LORRAINE JOHNS

THE FREE EXPRESSION OF NEW ZEALAND SCHOOL STUDENTS

LLM RESEARCH PAPER

FREEDOM OF EXPRESSION (LAWS 520)

LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

2005

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ABSTRACT

This paper looks at the issue of student expression in New Zealand schools. The inquiry is based around section 14 of the New Zealand Bill of Rights Act 1990 which affirms the right to free expression. However, the Human Rights Act 1993 is also referred to where the restriction upon expression also relates to a prohibited ground of discrimination. The paper divides its general topic into the two categories of conduct and speech-related expression. Its main focus is expressive conduct which essentially constitutes issues concerning uniform policies and dress codes. The principal concern here is the issue of gender and school clothing and appearance policies, as this important matter has received little consideration in the New Zealand context. In order to properly analyse this issue, the paper first considers the preliminary matter of the relationship between expression, conduct, and section 14, an area in which the law in New Zealand is relatively undeveloped. Furthermore, given that the Bill of Rights has not as yet been judicially applied in the school context, this paper hypothesises as to how a court might potentially deal with such issues. A principal finding is that the standard *Moonen* test for the Bill of Rights might be altered due to the 'special characteristics' of the school environment and overseas jurisprudence. Another principal finding of this paper is that even in light of the altered *Moonen* test, gendered school uniform or dress code policies do not generally constitute a justified limitation on student expression. Some options for reform are raised including legal education seminars for school trustees, and in particular, the paper advocates the establishment of an Education Review Tribunal.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography, and appendices) comprises approximately 16 968 words.

I *INTRODUCTION*

> Ever since the United Nations invented another of its meaningless "declarations", and certainly since some Government created the office of Commissioner for Children, we are regularly belaboured by misty-eyed functionaries with bleatings about "the rights of the child"...It's long past time we shucked off the victim mentality and understood that those children who are suspended from school have been so treated because their behaviour has made them a threat to the institutions charged with their education...That such things as uniform irregularities and non-approved hairstyles are not "minor breaches" but are destructive of discipline and school spirit.[1]

This may be a little blunt, but after all, it is just common sense. Children and rights? Granted, in modern times there may be a few: food, shelter, and life spring to mind. And education. But education is also a privilege, and bears responsibilities. Absolute obedience to school rules and authorities is one of them. So, children and rights? An oxymoron if ever there was one, or so the argument goes...

Do we really live in a society with such an appalling lack of tolerance for student dissent? After all, ours is a democratic country where the courts have continuously reaffirmed the fundamental importance of those rights which enable and protect such dissent. This brings to mind the New Zealand Bill of Rights Act 1990, and section 14, freedom of expression, of that particular piece of legislation. The passage of this Act was applauded in part for its potential impact on public decision-making processes, requiring them to be fairer and better. It recognises that adults in power do not always make proper decisions in relation to those their decisions affect, and parliament has pinpointed the unjustified restriction of free expression as one such illegal outcome. The young, not just the old, may be affected by bad decisions.

School policies and practices may not just prevent students from expressing their opinions. School rules can also stop students from expressing their identity. They can even force students to express themselves in a manner that conflicts with this identity. School policies can be sexist or racist. They can also fail to take cultural or religious differences into account. In other words, school policies can potentially be very wrong. So are we really all that ready to impose an age restriction on the

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[1] Garth George "Here's a revised declaration of the rights of the child" (5 August 2004) *The New Zealand Herald* Auckland.

application of section 14? For if young people cannot freely express themselves at school, their opportunity to do so is radically curtailed, given the dominance of educational institutions in their lives.

This paper argues that it is time to fully recede from the traditional acceptance of the Dickensian absoluteness of school authority. For it seems logical to suppose that many of those who currently make school rules would have had this type of scholastic experience, albeit a less extreme version, and their impressions of the nature of school authority and the rules they prescribe may reflect this. This paper is written because the free expression of students is worth protecting and because young people are more vulnerable than adults when it comes to the abrogation of their rights. The age of students varies, but in their final year, many will have reached their eighteenth birthday, and will have highly developed characters, opinions, and ideals. Forcing these young people to conform to rules which may unjustifiably limit their expression and impede the development of their potential is not something that should be done lightly or on the basis of the gross generalisation that all student dissent is necessarily detrimental to the running of a school.

This paper does not argue that such dissension is always beyond reproach, but it does suggest that sometimes it may be, and a means by which a line may be drawn is sorely needed. It therefore attempts to set out a basis on which school policies which affect expression may be assessed for their compliance with basic human rights law.

II STRUCTURE AND CONTENT

Identifying and evaluating the restriction of free expression in schools is the central concern of this paper. Structurally it adopts a bipartite approach, commencing with issues of conduct-related expression, and concluding with those of speech-related expression. The first section is composed of two essential issues: school uniform policies, and more generally, the regulation of appearance through dress codes. Gender issues are the focus here. The second section covers some important free speech issues. More time is spent considering conduct-related issues as both the probable legal position and normative viewpoints are perhaps less clear than for speech issues, and also appear to have been subjected to less academic scrutiny. The final concern of this paper is with suggestions for reform.

There does not appear to be any real discussion regarding the expression of school students in New Zealand case law. As such other jurisdictions will be referred to with respect to the light they throw on particular issues, particularly the United States, as substantial judicial exploration of student expression has taken place there. The main sources of New Zealand academic commentary on free expression in schools are publications by Bill of Rights expert, Paul Rishworth. As research on this specific area in New Zealand is extremely limited, this paper must draw its academic commentary on the New Zealand context almost entirely from Rishworth.

III SCHOOLS IN NEW ZEALAND

A snapshot is now taken of the legal framework within which New Zealand schools operate. This includes setting out their composition, the source and scope of their powers, their rule-making procedures and practices, and the limitations on their power to make rules.

A Composition and Framework

There are different institutional frameworks available to schools in New Zealand. Primarily, education is organised in the form of Kura Kaupapa Maori, state, integrated, designated character, or private schools.[2] These schools are also categorised by student age.[3] The focus of this paper is the state school as it has been delegated relatively less statutory authority to regulate student conduct. In comparison, the Education Act 1989 (Education Act) enables certain other schools to impose particular requirements on students which relate to the special character of the school as a condition of admittance. These have the potential to operate as state-sanctioned limitations on the free expression of their students.[4]

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[2] See Appendix I for a glossary of these terms.

[3] Principally as primary, intermediate, or secondary level schools, and sometimes a combination of two or all three of these groups (known as composite schools).

[4] See for example sections 155 and 156 of the Education Act 1989, the Private Schools Conditional Integration Act 1975, as well as section 58 of the Human Rights Act 1993. As the New Zealand Bill of Rights is not supreme law, such legislation will stand even when one consequence of this may be to unjustifiably limit student expression. Thus, state schools are a logical starting point for this inquiry. There is no reason to suppose, however, that the Bill of Rights does not apply to all types of school, as it would seem that all schools are serving a public function of delivering education under statutory authority and regulation (see n 10). Nevertheless, the situation of private schools is less clear because they provide an education within the terms of the enrolment contract that students and parents sign and do not have to follow many rules of the Education Act 1989.

B State Schools and their Powers

State schools derive their power and authority from legislation. The principal statute is the Education Act. They are established by the Minister of Education and must have a Board of Trustees.[5] They are run by their Board which is made up of members of the school community.[6] At least three members of the Board must be parents of students currently enrolled, and must be elected by parents of students.[7] Where schools have pupils that are enrolled full-time for classes above form three, then Boards must also have one student representative.[8] Boards meet regularly to discuss school matters, make decisions, and hear submissions, suggestions and complaints from members of their community, including students and their parents.[9] School rules are formulated and passed at these meetings.

Section 75 of the Education Act provides that, "Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school's Board has complete discretion to control the management of the school as it thinks fit." This includes the New Zealand Bill of Rights Act 1990 (BORA).[10] The principal concern of this paper is section 14 of the Act, which affirms the right to free expression which includes, "the freedom to seek, receive, and impart information..." New Zealand is also a signatory to The United Nations Convention on the Rights of the Child 1989 which allows young people the right to free expression in a similar manner to the BORA.[11] Section 14 is not the only tool by which a student's expression might be

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[5] Education Act 1989, ss 146 and 93 respectively.
[6] Education Act 1989, s 94. See generally Part 9 of the Act which sets out all matters relating to the constitution of the Board.
[7] Education Act 1989, s 96.
[8] Education Act 1989, s 94(1)(f).
[9] YouthLaw "School Powers and Obligations: How do schools make rules?" <http://www.youthlaw.co.nz/default.aspx?_z=73#_Toc12785808> (last accessed 21 August 2005).
[10] Note that the BORA will apply to rules and policies drawn up and implemented by school boards under s 3(b) which provides that the BORA applies to acts done "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."
[11] Article 13 states that:
1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others; or
(b) For the protection of national security or of public order (ordre public), or of public health or morals.
Article 28 also stipulates that school discipline must be exercised in conformity with the Convention.

protected. It may also be protected under the Human Rights Act 1993 (HRA), when the restriction upon expression also relates to a prohibited ground of discrimination.[12] Therefore, where appropriate, this paper also considers the application of the HRA to free expression issues discussed.

Rules made under section 75 must also be in harmony with national education guidelines (NEGs), which include the publication of national administrative guidelines (NAGs).[13] Under section 60A NAGs "set out statements of desirable codes or principles of conduct or administration for specified kinds or descriptions of person or body", as well as broad requirements for community consultation, particularly that of a school's Maori community.[14] By way of example, NAG 5 stipulates that schools must provide "a safe physical and emotional environment for students". Furthermore, section 61 of the Act requires schools to have a charter and section 63 obliges Boards to comply with the charter when they manage the school.[15] Under section 61(2):

> The purpose of a school charter is to establish the mission, aims, objectives, directions, and targets of the Board that will give effect to the Government's national education guidelines and the Board's priorities, and provide a base against which the Board's actual performance can later be assessed.

Under section 63B once a school charter or updated charter takes effect, the Board must make the charter available. How this may or should be done is not specified.[16] Schools' charters are intended to represent a single planning document which must be reported on yearly to the Ministry of Education in the school's annual report, where a school presents its evaluation of its progress against its planned objectives.

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[12] Bill of Rights Act 1990, s 19.

[13] National education guidelines otherwise include both national educational goals (essentially statements of desirable achievement or government policy objectives in respect to the school system) and national curriculum statements (essentially areas and levels of knowledge and skills to be developed by students). Section 60A of the Education Act 1989 governs the application of the guidelines and they may be obtained from the website of the Ministry of Education, <http://www.minedu.govt.nz> and are also published in the *Gazette* <http://www.edgazette.govt.nz/>.

[14] Education Act 1989, s 60A(1)(c)(i) and (1)(c)(ii)(C) respectively.

[15] Note that section 61(3)(a)(1) specifically requires schools to have a section which addresses the government's "aim of developing, for the school, policies and practices that reflect New Zealand's cultural diversity and the unique position of the Maori culture". This is similar to National Education Goal 10 which stipulates that schools must demonstrate "Respect for the diverse ethnic and cultural heritage of New Zealand people, with acknowledgment of the unique place of Maori, and New Zealand's role in the Pacific and as a member of the international community of nations."

[16] However, the Ministry of Education notes that more and more schools are choosing to make their charters available on their school websites, "Planning and Reporting – Frequently Asked Questions" <http://www.minedu.govt.nz/index.cfm?layout=document&documentid=5133&data=l#P3_104> (last accessed 17 September 2005).

IV SO WHAT CONSTITUTES EXPRESSION?

When it comes to school students, what counts as expression? Writing about a 'boner' in an English essay? Donning a pair of shorts rather than the regulation skirt? Wearing earrings? At the outset of this paper it was suggested that expression may be divided into two categories of 'speech' and 'conduct'. These two concepts must be distinguished because while all speech is expression in New Zealand, it may be that not all conduct amounts to expression in the eyes of the law. As this paper focuses on issues of student expression described as 'conduct', time is now taken to explore the relationship between conduct and expression, starting with what is known about conduct in the New Zealand context and working outward from there.

A Conduct and Expression in New Zealand

Rishworth states that in New Zealand, "symbolic expression is within the protection of the right, and may include actions or physical conduct."[17] This is particularly so given the wording of section 14 which includes expression, "of any kind in any form". Certainly, there are some New Zealand cases in which conduct has been accepted as being within the scope of section 14. However, in each of these cases there is little or no consideration of the fact that it is conduct, not speech, that is the subject of the section 14 inquiry.

First, in *Geiringer v Police*, a student lay down in front of a ministerial car, apparently with the intent of preventing the Minister of Labour from leaving the student protest which was being staged.[18] Geiringer was charged with disorderly conduct and section 14 of the BORA was relied upon in his defence. The judge accepted section 14 was in issue although the student's conviction was upheld as a justified limitation.[19] He specifically stated that, ".....I accept there are other methods

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[17] Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 313.

[18] *Geiringer v Police* [1990-92] 1 NZBORR 331 Holland J.

[19] In fact, Rishworth suggests that this case was misconceived as a case concerning free expression. See Rishworth, n 17, 313. His precise rationale for this is unclear, although it seems to be based on his statement that, "if the mere existence of an expressive component brings conduct within the protection of the right, then the right is rendered meaningless." Why Geiringer's conduct should be excluded on this basis is unclear, as it occurred in the context of a protest, which arguably makes it more important to protect as expression. Nevertheless, this statement may be influenced by Justice Holland's understanding of Geiringer's intent. Justice Holland adopted the analysis of the trial judge who stated that, "It is clear, in my view, that the purpose of Mr Gieringer [sic] lying down in front of the car was in order to prevent the car from leaving. It was, of course, a political protest as he says but the purpose of the protest was to prevent the vehicle leaving and thereby make a point, and also continue, if possible, the debate...It is clear, in my view, both from Mr Gieringer's statement and from the

of expression other than mere speech..."[20] Then, in *Zdrahal v Wellington City Council*, the court implicitly accepted that the placement of swastikas on an outside window and wall of a house was expression.[21] The main concern of the case related to whether there had been a breach of section 322 pf the Resource Management Act. However, Zdrahal also argued that the swastikas were a manifestation of his section 14 and 15 rights, and the court simply noted that, "There was no dispute that the Bill of Rights Act applied in this case to the application of s 322 of the Act...", focussing rather on the justified limitation of the right under section 5 of the BORA.[22]

Next, the application of the Bill of Rights to disorderly conduct was also referred to in the High Court and Court of Appeal judgements in *Ceramalus*, a case involving a man who walked down a street naked. At High Court level the judge ruled that, "Any freedom of expression guaranteed by virtue of the Bill of Rights Act cannot stand against an express prohibition contained in a Statute."[23] As such, the judge appears to have accepted that Ceramalus' conduct fell within the scope of section 14, though this did not change the outcome. Similarly, the Court of Appeal ruled with respect to the Bill of Rights and in particular freedom of expression, "The considerations to which Mr Ceramalus alludes are already inherent in the established test..."[24] Again, the Court seems to accept here that conduct is within the scope of the section 14 right, though this is not as clear as in *Geiringer*.

Then in *Hopkinson v Police*, flag burning was found to be within the ambit of the section.[25] The court ruled that, "there cannot be any doubt that prohibition of the appellant's conduct is prima facie a breach of his right to freedom of expression. The scope of the right is broad and it is well established that it includes non-verbal conduct

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evidence of the others, that his purpose in lying down in front of the car was to prevent it from leaving". On this basis Justice Holland simply affirmed that Geiringer's purpose was to "prevent the car from leaving" (341). As such, is possible to interpret this statement as understanding Geiringer's conduct in isolation and as a protest separate from the 'real' protest, although surely the better view would be to understand it as part of the process of the political protest.

