may breach the state's negative duty not to interfere indirectly with individuals' beliefs. Of course,

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[168] *Mendelssohn v Attorney-General*, above n 97, 276.

[169] Hannan, above n 21, 135-136.

[170] *Adler v Ontario*, above n 163, 652 L'Heureux- Dubé J, 711-713 McLachlin J.

[171] *Adler v Ontario*, above n 163, 652 L'Heureux- Dubé J. This reasoning is applied in *Bal v Ontario (Attorney-General)* 1997 34 (OR) 3d 484 (Ont CA).

this argument is in direct conflict with *Adler* and *Mendelssohn*, and is therefore at odds with Canadian and New Zealand law as it stands. Although the state's failure to fully fund religious schools does not amount to a prima facie breach of religious freedom rights at present, there is potential for the law's development to find such a breach in the future.

2 *Section 19: Freedom from discrimination*

Section 13, then, does not currently oblige the state to fund integrated schools. However, section 19 can be argued to suggest otherwise. Turning first to the issue of whether the state's failure to provide full funding makes a distinction between different groups, it seems that an indirect distinction exists. As the Canadian Supreme Court acknowledges in *Adler*, the attendance of schools that promote a particular faith is itself a tenet of some religions.[172] Thus, L'Heureux-Dubé and McLachlin JJ argue, the state's failure to fund religious schools makes a distinction between those students whose religious and ethical beliefs allow them to attend (secular) state schools, and those whose beliefs prevent their attendance.[173] Such a distinction is obviously on the basis of an enumerated ground – namely, religious or ethical belief.[174]

Sopinka and Major JJ, however, disagree with this conclusion. They contend that it is not the *legislation* that creates the distinction, but rather the *religious and ethical beliefs* to which different children and their families adhere.[175] In other words, in 'choosing' to adopt a particular religion, individuals are themselves the cause of any distinction that arises. Yet as L'Heureux- Dubé J indicates, the individual children and guardians in question do not regard themselves as having a 'choice'.[176] Moreover, even if the selection of one's beliefs does allow room for choice, that

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[172] *Adler v Ontario*, above n 163, 656 L'Heureux- Dubé J.

[173] *Adler v Ontario*, above n 163, 656 L'Heureux-Dubé J, 716-717 McLachlan J.

[174] New Zealand Human Rights Act 1993, section 21(1)(c), (d).

[175] *Adler v Ontario*, above n 163, 705, 708 Sopinka J (Major J concurring).

[176] *Adler v Ontario*, above, n 163, 657 L'Heureux-Dubé J, 716-717 McLachlan J.

choice cannot be relevant in determining whether discrimination has occurred. If state action that discriminates on the ground of religion can be excused because religion is a choice, then discrimination on that basis will become an "empty concept".[177]

Having established that the state's failure to fully fund religious schools creates a distinction between comparable groups on the basis of an enumerated ground, it is necessary to consider whether that distinction involves disadvantage to one group. Here, that requirement is clearly met. By rendering state schools acceptable only to those whose religious and ethical beliefs allow their attendance, the benefit of (fully) funded education is denied to those whose beliefs do not. The state's omission to fully fund integrated schools is thus a prima facie breach of section 19.

D Does the State's Decision to (Partially) Fund Integrated Schools of a Religious Character Constitute a Prima Facie Breach?

Thus far it has been seen that the state's *failure* to fully fund integrated schools constitutes a prima facie breach of section 19. Although completely at odds with this finding, some case law suggests that the state's decision to partially fund integrated schools may also breach the BORA. This section investigates such a possibility.

1 Section 13: Freedom of religion

It is widely recognised that the mere recognition of one group's anti-discrimination rights cannot, of itself, violate the rights of another.[178] In *Bal v Ontario*,[179] however, the Ontario Court (General Division) indicates that something more substantive is involved here: if the most convenient state school for a child to

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[177] *Adler v Ontario*, above, n 163, 657 L'Heureux-Dubé J.

[178] See, for instance, *Reference re Same-Sex Marriage* [2004] 3 SCR 698, para 46.

[179] *Bal v Ontario (Attorney-General)* 1994 21 OR 3d 681, 707-709 (Gen Div).

attend is a religious school (the religion of which the child does not share), then that child must either attend a less convenient school or seek an exemption from the religious elements of the most convenient school's programme.[180] These hurdles inhibit the attainment of education that is compatible with the child's beliefs. Thus, the Charter may preclude the state from operating religious schools within the state system, even if they are attended only by those who choose to do so.

This reasoning suggests that New Zealand's partial funding of integrated schools (which allows for their very existence) impinges on children's right not to be coerced into adopting a particular religious or ethical belief. Of course, the practical reality is that, in New Zealand, all children can attend (reasonably) convenient state schools. The issue is not one of bare possibility, however, as of degree. While the mere existence of an even more convenient integrated school does not negate the existence of a reasonably, although slightly less, convenient state school, the greater convenience of the integrated school constitutes an incentive that can operate to coerce children's attendance. Thus, the legislature's decision to (partially) fund integrated schools is a prima facie breach of section 13.