[20] *Geiringer*, above n 18, 345. In accepting this the judge relied on the Canadian case of *Retail, Wholesale and Department Store Union Local 580 et al v Dolphin Delivery Limited* (1987) 33 DLR (4th) 174, quoting the principal judgment of the Supreme Court as delivered by McIntyre J who stated at 187 that, "Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression."

[21] *Zdrahal v Wellington City Council* (16 December 1994) HC WN AP99/93 Greig J.

[22] *Zdrahal*, above n 21, 16.

[23] *Ceramalus v Police* (27 October 1995) HC AU AP131/95, 9 Morris J.

[24] *R v Ceramalus* (17 July 1996) CA14/96, 6-7 Thomas J.

[25] *Hopkinson v Police* [2004] 3 NZLR 704.

such as flag burning".[26] Finally, in *R v Phillips*, the court once again considered the application of section 14 to disorderly conduct when a protester threw a plastic bag holding light debris at the car of the Australian Prime Minister.[27] In considering *Ceramalus*, the court stated that:[28]

> While the District Court judgment did not expressly refer to the right to free speech, and the need for its protection, the Judge's consideration of the line of cases upholding the right of political protest indicate that this value was clearly in his mind. It was open to him thereafter to focus his consideration on whether the nature of the conduct was…covered by the offence…

The communicative function of conduct is also something that has been the subject of consideration in hearsay cases. *Cross on Evidence* tells us that hearsay rule states that, "an assertion other than one made by a person while giving oral evidence...in the proceedings is inadmissible as evidence of any fact asserted."[29] Significantly for our purposes, in New Zealand "The rule applies to all kinds of assertion, whether made orally, in writing, or by conduct."[30] The clearest case of conduct as hearsay is where sign language is used, and another, albeit less direct case, is the re-enactment of a crime.[31] This reinforces the understanding set out above of conduct as expression

However, it is also evident from the cases outlined above that New Zealand has yet to draw a clear distinction between speech and conduct as expression in the context of the BORA, and moreover, to delineate between degrees of conduct, particularly with regard to the concepts of 'expressive' and 'non-expressive' conduct. As this has been the Canadian experience, this paper takes time now to explore the idea of conduct as expression in more depth. This is particularly important as New Zealand has often looked to the Canadian Charter of Rights tradition in interpreting its own Bill of

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[26] *Hopkinson*, above n 25, 711. In fact, the court relied on Rishworth's statement that, "burning a New Zealand flag 'with the intention of dishonouring it' is clearly expression, and its prohibition is a serious infringement on the right to freedom of expression: the very purpose of the prohibition is to compel respect for a political symbol." above n 19, 313-4.
[27] *R v Phillips* (14 March 2005) CA430/04 McGrath J.
[28] Phillips, above n 27, Para 11.
[29] Rupert Cross and Others, *Cross on Evidence: The Original Text by Rupert Cross* (LexisNexis, Wellington, 2005) 614
[30] Cross, above n 29, 614
[31] Cross, above n 29, 638. In respect to the former see *Chandrasekera v R* [1937] AC 220. In this case the accused was charged with the murder. Before the victim died she was asked who attacked her and she made signs indicative of driving oxen then pointed at a police officer and made signs of slapping her face. These signs were immediately interpreted as referring to the accused who drove oxen and had previously slapped a police officer's face. In respect to the latter see *Collins v R* (1980) 31 ALR 257.

Rights[32] As this paper looks at issues of clothing and appearance, the argument ultimately needs to be made that these are at least examples of expressive conduct and therefore fall within the ambit of section 14.

B The Overseas Experience

Section 2(b) of the Canadian Charter of Rights and freedoms protects "freedom of expression" whereas the First Amendment to the United States Constitution protects "freedom of speech".[33] The two jurisdictions are considered separately here because there are important differences in their approaches to interpreting their respective rights. This section is not intended as a comprehensive discussion of the relationship between conduct and expression. Rather it hopes to outline some of the problems that have resulted from the ways in which countries with a longer Bill of Rights tradition than ours, America and Canada, have included conduct within the scope of their rights. The Canadian approach is particularly likely to impact on the degree to which section 14 of the New Zealand BORA would protect issues of student conduct-related expression in the future, if such issues are litigated.[34]

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[32] For example, the seminal Canadian case of *R v Oakes* [1986] 1 SCR 103, has greatly influenced the approach of the New Zealand courts in interpreting the New Zealand Bill of Rights. In fact, the BORA itself was based on the Canadian Charter of Rights and Freedoms, a fact which has been recognised by the Canadian Department of Justice, which states on its website that "The *Charter* has been used as a source of guidance by other countries when drafting their own bills of rights. For example, the wording and structure of the New Zealand *Bill of Rights Act*, 1990 was strongly influenced by the *Charter*..." and the department also points out that New Zealand courts have subsequently used Charter decisions from Canadian courts <http://canada.justice.gc.ca/en/news/fs/2003/doc_30898.html> (last accessed September 24 2005). In fact, Lord Cooke expressly acknowledged in *Ministry of Transport v Noort* [1992] 3 NZLR 260, 269, that "...New Zealand may be able to learn from the Supreme Court of Canada. They have had much more experience than the New Zealand Courts in dealing with declarations of rights..." and this seems indicative of the New Zealand experience thus far.

[33] Note that the first ten amendments to the United States Constitution constitute the United States Bill of Rights, which therefore includes the right to free speech. The provisions of the Bill apply to both Federal and State governments, although not all provisions apply to the latter. Certainly freedom of speech is one provision that does apply to both Federal and State governments.

[34] At its conclusion, this paper discusses the establishment of an Education Review Tribunal. While concerns of money and time currently deter potential litigants from seeking judicial review of school rules and policies in the High Court, if such a Tribunal is set up then matters involving section 14 of the BORA are more likely to receive judicial attention in the New Zealand context.

1 The United States

So what is the difference between conduct and speech? Do actions really speak louder than words when they come before the courts? This is addressed by Loewry who summarises the American position stating that:[35]

> Ascertaining what is "speech" is one of the thornier First Amendment problems. Two principles, however, are clear...: (1) Some spoken words are not constitutionally protected speech, and (2) some symbolic conduct is constitutionally protected speech. To illustrate, Justice Holmes' classic shout of "fire in a crowded theatre" is treated as conduct, while wearing black armbands to school to protest the Vietnam War is treated as speech. In determining when words should count as speech, there are two basic approaches. One is to treat virtually all words as speech, but permit punishment when the state presents a good enough reason for inflicting it. Under this approach, known as "*ad hoc* balancing," shouting "fire in a crowded theatre" would qualify as speech, but the state's compelling interest in preventing panic would permit the state to punish it. Under the other approach, known as "definitional balancing," intentionally causing, or attempting to cause, a panic is not constitutionally protected speech at all.

This approach seems a product of the conceptual problems posed by having a right which protects "freedom of speech" rather than "freedom of expression".[36] In America, both spoken words and conduct may therefore constitute 'speech', and it will be a matter of assessing the merits of the expression in question in determining whether it is protected. For example, in *Tinker v Des Moines* a group of students wore arm bands to school in protest of the Vietnam War.[37] Their schools adopted a policy that any student who refused to remove an armband would be suspended. The court ruled that the conduct "...was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[38]

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[35] Arnold H Loewy (1994) "Distinguishing Speech From Conduct" 45 Mercer L R 621, 621. In this extract Loewry refers to the basic 'categorisers/balancers' debate as to whether First Amendment jurisprudence should utilise strict categories or flexible balancing tests. See generally Wallace Mendelson (1964) "The First Amendment and the Judicial Process: A Reply to Mr. Franz" 17 Vand L R 479.

[36] See for example, Kent Greenawait (1992) "Free Speech in the United States and Canada" 55 Law and Contemporary Problems 5, 7, who states that differences in constitutional language "might be expected to yield variances in judicial approach".

[37] *Tinker v Des Moines* (1969) 393 US 503 Fortas J.

[38] *Tinker*, above n 37, 505-6 Fortas J. The school attempted to argue that the restriction was reasonable in order to prevent disturbance of school discipline, to which the Justice Fortas replied that "...the

However, in *United States v O'Brien*, another case involving protest against the Vietnam War, the Supreme Court upheld a conviction for burning a draft card, "despite not only the importance of the expression in question, but also the government's obvious interest in suppressing that message by the means of the law prohibiting the destruction of draft cards."[39] O'Brien argued that his act was one of "symbolic speech", and the court answered that, "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea", though they did not expressly rule on this point, preferring to assume that, "the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment."[40] In upholding O'Brien's conviction the court then stated that:[41]

> ...when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest regulating the nonspeech element can justify incidental limitations on First Amendment freedoms...we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged...freedoms is no greater than is essential to the furtherance of that interest.

O'Brien was elaborated on by the Supreme Court in *Spence v Washington*, which ruled that activity must be "sufficiently imbued with elements of communication" to fall within the First Amendment.[42] In that case "...the nature of the appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected

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wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it." (503).

[39] Rishworth, above n 17, 313.

[40] *United States v O'Brien* (1968) 391 US 367, 376 Warren J.

[41] *O'Brien*, above n 40, 376-7 Warren J. Note that in upholding O'Brien's conviction, the court found that "The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted." (382).

[42] *Spence v Washington* (1974) 418 US 405, 409, *per curiam*. In this case Spence attached a peace symbol to a United States flag which he then hung from the window of his apartment. Under the state's penal code it was an offence to exhibit a United States flag that had a symbol attached to it.

expression."[43] The judgements in both *O'Brien* and *Spence* were affirmed in *Texas v Johnson*, where Justice Brennan ruled that when there is a sufficiently communicative element and if the regulation is not related to the suppression of free expression, the "less stringent standard set out above in *O'Brien* for regulating 'non-communicative' conduct applies".[44] He also stated that, "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[45]

Johnson indicates that whether conduct has a 'sufficiently communicative' element is a question of fact and degree. Also troublesome is the *O'Brien* idea of a lower threshold for limiting expression that has a 'non-communicative' element at which the restriction is apparently aimed. Rishworth notes that in respect to expressive conduct, the American experience following *O'Brien* is that "the limitation of the right will usually be considered reasonable and demonstrably justified in the circumstances."[46] Moreover, the test is conceptually problematic as demonstrated by *Madsen v Women's Health Centre*, where the state and federal courts took different views of the speech restriction, one viewing it as content-neutral and the other as content-based.[47] Jacobs also points out that content-neutral restrictions can moreover hide viewpoint discriminatory motivations and have strong content-based effects.[48]

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[43] *Spence*, above n 42, 409-10 *per curiam*. By this statement the court means that Spence's conduct was within the scope of the right. They then considered whether the law constituted a justified limitation on Spence's right and decided it did not.

[44] *Texas v Johnson* (1989) 491 US 397, 403 Brennan J. Johnson burnt a United States flag in protest against the policies of the president of the United States. The court then noted that if the restriction on the conduct is related to the suppression of speech the court must apply a stricter standard, although this will depend in turn on the value of the category of speech that is being restricted. Note also that a doctrine of secondary effects (relating to the spoken word) has developed in the United States which operates much like the expressive-conduct doctrine and "... exempts from strict scrutiny government regulations of speech that are indeed based on the speech's content, but are not aimed at suppressing speech." See Ofer Raban (2000) "Content-based, secondary effects, and expressive conduct: What in the world do they mean (and what do they mean to the United States Supreme Court)?" 30(2) Seton Hall L R 551, 552.

[45] *Texas*, above n 44, 406 Brennan J.

[46] Rishworth, above n 17, 313. This is supported by Greenawait, above n 36, 26, who states that "The Supreme Court and other courts using the *O'Brien* standard in the various areas to which it has now been applied almost invariably end up approving the government's restrictive action".

[47] *Madsen v Women's Health Centre* (1994) 114 SC 2516. This case concerned anti-abortion protesters who challenged the constitutionality of an injunction by a Florida court which prevented them from protesting in certain places. See Nina Kraut (1995) "Speech: A Freedom in Search of One Rule" 12 TM Cooley L R 177 who argues against the rule as formulated in *O'Brien* and in favour of a 'one-test' rule for both speech and conduct once the conduct has been deemed to be within the scope of the right.

[48] Leslie Gielow Jacobs (2003) "Clarifying the content-based/content neutral and content/ viewpoint determinations" 34(3) McGeorge L R 595, 598-9. Viewpoint neutrality refers to the idea that government may not favour or disfavour particular messages in the private marketplace of ideas.

In this respect Huhn states that "...it is not always possible to classify a law as purely content-based or purely content-neutral. Many laws regulating expression - perhaps most such laws - are both content-based and content-neutral."[49] He continues that although First Amendment doctrine remains unsettled, "the Court is moving away from categorizing laws affecting expression as purely "content-based" or "content-neutral," and is instead attempting to measure the value of the ideas being suppressed and the importance of the reduction in the opportunity for expression."[50]

2 *Canada and the scope of expression*

The Canadian court in *Irwin Toy* ruled that "Expression has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content."[51] The court then attempted to distinguish between expressive and non-expressive conduct, stating that:[52]

> ...while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees.

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[49] Wilson R Huhn (2004) "Assessing the constitutionality of laws that are both content-based and content-neutral: the merging constitutional calculus" 79(4) Indiana L J 801, 806. In his article he argues that a "constitutional calculus" is a better method of analysing free speech issues, but that the Court should still retain the outcome-determinative categorical distinction that viewpoint-based laws suppressing speech are unconstitutional.

[50] Hunh, above n 50, 854.

[51] *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927, 968 Dickson CJ and Lamer and Wilson JJ. This case concerned a law which prohibited commercial advertising directed at children less than 13 years of age. While the advertising was found to be within the scope of the right, its restriction was a "reasonable limit" under section 1 of the Charter (1000). The Court in *Weisfeld* affirmed the rule in *Irwin Toy* and continued that, "Our Charter guarantees freedom of expression, not merely freedom of speech. Even in the United States, where the First Amendment to their Constitution guarantees only freedom of speech, the courts have developed a concept of expressive conduct which amounts to free speech." *Weisfeld v Canada* (1994) 22 CRR (2d) 1, 26 Linden J. In this later case the state dismantled a Peace Camp which the appellant and others had erected on Parliament Hill to protest cruise missile testing in Canada. The court agreed that the conduct came within the prima facie scope of the section 2(b) right, but found that the actions of the state constituted a justified limitation.

[52] *Irwin Toy*, above n 52, 969 Dickson CJ and Lamer and Wilson JJ. As such a distinction between speech and conduct becomes less important, a point which is supported by Greenawait, above n 36, 25 who points out that "since all language is symbolic saying where ordinary speech ends and symbolic speech begins is somewhat artificial".

Surely though, the mere parking of a car is expressing exactly that you intend to park the car and park it in that particular place. This may be expression that does not readily lend itself to either a depth or visibility meaning, yet it still communicates information (though this may be viewed as incidental to the real purpose for parking the car). In this respect Rishworth notes that, "virtually all conduct can be said to have an expressive component."[53] The question is whether the presence of an expressive component should always bring conduct within the protection of the right. In this respect, the Court in *R v Butler* explained the dicta in *Irwin Toy* by emphasising the difference between "purely physical" activity and "physical activity" which has an expressive conduct, the latter being within the protection of the right.[54] Of course, even if the expression is within the scope of the right, it may still be restricted as a justified limitation under section 1 of the Charter.[55]

The Canadian approach of including all expressive conduct within the ambit of the right may seem logical as any initial exclusion (such as the American approach allows) appears to prejudge (and circumvent) the section 1 analysis, which is set up to balance the importance of the expression with the importance of the objective.[56] However, the problem is that with a more generous interpretation of the scope of the right, the balancing test under section 1 of the Charter has subsequently been relaxed, making it easier for a restriction to be judged reasonable.[57] In fact, it has been argued that the concept of 'minimal impairment' now "seldom plays anything more than a

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[53] Rishworth, above n 17, 313.