2 *Section 19: Freedom from discrimination*

The partial funding (and hence existence) of integrated schools can also be argued to infringe the anti-discrimination rights of children and guardians whose most convenient school expounds a religious or ethical belief that they do not share. First, the impact of the decision creates an (indirect) distinction between those students whose beliefs allow them to attend the most convenient school and those whose beliefs prevent this attendance. Second, that distinction is on the basis of a prohibited ground – namely, religious or ethical belief.[181] Finally, the distinction

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[180] *Bal v Ontario (Attorney-General)* (Gen Div), above n 179, 707-709. While these observations were only obiter, Winkler J's reasoning as a whole is affirmed by the Ontario Court of Appeal in *Bal v Onatario (Attorney-General)* (CA), above n 171. And see Rod Wiltshire "The Right to Denominational Schools Within Ontario Public School Boards" (1996) 7 Educ & LJ 81, 81-82.

[181] New Zealand Human Rights Act section 21(1)(c), (d).

involves the same disadvantages as noted above – that is, the need to either attend a less convenient school or to seek exemption from the religious aspects of the local school. Thus, the funding of religious schools also constitutes a prima facie breach of section 19.

E A Conflict of Rights

It can be seen that, once the various issues surrounding religion in schools are delineated, what is left is a veritable quagmire of conflicting and competing prima facie breaches. On the one hand, religious instruction in schools infringes children's and guardians' religious and anti-discrimination rights; on the other hand, teaching about religion – and, indeed, any other 'secular' subject – also violates the religious and anti-discrimination rights of a fundamentalist minority. Do these findings mean that *all* education must be prohibited? Additionally, both the decision *to* fund and the decision *not* to fund religious schools contravene a cocktail of religious and anti-discrimination rights. On what basis should the state progress?

The only New Zealand case to address the issue of conflicting rights is *Re J*,[182] in which Jehovah Witness parents wished to prevent their child from having a blood transfusion. The Court of Appeal conceptualised this scenario as involving a potential conflict between the parents' right to religious freedom and the child's right to life. In resolving the conflict, Gault J defined the right to freedom of religion so that it does not impinge upon the right to life.[183] That is, he limited one of the potentially conflicting rights at the prima facie stage, implicitly creating a hierarchy of rights under which life is superior to religious freedom. In this way, a conflict of rights is avoided.

Applying the Court's approach to the factual matrix at hand, however, a problem is encountered. Not only does 'religion in education', as a broad area of

[182] *Re J (an Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA).

[183] *Re J (an Infant): B and B v Director-General of Social Welfare*, above n 182, 146 Gault J for the Court.

enquiry, involve conflict between *different* rights, but there is also conflict between different individuals' enjoyment of the *same* right. With regard to the funding of integrated schools, for instance, the anti-discrimination rights of children from religious minorities conflict with the anti-discrimination rights of children who do not belong to those minorities: as soon as the state gives effect to the rights of minorities by removing the financial burden of attending religiously appropriate schools then it imposes a burden on children whose beliefs do not accord with those espoused by such schools to attend less convenient institutions. These intra-right conflicts cannot be resolved through definitional tweaking.

An alternative approach is provided by Canadian jurisprudence. Instead of addressing potential conflicts at the prima facie stage, they can be resolved under section 5, which allows rights to be subject to "such reasonable limits as are demonstrably justified in a free and democratic society". This approach, which is known as 'ad hoc balancing',[184] thus makes use of the structure that Parliament has provided for the limiting and qualification of rights. Of particular relevance to the conflicting and competing prima facie rights at hand is the way in which ad hoc balancing resolves the conflict *in the context in which it arises*. In so doing, the approach avoids the potential for rights to be limited at the definitional stage in a manner that may not always be appropriate.[185]

While the definitional balancing of conflicting rights has thus far been favoured by the New Zealand courts, academics prefer the ad hoc approach.[186] In light of the inability of definitional balancing to resolve the multifarious prima facie breaches pertaining to religion in education, it is evident that the ad hoc approach must be applied. First, however, it needs to be determined whether it is legal for the state and school boards to commit these prima facie breaches.

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[184] Rishworth, Huscroft, Optican and Mahoney *The New Zealand Bill of Rights Act*, above n 131, 56.

[185] See Julia Rendall *Veiled Witnesses, Fair Trials and the Bill of Rights: A Case Note on* Police v Razamjoo (LLB Hons Research Paper) Victoria University of Wellington, 2005.

[186] See Andrew S Butler "Limiting Rights" (2002) 33 VUWLR 537, 546-550; Rishworth, Huscroft, Optican and Mahoney *The New Zealand Bill of Rights Act*, above n 131, 56.

VIII ARE THE PRIMA FACIE BREACHES SAVED BY SECTION 4?

Unlike the human rights documents of some other states, New Zealand's BORA is not supreme law. Section 4 provides that the courts are not to impliedly repeal or decline to apply any statutory provision by reason of its inconsistency with the BORA. As section 6 states, however, where an enactment can be given a meaning that is consistent with the BORA, that meaning is to be preferred. In *Moonen*, the Court of Appeal dealt with the tension between these two sections by first asking whether the legislative provision in question is open to more than one "tenable meaning".[187] If it is, then the meaning that constitutes the "least possible limitation" on the right is to be adopted.[188] This section will apply such a process to the legislation pertaining to each of the prima facie breaches in turn. In so doing, it will establish how the state and school boards can act under the present law.

A Religious Instruction and Observances in Schools

As found above,[189] the holding of religious instruction and observance in all schools constitutes a prima facie breach of sections 13 and 19. Are the legislative provisions under which these activities are held properly open to an interpretation that precludes the breaches, or places a lesser limitation on rights?

1 State primary schools

Religious activities in state primary schools are ostensibly authorised by sections 78 and 78A of the 1964 Act. It does not seem that the provisions are open to more than one tenable meaning. While the phrase "religious instruction" could arguably, on its own, be interpreted as 'instruction *about* religion', the addition of the

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[187] *Moonen v Film and Literature Board of Review*, above n 94, 16.

[188] *Moonen*, above n 94, 16.

[189] See Part VII A Does the Holding of Religious Observance or Instruction Constitute a Prima Facie Breach?

phrase "given by voluntary instructors approved by the School Committee" renders this interpretation untenable. In enabling school boards to choose their own religious instructors, the legislature clearly intended to allow them to select teachers who follow an exclusively Christian approach that is designed to indoctrinate. Thus, in accordance with section 4, it is legal for state primary schools to hold religious instruction and observances, including those designed to indoctrinate children.[190]

2 Integrated primary schools

Section 32 of the 1975 Act provides that, in integrated schools for which religion forms part of their special character, religious instruction and observance can be held "in accordance with the terms and conditions prescribed in [their] integration agreement[s]". These agreements can allow for religious activities that "accord with practices, rites and doctrines of a designated religious or philosophical body as from time to time determined by a designated member or designated members of that body".[191] That such activities may amount only to instruction *about* religion is not an interpretation that is properly open under section 6. So long as their integration agreements provide for it, integrated schools can legally hold religious activities of an indoctrinating nature.

3 Private primary schools and all secondary schools

As provided by section 81 of the 1964 Act, "nothing in [that] Act shall affect religious instruction or observances in schools other than State primary schools". When enacted, this provision was intended to allow private and secondary schools to hold religious activities that extend beyond those permitted in state primary schools.[192] Indeed, that more extensive religious content is permitted in schools other

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[190] Paul Rishworth "The Human Rights Act and Discrimination" in Paul Rishworth, Patrick Walsh *Education Law* (New Zealand Law Society, Wellington, 1999) 127.

[191] Private Schools Conditional Integration Act 1975, section 7(6)(f).

[192] Hon WB Tennent (9 November 1962) 332 NZPD 2569.

than state primary schools is clearly the implication of the provision. As section 6 indicates, however, mere implication is not necessarily sufficient in light of the BORA. Section 6 requires the court, in its interpretive role, to apply the meaning that places the least possible limitation on the right not only if it is the 'natural' meaning but also if it is merely "tenable". Is an interpretation of section 81 that precludes private and secondary schools from holding religious instruction and observance properly open?

The courts have taken a varied approach to determining whether interpretations are tenable in border-line cases. In *Quilter*, the Court of Appeal was unanimous that the Marriage Act cannot properly be interpreted to allow for same-sex marriages, even though the requirement that marriage is between a man and a woman is not specified. The courts may interpret, states Tipping J, but they "cannot rewrite or legislate".[193] In criminal procedure cases, however, the courts have demonstrated willingness to adopt seemingly strained interpretations in order to give effect to rights. In *R v Poumako*, for instance, Gault J left open the possibility that the retrospectivity clause in the Crimes (Home Invasion) Amendment Act 1999 could be interpreted to apply for only 15 days, as opposed to the indefinite period that a natural reading suggested.

In attempting to reconcile these divergent approaches, it is important to note the different nature of the respective rights at stake.[194] Whereas *Poumako* involved a procedural right, *Quilter* concerned a social policy issue. While not rendered explicit in either case, perhaps it is this distinction that drives the Court of Appeal's disparate findings regarding what interpretations are tenable. Applying such an approach to section 81, it is clear that religion's place in schools is a matter of social policy, not procedure. Thus, while the issue is by no means clear-cut, it is likely that the courts

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[193] *Quilter*, above n 127, 572.

[194] See C Geiringer, "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in R Bigwood (ed) *Public Interest Litigation* (LexisNexis, 2006) 176, 180-184, although that article is concerned with defining rights rather than section 4 and 6 analyses.

would show deference to Parliament's inferred intention to hold that section 81 does not restrict religious activities in private and secondary schools.

B Religious Education and Other 'Non-Indoctrinating' Subjects

Just as this paper has determined religious instruction and observance to constitute a prima facie breach of some students' rights, so too did it find religious education and other 'secular' subjects to have the potential to infringe the BORA. [195] Are these prima facie breaches saved by section 4?

1 State primary schools, state secondary schools and integrated schools

The state's power to require schools to instil students with a 'critical' or 'objective' approach to life options is conferred by section 60A of the 1989 Act, which empowers the Minister to publish national education goals and curriculum statements.[196] The provision cannot be given a tenable meaning that precludes the state from requiring schools to follow an 'objective' approach. Such an interpretation would be so far from Parliament's intention that it would amount to judicial legislation. At present, a 'pluralistic' perspective is required by curriculum statements, with a basic principle being to "encourage students to understand and respect the different cultures which make up New Zealand society".[197] Today, then, state and integrated schools are legally required to promote a mind-set that contravenes the religious freedom and anti-discrimination rights of some fundamentalist minorities.

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[195] See Part VII B Does the Teaching of Religious Education and other 'Non-Indoctrinating' Subjects Constitute a Prima Facie Breach?

[196] Education Act 1989, sections 60A(1)(a), 60A(1)(aa), 60A(1)(b).

[197] Ministry of Education *The New Zealand Curriculum Framework* "The Principles" <http://www.tki.org.nz> (last accessed 26 September 2006).