[54] *R v Butler* [1992] 1 SCR, 452, 486 Sopinka J. The court then explained that parking a car is an example of pure physical conduct when it is performed as a day-to-day task. In this case the accused was charged with selling obscene material in contravention of the Canadian Criminal Code.

[55] Section 1 of the Charter provides that rights and freedoms of the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The current approach to interpreting section 1 is based on *R* v *Oakes*, n 32, 138-140.

[56] Specifically, under the United States approach some balancing occurs when defining the scope of the right as America employs a greater content-based categorisation of expression. This is mainly due to the lack of an express limiting provision in the United States Constitution, unlike Section 1 of the Canadian Charter or section 5 of the BORA, although Canada also engages in a minimal contents-based analysis, excluding expression which is communicated in a physically violent form. See Eugene Volokh (2005) "Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones" 90 Cornell Law Review 1277 for a criticism of the content-based approach to scoping out the ambit of the right.

[57] Peter Hogg (1990) "Interpreting the Charter of Rights: generosity and justification" 28 Osgoode Hall L J 817 who hypothesised that *Irwin* could have this effect on the Charter. See also Timothy Macklem and John Terry (2000) "Making the justification fit the breach" 11 Supreme Court L R 575.

formal role in the court's section 1 analysis."[58] Justice Rothstein has specifically stated that:[59]

> In recent years, the Supreme Court, in such cases as *RJR-MacDonald* and *Libman*, has adopted a more flexible approach to the minimal impairment test. If the law falls within a range of reasonable alternatives, it will not be found to be overly broad simply because another alternative might be less intrusive than the one selected. Thus, some leeway is accorded to the legislator in the selection of policy options enacted into legislation.

As suggested above, this relaxation of the *Oakes* test is not simply due to a desire to defer to the judgment of the legislature when policy considerations are at stake, but is specifically driven by opening the prima facie scope of the right to include all forms of expression. These observations, particularly in light of their potential impact on the New Zealand situation, are important to keep in mind as this paper now formulates a legal test for applying section 14 in the school context.

V MOONEN AND THE SCHOOL CONTEXT

The current New Zealand balancing test for interpreting the BORA was identified by Justice Tipping in *Moonen*, a case which specifically concerned the application of section 14 of the BORA.[60] The parts of the test relevant to this paper are as follows: At the outset the scope of the right must be determined. If the expression is within the ambit of the right, then the question is whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of section 5. First, the objective for which the rule was passed to achieve must be identified. Then its importance and significance must be assessed. In this respect the means by which it is achieved must be in reasonable proportion to the importance of the objective, should have a rationale connection to it, and *must interfere as little as*

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[58] Richard Moon (2002) "Justified limits on free expression: the collapse of the general approach to limits on Charter rights" 40 Osgoode Hall L J 337, 364. Moon specifically argues that this may be due to the fact that such judgements involve an uncertain assessment of the 'relative value/harm' of the expression, which has resulted in courts deferring to the judgement of the legislature. See also Errol Mendes (2005) "The crucible of the Charter: judicial principles v judicial deference in the context of section 1" 27 Supreme Court L R 47.

[59] Marshall Rothstein (2000) "Lecture Section 1: Justifying Breaches of Charter Rights and Freedoms" 27 Man L J 171, 178. Note that Rothstein does not relate this relaxation of the *Oakes* test under section 1 of the Charter to a broadening of the prima facie scope of the right to allow all expressive conduct *prima facie* protection.

[60] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 Tipping J. This case concerned the meaning of "objectionable" under the Films, Videos, and Publications Classification Act 1993, the publications in question being stories concerning sexual activity between men and boys as well as photographs of children, mostly boys.

possible with the right. The limitation involved must be justifiable in the light of the objective. It is for the party who is attempting to impose the restriction to show that it is justified. The question this section asks is whether this test is likely to be altered in light of its application to student expression in the school context, particularly when conduct-related expression is the subject of the inquiry.

To begin with, in determining the scope of the right, there must be a communicative element in the conduct.[61] In this respect Rishworth points out that where students complain about school rules "Realistically the conduct which is not intended to convey a meaning is not going to be made the subject of complaint and litigation."[62] Certainly, if the broad and inclusive approach of the Canadian courts is followed, then issues of conduct-related expression in schools would most likely easily fall within the scope of the right. Nevertheless, if regard is had to the approach of the American courts, there is the possibility of an assessment that such expression is not 'sufficiently communicative'. Then even if it is, there is also the possibility of a finding that the objective of the policy is aimed at regulating the 'non-expressive' aspect of the conduct, making it easier for the school to justify the restriction.

The first of these possibilities would serve to turn the focus of the inquiry onto the nature and value of the conduct at stake, and whether, for example, students are expressing themselves or intending to express themselves by donning a particular item of clothing or apparel, how extensively, and whether other people understand their conduct as expressive.[63] In this respect Rishworth reiterates that in relation to school dress codes, "In any particular case one will need to ask whether there is an expressive component to the item in question. It is possible that some cases may be

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[61] Paul Rishworth "Freedom of Expression by Students in Schools" in *School Discipline and Students' Rights* (Legal Research Foundation, Auckland, 1996) 38, 40. This is how Rishworth formulates the American approach. However, the specific question asked by American courts such as in *Spence*, is whether the expression is 'sufficiently' communicative, which would appear to be a higher standard.

[62] Rishworth, above n 61, 40

[63] Note that this paper does not examine the theoretical nature of communication in order to assess what sort of expression qualifies as 'expression', See for example Richard Moon (1985) "The Scope of Free Expression" Osgoode Hall L J 333 for such a discussion. Nevertheless, in the section immediately below this paper makes a prima facie case for appearance and clothing as 'sufficiently communicative' manifestations of expression. Clearly, when questions are asked pertaining to the intent of the conduct, whether it is expressive, who decides whether it is expressive, and whether an audience may perceive it as expressive (particularly an adult audience), this may pose problems for a student who wishes to argue that such conduct is within the *prima facie* scope of the right (for example the student who argues that their choice to wear two pairs of earrings rather than the schools regulation single pair of earrings, is a 'sufficiently communicative' manifestation of expression).

resolved at this stage".[64] Nevertheless, the approach of the New Zealand courts to conduct-related expression as outlined above would indicate that they are taking a very broad approach to the initial scope of the right, so such expression is unlikely to be excluded from the operation of section 14 at this stage.

Aside from this issue, realistically in applying *Moonen* in the school context, the focus will be on judging whether the limitation is a justified one. In this respect the Court in *Tinker* ruled that First Amendment rights are available to students but must be applied in light of the special characteristics of the school environment.[65] The question that is asked now is whether, like *Tinker* implies, a different balancing test might be used when assessing the application of section 14 to the school context in New Zealand, than the standard approach set out in *Moonen*.

Rishworth states that "the key question is likely to be whether or not the limitation on expression must be the "least drastic means" or at least a means reasonable capable of being chosen by the school to further its objectives".[66] This, he argues, will come down to how much deference a court believes it should pay to the primary decision already made by school authorities. The case of *Maddever* is demonstrative of the conservative approach of the courts toward 'interfering' in school disputes.[67] *Maddever* does not relate to free expression, but does set out some general principles with which courts will approach school disputes.[68] Justice Williams indicated that judicial review should rarely be undertaken in the context of the Education Act, stating that:[69]

> ...even in cases where pupils' rights are concerned it seems to me, with respect, that there is need for very considerable judicial caution. In the sensitive area of education there is a significant risk that the courts will, in administering judicial review, unwittingly impose their own views on educational issues when they have no special competence for that task and the legislature has made it tolerably clear that such matters

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[64] Paul Rishworth, Patrick Walsh, and John Hannon *Recent Developments in school Law* (New Zealand Law Society, Wellington, 2001) 41.
[65] *Tinker*, above n 37, 507.
[66] Rishworth, above n 61, 43. This comment was written before *Moonen* so was based around the previous BORA-interpretation case of *Noort*, above n 34, but no significant differences arise for the purposes of this section. Rishworth has also reiterated this point in subsequent publications after *Moonen* was decided, although perhaps not so clearly as stated here.
[67] *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478.
[68] The case concerned the review of a decision of the Board of Trustees to reject a complaint made by a pupil against the principal of the school.
[69] *Maddever*, above n 67, 507 Williams J.

> are not primarily judicial issues but rather issues of educational policy for school boards operating again the broad backdrop of the national educational guidelines.

Rishworth's alteration of the *Moonen* test is therefore compelled by the idea that "the proper judicial role is to allow leeway to the judgment made by primary decision-makers as to how schools should be run."[70] In fact, Rishworth points out that "the requirement of 'as little interference as possible with the right' repeats a mistakes in *Oakes* that the Supreme Court of Canada has long since corrected...it is always possible to conceive of a lesser limitation on a right...All that should be required is that rights are limited as little as reasonably possible in the circumstances."[71] Of course, the wording of the BORA does not expressly call for the least restrictive limitation to be imposed, but rather any that can be "demonstrably justified in a free and democratic society".[72] Ultimately, Rishworth argues that when matters affect student rights, the effect must most likely be "substantial" before a court will interfere.[73] Consequentially, not only is the *Moonen* standard relaxed, but in determining what is reasonable, deference is had to the judgment of the school.

Such a high threshold as outlined above would be difficult for students to surmount and might render their section 14 rights redundant, if indeed, a student and his or her parents should ever be brave enough to litigate under a test which is so unfavourably weighed against the protection of the student's expression. This relaxed *Moonen* test can be criticised for several reasons. First, the legitimacy of departing from the standard BORA test developed by the Court of Appeal in *Moonen* is questionable in of itself.[74] Furthermore, we are not considering deferring to the judgment of the legislature (identified above as partially compelling the relaxation of the *Oakes* balancing test in Canada) but that of Board members of a specific school.

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[70] Rishworth, above n 61, 46.
[71] Riswhroth, above n 17, 185.
[72] New Zealand Bill of Rights Act 1990, s 5.
[73] Rishworth, above n 61, 46.
[74] While at page 16 of *Moonen*, above n 60, Justice Tipping suggested that his approach would be "helpful" and that other approaches would probably lead to the same result (apparently leaving it open for different courts to use a different balancing test) this test has come to be accepted as the standard Bill of Rights test for New Zealand courts to use, whether or not it is applied rigorously in practice, and there should be compelling reasons before a court or other body retracts from the careful (careful by reason of the fundamental rights in issue) balancing test enumerated in *Moonen*, in order to take a more relaxed conceptual approach. At the very least, it should be left to the Court of Appeal to alter the test they developed in *Moonen*, rather than a lower court or judicial or quasi-judicial body.

Second, the philosophy underlying a deferral to the judgment of Schools is predicated on notions of Boards' representativeness and understanding of their community as making them better placed than a court to consider such issues. In this respect it has been said by one New Zealand court in relation to a Board's policy on hairlength that:[75]

> ... a school board comprised of parents, men and woman, presumably of the locality, in which the school is situated, with all their experience as parents and members of the board, thought it was necessary to prescribe hair length. And that this was a decision of recent date, modifying previously more stringent requirements, is a strong indication, we think, of an up to date assessment of desirability by people appropriate to hold such views.

But who do these people really represent and why are their views so persuasive? By way of example, the percentage of those elected onto boards in 2004 that identified as NZ European/ Pakeha was 76.1%.[76] When a complaint is brought, for example, by a Maori or Indian student that the school is unjustly restricting their cultural expression, will boards of predominantly Pakeha constitution always be best placed to judge what is 'desirable'? Section 60A of the Education Act in specifically requiring consultation of the Maori community by Boards might be interpreted as suggesting that this is not necessarily the case. For as will be seen in the examples below, such expression is restricted in the first place precisely because it goes against the taste of the majority. As the BORA accords individual rights, a majoritarian approach to fundamental freedoms is of course inconsistent with the rationale for having a Bill of Rights in the first place.

Moreover, in light of Justice William's comments above, surely the application of the fundamental rights contained in the BORA to the school context is precisely the sort of issue that is a judicial issue and not one of educational policy.[77] Board

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[75] *Edwards v Onehunga High School Board and Another* [1974] 2 NZLR 238, 244 Speight J. The conclusiveness of this "evidence" is apparently accepted despite the court earlier noting that even after the ordinance was passed, about 100 of the 500 boys at the school did not have hair that conformed to the regulation.

[76] Ministry of Education "Results of the School Board of Trustees Elections 2004" <http://www.minedu.govt.nz/index.cfm?layout=document&documentid=10211&indexid=6854&indexparentid=5611> (last accessed 24 September 2005).

[77] In the case Justice Williams indicated that he felt even when the rights of students were concerned that this would still be primarily a matter of educational policy not judicial concern.

members may not even know of the existence of the BORA let alone take it into account when formulating their rules.

Nevertheless, earlier this paper suggested that the Canadian approach to interpreting their Charter is likely to be influential when New Zealand comes to consider similar issues under our own Bill of Rights. As indicated above, the widening of the scope of the right to include 'expressive' conduct has arguably resulted in a relaxation of the interpretation of section 1 of the Charter, which in turn has been reinforced by the deferral of Canadian courts toward the legislature when it comes to applying the concept of 'least drastic means'. This would indicate that it is open to a New Zealand court to make such an alteration to the *Moonen* test in the school context as is proposed by Rishworth, that the limitation must simply be a reasonable one. This is particularly so if regard is had to United States jurisprudence.

Nevertheless this paper essentially takes the view that courts should be very careful before they adopt this alteration, as Rishworth indicates that not only may the test be lowered to a 'reasonable' limitation, but the judgement of Boards in determining what constitutes 'reasonable' may be definitive. First, while the student expression in question may be of little value to adults (it may make little difference to them at all), it may be extremely important to young people, and the test as formulated above seems to be set up to disregard their point of view. Second, the focus should really be on evaluating the objective the school identifies as underlying the rule or policy. Is the objective really a significant one? More importantly, is this objective really related to the restriction? Essentially it is somewhat naïve to assume that every school rule passed by Board members is related to pedagogical concerns let alone important ones.

There is no specific section in this paper to argue this point as it is something that is relevant at every stage of the analysis below. The objective in question and the means by which it is achieved may have no relationship, or a very minimal relationship, to the student expression that is being restricted, and this is not to mention the idea that the objective itself may in fact be devoid of merit, or even harmful. The focus should not then be on deferring to the school's judgment, but rather requiring them to explain and justify the steps they have taken in light of the objective. The point is that it may be that the expression in question is extremely important to the student and allowing it makes no real difference at all to school, except perhaps to clash with or offend the personal tastes of the adults who manage

the school. The fact that the role of Boards is to implement educational policy does not make their judgment in such matters beyond reproach, particularly when their decisions affect fundamental rights and freedoms for which they may have had little or no regard, and where their judgement is potentially affected by what, for example, staff consider is an appropriate way to dress from their own normative perspectives.

By way of demonstration, a century ago, appearance regulation in schools typically related to concerns of modesty and proprietary, the way that right-minded people should dress, and apparel such as make-up and adornments were excluded on this basis.[78] Nowadays, if you pick up a school prospective in New Zealand, you might still potentially find that the prohibition of, for example, make-up and body piercings, is related to concerns of propriety of dress (if indeed the school chooses to give any reason at all for this restriction). In respect to body piercings you might otherwise find that the restriction relates to health and safety concerns, equality of dress, reducing the impact of showy accessories, or lowering disruption caused by theft of the same. Nevertheless, some schools allow unlimited body piercings, others allow one pair of plain studs in the ears, and of course, some allow none, including piercings which are hidden beneath the clothes.