2 Private schools

Section 35A of the 1989 Act requires that, in order to be registered, private schools must prove that they have a "suitable" curriculum.[198] Whether this requirement is met is a matter for the Ministry's chief executive to decide.[199] As noted above,[200] a curriculum is probably "suitable" if it is reasonably similar to that followed by state and integrated schools. At present, such a requirement would require private schools' curricula to promote an 'objective' or 'pluralistic' world-view. While the issue is more contentious than for state and integrated schools, then, it is likely that section 4 also allows (and, indeed, requires) private schools to contravene the rights of those whose religious beliefs prohibit exposure to an 'objective' or 'critical' perspective.

C Partial Funding of Integrated Schools

Quite apart from the content of classes, this paper has also found that the state's decision to partially fund integrated schools constitutes a prima facie breach of the BORA in two ways: first, by omitting to fully fund such schools; and second, by deciding to provide them with any funding at all. Are the legislative provisions under which partial funding occurs properly open to an interpretation that places a lesser limitation on the rights at stake?

1 The state's omission to fully fund integrated schools

Section 40(2) of the 1975 Act provides that, except if stated otherwise in integration agreements, proprietors of integrated schools "own, hold upon trust, or lease" schools' land and buildings,[201] and "shall accept and meet the liability for all

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[198] Education Act 1989, section 35A(1)(a).

[199] Education Act 1989, sections 2, 35A(8).

[200] See Part III C Private Primary Schools.

[201] Private Schools Conditional Integration Act 1975, section 40(2)(a).

mortgages, liens and other charges upon the said land and buildings".[202] Further, integrated schools must pay for any improvements to school buildings and grounds that are required.[203] These provisions' complete lack of ambiguity render it untenable to adopt any 'interpretation' that requires the state to fully fund integrated schools.

2 The state's decision to partially fund integrated schools

Integrated schools' receipt of state funding (except for land and buildings) is the effect of several legislative provisions. Section 4(1) of the 1975 Act states that, "[o]n integration, an integrated school becomes part of the State system of education in New Zealand"[204] and is subject to the 1964 and 1989 Acts[205] (although, where there is conflict, the 1975 Act prevails).[206] Further, as noted above, section 36 allows integrated schools to charge "attendance dues".[207] These payments can only be used to meet costs relating to land and buildings.[208] When read in light of section 3 of the 1989 Act, which states that, except as provided in the 1975 Act, "every person who is not a foreign student is entitled to free enrolment and free education at any school" during their school-attending years, the state's obligation to partially fund integrated schools emerges. As the 1975 Act only allows integrated schools' attendance dues to meet costs regarding land and buildings, the state is required to fund all else. The legislative framework does not allow for any alternative interpretation.

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[202] Private Schools Conditional Integration Act 1975, section 40(2)(b).

[203] Private Schools Conditional Integration Act 1975, sections 40(2)(c), 40(2)(d).

[204] Private Schools Conditional Integration Act, section 4(1)(a).

[205] Private Schools Conditional Integration Act, section 4(1)(b).

[206] Private Schools Conditional Integration Act, section 80(1).

[207] Private Schools Conditional Integration Act., section 36(1).

[208] Private Schools Conditional Integration Act, section 36(3).

IX ARE THE PRIMA FACIE BREACHES DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY?

The conclusion that the prima facie breaches of children's and guardians' rights are legal by virtue of section 4 does not signal the end of the matter. While courts are precluded from repealing statutes on the basis of BORA-inconsistency, the Court of Appeal has held that it is still open to courts to issue a "declaration of inconsistency".[209] Such declarations notify Parliament that legislation conflicts with the BORA, affording it the opportunity to rectify the situation. Regardless of the finding that schools' actions are legal pursuant to section 4, it is thus necessary to consider whether the impugned legislation is itself inconsistent with the BORA. In accordance with section 5, such an enquiry requires investigating whether the prima facie breaches are "demonstrably justified in a free and democratic society".[210]

Before embarking on the BORA analysis, this paper addressed the balance of decision-making power between children and their guardians.[211] Yet these potentially competing interests form only part of the picture. Connected to the interest of guardians is the interest of the community (or communities) to which they belong in maintaining their cultural cohesion and beliefs. Beyond communities is the state's interest in cultivating an informed and harmonious citizenry that is capable of participating in the political and economic spheres of the nation.[212] It is the tension between the interests of these different social units that the section 5 analysis must address.

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[209] *Moonen*, above n 94, 17. No declaration of inconsistency has yet been issued.

[210] New Zealand Bill of Rights Act 1990, section 5.

[211] See Part V Whose Rights Are At Stake?

[212] See Shauna Van Praagh, "Faith, Belonging, and the Protection of "Our" Children" 1999 17 Windsor YB Access to Just 154; Michael David Jordon "Parents' Rights and Children's Interests" 1997 10 Can J L & Juris 363.

A well-established (although not mandatory)[213] test for section 5 justifiability is outlined by the Court of Appeal in *Moonen*,[214] as adopted from the Canadian case of *R v Oakes*.[215] The test involves two primary questions. First, does the legislation have a pressing and substantial objective? Second, are the statutory means used to achieve the objective proportional to its importance?[216] In considering the second question, it must be established both whether there is a rational connection between the statutory means and the objective and whether the statutory measures impose but a minimal impairment on constitutional rights. A prima facie breach can only be justified under section 5 if it is determined that all the relevant considerations are satisfied – a process that will "of necessity" involve value judgments.[217] This section applies the justifiability test to each of the prima facie breaches identified above. In so doing it determines whether New Zealand's education framework is consistent with the BORA.

A Is the State's Omission to Fully Fund Integrated Schools Justified?

In allowing private schools to integrate into the state system, the legislature's purpose in omitting to provide full funding is unclear. Indeed, the possibility of extending funding to include land and buildings is not mentioned in the Parliamentary Debates.[218] Quite probably, it was assumed that fully funding such schools would be too expensive, although, in light of the state's commitment to free education,[219] the objective of avoiding this cost seems neither pressing nor substantial. In order to give the omission the best chance of being held justified under section 5, this paper will

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[213] *Moonen v Film and Literature Board of Review (No 1)*, above n 94, 16; and see *Moonen v Film and Literature Board of Review (No 2)*, above n 95, 760.

[214] *Moonen v Film and Literature Board of Review* [2000], above n 94, 16.

[215] *R v Oakes* [1986] 1 SCR 103.

[216] *Moonen v Film and Literature Board of Review*, above n 94, 16.

[217] *Moonen v Film and Literature Board of Review*, above n 94, 16.

[218] (23 July 1975) 400 NZPD 3325-33; (24 July 1975) 400 NZPD 3343-52; (3 October 1975) 402 NZPD 5109-14; (7 October 1975) 402 NZPD 5183-22; (9 October 1975) 402 NZPD 5320; (10 October 1975) 402 NZPD 5433-6.

[219] Education Act 1989, section 3.

assume that its purpose is the most principled available – namely, that provided by citizenship theorists.

The argument from citizenship theory has become increasingly popular.[220] Dismissing the notion that citizenship is simply about the acquisition of rights, these theorists contend that it entails the active exercise of responsibilities and virtues. In a modern liberal democratic state, the relevant virtues include "the ability and willingness to question political authority, and to engage in public discourse about matters of public policy".[221] A fundamental priority of education, then, is to constitute a "seedbe[d] of civic virtue" – that is, to instil children with the virtues that they need in order to assume the responsibilities of good citizens.[222] Assuming that such a seedbed can best be cultivated in secular state schools, citizenship theory suggests that the state's purpose in omitting to fully fund integrated schools is to encourage the attendance of their more 'civically virtuous' secular counterparts.

That this purpose is pressing and substantial is argued strongly in much of the North American jurisprudence. In *Mozert*, above, Kennedy J emphasises the importance of education's nurturing children's capacity to "think critically about complex and controversial subjects" in order to participate actively in the democratic process.[223] In *Adler*, McLachlin J considers the particular requirements for this objective to be achieved in a multicultural society:[224]

> A multicultural multireligious society can only work ... if people of all groups understand and tolerate each other. According to the Shapiro Report ..., "the public school context represents the most promising potential for realising a more fully tolerant society". ... The strength of the public system is its diversity – diversity

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[220] See, for instance, Richard Dagger "Education, Autonomy and Civic Virtue" in Richard Dagger *Civic Virtues* (Oxford University Press, Oxford, 1997) 117; Kevin McDonough, Walter Feinberg (eds) *Education and Citizenship in Liberal-Democratic Societies: Teaching for Cosmopolitan Values and Collective Identities* (Oxford University Press, Oxford, 2003).

[221] Will Kymlicka *Contemporary Political Philosophy: An Introduction* (Oxford University Press, Oxford, 2002) 289.

[222] Kymlicka, above n 221, 302, 307.

[223] *Mozert v Hawkins County School*, above n 158, 1070.

[224] *Adler v Ontario*, above n 163, 718 McLachlin J.

> which its supporters believe will lead to increased understanding and respect for different cultures and beliefs.

In this way, McLachlin J held that the prima facie breach of children's and guardians' anti-discrimination rights is justified in a free and democratic society.

While the rhetoric of citizenship theory is attractive, it is important to remember that Canada and New Zealand are liberal democracies, not civic republics. As such, they ought not to require public-spirited aims to govern citizens' actions in every area of their lives.[225] While some may regard the construction of an informed and tolerant citizenry as the primary benefit of education, it is not the *only* benefit. Others may emphasise, for instance, the importance of education for personal fulfilment. Further, even were good citizenship the primary concern of every New Zealander, the ability to participate in a multicultural society is not the only relevant virtue. Law-abidingness and the development of personal and family relationships are also necessary in liberal democracies,[226] and may (arguably) be nurtured just as effectively in an homogenous school environment as in a heterogeneous one. The aims of citizenship theory, then, are not sufficiently pressing and substantial to justify the infringement of children and guardians' anti-discrimination rights. At this stage, it seems that the state's omission to fully fund integrated schools is not demonstrably justified.

B Is the State's Decision to (Partially) Fund Integrated Schools Justified?

If the state's omission to provide full funding were the only prima facie breach pertaining to religious schools, then the inadequacy of citizenship theory to justify the policy would, in the absence of further justification, be sufficient to require full funding to commence. After all, the onus of proving that prima facie breaches are justified rests squarely with those who have perpetrated them –[227] here, the state.

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[225] Galston "Parents, Government, and Children" in Stephen Macedo, Iris Marion Young (eds) *Child, Family, and State* Nomos XLIV (New York University Press, New York and London, 2002) 211, 213.

[226] Galston, above n 225, 230.

[227] *Ministry of Transport v Noort*, above n 123, 283 Richardson J.

However, a further prima facie breach is at issue – namely, the state's decision to *partially* fund religious schools. In light of this conflicting breach, one set of rights must give way: either full funding must commence, or no funding should be provided at all.