In 1998 a female student left school because her college would not allow her to wear her tongue stud (the school principal said she was concerned the stud would come out).[79] In 2002 another female student was expelled from school for the same reason and planned not to return to college.[80] This student was part of a group of 30 to 35 students from the same school who were locked out of the school when they tried to protest against school's piercing policy (the group that initially gathered outside the school was about 150 students strong) and the police were called as the smaller group of students marched into town (they were all later stood down).[81] The school allowed one plain stud in each ear. One college dean has said "Our students are allowed to wear beards, nose rings, dye their hair blue and tattoo their bums and I

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[78] See for example the American case of *Pugsley v Sellmeyer* (1923) 158 Ark 247, 254 where the school prohibited female students from wearing "face paint or cosmetics" and "clothing tending toward immodesty in dress" for exactly this reason.
[79] NZPA "Tongue-stud student to try polytechnic" (16 April 1998) *The Evening Post* Wellington, 2.
[80] Editorial "Josie's Stuck with it" (17 March 2002) *Sunday Star Times* Auckland, 10.
[81] Leah Haines "Civil libertarians join body-piercing row" (13 March 2002) *The Dominion Post* Wellington, 1.

can't see what effect it has on their learning."[82] It is incidences like these that suggest the focus and scrutiny of the section 14 interpretative test should continue to be on the party prohibiting the expression. Are schools really attempting to achieve an important educational objective with the policy, or are Board members, put bluntly, imposing their own conservative tastes in dress upon their students for no other reason than their own personal views of proprietary.

VI CONDUCT-RELATED EXPRESSION IN SCHOOLS

Rishworth states that "rules about appearance and dress code regulate conduct not speech."[83] This section considers issues relating to school uniforms and general appearance regulation. Because these are examples of expressive conduct, in light of the discussion above, some initial words are said about the importance of appearance-related expression to students.

A Expression and Appearance

Rishworth states that "...the weight of American law is that the appearance of a person, both as to clothing and hairstyle etc, is a matter of freedom of expression because, through appearance and clothing, students attempt to express themselves."[84] In considering whether restrictions on the clothing that can be worn impede students' ability to express themselves he continues:[85]

> Does a compulsory uniform rule restrict freedom of expression? The likely answer is yes, for the fact is that persons express themselves through clothes, and that this is essentially how the whole "marketing industry" associated with clothes works. You are what you wear, or at least that is what many people believe. Clothing also signifies belonging to groups, which again expresses something about a person. So, to require that students wear only the officially approved uniform is a restriction on their right to freedom of expression.

This indicates that students are communicating through their choice of clothing and apparel. In this respect the court in the American case of *Canady* stated that:[86]

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[82] "Facial hair not schools' concern, says college dean" (24 April 1996) *Evening Post* Wellington, 3.
[83] Rishworth, above n 61, 40.
[84] Rishworth, above n 61, 40.
[85] Rishworth and others, above n 64, 39.
[86] *Canady v Bossier Parish School Board* (2001) 240 F3d 437, 440-1 Parker J. The constitutionality of a school uniform policy was challenged in this case. This statement is important in light of what was said above concerning the nature of communication and the sending and receipt of messages. At the

> A person's choice of clothing is infused with intentional expression on many levels. In some instances, clothing functions as pure speech. A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues...Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. Individuals regularly use their clothing to express ideas and opinions. Just as the students in *Tinker* chose to wear armbands in protest of the Vietnam War, students may wear color patterns or styles with the intent to express a particular message... Finally, students in particular often choose their attire with the intent to signify the social group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment. While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable affect, whether positive or negative, on a young person's social development. Although this sort of expression may not convey a particularized message...in every instance, we cannot declare that expression of one's identity and affiliation to unique social groups through choice of clothing will never amount to protected speech.

After all, if appearance does not constitute expression then exactly what is it, and why do we lay so much store by it? In fact, if clothing cannot communicate a significant meaning or have an important impact, then the rationale for having a uniform or dress code might be doubted at the outset. It is through our appearance that we attempt to visually convey our character and personality as well as our attitudes and beliefs, and our personal attractiveness. For students the way they dress can be a matter of status and respect as they vie for a place in the school hierarchy. If a student is confident in the way that they look this can also help to boost self-esteem and confidence. This does not mean that the importance we attribute to appearance cannot have negative consequences. Of course, this is a feature of the adult-world, not just the schoolyard.

Significantly, the New Zealand Government has a schooling strategy in place for the years 2005-2010. In his foreword to the report, the Minister of Education writes that "As a nation, we want each student to be well equipped with the knowledge, skills, attitudes, values, and sense of identity they need to give them the best chances in life." [87] The report itself specifically states that "New Zealand's national

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very least, students are intending to signal to each other even if adults do not understand or value this communication.

[87] Ministry of Education "The Schooling Strategy 2005-2010" (July 2005). <http://www.minedu.govt.nz/web/downloadable/dl10610_v1/moedifference05full.doc>

curriculum takes a broad view of student outcomes from schooling. It emphasises that outcomes for students include what they know (knowledge), what they can do (skills), and who they are in relation to themselves and others (values and attitudes, including a strong sense of personal and cultural identity)." As such, the philosophy of schooling in New Zealand is underpinned by the larger goal of bringing about the conditions for every young person to work toward self-realisation. The Government's Schooling Strategy identifies that an important part of this is to allow young people to develop both their own identity and tolerance for that of others. The Strategy therefore intends that "The identities and experiences [students] bring to school are affirmed and built on in their school and class experiences...They share, are respectful of differences, and are learning to resolve conflict constructively. They participate and are included."

Of course, one of the reasons for having a right to free expression is a connection that has long been made between the right and self-realisation.[88] For students, as for adults, an important way in which they can express themselves and their individuality and therefore achieve self-realisation, is through their appearance. Thus, it is consistent with the stance of the Ministry of Education to require schools not to signal to their students that their unique identity and the way they want to express that identity do not matter, by restricting expression when there is no pressing and substantial justification which is rationally connected to the restriction to do so.

B School Uniforms

The initial issue for consideration in the New Zealand context must be the popular public school adoption of a compulsory uniform requirement.

1 To wear or not to wear?

A Uniform may be described as "the distinctive clothing worn by members of the same organization or body or by children attending certain schools."[89]

(last accessed 26 September 2005). As the report is made available in a Microsoft Word document with no page numbers assigned, no indication is given here of the place of quotations in the report.

[88] Brain C Murchison (1998) "Speech and the self-realization value" 33(2) Harvard Civil Rights-Civil Liberties L R 443.

[89] *Concise Oxford Dictionary* (10ed, Oxford University Press, New York, 1999).

So what reasons underlie the imposition of a uniform requirement? Formal research on this issue in New Zealand does not appear to be readily available, but YouthLaw, a community law centre for children and young people in New Zealand, has spoken to both young people and adults to gather information concerning the perception of uniforms by students and their parents.[90] Reasons that young people gave in support of a uniform included:

- It looks good
- There is less "hassle" as students do not have to think about what to wear
- It reflects well on the respectability of the school

Reasons that adults gave in support of a uniform included:

- It makes it easier to identify students when they are outside school grounds (for example, on a school trip)
- It takes away the competition between students over clothes
- It encourages students to have pride in their school
- It improves the school's reputation
- It encourages school order and discipline

Nevertheless, 90% of the students YouthLaw talked to did not like to wear a uniform. They felt that:

- They are expensive, especially if prone to being changed, and differing between seniors and juniors
- Casual clothes are more comfortable
- The colours and designs look "dorky"
- Students should be able to wear what they choose
- Girls should be able to wear pants or shorts, especially in summer
- It does not affect students' learning
- Teachers fuss about uniforms rather than teaching

Of course, one important perspective is missing from the data above. While some New Zealand schools articulate objectives for their uniform policies in their prospectuses, many do not, and those that do appear to provide little elaboration.[91] It might perhaps seem questionable whether New Zealand schools have made a genuine and real effort to investigate and provide reasons for restrictions on expression imposed by uniform polices. Here it is useful to turn to United States jurisprudence as

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[90] YouthLaw Tino Rangatiratanga Taitamariki <http://www.youthlaw.co.nz/default.aspx?_z=67> (last accessed 27 September 2005). The data and statistics were gathered through informal networking, which although not scientific, much like the community standards research of the Office of the Censor, it may help to inform the overall picture of attitudes toward school uniforms in New Zealand. It also focuses on the attitudes and opinions of two of the main groups of stakeholders; students and their caregivers.

[91] See, by way of example, Appendix 3.

schools in America have sometimes been required to articulate their objectives as well as point to evidence connecting the achievement of these objectives to the means employed to that effect (where schools have been taken to court by students who have challenged uniform policies as an unjustified restriction on their expression).

2 *The United States*

To begin with, uniform policies in the United States are a relatively recent event, and the first public school to adopt one did not do so until 1987.[92] In fact, in the year 1996-7 only three percent of all public schools required student to wear a school uniform (a statistic which includes schools that have an opt-out option available to students and schools where the uniform policy is voluntary).[93] Interestingly, Ray suggests that, "Gang activity in schools provides the major impetus for uniform codes and policies in the public schools".[94] In this respect the Education Commission of the States comments that, "Recent episodes of violence in schools, however, have led to an increasing interest in bringing uniforms and more stringent dress codes into public schools as well."[95]

The Supreme Court has yet to decide whether students are required to wear uniforms, and "as a result, this issue is a matter of first impression for all circuit courts of appeals and most federal and state courts."[96] There have been several low-level cases which have ruled uniform policies constitutional, although only because certain conditions have been met. To begin with in *Hicks v Halifax County*, a student and his caregiver complained that the school uniform policy was unconstitutional because it did not allow exemptions in order to maintain religious freedom.[97] The court refused to grant the school summary judgement, even though it felt the restriction did not appear to be aimed at restricting free expression, because both the right of the student to free speech and the right of Hick's caregiver to oversee Hick's religious upbringing

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[92] National Association of Elementary School Principals "Information and Resources: Public School uniforms" <http://www.naesp.org/ContentLoad.do?contentId=929> (last accessed 24 September 2005).
[93] The National Center for Education Statistics "school uniforms" <http://nces.ed.gov/fastfacts/display.asp?id=50> (last accessed September 28 2005).
[94] Alyson Ray "A Nation of Robots? The Unconstitutionality of Public School Uniform Codes" (1995) 28 J Marshall L R 645, 646.
[95] Education Commission of the States "Uniforms/Dress Codes" http://www.ecs.org/html/IssueSection.asp?issueid=145&s=Overview> (last accessed 24 September 2005). This concern does not seem transferable to the New Zealand context.
[96] Education Commission, above n 95.
[97] *Hicks v Halifax County Board of Education* (1999) 93 F Supp 2d 649.

were involved. The court ordered mediation and the school ultimately amended its policy to include religious exemptions.

Most importantly, *Canady v Bossier Parish School Board* in 2001 ruled that under *O'Brien*, "the school board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest".[98] As the plaintiffs' evidence had not raised an issue of fact as to whether the defendant school's uniform policy furthered the improvement of education in the school system, and as the restriction was considered to be view-point neutral, summary judgement for the school was deemed appropriate.[99] Another case, *Littleford v Forney Independent School District*, relied on *Canady*, assuming that choice of clothing was expressive conduct as well as adopting the test outlined immediately above.[100] The court in this instance also found that the restriction could be upheld, in part because in compliance with state law, the school provided an 'opt-out' to those with 'bona fide' religious, philosophical, or medical objections.

Moreover, the restriction was apparently not aimed at the suppression of student expression, but what the court termed the important and substantial interest of defendants in improving the educational process. The court ruled that:[101]

> The Uniform Policy was adopted to improve student performance, instill self-confidence, foster self-esteem, increase attendance, decrease disciplinary referrals, and lower drop-out rates... Such interests in the health, safety, and order of public schools are sufficient government interests under *O'Brien*. While the Students argue that Defendants have failed to produce evidence of any need to further these improvements in Forney, we are satisfied that, on this record, Defendants have established the requisite connection between the Uniform Policy and the stated interests in improving Forney schools.

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[98] *Canady*, above n 86, 443 Parker J. However, in cases where uniform policies have been challenged courts have not actually taken a 'minimal impairment' approach.

[99] In upholding the imposition of mandatory uniforms, the court also noted that students still could express themselves through other mediums during the school day. The school itself adduced evidence to support its claims as to the educational benefits of uniform policies which the court prima facie accepted.

[100] *Littlefield v Forney Independent School District* (2001) 268 F3d 275.

[101] *Littlefield*, above n 100, 287 King CJ. This was despite the argument raised by the student that this is an example of 'compelled speech', by which the court was not persuaded.

These cases suggest a couple of points. First, it may be necessary for schools in the United States to offer opt-out options to uniform requirements and for such policies to be view-point neutral. Second, American courts appear to consider that uniform policies are not aimed at regulating student expression and therefore the lower standard of scrutiny under *O'Brien* will apply. Third, as *Littlefield* demonstrates, it has been relatively easy thus far for a school to show that school uniform policies relate to legitimate pedagogical concerns. In such matters scientific empirical evidence should not perhaps be required, as in the case of school uniforms, the evidence relating to their effect on educational objectives is extremely contentious and currently inconclusive.[102] Certainly, in Canada, the inconclusiveness of social science evidence has meant that a casual relationship may not be necessary to assess the constitutionality of hate literature and evidence of a 'reasoned apprehension' of harm may be enough to make pornography illegal.[103] Nevertheless, American courts have traditionally insisted on strict scientific for evidence that relates to obscenity and harm to society before they are prepared to restrict the expression.[104] It could therefore be argued that by analogy, such a strict standard should have been applied in *Littlefield*.[105]

Finally, the United States Department of Education has published a manual on school uniforms. At the very least, the manual states that, "In the absence of a finding that disruption of the learning environment has reached a point that other lesser measures have been or would be ineffective, a mandatory school uniform policy without an "opt out" provision could be vulnerable to legal challenge."[106]

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[102] See for example, The Education Commission of the States "Selected Readings and Research on Uniforms and Dress Codes" <http://www.ecs.org/html/IssueSection.asp?issueid=145&s=Selected+Research+%26+Readings> (last accessed 27 September 2005).

[103] See R v Butler, above n 54, 503 Sopinka J.

[104] This approach was set out by Justice Burger in Paris Adult Theatre v Slaton (1973) 413 US 49.

[105] In both cases the evidence offered is intended to justify the restriction, albeit in one case the party justifying the restriction argues that the expression in question is inherently harmful whereas in the other, it is not so much that the expression is harmful as that gains may be made by restricting it. Surely though, a higher standard should apply to regulating expression that is not dangerous.

[106] United States Department of Education "Manual on School Uniforms" <http://www.ed.gov/updates/uniforms.html> (last accessed 24 September 2005).

3 *Applying Moonen*

Rishworth argues that the decision as to whether a straight or altered *Moonen* approach is to be applied will determine whether a school uniform policy is a justified or unjustified limitation in New Zealand. He states:[107]

> Assume that the aim of the uniform law is to foster neatness and pride in appearance and to minimise student "competition" amongst themselves as to how expensive or trendy their clothes are. If a court were to say that these aims, though good aims, could be equally met by other steps short of compulsory uniforms – such as a non-uniform dress code allied with education about non-competitiveness in attire – then the school decision would have failed the reasonableness test. If on the other hand the court was to say that this is a decision which the school board could legitimately make, and that it was not outside the range of acceptable decisions, then the decision would stand. So it is ultimately a question of how much deference a court should pay to the choices made through the political process which prevails in school government.

Thus it does not seem possible that uniform policies would survive a strict application of the *Moonen* test. However, if the standard is relaxed to one that requires 'reasonableness' the reverse is said to be true, particularly if there is "substantial deference to the school's own assessment of what a reasonable limit is, of how the Bill of Rights is to be integrated into their community".[108] Rishworth concludes that "...a policy decision to introduce a uniform is a paradigm example of an issue upon which reasonable people might differ, but in respect of which a school board decision ought not be "second guessed" by a court on a judicial review application".[109] Surely though, as indicated earlier, when schools do not even make a genuine and real attempt to justify their uniform policies by indicating exactly how they impact on the educational environment, then this relaxation of the *Moonen* test scarcely seems to be merited. This is particularly so when a substantial proportion of the student body and community is in opposition to the uniform requirement, as this would seem to undermine the objectives such a policy is said to achieve.