Once again, the first step is to consider whether the purpose of the impugned provisions is pressing and substantial. When Parliament made provision for the partial funding of private schools through their integration into the state system, a number of factors were at play. Primarily, the legislation was passed in order to save the financially imperilled Catholic schools from closure.[228] Yet Parliament decided not to fund only Catholic schools; nor did it simply provide state aid to private schools, which would also have solved the Catholic school problem. Instead, Parliament opted to open up the possibility of (guaranteed) partial funding to all private schools through integration. In so doing, the then-Minister emphasised the new scheme's importance for the education system as a whole:[229]

> ...the Bill ... will prove of mutual benefit to both private schools and the State system. The former will gain relief from financial and staffing problems, and at the same time preserve their special character; the State system will have access to ... additional expertise..., together with a further diversity of approaches to education within the total system.

The purpose of the funding is thus to allow for a new diversity of education within the state system, making room for schools of 'special character' to enter its ranks. As a corollary of this desired diversity, it seems that the legislation is intended to ensure that children have access to education that is culturally and religiously appropriate. Is this objective pressing and substantial?

In considering this question, it is necessary to identify the very purpose of education. For liberals, education should serve to equip autonomous individuals with the capacity to question their fundamental values. It is only when individuals have

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[228] Hon PA Amos (7 October 1975) 402 NZPD 5138.

[229] Hon PA Amos, above n 228, 5184.

autonomy that they can exercise choice about the basic commitments of their lives.[230] For communitarians, however, the liberal conception of autonomy's importance is overstated. This inflation of the significance of choice can "alienate us from some of the deepest aspects of human well-being", such as integration with one's culture.[231] Whereas liberals seek to ensure that education does not 'trap' children within a culture's seemingly invariable values, communitarians emphasise culture's fundamental importance in leading worthwhile lives.

Traditionally, these different perspectives were considered mutually exclusive. Applying them to the question of whether religiously appropriate education is pressing and substantial, it was assumed that liberals would answer in the negative and communitarians in the affirmative. Yet, as the political theorist Will Kymlicka demonstrates, liberals' and communitarians' concerns are not necessarily irreconcilable. As a liberal, Kymlicka believes that a precondition for leading 'the good life' is that individuals must be free to question and modify their beliefs. Where he has contributed to the liberal tradition is in his identification of conditions that are necessary in order for this freedom to be available. Far from assessing their values as atomised beings removed from the world, Kymlicka argues, individuals can only make life choices from within the context of their culture.[232] Access to one's culture is thus necessary in order to render meaningful the life options from which individuals can choose. For all children whose religion forms an intrinsic part of their culture, then, attendance of religious schools is necessary in order for them to benefit from the objective of liberal education – namely, the fostering of individual autonomy.

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[230] Eamonn Callan "Creating Citizens: Political Education and Liberal Democracy" (Clarendon Press, Oxford, 1997) 52.

[231] Callan, above n 230, 52; see also Amitai Etzioni *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (Crown Publishers, New York, 1993) 101.

[232] Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995) 75.

Kymlicka himself proposes that his argument from culture, while applying in theory equally to immigrant and indigenous peoples, in practice only imposes an obligation on the state in regard to the latter. Unlike indigenous groups, he maintains, immigrant minorities have already exercised their autonomy in choosing to live in a different culture, thus relinquishing their right to full cultural protection.[233] This stance, of course, is merely a sop to practicality; as several theorists have pointed out, the nature of individuals' culture should not impact upon their right to access it.[234] For the purpose of this paper it is assumed that Kymlicka's distinction is invalid, and that the argument's logic leads inexorably to its being applied to all minority groups, indigenous and immigrant alike. In light of the above analysis, it follows that the purpose of providing culturally appropriate education for all children is pressing and substantial.

Turning to the proportionality analysis, there is a rational connection between the purpose of maintaining the diversity of education available to children and the legislative means of funding integrated schools. After all, when the Act was passed in 1975, it was only through the provision of state funding that many Catholic schools could remain open. Moreover, the impugned provisions impose but a minimal impairment on children's rights: 'secular' state schools also exist; children are not required to attend schools of a religious character; and even if they do, they can be exempted from overtly religious activities.[235] Thus, the state's partial funding of integrated schools is justified in a free and democratic society. As no justification for the state's omission to provide full funding was found above, it follows that the BORA requires the state to fully fund integrated schools.

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[233] Will Kymlicka *Multicultural Citizenship*, above n 232, 10-33.

[234] Paul Gilbert *Peoples, Cultures and Nations in Political Philosophy* (Georgetown University Press, Washington DC, 2000) 179-180; see also Joseph Raz "Multiculturalism: A liberal perspective" in Joseph Raz *Ethics in the Public Domain* (OUP, Oxford, 1994) 158, 160.

[235] Education Act 1989, section 75A.

C *Is the Teaching of Religious Education and Other 'Non-Indoctrinating' Subjects Justified?*

While the argument for the state's obligation to fund integrated schools is founded on liberal (rather than communitarian) principles, its solution is acceptable to most minority groups. As the cases of *Yoder* and *Mozert* (above)[236] demonstrate, however, it is not acceptable to all. For although the Kymlicka-inspired argument obligates the state to fund religious schools that consent to integrate, this integration is conditional on schools' acceptance of the liberal good of individual autonomy (as represented by their obligation to comply with the national curriculum). While, under this model, children are educated in the context of their own culture, their education must include being presented with a range of life choices. The presence of children's cultural contexts is not to intrude to the extent that they are trapped within them. Yet it was the very manner in which education highlights the existence of alternative life-options to which the plaintiffs in *Yoder* and *Mozert* objected. Whereas Kymlicka understands culture to provide the context of choice in which individuals can make life decisions, the minority cultures represented in these cases regard part of their culture to be the exclusion of such choice.

Any attempt to adduce the legislature's purpose in empowering the Ministry to require schools to instil students with an 'objective' mindset will invariably involve dabbling in fiction. That the Ministry should possess such a power is, in New Zealand society today, such an inevitability that Parliament would not have turned its collective mind to any alternative. If called upon to justify its approach, however, the state would probably light upon the liberal conception of education described above – namely, fostering individual autonomy.

In the context of a liberal democracy, this purpose must be regarded as pressing and substantial. After all, it forms the very foundation of such a society.

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[236] See Part VII B Does the Teaching of Religious Education and Other 'Non-Indoctrinating' Subjects Constitute a Prima Facie Breach?

Turning to the proportionality analysis, there is a rational connection between the purpose and the statutory means: if the Ministry is not empowered to compel schools to comply with curriculum goals and guidelines, then the purpose of fostering students' autonomy (as required by those guidelines) could not be achieved. Further, even though the statutory measures serve to severely impair the religious freedom and anti-discrimination rights of fundamentalist minorities, this impairment constitutes the minimum possible limitation in the circumstances. In state schools, students can be opted out of standard classes at the principal's discretion.[237] Where exemption is refused, however, the objective of fostering individual autonomy is so incompatible with the desire to limit such autonomy that a less significant impairment is impossible. For all the ticks in the justifiability boxes, however, the ultimate issue of whether the infringement is proportional to the statutory purpose remains problematic: Why should the priority that the majority places on individual autonomy justify imposing this value on those who do not hold it?

The inability of Kymlicka's cultural theory to address the concerns of all minority communities is significant. Ultimately, however, it is not something with which the parameters of this paper require it to grapple. As noted above, this section's purpose is to conduct a human rights analysis *within the context of section 5 of the BORA*. By specifying that prima facie breaches do not violate the BORA if they are "justified in a *free and democratic* society",[238] section 5 prioritises policies that uphold these social characteristics. For the purposes of this analysis, then, the breach of fundamentalist minorities' religious freedom and anti-discrimination rights is proportional to the objective of promoting individual autonomy. The paradox of a tolerant society's intolerance for the intolerant[239] is one that will be left for another day.

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[237] Private Schools Conditional Integration Act 1975, section 25A.

[238] New Zealand Bill of Rights Act 1990, section 5 (my emphasis).

[239] Stolzenberg , above n 58, 584.

D Is Religious Instruction and Observance in State Schools Justified?

Thus far, it has been established that the BORA requires the state to fully fund integrated schools, and that the possible breach of some fundamentalist minorities' rights not to be 'indoctrinated' by liberal education is justified in a free and democratic society. It remains to be seen whether the holding of religious instruction and observance in state schools is also justified.

In introducing the 1962 Act, the then-Minister stated that its purpose was to legalise the Nelson System. In other words, Parliament wanted to allow religious activities of an indoctrinating nature to be held in state primary schools.[240] Such legislation was desirable because it gave "expression to the wishes of the very great majority of parents".[241] In the Minister's opinion, "no young person, boy or girl, is able to reach full development of character or of purpose in life without [religious instruction]".[242] Taking these reasons into account, is the purpose of legalising religious activities pressing and substantial?

When the 1962 Act was introduced, New Zealand's Judeo-Christian heritage was subscribed to in some form by the "very great majority" of New Zealanders.[243] As such, its presence in schools was *arguably* justified, as it reflected broad social consensus. In 2006, however, this consensus has disintegrated. While more than half of New Zealanders continue to adhere to Judeo-Christian faiths,[244] significant minorities profess belief in other religions or in no religion at all. Yet even if the Judeo-Christian tradition undergoes a massive resurgence in support, it does not follow that the state is justified in allowing its schools to hold religious instruction and observance. Fundamental to the notion of rights is that they are not to be dictated

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[240] Hon WB Tennent (13 December 1962) 333 NZPD 3387.

[241] Hon WB Tennent, above n 240, 3387.

[242] Hon WB Tennent, above n 240, 3389.

[243] Hon WB Tennent, above n 240, 3387.

[244] Statistics New Zealand "Census snapshot: cultural diversity" <www.stats.govt.nz> (last accessed 28 September 2006).

by a tyranny of the majority. This position is strongly stated by Thomas J in *Quilter*:[245]

> A majoritarian notion of "morality" is not a sufficient basis to deny an unpopular minority the equal protection of the law. Indeed, it is because they are a minority and likely to be politically powerless that they require the protection of the law and equal treatment under the law.

The mere fact that the majority of students at a state school wish to participate in religious activities does not justify encroaching upon the rights of those whose beliefs are incompatible with such attendance. Thus, the original purpose for which the 1962 Act was introduced is not pressing and substantial.

If required to justify the impugned provisions as they stand in the 1964 Act today, the state would probably refrain from attempting any argument that draws upon New Zealand's Judeo-Christian heritage. Rather, the manner in which the legislation allows school boards to hold not only Christian instruction and observance, but rather any religious activities of their choice, would be emphasised. In this way, a revised purpose might reflect that of the 1975 Act – namely, the facilitation of (the majority of) children's access to education that is culturally and religiously appropriate. Does this alternative objective render the provisions demonstrably justified?