Certainly, dissent has occurred in New Zealand. By way of example, in 1997 34 seventh formers were suspended from a New Zealand school for refusing to wear a uniform and in 2001 the same school sent 50 pupils home for wearing incorrect

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[107] Rishworth, above n 61, 44.
[108] Rishworth, above no 61, 47.
[109] Rishworth, above n 61, 53.

uniform.[110] Nevertheless, Rishworth is confident that such policies would be ruled lawful in the face of a legal challenge.

C The Ambit of School Uniform Policies and Dress Codes

Of course, the fact that a school may be able to legally impose a uniform policy does not mean that the school has absolute freedom with respect to the actual contents of the policy. This next section considers the issue of dress codes and the ambit of uniform policies in schools. The focus is gendered policies, in particular the tendency of schools with uniform policies in New Zealand to require girls to wear skirts and boys to wear shorts.

1 Gender and gender expression

Gender refers to the perceived or projected femininity or masculinity of a person. It typically relies on a demarcation between biological sex and the way in which sex is communicated through the performance of particular behaviours that are associated with a particular sex.[111] Gender is at least to an extent, a social construct, and is a fluid concept as evidenced by variations over time and between culture in our expectations of 'male' and 'female' behaviours. The importance of having a sex to match the gender you perform in our society is demonstrated by the difficult time people have when their sex is visually incongruent with their gender (for example, the contempt with which 'girlie' men and 'butch' or 'manly' women are treated). One of the ways in which we express gender is through our clothing choice and this may strongly politicise particular items of clothing. The importance of gender-appropriate clothing in schools has long been recognised by psychologists who state that role theory predicts that a student's conformity to gender-role expectations for dress will result in both favourable peer and teacher evaluations and expectations.[112]

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[110] Libby Middlebrook and Cathy Aronson "School Uniform – once a grey area, still a grey area" (5 February 2001) *New Zealand Herald*, Auckland.

[111] Heike Polster defines gender in relation to sex as "...a more complex and socially constructed matter. It relates to those factors traditionally associated with being male or female and can be defined as the sum of the characteristics which are traditionally or culturally associated with being male or female." (2003) "Gender Identity as a New Prohibited Ground of Discrimination" 1 NZJPIL 157, 159.

[112] See for example Jane Workman and Kim Johnson (1994) "Effects of Conformity and Nonconformity to Gender-role Expectations For Dress: Teachers Versus Students" 29(113) Adolescence 207.

A person's choice as to how they represent their gender constitutes an integral part of their sense of self and may convey a highly-charged political and social message in a society that is based on a gender hierarchy that has traditionally valued the 'male' over the 'female' (in other words, a patriarchy).[113] Many women have felt frustration with the inhibiting idea that 'women' should dress and behave a particular way to show that they are 'female' and 'feminine'. Some resist the imposition of the gender-role associated with such clothing by refusing to wear these items of clothing or only wearing them when it is their choice to do so.[114] In this way people resist traditional, unequal patterns of performing gender and create new, equal ones. Most of all, it is important to be able to express yourself in a way which does not go against your fundamental sense of self, and this includes not being forced to express yourself in accordance with the gender-role society has allocated your sex.

School uniform policies which only allow female students to wear a skirt or a dress and do not allow them to choose to wear shorts or trousers, reinforce the idea of a female gender role and a particular way of performing it. Skirts have long, though not always, been socially constructed as profoundly feminine, and in most instances it is taboo for men today to wear them. In the 1800s the skirt-wearing woman was said to be a reflection of the 'essential' differences between the sexes, and "Any woman who was brave enough to wear trousers in mid-nineteenth-century America posed a threat to this symbolic order, and was seen to be acting 'out of her sphere'".[115] In fact, for woman gaining the right to wear trousers was just as difficult as gaining the right to vote, and it has been said of the twentieth century that, "...one of the most potent symbols of female emancipation has been the adoption of trousers by women, a phenomenon well-documented in social and dress histories."[116]

It may seem strange that it is possible for an item of clothing to be imbued with a sense of inferiority. Of course, there is not necessarily any innate inferiority or superiority about any item of clothing, but rather this comes to be socially assigned when a garment is marked out to only be worn by a particular gender in a society that

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[113] Note here that masculinity is only valued when it is performed by a male.
[114] The concept of 'gender role' refers to a behaviour or set of behaviours associated with a particular gender.
[115] Kate Luck "Trousers: Feminism in nineteenth-century America" in Pat Kirkham (ed) *The Gendered Object* (Manchester University Press, Manchester, 1996) 141, 141.
[116] Mary Schoeser "Legging it" in Pat Kirkham (ed) *The Gendered Object* (Manchester University Press, Manchester, 1996) 133, 133.

is predicated on the notion of gender hierarchy. Skirts have gathered such a socially constructed meaning over time due to being marked out as a woman-only item of clothing in a patriarchal society. Therefore, nowadays when the choice is taken away from female students as to whether to wear a skirt or not, the uniformed skirt is imbued with a significance that sees both it and the wearer relegated to the wrong side of the male/female binary opposition, as their sexuality is moulded to conform to the gender expectations of Board members.

No doubt this would be clear for us all to see were women lawyers in New Zealand, for example, still required to wear skirts to court, or were school dress codes to require their female students to wear skirts.[117] However, for some reason, this point seems to be obscured when situated in the context of school uniforms.[118] This issue of skirts in schools is now analysed as a paradigmatic example of how section 14 should apply to the ambit of uniform policies.

2 Moonen and skirting the issue

The objectives justifying the imposition of a uniform in the first place are not of equal application to issues concerning the ambit of uniform policies. In this particular instance, these objectives could equally be achieved by allowing female students to wear either skirts, shorts, or trousers, and it might be suggested that such an approach would be more conducive to their attainment. The shortcomings of a skirt also seem fairly apparent. It limits physical activity, provides no warmth during the winter, and given the prevalence of kilts in uniform policies, may have little to recommend it aesthetically to the modern student. In fact, the compulsory wearing of a skirt may even undermine some of the reasons for having a uniform in the first place, as well as the general goal of valuing individuality and promoting equality in schools.

Ultimately there is no objective, pressing or otherwise, in forcing female students to wear a skirt other that that of it being a 'feminine tradition' in schools. It is particularly disheartening that such an attitude still exists in the conclaves of uniformed schools despite the fact that it has finally become acceptable for young

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[117] In the American context, on suitable dress for female lawyers, see for example James Clement "Judge Doesn't Skirt Issue" 130 (26 September 1984) Chicago Daily Law Bulletin 1.

[118] This is unfortunate given YouthLaw's finding that at intermediate schools, there is much more support for wearing uniforms when they are casual (such as shorts and tee shirts) and the girls can wear shorts as well as the boys." Above n 90.

women to wear shorts or trousers in society and despite the drive to eradicate sexism in schools. As for the value of 'feminine traditions' that are forced upon women by the establishment; if these were really a good thing, we would still be barring women from education, or at the most, permitting them to go to school to take sewing and cooking lessons.

Ultimately when female students are forced to wear a skirt this is not only a restriction on the way in which they express themselves, but moreover forces them to express themselves in accordance with traditional notions of their gender role. The harm suggested here is a product of not allowing the student a choice, rather than the wearing of a skirt *per se*. In applying the *Moonen* test it would thus appear that there is no pressing or substantial objective underlying a policy that specifically forces female students to wear a skirt. It therefore seems to make little difference as to whether the *Moonen* test is relaxed to the standard of a 'reasonable' limitation, even when deference is had to the school's judgement of 'reasonable', because there is no justification in having such a policy at all. In addition, such a rule is not viewpoint or content neutral.

Given societal attitudes toward trousers and women in New Zealand today, there could be no reasonable suggestion that the educational environment would be disrupted or impaired from allowing female students to wear trousers or shorts. If there was, this would seem tantamount to the objections raised by the establishment when women first attempted to receive higher education and then to receive it in 'male' clothing. In other words, the fear of disruption resulting from dismantling the patriarchy is not a valid reason to perpetuate it. This would seem a prime example of a harmful school policy that is based on nothing other than sexism, and if such a policy could continue to stand in the face of a legal challenge, it would seem that our Bill of Rights has failed us.

3 A matter of discrimination

A proper application of section 14 to the issue of skirts in schools should therefore result in such a policy being struck down as an unjustified limitation on the student's expression. Of course, such a challenge would require the student to seek judicial review in the High Court unless the student was able to negotiate this point with the school on an informal basis (perhaps in conjunction with the Office of the

Commissioner for Children as sometimes occurs). More practically, the HRA may be able to serve a similar and more accessible function when the restriction in question has an element of discrimination attached to it.

Section 57(1)(b) of the HRA makes it unlawful to "admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available" by reason of any prohibited ground of discrimination, including sex under section 21 of the Act.[119] A 1991 opinion of the Human Rights Commission (HRC) found that the requirement for girls at an intermediate school to wear a skirt while boys wore shorts constituted unlawful discrimination.[120] Two students complained that this requirement limited their ability to participate fully in school activities and thus constituted unlawful discrimination. The HRC concurred but noted that the school did not have to provide a unisex option and endorsed the solution of culottes the school had adopted in the interim period.

This outcome is not ideal. The HRC overemphasises the importance of equality in the playground to the exclusion of other considerations. Even there, the ability of

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[119] Section 57 provides that:

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

(a) To refuse or fail to admit a person as a pupil or student; or

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

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

(d) To exclude a person as a pupil or a student or subject him or her to any other detriment,—

by reason of any of the prohibited grounds of discrimination

Section 21 sets out the prohibited grounds of discrimination which include sex, religious belief, sexual orientation, political opinion, and race. Section 19 of the BORA also provides that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Note also that a Bill currently under consideration proposes to add gender identity to the list of prohibited grounds of discrimination (The Human Rights (Gender Identity) Amendment Bill).

[120] HRC Opinion C130, 130/191 (31 October 1991) <http://www.hrc.co.nz/index.php?p=13684&id=13904&> (last accessed 26 September 2005). Note that this opinion was written before the 2001 amendments to the HRA, and the HRC no longer has the legal authority to form opinions as to whether a complaint has substance. Note also that this opinion was written before the 1993 Act was passed, and thus the opinion was made in relation to the Human Rights Commission Act 1977 section 26 (which was replaced by section 57 of the present Act) although there is no essential difference between the two for the purposes of this paper. Under that Act it was illegal to "admit a student on less favourable terms and conditions or to deny or restrict access to any benefits or services or subject a student to a detriment by reason of the student's sex" (Human Rights Commission Act 1977, s 23). It is unclear whether this ruling would apply to single-sex schools. This would depend on whether the students must be disadvantaged in relation to a comparator at the specific school or if general disadvantage is sufficient.

culottes (a skirt with a dividing piece of material) to preserve modesty at play may be suspect, and there is also the question of whether young women would wear such an old-fashioned item of clothing. If not, then this is not a workable solution to the discrimination. Moreover, in focusing on the physical consequences of the discrimination, the HRC disregards the insidious harm of a policy that is inherently and ideologically discriminatory. In fact, culottes are also a gender-specific item of clothing and aim to preserve the façade of wearing a skirt. It may seem slightly strange that the Commission did not turn their attention to consider why the school insisted on culottes rather than allowing shorts, particularly given that the specific complaint of the two girls was that they did not feel that they were on "equal footing" with the boys at the school. However the HRC stated that:

> It was theoretically possible...to argue that employers and schools should have the same dress and appearance requirements for both sexes. However, the Commission has usually declined to investigate such complaints, believing it not to be the legislature's intention for the Commission to be involved in relatively minor matters of this nature.

It is perhaps a little disquieting that the HRC has taken such a narrow view of the concept of equality, particularly in light of the effect this comment would have had on the female complainants, who clearly felt that this was not a trivial matter.[121] Nevertheless, this opinion has established that at the very least, in some circumstances, it will be illegal for a school to allow male students to wear shorts but require female students to wear a skirt. Whether this opinion has had any real impact on school policies however is unclear.

4 Hairlength

Hairstyle is another issue that raises similar concerns as those set out above.[122] In the New Zealand case of *Edwards v Onehunga High School Board* the school had a policy whereby boys had to ensure that the length of their hair was "not over the

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[121] See also Kamala Hayman "Last stand before longs gone" (27 May 2005) *The Press* Christchurch, 1, for another situation in which such issues are demonstrably very important to students. When it appeared that her school was going to ban trousers one student collected 300 signatures (including those of 21 staff members) in three days. The school later said that they had not considered abandoning the trousers, but rather intended to make them more fashionable for girls to wear.

[122] The issue of boys who wear skirts is not considered in this paper due to constraints of space. However the discussion that follows in relation to the hairlength of male students may equally apply to such an issue as both may potentially be considered 'taboo' or 'extreme' forms of expression.

eyebrows, not below the bottom of the ears and not on the collar".[123] This case was decided well before the BORA was passed. Counsel for the appellant nevertheless argued that the ordinance was, "an unreasonable and an unjustifiable intrusion into the boy's personal liberty" which affected "...the pupil away from school, in his home and in his leisure hours."[124] He also stressed the, "unimportance of appearance in the scholastic scheme of things" as rendering the rule petty.[125]

Justice Speight in delivering the judgment of the court noted and misinterpreted counsel's last point, stating that, "It was the boy and his father who elevated the matter to a direct challenge to the authority of the school."[126] He affirmed the school's right to suspend Edwards as "This was bad conduct for the reasons we have set out – a deliberate breach by him of a school rule which all others had obeyed; and it was incorrigible in the sense that "it was not likely to be changed" for it had been persisted in on five occasions even in the face of warning..."[127] Therefore the actual conduct itself, a boy coming to school with longer hair than allowed, received no real consideration at all. This is apparently because there is a "...presumption the board acted within its powers, and that the appellant apparently did not put evidence forward that this rule was not necessary or desirable."[128]

This case must be considered of dubious precedent value. It was decided before the passage of the BORA and our norms and tolerance have evolved since 1974. Nevertheless, *Maddever* would suggest that the emphasis placed on the school's right to manage itself without judicial interference has not diminished in the intervening years. Furthermore, a future court might also characterise the expressive value of hairstyles in the same manner as Justice Speight, who conceptualised Edward's as an "undue eccentricity of personal appearance".[129]

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[123] *Edwards*, above n 75, 240 Speight J. Edwards was suspended for refusing to comply with this rule.
[124] *Edwards*, above n 75, 241-3 Speight J.
[125] *Edwards*, above n 75, 244 Speight J.
[126] *Edwards*, above n 75, 244 Speight J. Counsel for the student was arguing that appearance regulation has no impact on educational policy, but Justice Speight interpreted this as an admission that issues of appearance are of no real importance to anyone including students.
[127] *Edwards*, above n 75, 245 Speight J. The simple fact that Edwards disobeyed a school regulation led the court to declare that the principal had "substantial grounds" to suspend him, as allowing the appeal would set a "very bad example for the rest of the school and militated against the maintenance of control and discipline".
[128] *Edwards*, above n 75, 244 Speight J.
[129] *Edwards*, above n 75, 242 Speight J.

However, it is just as sexist to force a boy to keep his hair short as it is to forbid short hair or a pair of shorts to a girl, and it helps to reinforce male and female gender roles. A regulation haircut has far-reaching consequences as it affects the student's expression outside of school time. It is difficult to think of a persuasive, non-sexist objective which justifies different standards of hairstyle for boys and girls. However, the issue of hairlength has long been the subject of case law in the United States. As such, some of the dicta that have come out of these cases may help us to understand what sort of objectives are used in reality to justify such policies.