Rather than approaching this question as a discrete matter, it is important to take the conclusions reached above into account. That the incorporation of religion within the education environment is necessary for children of some cultures (and hence a pressing and substantial objective) has already been established. In light of the finding that the state should fully fund integrated schools, however, this need is already met. The economic circumstances of families will not be a barrier to their children's attendance of religious schools.

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[245] *Quilter*, above n 127, 545.

In the absence of further justification, there is no rational connection between the objective of ensuring children's access to education that is culturally appropriate and the means of allowing religious activities to be held in state schools. Indeed, such a means has been demonstrated to *impair* the objective, as it results in school environments that are culturally *in*appropriate for those students who do not share the majority's religious beliefs. Even if a rational connection were found, the opt out scheme does not impose the minimum possible impairment on rights. Unlike exemption from general classes, it would be feasible to implement an alternative opt in system (like that recently abandoned by the Ministry)[246] that would lessen the current infringements. Finding no further justification for the breach of children's and guardians' rights, it is concluded that the legislation allowing religious activities to be held in state schools contravenes the BORA.

X REFORMING THE LAW

This paper has found that New Zealand's education provisions breach the BORA in several ways. If the matters are litigated, it would be open to the courts to issue declarations of inconsistency. As provided by section 4, of course, Parliament has no obligation to rectify these breaches. If it wishes to, however, this section suggests how it might be achieved.

A The 1964 Act

One of this paper's conclusions is that the holding of religious instruction and observance in state schools contravenes the BORA. This breach can be remedied by repealing sections 78, 78A, 79, 80 and 81 of the 1964 Act. In this way, the secular requirement stands, but no exceptions allowing for religious activities in state primary schools remain. Further, by repealing section 81, the implied authority for religious activities to be held in state secondary schools is also removed. To clarify this matter, a new subsection could be introduced stating that, 'Except as provided in the Private

[246] See Part I Introduction.

Schools Conditional Integration Act 1975, no religious instruction or observance is to be held in state schools at any time'.

B The 1975 Act

In order for the 1975 Act to be consistent with the BORA, this paper has found that the state must fully fund integrated schools. If Parliament wishes to remedy the breach, then paragraphs (a), (b), (c), (d), (g) and (h) of section 40(2) must be repealed. These paragraphs currently require integrated schools to provide their own land and buildings, to maintain them at the minimum standard set by the Ministry, and to ensure that they are appropriately insured. As a consequential amendment, section 36, which allows integrated schools to charge attendance dues in order to meet costs regarding land and buildings, must also be repealed. If the state decides to meet these costs, then attendance dues are no longer necessary. Religiously appropriate education would become free for all.

XI CONCLUSION

Religion's place in education is a highly contested area. In New Zealand, current education policy draws a distinction between religious activities designed to indoctrinate and secular content intended to inform. Whereas no limitation is placed on the latter, the former is sanctioned only in prescribed circumstances, as dictated by the type of school in which they are held. Despite this restriction on religious activities, however, schools that have a special religious character can integrate into the state system, receiving significant (although not full) funding. This paper has explored whether the current arrangements are consistent with the BORA. In particular, it has considered the appropriate balance between the interests of children and guardians, communities and the state.

The tension between these interests is demonstrated by the array of prima facie breaches that the current framework raises. Far from falling into a neat pattern

indicating the best way forward, the prima facie breaches compete and conflict so as to be irreconcilable. Not only do religious activities of an indoctrinating nature violate religious freedom and anti-discrimination rights, but 'secular' education is also inconsistent with these provisions. Moreover, the state's partial funding of integrated schools infringes the rights of both children and guardians whose beliefs accord with those adhered to by the school, and those whose beliefs do not. Because of the unambiguous wording of the relevant legislative provisions, these prima facie breaches are all saved by section 4 of the BORA: both the state and school boards are operating within the law. Yet this finding does not signal the end of the matter. The courts can issue declarations that the legislative provisions are themselves inconsistent with the BORA.

In order to issue such a declaration, the courts must be satisfied under section 5 that the prima facie breach is not justified in a free and democratic society – an enquiry that necessarily involves value judgments. The cornerstone value adopted by this paper is that inspired by the liberal theorist Will Kymlicka. To exercise true autonomy, Kymlicka maintains, individuals must have access to their own culture. For all children whose religion forms an intrinsic part of their culture, access to religious schools is therefore necessary in order to render meaningful the life options from which they can choose. Yet just as great care must be exercised to ensure that majoritarian values are not imposed on social minorities, New Zealand's liberal-democratic framework requires that children are not trapped within their culture. Thus, while the state has an obligation to fully fund religious schools that consent to integrate into the state system, it is justified in limiting integration only to those schools that expose children to an 'objective' or 'critical' mindset.

If this proposal is implemented, it will give rise to an education system in which culturally and religiously appropriate education is available to all. Such a finding has important implications for the matter of whether religious instruction and observances are justified in state schools. Once the interests of those whose religion is integral to their culture are accommodated, the strongest argument for allowing

religious activities in state schools is addressed. If the cultural needs of religious groups are met by fully funding integrated schools, then their interests cannot justify infringing upon those of children and guardians who do not share their beliefs. In the absence of an alternative justification, religious instruction and observances should be prohibited in state schools.

Ultimately, then, the question of whether God should be expelled from New Zealand schools receives a bifurcated answer. On the one hand, religious instruction and observances ought to be excluded from state schools. On the other hand, such activities should be allowed in prescribed circumstances in integrated schools, and the viability of those schools ensured through full funding. In this way, the state can best ensure the promotion of individual autonomy in a diverse society.

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