The position in the United States as to the constitutionality of hair regulations is unclear because different courts have taken different positions for different reasons and the Supreme Court has continuously denied certiorari.[130] Examples of cases which did not uphold hair regulations include *Zachry v Brown* which held that a regulation pertaining to "permissible hairstyles" was unreasonable because it was promulgated "solely because the school administrators thoroughly disliked what they considered exotic hairstyles."[131] *Breen v Kahl* also ruled such a policy restricting the hairlength of male students unconstitutional.[132] The court held that school had failed to show that the distraction "allegedly created" was substantial enough to uphold the regulation or that a differential existed in school performance between male students with long hair and those with short hair (the school argued that students performed better when their appearance conformed to 'community standards'), and also that there was no showing of any other possible justification for the regulation.[133]

The Court in *Crew* affirmed this ruling.[134] The court held that the school failed to overcome the "substantial burden" of justification for denying the student admission to the school based on his hairlength, and as there was no evidence that the school had

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[130] See Higinio Gamez (1996) "Son, Get a Haircut or Leave my School? Hair Length Restriction for Male Students Upheld by Texas Supreme Court" T Marshall L R, 185, 186, who states that "Circuit courts that have invalidated hair length regulations are the First, Second, Fourth, Seventh and Eighth Circuits. Circuit courts which have upheld hair length regulations are the Fifth, Sixth, Ninth, Tenth and District of Columbia. The Third Circuit has changed its position in this area and currently holds that the federal court system is not well equipped to make value judgments on hair length regulations. The United States Supreme Court has continuously denied certiorari despite the division. On at least three occasions strong dissents have been filed advocating certiorari. State courts are also divided on this issue and those cases invalidating hair length regulations often utilize a wide variety of rationales."

[131] *Zachry v Brown* (1967) 299 F Supp 1360, 1361 Lynne CJ.

[132] *Breen v Kahl* (1969) 419 F2d 1034.

[133] *Breen*, above n 131, 1036-7 Kerner J. Also, in affirming, the student's rights the court found that the standard was arbitrary and that it sharply implicated basic constitutional values.

[134] *Crews v Cloncs* (1970) 432 F2d 1259.

attempted to control disruptive behaviour allegedly caused by student's hair, the school could not rely on this as justification for the limitation. More importantly, the court also ruled that the student was denied equal protection because girls with long hair were able to participate in the same gym and biology classes as boys (the student had been excluded from these classes) and this also meant that the school had failed to demonstrate any valid safety or health issues concerning the boy's hairlength.

However, subsequent jurisprudence in the United States has tended to uphold hair regulations. In *Barber v Colorado Independent School District* a class action was taken on behalf of male students at the school by a student who had reached the age of majority and who felt that at age 18, the school's hair regulations for male students and another preventing them from wearing jewellery, were unfair.[135] In upholding the school's policies, the court did not require evidence connecting the regulations to the advancement of education goals, simply deferring to school authorities as best-placed to judge what is appropriate for students. The court also stated generally that the rights of children cannot be equated with those of adults and cited the inability of students "to make critical decisions in an informed, mature manner".[136]

The same year, in *Hines v Caston School Corporation*, a ban on earrings for male students was upheld.[137] The court ruled that there is a presumption that school rules are constitutional. The school advanced several reasons in support of the earrings ban including stopping an influx of gangs and cults, discouraging students from identifying with drug use and homosexuality, and health and safety reasons, though the court found that there was no evidence to support any of these contentions. However, the court nonetheless upheld some of the schools other arguments in favour of the ban, including higher rates of achievement and attendance, as well as

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[135] *Barber v Colorado Independent School District* (1995) 901 SW 2d 447 Gonzalez J.
[136] *Barber*, above n 133, 451 Gonzalez J.
[137] *Hines v Caston School Corporation* (1995) 651 NE 2d 330. The school had no written dress code but after Hines was instructed to decease from wearing the earring (the school specifically stating that this must be done even though Hines had taken to covering the earring with a bandage), the following year the Board formulated a rule which stated that "Students are not to wear jewelry or other attachments not consistent with community standards or that could pose a health or safety hazard to either the student himself or to other students in his presence."

discouraging "rebellion against local community standards of dress, under which earrings are considered female attire."[138]

In this respect, despite evidence adduced at trial, the court held that the student's parents failed to show that the earring ban served no purpose rationally related to the educational function of the school. They had also not shown that it violated equal protection in distinguishing between the sexes (because they had not shown that it did not substantially relate to a 'legitimate government objective'). Finally, the court found that the enforcement of community standards of dress to install discipline was a legitimate educational function. This is a particularly surprising result because the court also noted that "To the extent that the wearing of an earring is an expression of sexual orientation, it may be a protected form of speech, but we are not presented with that question here."[139]

In fact, even before *Breen* and *Crew* were decided, in 1968 in *Ferrell v Dallas Independent School District* a dress code was upheld that stipulated a particular hairlength and style for male students.[140] The court found that testimony of students and staff (primarily relying on that of the school principal) showed that the wearing of long hair had caused disciplinary problems and disruptions within the school, and that the state had a compelling reason to circumscribe rights where its interest in maintaining efficient and effective schools was compromised.[141] It also noted that girls had been sent home to change their dress because of body exposure, required to remove excessive make-up (such as too much 'paint' and false eyelashes), and were expected to wear dresses and not tight fitting pants.

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[138] *Hines*, above n 135, 334 Sharpnack CJ. The court continued, "Evidence was presented that the wearing of earrings by males was inconsistent with community standards in the Caston area, which is, by all accounts, politically and religiously conservative. Members of the Caston school board and school administrators testified that the earring ban serves to prevent 'disrespect for authority and disrespect for discipline within the school' by maintaining 'a basic standard for the children to live by.'"

[139] Hines, above n 132, 335 n 6 Sharpnack CJ.

[140] *Ferrell v Dallas Independent School District* (1968)392 F 2d 697.

[141] Given the extent to which the media became involved in this case after the school refused to back down, and the palpable anger the students clearly felt at the school's stance, the real origins of this 'disruption' might be rather differently presented than the way in which the court conceptualised them. In other words, it could actually be argued that the school caused this disruption.

So how are we to understand this contradictory conglomeration of cases, objectives, and results in order to make some sense of how the issue might be approached in the New Zealand context?

5 *Justifying the unjustifiable*

Ultimately, if such issues are litigated in New Zealand the outcome will depend on how closely the courts adhere to the *Moonen* test, either standard or altered. The cases above indicate that American courts are prepared to take vastly different conceptual approaches, for example, some requiring the school to justify the restrictions, and others requiring the student to prove that the restrictions are unjust or even refusing to evaluate school policies. In New Zealand the onus under *Moonen* is supposed to be on the party who is trying to uphold the restriction to establish that it is not unjust, and this should continue to be the case. The point is that despite the dicta in *O'Brien*, *Tinker* and other such cases, the American courts have evidently departed from the First Amendment tests set out by the United States Supreme Court on a haphazardous basis. It is outside the scope of this paper to assess whether New Zealand courts are consistently applying the *Moonen* test in other contexts, but the conduct-related expression cases referred to at the beginning of this paper might be interpreted as demonstrating that the Court of Appeal's analysis in *Moonen* has not always been as stringently applied as might have been hoped.

However, provided that a court does apply the *Moonen* test, ultimately the question of whether hair regulations and other such school rules are justified will come down to how closely a court is prepared to scrutinise the objectives a school puts forward as justifying the policies they have in place. Where American courts have been prepared to assess school policies, it is enough for some courts to be told by the school that the objectives exist or receive some oral testimony from the school as 'evidence' that the restriction is necessary. Others require a high standard of 'hard' evidence. A popular objective that schools rely on is preventing the disruption of the school environment. However, some courts such as in *Crew*, have required the school to attempt to constrain the disruption before they can rely on it as justifying the restriction.

In particular, it appears that some of the more conservative American courts are prepared to accept school policies which are based on the personal preferences of those who manage schools, who conceptualise their policies as enforcing 'community

standards' of decency and proprietary. While such rules may be based in part on the personal preferences of Board members, they may also relate to the marketing of the school to a particular target group. The Children's Commissioner has said that:[142]

> ...in the present competitive educational environment there is evidence that some school s are using formal and informal methods of excluding students as a means of student selection and quality enhancement. Draconian exclusion policies are seen as a means of ridding the school of 'troublemakers' thus adding to the school's reputation and prestige and attracting a 'better quality student' to the school.

Nowhere in any publication on education law in New Zealand is there the suggestion that schools are thinking of their reputation and the image they present to the community when they formulate appearance-related rules. But how far are such concerns from the mind of people that pass such policies? Even when schools cite objectives such as 'health and safety' behind rules regulating the appearance of students, is it not possible that these are a subterfuge to hide a school's concerns as to proprietary and their community standing? Given that the BORA confers individual rights along with the fundamental nature of free expression, it is questionable whether perceived community intolerance should ever be a basis for restricting a student's expression. If these sorts of issues are litigated in the future in New Zealand, hopefully courts will be prepared to follow the approach of United States courts in cases such as *Zachry* and *Breen*.

Before this section concludes it is informative to look at some of the reasons schools have put forward as justifying restrictions on expression that have gained the attention of the media, and the method of enforcement of these rules.

The principal of one school which prohibits hair extensions and dreadlocks told the media that "Most employers would see students with dreadlocks and put crosses against their name even before they went to the interview. We try to reflect the standards employers would expect."[143] In response to two male students who accused the school of a sexist hair policy the principal told the media "They tell me there is a

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[142] Office of the Commissioner for Children, "Briefing Paper for the Minister of Education on the Need for an Education Review Tribunal from the Office of the Commissioner for Children" (April 1997) 4. <http://www.occ.org.nz/childcomm/media/files/education_review_tribunal> (last accessed 24 September 2005). See also Nicky Darlow "Harsh Cure for Students Who Don't Fit the System" (6 May 1996) *The Evening Post* Wellington, 5 who states that "Boards of trustees consist largely of parents who have a vested interest in keeping "undesirable influences" out of the school."

[143] "Mountainview joins school hair policy" (10 July 2003) *The Timaru Herald*, Timaru, 2.

double standard and there is. That's been hacked about for a long, long time. There are different rules for uniform code wherever we work."[144] Another principal justified the suspension of a student by reason of her tongue stud because she "was concerned the stud could come out and [the student] could choke on it."[145] In 2004 the Timaru Herald surveyed several South Canterbury high schools which all had 'one-size-fits-all' policies relating to 'jewellery' (no religious or other exemptions), and one principal justified this on the basis that the rules were made clear before students enrolled and they could have considered another school if they did not like them.[146] Another boy was excluded from classes when his hair fell a few centimetres below regulation length, despite the fact that his mother could not afford a haircut immediately and even though she passed this on to the school.[147] The same year the principal of this particular school walked on to the basketball court and took a player off during a game against another school "because he had developed a 'mullet haircut' overnight". Another school justified their uniform policy by stating that "the uniform was an essential means of promoting the school."[148] The story of a student who failed to shave off his facial hair when he hit puberty is equally demonstrative:[149]

> Chad recounted being approached by a teacher in front of his woodwork classmates, given a razor and told to shave or not come back to class...[his mother] said it was ironic that at the meeting deputy principal...praised [the student], saying the fourth former was doing well in class...College board of trustees parent representative Gill Leonard says the decision is final. "It's not the issue of the hair on the face. It's the issue to abide by school rules."

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[144] Julie Asher "Hairline Rule Irks Boys" (1 April 2000) The Southland Times, Southland, 3.
[145] NZPA "Tongue-stud student to try polytechnic" (16 April 1998) *The Evening Post* Wellington, 2.
[146] Claire Haren "SC school policies clear on jewellery" (12 March 2004) *The Timaru Herald*, Timaru, 2 This type of objective has the support of the School Trustees Association who have commented that "When you enrol at that school you are saying you are aware they exist, and you are willing to adhere to them" NZPA "Board backs school's tough stance" (9 March 2002) *The Evening Post* Wellington, 10.
[147] Tina Nash "School haircut crackdown raises hackles" (8 October 2004) *The Manawatu Standard* Palmerston North, 3. The school principal commented that if he had known this the school would have paid for the boy to get his hair cut and his mother could have paid the school back later.
[148] "Student uses Web to push mufti cause" (2 June 2000) *The Evening Post* Wellington, 19.
[149] Louisa Cleave "Stiff Upper Lip for Suspended Teen" (30 March 1997) *The Sunday News* Auckland, 1. Interestingly, School Trustees Association president said that school dress codes and student appearance were "coming up for discussion more and more" and "In the past if facial hair was not permitted. . . people accepted that was part of the rules. These days there are more people challenging it because of human rights."

These excerpts from the media seem to indicate that the objectives behind school appearance-related policies in New Zealand may be based on ideologies which do not relate to pedagogical concerns to say the least.[150]

D Religion

Another important area of expression for young people is that which pertains to religion. Again, this is more likely to be of issue in a school with a uniform policy than one with a dress code, although the latter is nonetheless possible. Religion receives special protection under section 15 of the BORA which provides that "Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private." Under section 21 of the HRA, religion is also a prohibited ground of discrimination.[151]

To begin with, schools may have to allow exemptions on religious grounds. In 1995 a Muslim child complained to the HRC because his school did not allow him to wear trousers in accordance with his faith (the school required boys to wear shorts).[152] In the opinion released by the commission this was found to constitute indirect discrimination on the ground of religious belief as there was no good reason to justify such discrimination. This was particularly so as the school's objectives included the promotion of equality and tolerance for other religions. The student was supposed to be in the best position to assess what his religious beliefs required as long as they were *bona fide*. In this case the commission found that the complainant's religious belief was sincerely held and based on established tenets of the Islamic religion.

Such expression may also be protected under the BORA as section 15 protects both observances and practices which include "not only ceremonial acts" but also "the

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[150] However, it is not all bad news. One dean in stating that schools have no right to be concerned about trivia like facial hair stated that "Our students are allowed to wear beards, nose rings, dye their hair blue and tattoo their bums and I can't see what effect it has on their learning." He continued by pointing out that "Schools doing this are acting against the civil liberties of their pupils and they expect these pupils to respect the civil liberties of others", "Facial hair not schools' concern, says college dean" (24 April 1996) The Evening Post, Wellington, 3.

[151] Note also that Rishworth suggests in his seminars that religious expression may be protected under section 14 when the restriction does not amount to discrimination for the purposes of the HRA, or the expression in question is not within the ambit of section 15 of the BORA.

[152] HRC Opinion C149/94 (17 August 1994) <http://www.hrc.co.nz/index.php?p=13684&id=13957&wd0=muslim> (last accessed 25 September 2005).

wearing of distinctive clothing or headcoverings".[153] Potentially however, Rishworth notes that if the item is not considered mandatory to the particular religion, it is possible that section 15 will not apply, and therefore a section 14 argument is thrown into issue.[154] The question here will be whether the restriction (which will generally constitute a refusal to make an exemption) is justified. Rishworth generally supports the idea of religious exemptions because the objectives of having a uniform may still be attained if exemptions are made for religious purposes, making them a "defensible policy which preserves the integrity of the basic requirement of a uniform code".[155] However, it is unclear how far this may extend.

E Race and Culture

Essentially, issues of race and culture should be dealt with on the same basis as those of religion. Both may involve expression under section 14 and both constitute prohibited grounds of discrimination under the HRA.[156] For the purposes of this paper it is important to note that a 1994 opinion of the HRC dealt with a situation where the school in question would not allow a Maori student to wear his taonga openly.[157] The policy prohibited all jewellery but allowed Maori students to wear their taonga provided it was hidden. The complainant's mother attested that her son had worn his manaia at the base of his throat since he was a baby (this had been long-decided by his whanau) and objected to the requirement that it be hidden.

The HRC reported in their opinion that this constituted discrimination under section 26(1)(d) of the HRCA, and that it "could also be said" to be discrimination under section 26 (1)(b) of the Act.[158] It would seem then, that discriminating between

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[153] Human Rights Committee, General Comment 22 (Thirteenth session, 1981).
[154] Paul Rishworth "Legal Liability in Relation to Students" In Paul Rishworth, Patrick Walsh, and John Hannon *Education Law: Continuing Developments* (New Zealand Law Society, Wellington, 2004) 44.
[155] Rishworth, above n 153, 44.
[156] Note that section 20 of the BORA provides that "A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language of the minority" although this is not to suggest that section 20 will have specific application to situations of appearance-based regulation in the school context. Nevertheless these are liberty rights which arise from the history and practice of relevant minorities.
[157] HRC Opinion C112/91 (31 October 1994) <http://www.hrc.co.nz/index.php?p=13684&id=13902&> (last accessed 29 September 2005).
[158] This analysis is a little surprising as this would seem to simply constitute indirect discrimination rather than strictly fulfilling the requirements of section 26(1)(b) of the Act. The commission reasoned that, "The refusal could also be said to be making available to this Maori student less favourable terms

taonga and other 'jewellery' is required by the Human Rights Act. The opinion continues that, "it was important that the taonga be able to be worn unconcealed as it was a symbol of that person's cultural identity. It was not appropriate to label taonga as "jewellery". Nevertheless, it is clear that such rules still exist in schools. By way of example, a Fijian Indian student was suspended from a New Zealand school when she refused to remove her "culturally important" nose stud.[159]

F Dress Codes and 'Mere Aesthetics'

Finally, this paper considers the case of dress code concerns that do not relate to considerations such as religion, race, culture, and sex. Here the student is 'simply' asserting that the wearing of a particular garment or adornment is a means by which they like to express themselves. This is more complicated than it might first appear. For example, in 2004 a student at Marlborough Girls College complained to the HRC that her school allowed Maori students to openly wear greenstone and bone carvings, and Christian and Jewish students to wear crosses and stars of David (provided they were out of sight), but did not let her wear an amethyst pendant.[160] She stated that the necklace had a calming effect on her and she had worn it since she was ten. The HRC facilitated a mediation between the school and student, and the school agreed to reformulate their policy in consultation with the HRC.

In applying section 14 of the BORA to this situation Rishworth suggests it is possible that in allowing exceptions to the rule (particularly if there are many exceptions) then the point of the rule may be small, and at any rate, the school policy in this case constituted viewpoint discrimination.[161] He continues that a better rule would have addressed issues of safety and uniformity by regulating the size or shape of the adornment, not the nature of the message sent by it, and specifically that:[162]

> ...a viewpoint neutral rule would be a better way of attaining the school's objective. If it were thought that the objective of the rule were sufficiently compelling, and that a

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and conditions (s 26(1)(b)) than otherwise because the cultural significance of his taonga had not been acknowledged when presumably equivalent cultural norms for pakeha students were taken into account, ie the jewellery policy."

[159] Catherine Masters "Talks Over Uniform Breach" (23 November 1999) *New Zealand Herald*, Auckland.

[160] Rishworth, above n 153, 52-4. The 2004 prospectus of the school did not openly allow these exceptions, rather stating that "For health and safety reasons make-up and jewellery, other than one pair of ear studs worn in the ear lobe and a watch, are not permitted."

[161] Rishworth, above n 153, 53.

[162] Rishworth, above n 153, 54.

> neutral rule as to who could wear jewellery would permit too many exceptions, then the obvious alternative is to have a blanket prohibition.

However persuasive this analysis might seem, the precedent created by the HRC opinions in relation to Maori taonga and Muslim apparel as outlined above, support the formulation of such a rule. In fact the school's new policy in their 2006 prospectus reflects this, stating that:

> Cultural practices for example, the wearing of taonga, where display is intrinsic to that culture; or the wearing of a headscarf will be permitted with the approval of the Principal. Items such as taonga, where display is intrinsic to the culture and/or the item may, with the approval of the Principal, be worn openly. Religious or spiritual items may be worn tucked out of sight. Jewellery is not permitted to be worn other than one stud in each ear lobe. Visible body piercings are not permitted.

Surely though, there is no real reason to elevate religious and cultural expression over that which a student genuinely asserts is of fundamental importance to their identity, despite the fact that it is not religiously or culturally grounded (such as the student in this particular case).[163] Moreover, when the school has no real reason for limiting such expression, and in particular when this is simply a matter of the personal taste of school officials, both the reason why the form of expression is important to the student, and the extent of this importance, should not matter.

VII INTERIM CONCLUSION

Thus far it seems evident that in many circumstances schools restrict student expression for no real reason other than the perpetuation of discriminatory traditions or an attempt to appeal to the 'community values' of the school's target market. This paper has attempted to show that at the very least schools should not force a student to express themselves in a manner which goes against an essential component of their identity when there is no pressing or valid objective behind the requirement. If such issues are litigated at any point in the future, then a court should be prepared to scrutinise the objectives a school claims underlie any restriction upon student

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[163] This is consistent with the view of the Minister of Education who stated that "I think schools should have consistent rules for school uniform, and if people are allowed to wear treasures of one sort, whether they are greenstone or bone carving, then people should be allowed to wear treasures of another sort, stars of David or crosses." Mr Mallard said his personal view was that "if you've got something that is really a treasure, you can wear is close to your heart but not outside your uniform." Dress Code Under Fire" (26 February 2004) *Nelson Mail* Nelson, 2. Both the Race Relations Conciliator and the Minister agreed that the school had made a mistake.

expression. Moreover, perhaps it is time for the Ministry of Education to formulate some model guidelines as to the ambit of uniform policies in schools.[164]

VIII FREE SPEECH IN SCHOOLS

The final concern of this paper is the issue of free speech in schools. It focuses on three contentious issues that may potentially arise. The starting point is articulated by Rishworth who states that "The guiding principle...is that the expression of ideas, especially political ideas, is near the core of freedom of expression in a democratic country."[165] As such, the political speech of students is likely to be protected under section 14. However, what if the speech in question is 'offensive' or used to criticise other students?

A "Offensive" speech

In America 'offensive' speech is essentially an exception to the principle stated above, and the courts allow schools much leeway to decide what is offensive and to determine whether the exclusion of such expression is justified.[166] Essentially in America 'vulgar' or 'offensive' speech may be prohibited without a showing of disruption or substantial interference with the school's work, but speech that is not vulgar may only be prohibited if it causes a substantial and material disruption of the school's operation.[167]

The leading case is *Bethel School District v Fraser* where Fraser delivered a speech nominating a fellow student for student elective office.[168] During the speech he referred to his candidate in terms of "an elaborate, graphic, and explicit sexual metaphor" which included comments such as "he's firm in his pants...his character is firm", "a man who takes his point and pounds it in," and "a man who will go to the very end - even the climax, for each and every one of you."[169] Some students apparently reacted by "hooting and yelling, others by making sexually suggestive

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[164] This is particularly so when despite a traditional non-interventionist approach, a school that prohibited dread locks still "had the backing of the Local Ministry of Education Office", Stuart Dye "Dreadlock Holiday Forced on Student" (5 October 2004) *New Zealand Herald* Auckland. A set of draft model guidelines are set out in Appendix II.

[165] Rishworth, above n 64, 42.

[166] Rishworth, above n 64, 42.

[167] *Chandler v McMinnville School District* (1992) 978 F 2d 524.

[168] *Bethel School District v Fraser* 478 US 675.

[169] *Bethel*, above n 153, 678 Burger CJ.

gestures, and still others appeared to be bewildered and embarrassed".[170] The student had been warned not to make the speech. The court ruled that the speech was not 'political' in nature and as it was 'offensively lewd and indecent' it was open to the school to conclude that allowing such speech would impair its basic educational mission.

In this respect Rishworth states that there is, "a clear reluctance to establish the courts as a forum for deciding how vulgar a particular form of expression must be and so deference is paid to a school board or the principal's own determination of this issue".[171] However, what if rather than 'sexually explicit' language, a student speaks out in support of homosexuality or the Ku Klux Klan? How should a court approach such issues as these?

In respect to the first example, a school might classify such speech as offensive depending on exactly what was said and its conceptualisation of homosexuality. The American case of *Pyle* suggests that this is possible due to the latitude courts allow schools in determining what is 'offensive'.[172] The court found however that such policies must be applied on a content-neutral basis. Nevertheless, in this case this meant that speech used to express support for homosexuality could only be allowed if speech carrying an anti-homosexual message was not restricted. In fact, the same result would be unlikely to occur in New Zealand by reason of the HRA (discrimination on the basis of sexual orientation is a prohibited ground of discrimination for the purposes of section 57). Moreover, Rishworth suggests in applying section 14 that prohibiting speech that is racially or sexually demeaning may be justified because it may otherwise result in the creation of an environment which is hostile to the minority concerned.[173] In the same way, speech in New Zealand

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[170] *Bethel*, above n 153, 678 Burger CJ.
[171] Rishworth, above n 64, 42.
[172] *Pyle v South Hadley School Committee* (1994) 861 F Supp 157. In this case students with screen-printing abilities came to school everyday with a different 'vulgar' slogan printed on their t-shirts. However, if a distinction is drawn between the initial characterisation of speech as 'vulgar' and the degree of vulgarity and what is to be done about it, it might be argued that the court may play a role in determining the former.
[173] Rishworth, above n 64, 43.

schools in support of an organisation like the Ku Klux Klan could and should be restricted whether it is classified as offensive or not.[174]

Finally, should a school have absolute discretion to restrict 'sexual' speech? This is a particularly pertinent question in the New Zealand context. In 2002 a New Zealand school student was assigned a creative writing topic by his English teacher titled, "How does your body betray you?"[175] He wrote about an embarrassed teenager whom he described as having "a boner" while in class and not wanting to leave his seat when called to the front of the class. He was stood down for five day from his school (Cambridge High) and was required to undergo counselling. He also garnered a large amount of media attention and public support. The school refused to comment to the media or attend a community meeting organised by the student's parents, citing the privacy of the student. However, it also released a four page newspaper to approximately 7 500 Cambridge Homes justifying its stance on the matter with articles and letters written in support of the school, including those which severely criticised the behaviour of the student.[176] The controversy was eventually resolved by private mediation.

So how does the *Moonen* test impact on this type of situation? To begin with, creative writing should be an important form of expression under the ambit of section 14. When accusations of offensiveness are raised in the context of creative writing, a court should thus be wary before they defer absolutely to the judgment of the school. In fact, this seems like a paradigm case in which a court should require the school to show that the restriction was a reasonable limitation rather than use the *Bethel* approach of allowing such speech to be restricted without justification (of course New Zealand has not actually adopted such a test yet). The approach chosen along with the

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[174] In comparison, in the American case of *Castorina v Madison County School Board* (2001) 246 F 3d 536 the school was prevented from prohibiting a t-shirt with the confederate flag printed on it as the restriction in question was not viewpoint neutral. The Supreme Court refused an application for certiorari.

[175] See Phil Taylor "A Family's Bone of Contention" (May 26 2002) *Sunday Star Times* Auckland, 7, for a copy of this essay.

[176] "Special Issue of the Cambridge High School Leader" June 2002. In particular the publications emphasised the fact that the teacher was "disturbed when the student was showing his work to others and sniggering" and also the fact that the student was asked not to submit the essay, he defied the teacher in doing so, and was "argumentative" when interviewed by the Deputy Principal. The student told the media that he was rather asked whether he felt it was appropriate to submit it. Whatever the conduct of the student, this paper is concerned with the essay itself, rather than the manner in which it was submitted.

court's attitude toward sexuality will be determinative of the outcome. Significantly, in this case the presumption that the school is best placed to assess community standards would appear to have been displaced. The media documented the outrage of the public, the 200 strong meeting regarding the incident, and the Office of the Commissioner for Children even criticised the school's reaction "bizarre".[177]

B Student Criticism

This section briefly addresses the issue of student criticism, confining itself to the case of student criticism of other students. To begin with, such speech is likely to come within the prima facie scope of section 14. However, the objective of creating a safe emotional environment for students through the prevention of bullying may be a basis for limiting such expression under section 5 of the BORA.

Kazmierow and Walsh state that "There is a culture of cruelty that flourishes in schools posing major legal issues..."[178] They outline the severe effects bullying may have on students which include physical and mental injury, lower self-esteem, and the disruption of a positive learning environment.[179] In this respect, Boards are required by law to provide a "safe physical and emotional environment for students".[180] Kazmierow and Walsh argue that, "Schools are...not only morally obliged go reduce bullying, [have an] obligation to provide a safe physical and emotional environment. Schools are bound by statutory duty to provide a safe bullying free learning environment."[181]

The significance of this is the potential crossover between student criticism of other students and bullying. While such conduct may not be entirely preventable, the point is that in cases where a student's speech is restricted on the basis that it amounts to bullying, this may be a justified limitation of their right. In fact, even more than in

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[177] Gregg Wycherley "Boy's suspension over essay 'bizarre'" (15 May 2002) *New Zealand Herald* Auckland. The spokesman continued, "We're certainly going to go in to bat for him ... We just can't honestly make out what the offensive part of it is, it's incredibly innocuous." He was also concerned that the student had been sent to counselling. "It's almost as if they are suggesting he needs some sort of psychological intervention, which is quite an intrusion."

[178] Maria Kazmierow and Patrick Walsh "Legal Liability in Relation to Students" In Paul Rishworth, Patrick Walsh, and John Hannon *Education Law: Continuing Developments* (New Zealand Law Society, Wellington, 2004) 103.

[179] Kazmierow and Walsh, above n 177, 105.

[180] NAG 5: "Each Board of Trustees is also required to (i) provide a safe physical and emotional environment for students; (ii) comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees."

[181] Kazmierow and Walsh, above n 177, 106-7.

the case of 'offensive' speech, this seems an important example of an area where courts should defer to a school's judgment as to what constitutes bullying. This is particularly so if the criticism amounts to the creation of an environment hostile to a minority.

C Clubs

The final issue of expression considered by this paper is that of student clubs. It is difficult to know whether the restriction of such clubs is a widespread problem in New Zealand. In the United States cases have tended to arise concerning the prohibition of religious or gay student clubs. Essentially, students may ask to form a club and use a school room to meet in outside of school time. In 2005 one such case became widely known in New Zealand through the media. This case involved a religious club, KidsKlub, which meet at a primary school once a week during the children's lunch hour.[182] The club ran for two years before a newly elected Board banned the meetings. The School Trustees Association backed the Board's position. Both sides hired what the media termed 'heavyweight' lawyers for opinions on the legality of the ban. The school ultimately backed down and reinstated the club.[183]

The legal opinion provided to the club by former Prime Minister Geoffrey Palmer advised the ban was illegal.[184] It stated that the decision constituted an unjustified limitation on the student's freedom of religion as set out in sections 13 and 15 of the BORA. Moreover it was not one that was prescribed by law.[185] Although the board did not make their legal advice available, their general position was reported in the media as believing they were not under any legal obligation to facilitate religious expression and that the Bill of Rights Act did not apply in this case because making

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[182] See David McLoughlin "Legal Eagles in Religious Fight" (9 June 2005) *The Dominion Post* Wellington, 1. KidsKlub is based on a Scripture Union programme and similar classes are held at about 20 other North Island primary schools. Children are not allowed to attend without the permission of their parents. The meetings are based around "values and relationships" and involve scripture, craft, stories and role-playing. About one third of the school's 400 pupils had permission to attend, and around 30 came to each session. See "School split over religion club ban" (10 June 2005) *New Zealand Herald* Auckland.

[183] "School gives way on lunchtime bible study" (7 July 2005) *The Dominion Post* Wellington, 1.

[184] Letter dated 27 May 2005 to Seatoun School Board of Trustees concerning decision to refuse permission for KidsKlub to continue to operate.

[185] This was apparently because "the legislation does not explicitly authorise the Board to limit the rights to freedom of religion in a manner outside sections 78-9". However explicit authorisation is unnecessary and section 75 which confers on the Board "complete discretion to control the management of the school as it thinks fit" would provide ample authorisation for the Board to make such a rule so long as it is consistent with the general law of New Zealand.

decisions about religious instruction was one of the school's private, not public duties.[186] Also the ban was said to be legal due to the school's secular status.

The grounds on which the school argued that the BORA did not apply are untenable. As stated above the BORA applies to decisions made by the Board who carry out a public function in managing schools under section 75 of the Education Act. Moreover, the section expressly provides that such management must be consistent with the general law of New Zealand. The decision to ban KidsKlub comes within the ambit of section 75. While there may be no general duty on a Board to 'facilitate' religious expression, it is also clear from the weight of American law that a refusal to do so must be made on the grounds of viewpoint neutrality. In this case if the school facilitated the expression of any other student club at the school it could not differentiate that of KidsKlub.

The ban cannot be supported on grounds of the school's secular status for two reasons. First, sections 78 and 79 of the Education Act only prohibit religious instruction when this takes place in school time. Moreover, the Act provides for the 'technical closure' of schools in order to provide up to an hour of religious instruction per week.[187] As such, there is nothing in the Education Act to prevent the meeting of such clubs outside of school time, and it would seem consistent with the rationale to let them do so. Therefore this ban was an unjustifiable restriction under section 15 of the BORA and it is not surprising that the school ultimately capitulated.[188]

IX OPTIONS FOR REFORM

This section briefly sets out two options for reform to help address the concerns raised above.

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[186] Sandra Paterson "Who's kidding who about kids' clubs?" (18 June 2005) *New Zealand Herald*, Auckland.

[187] In fact, as many as 60 per cent of state primary schools are "closing" each week to host such religious classes, Anna Saunders "On a legal opinion and a prayer: The religious divide" (28 June 2005) *The Dominion Post* Wellinton, 8.

[188] As a point of comparison, the United States the Equal Access Act 1984 was passed specifically to combat discrimination against student religious groups in public high schools and has subsequently been ruled constitutional. It provides that if any clubs are allowed then schools may not refuse permission to religious ones. More recently the Act has been used to fight opposition to 'Gay-Straight Alliances' in high schools and rules prohibiting such clubs have been ruled unconstitutional at district court level.

A Education Review Tribunal

When schools infringe upon the rights of students, litigation is rarely going to be a viable option of redress. The cost and time delays involved, combined with the uncertainty of outcome of a court case (due to the undeveloped status of education law), the fact that points of principle are at stake rather than sums of money, and the probability that the adversarial nature of the court system would impact negatively on the relationship between the school and the student, make litigation an option unattractive to both students and schools.[189] In fact, the Office of the Commissioner for Children has published a government briefing paper which advocates the establishment of an independent body of review to deal with school issues, and this would include those relating to free expression.[190]

This briefing paper essentially arose from the large number of exclusions and suspensions of school students in New Zealand, which the commission alleged in some instances, might be both unfair and illegal. The Commission outlines how litigation and other possible avenues of redress have substantial shortcomings which may render them of little practical use in many situations. It is outside the scope of this paper to consider the constitution of a Tribunal or the sum total of the reasons for establishing such a body.[191] However, a Tribunal could provide a cost and time-effective means through which schools and students could resolve their difficulties on a constructive basis which encourages the maintenance of amicable relations between parties, and mediation may be involved in such a process.

Most importantly to the subject-matter of this paper, a Tribunal could give real effect to students' rights under the BORA and the HRA, encourage consistency of approach between schools, and increase the likelihood of compliance with basic

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[189] In respect to the difficulties subsequently faced by students who take a school to court, see for example Mike Crean "We had a really good cause" (10 January 2002) *The Press* Christchurch, 7 who documents the life of Wendy Rich who took her school to court over religious observances that took place during the school assembly (one of the few cases litigated concerning education law in New Zealand). She had tried to raise the issue with the school counsel but turned to the media when this proved ineffective. He reports that "Publicity of the case made job-hunting difficult. She changed her name, and immediately landed a job. 'But then I blew it by forgetting to answer when people called me by my assumed name.'"

[190] Office of the Commissioner for Children, above n 141.
See also Trish Grant "School Students Human Rights" (2 November 2004) <http://www.occ.org.nz/media/files/education_review_tribunal> (last accessed 24 September 2005).

[191] Rather, the reader is referred to the Briefing Paper of the Commission above n 141. The Commission notes that England has a similar such judicial body set up to deal with school issues.

standards due to the visibility and status of Tribunal rulings. As such, a Tribunal could ultimately result in an increased respect for human rights and tolerance in the school environment, allowing students to develop their identities, and consequently increase the possibility of educational success and self-realisation. Such an idea has received the support of several key stakeholders and organisations including the Human Rights Commission, YouthLaw and was even endorsed by Minister of Education, Trevor Mallard, in 1997, although he subsequently retracted from this.[192]

B Legal Education Seminars for Trustees

Given the requirement under section 75 of the Education Act that Boards must make their rules and decisions in conformity with the general law of New Zealand, it would seem sensible that some effort should be taken to ensure that trustees understand what constitutes the general law of New Zealand and can apply it when they carry out their functions. An import part of this would be to educate trustees on the operation of the BORA and the HRA in the school environment. An educational programme could be executed through legal education seminars held in conjunction with an effort to bring relevant publications to the attention of Boards. Such an initiative should set in motion by the Ministry of Education.

X CONCLUSION

This paper has attempted to set out the case for protecting student expression in New Zealand schools and a basis on which this may be done. It has done so because it is the responsibility of adults to ensure that schools treat pupils fairly. There is an imbalance of power between school students and the adult world, and it should not be left solely to the student to query school policies which appear to be unlawful. If it is, there is evidence to suggest that not only is this ineffective in light of the current system of redress, but moreover there is a risk that this may compromise the student's fundamental right to education as relations between the school and the student sour. Moreover, there is a risk that policies which unjustifiably limit individual liberties and compromise a student's right not to be discriminated against may result in indoctrination which lowers their sense of individuality and equality, their expectation

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[192] See for example HRC "Submission of the Human Rights Commission to the Law Commission on: The Review of the New Zealand Court System" (12 July 2002) <http://www.hrc.co.nz/index.php?p=13681&format=text&id=14057> (last accessed 29 September 2005).

that they should be treated as such, their social consciousness, and their tolerance for others who are different. Concerns raised by some students through the media indicate that students are not apathetic when it comes to their rights, though visibility is nonetheless a serious problem, and there is evidently a general sense of powerlessness and helplessness on the part of students and their parents.

The only way forward is if those adults placed in positions of power over school students are prepared to allow student dissatisfaction as having more validity than is currently the case, and pay attention to human rights legislation with the same spirit of tolerance and open mindedness with which the legislation was passed. On 24 May 2004 *The Dominion Post* reported an instance of a student who wore pyjamas to school. This was done in protest of the United States' treatment of prisoners of war in Iraq, and the student was upset because it was a case of bullying. Instead of being sent home, suspended, to change, and despite the ribbing the student received from his peers, his teacher used this opportunity to hold a classroom discussion on the Iraqi situation, and reported that students consequently had a better understanding of the situation from the points of view of both sides. While not all student expression may be so noble, this instance nonetheless demonstrates that allowing students to express their individuality not only empowers and helps them on the way to their own self-realisation, but can benefit the student body as a whole.

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Education Commission of the States <http://www.ecs.org>

United States Department of Education <http://www.ed.gov>

XII APPENDIX I: GLOSSARY OF TERMS

The information given in this glossary is taken from "School Powers and Obligations" published by YouthLaw. This publication and more information can be obtained from their website, http://www.youthlaw.co.nz.

Boards of Trustees: All state schools must have a Board of Trustees. Boards are composed of members of the school community and control and manage the school, making rules under section 75 of the Education Act 1989.

Designated Character Schools: Under section 156 of the Education Act the Minister of Education may set up schools of special character. These are known as "designated character schools". Such schools may refuse to admit students whose parents do not agree with the school's aims.

Integrated Schools: These are schools that used to be private but have now agreed with the Ministry of Education to join the state school system under the Private Schools Conditional Integration Act 1975. Many such schools are owned by churches. They must also follow the Education Act and are responsible to the Minister of Education. However, such schools can still keep their "special character".

Kura Kaupapa Maori Schools: These are specialist Maori language schools established by the Minister of Education under section 155 of the Education Act. Classes are taught entirely in te reo Maori. They generally have the same rules as state schools under the Education Act, but most also follow other rules called Te Aho Matua (an approach for teaching and learning). Any parent who wants to enrol their child at a Kura Kaupapa Maori School must agree with Te Aho Matua or the school is able to refuse entry to the student.

Private Schools: Private schools are established by a private owner. They provide an education on the terms of the enrolment contract that students and their parents agree to when they enrol. They do not have to follow many of the rules under the Education Act that state and integrated schools must follow.

State Schools: State schools are established by the Minister of Education under the Education Act. They must provide a free education to their students, although they can ask for donations and charge for extra-curricular activities. They must follow both the rules of the Education Act and their obligations to the Ministry of Education.

XIII APPENDIX II: GUIDELINES FOR UNIFORM POLICIES

This appendix sets out some draft guidelines that schools could follow in formulating uniform policies.

Proposal 1: A new National Educational Guideline

Suggested Guideline:

Schools must work toward the creation of an educational environment where the individuality and identity of students are nurtured and supported, while allowing the school to achieve its education goals. Account must be taken of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Rationale:

This Guideline is intended to be generally phrased as to confirm with the style of the other National Guidelines and likewise will leave School Boards with discretion as to how the Guideline may be achieved. It takes note of the connection between human rights legislation, the importance of individuality and identity to students, and educational goals. It encourages schools to consider the Bill of Rights and the Human Rights Acts in formulating school rules, which will include those which pertain to school uniforms.

Proposal 2: Promulgation of Best Practice Guidelines in relation to school uniforms under new National Guideline

Research indicates that the ability of students to freely express their unique identities while at school will enhance their capacity to achieve both self-realisation and positive educational outcomes.

As such, rules inhibiting or restricting expression should be based on sound educational policy and made in consultation with the school community as well as specific communities that a policy may disadvantageously affect. Objectives behind uniform and dress codes, including prohibitions on certain apparel, should be stipulated in the school prospectus and developed in the school charter.

Generally

1. Schools must have regard to the Bill of Rights 1990 and the Human Rights Act 1993 in formulating and implementing rules and policies. This is implicitly required under the section 75 of the Education Act 1989.

2. Trustees should have an understanding of how these Acts operate in the school context. This will include a particular knowledge of Human Rights Commission opinions that relate to school uniform policies which have been found to discriminate against certain students.

3. When issues regarding restrictive rules arise, schools must adhere to their responsibilities under the Education Act by following the correct process when a student transgresses a school rule.

Specifically

Section 14 of the Bill of Rights allows New Zealand citizens the right to free expression. This may impact on school uniform policies. As such:

I. Uniform policies must have clearly specified objectives based on evidence. These should be referred to in the school's prospectus. They may be expanded in the school charter.

II. Schools should have regard to the importance of student free expression and the goal of in formulating these policies. Account must be taken of the fact that the Bill of Rights confers individual rights.

III. Schools should ensure that the equality and individuality of students are not unduly compromised by the passage of such rules. When expression of a student is restricted the onus is on the school to demonstrate that the restriction is a justified limitation on the student's expression. Rules must not relate to a prohibited ground of discrimination under the Human Rights Act 1993.

IV. At the very least schools should be prepared to allow exemptions to certain groups. For example:

Case Study 1: religion

A Human Rights Commission opinion indicates that schools may need to allow religious exemptions to uniform policies where the expression that is restricted is an important part of the student's religion. See opinion C149/94

Case Study 2: Culture

A Human Rights Commission opinion indicates that culturally important expression may necessitate an exemption to uniform policies which restrict such expression. See opinion C112/91.

Case Study 3: Gender

A Human Rights Commission opinion cautions against uniform policies that result in unequal access to education as between male and female students. See opinion C130, 130/191.

XIV APPENDIX III: EXAMPLES OF APPEARANCE REGULATION IN SCHOOLS

The follow is a list of Wellington state secondary co-education schools (not integrated). There are four in total. Essentially this appendix is intended to demonstrate some uniform and dress code policies found in New Zealand state co-educational schools (which allows a comparison between uniform requirements for male and female students).

This is essentially for the reader's benefit in order to gain a preliminary understanding of how schools might officially approach the issue of appearance regulation. Nevertheless, such co-education schools tend to have more relaxed uniform policies than those of single-sex schools. The reader is referred to the website of the Ministry of Education for a directory for specific schools.

Identified are the schools' uniform policies or dress codes and the objectives the schools have articulalted, as per their prospectuses and websites, as underlying these policies and the overall values of the school.

In terms of commenting on the specifics of uniform policies and dress codes, this appendix focuses on differences as between male and female students as well as restrictions relating to hair, culture, religion, and accessories.

Newlands College: Uniform requirement

Website: http://www.newlands.school.nz/

Boys may wear shorts and trousers. Girls may wear trousers and skirts (dress uniform is a skirt).

Apparel: "To be restricted to a watch, one plain ring, and one plain chain to be worn under the uniform. Either one plain stud or sleeper may be worn in each ear. There is to be no other body piercing."

Hair: "Hair must be clean and tidy. Extreme styles are not acceptable. Boys are to be clean shaven."

Other: Make-up and nail polish may not be worn.

Objectives: "For the smooth and efficient running of the school a code of behaviour is required. This is not designed to restrict individual students unduly, but to form a culture and a climate in the school based on self-responsibility and care. The best rule is, 'to have respect for oneself and for others'."

"The appearance of the students is expected to bring both credit to themselves and the school. Newlands College is a uniformed College and the students are expected to wear it neatly and correctly."

The prospectus and website make no specific reference to concerns of religion, culture, race, or gender.

Onslow College: Dress Code

Website: http://www.onslow.school.nz/

No set uniform for day wear. Student clothing must be clean and appropriate to educational activities.

Logos and graphics must be appropriate (not offensive or promoting alcohol or illegal substances).

For safety reasons some departments may require particular clothing requirements.

Values include encouraging social responsibility, striving for an environment that is inclusive, culturally and socially diverse, and physically and emotionally safe.

Tawa College: Uniform Requirement

Website: http://www.tawacol.school.nz/

Shorts for male students and skirts for female students. Female students may also wear shorts made out of the same kilt material as the skirts, but this is not advertised in the prospectus or on the school's website. Male students may wear trousers in their senior years if worn with a long-sleeved shirt and tie

Apparel: "No jewellery may be worn, but a plain gold or silver keeper or stud may be worn in pierced ears. The wearing of jewellery, studs or keepers in other parts of the body which may have been pierced is not permitted."

Hair: "Students' hair must be clean and groomed to such a style and length as to remain tidy and off the face throughout the normal activities of a school day. Beards, moustaches, and extravagant hair colours and sideburns are not acceptable."

School values include:

- Excellence and inclusive participation
- Music, other cultural and sporting experience
- Safety of students and staff
- High standards of behaviour and appearance
- Service to, care and support of others
- Partnership with parents and community

Wellington High School: Dress Code

Website: http://www.whs.school.nz/

Dress code only. Clothing must be clean and safe including safe footwear and non-offensive clothing, for example non-offensive t-shirt slogans.

Wellington High School discarded its uniform policy in 1986. It now prides itself on being "the only co-educational, non uniform secondary school in Wellington City".

In their prospectus the school affirms the following as important goals of the school:

- Gender equity and respect between young men and women
- Tikanga Maori
- Ethnic diversity and respect for different cultures
- Valuing the uniqueness of individual students and their ability to express their personalities
- Effective social development of students to become confident, contributing adults. This includes respecting differences and individuality.

The school specifically states that as part of achieving these goals "Wellington High School has a dress code and is non uniform".