PENNY H.J. THE LEGAL RIGHTS OF SCHOOLCHILDREN

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INTRODUCTION.

It is a comparatively recent phenomonen for Western society to recognise children as in any way different from minature adults.[1] Thus it was only largely in the eighteenth and nineteenth centuries that legislation was enacted to make them a group separate from adults. Children were seen then as innocent and helpless and therefore exploited by money-loving adults. Legislation was aimed at curbing the excesses of industrialism and centred round the need to forbid adults from employing children. But if children were not to be allowed to work, what were they to do? The answer was that they should be educated. At common law there was no obligation on a parent to educate his child. So compulsory education had to be provided by the state - in Britain in 1870 and in New Zealand in 1877.

Laws made especially for children were essentially protective. They gave children few rights as persons; they were still regarded as possessions of their parents.

> During the nineteenth century there was a spate of legislation relating to children but none of it challenged the idea so firmly held in common law that children were the possession of parents. None of it contained even a hint of giving status to the child as a person. The child was the property of its parents who had complete control over its being and life and the new laws buttressed this idea.[2]

Beginning as early as Rousseau,[3] some thinkers have challenged the need to protect the child while still retaining an image of him/her as a chattel. They have seen the best protection for the child as being to protect his rights as a citizen. In the words of John Holt, perhaps one of

1. P. Aries. Centuries of Childhood (London, Cape, 1962.)
2. Nan Berger "The Child, The Law and the State" in Children's Rights ed P. Adams (London, 1972) 164
3. R Farson. Birthrights (Penguin, 1974) 9

our most influential modern day educators.[4]

> I urge that the law grant and guarantee to the young the freedom that it now grants to adults to make certain kinds of choices, do certain kinds of things and accept certain kinds of responsibilities. This means in turn that the law will take action against anyone who interferes with young people's rights to do such things.

It is true to say that the law relating to education still fulfils a role which protects the child rather than protects his rights as a person. His relationship to his school and teachers is often defined in terms of his relationship with his parents. Parents are often given rights which should really be those of the pupil. This protective aspect of education is shown in the international covenants to which New Zealand is a party. Article 13 of the International Covenant on Economic, Social and Cultural Rights reads

> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
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> 2. The States Parties to the present Covenant recognise that, with a view to achieving the

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4. John Holt. Escape from Childhood (Penguin 1974) 114

full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means,, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall/be encouraged or intensifed as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

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

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the

education given in such institutions shall conform to such minimum standards as may be laid down by the state.

Principle 7 of the Universal Declaration of the Rights of the Child reads

> The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him on a basis of equal opportunity to develop his abilities, his individual judgment and his sense of moral and social responsibility, and to become a useful member of society.
>
> The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
>
> The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of his right.

While these objectives may be praiseworthy, they grant or preserve very few rights to children while stressing the rights of parents, the State and Society in education. They define what is agreed on as the aims of education - what is "good" for children, who are differentiated from adults in that education is to be compulsory for them.

The purpose of this paper is to consider what rights pupils have in the New Zealand education system,[5] and whether those rights (of lack of them) can or should be changed. To this end, the rights considered in this

5. A brief outline of the structure of state education in New Zealand is contained in Appendix A.

paper are from areas where the students themselves may feel concern. These fall into three broad areas. Firstly, the compulsory nature of education - what obligations there are on pupils to attend school, what punishment may be inflicted on them if they do not, and whether the right to education needs to be accompanied by enforced attendance related solely to age. Secondly what may be loosely described as the rights of the person - the way which the education system can curb these by enforcing rules about dress, punishment, possession of property, and regulation of behaviour even outside school hours. The third main area of rights considered is the right to have a voice in the system, both in what happens to an individual and in how the system is run. These three major sections are preceded by a discussion of the doctrine which pervades much of education law. This is the "in loco parentis" doctrine, a common law precept defining a pupil's relationship to his teacher in terms of his relationship with his parents.

The paper is entirely concerned with the state system of education since, with the large number of private schools at present integrating into the state system there will soon be very few children in New Zealand attending schools which are not governed by the State. Section 4 of the Private Schools Conditional Integration Act 1975 says "An integrated school shall, on integration, become part of the State system of education in New Zealand and shall be subject to all the provisions of the Education Act 1964 and regulations made under that Act." In practice the rights of schoolchildren attending a private school are similar to those attending a state school, although in theory those rights will be more governed by the contract between their parents and the school.[6]

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6. See Chapter 2 for a fuller discussion of this point.

"IN LOCO PARENTIS"

The doctrine of "in loco parentis" has for centuries been the common law rule underlying much of the authority that schools have over their pupils. It was first enunciated by Blackstone.[7]

> ....he [the father] may also delegate part of his parental authority during his life to the tutor or schoolmaster who is then 'in loco parentis' and has such a portion of the power of the parent committed to his charge viz., that of restraint and correction as may be necessary to answer the purposes for which he is employed.

At common law, the father had the right to restrain and control the acts and conduct of his child and to inflict punishment on the child to a reasonable extent. Blackstone probably had in mind the tutor or governess who lived as a member of the family or possibly the small village school of a few pupils. His doctrine is however still used centuries later to justify rules and practices in today's education factories of a thousand or more pupils. One of the purposes of this paper is to show that the doctrine seems no longer appropriate to modern education, despite the fact that it is still often cited as a justification and is often used to uphold the authority of the school in the face of strong opposition from the parents whose authority has supposedly been delegated.

The "in loco parentis" doctrine was translated by the courts of the nineteenth century to be a term in the contract between the parent and the school which he paid to have his child attend. In some cases it was held that the delegated authority was expressly set out in that the parent received a copy of the school rules or prospectus before signing the contract.

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7. Stephen's Blackstone 9th ed Vol ii, 296

In Price v. Wilkins[8] the father had received a prospectus. Wills, J. therefore summarised the respective rights of the parties as follows:[9]

> "The parent surrenders for the time being a part of his otherwise exclusive right to direct or control the child, and certainly undertakes that the master shall, so far as he or his action are concerned, be at liberty to enforce with regard to his son, the rules of the school, or, to put it at the very lowest, at all events such rules as are known to him and assented to by him. He cannot, without breaking the contract implied by the very relation between them, require his son to disobey such a rule of the school. And the contract of the master is, not at all hazards and in all events to supply board, lodging and tuition, but to supply them on the terms that these rules are observed, so far at least as the action of the parent is concerned . . . . the very nature of school life imports such an obligation on the part of the parent."

The last sentence indicates the change in circumstances from Blackstone's day. It would not have been contemplated that the private tutor, a paid servant in his master's house could override the wishes of a parent. But by the nineteenth century, the provision of education has become a contract between independent legal equals. Thus, as outlined in the passage above, the parent gives up some of his rights to the schoolmaster in accordance with the terms of their contract.

If there was no specific delegation of authority to the school in this way at the time of the contract, there was an implied term that the parental authority was delegated if and when the need arose. So in Hutt and anor

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8. (1888) 58 L.T. 680
9. ibid 684

v. The Governors of Haileybury College and Others[10] Field, J. said "What amount of power is actually delegated by a parent to a master must depend on the circumstances in each case. Those circumstances might be greatly varied by any special terms in the contract." And so, in R. v. Newport (Salop) Justices ex p. Wright[11] the court upheld the right of a school to punish a boy who broke the school rule of not smoking in the street even although he had his father's permission to do so. Since this rule was well known to the boy, the father could not override the authority he had explicitly delegated to the school.

Thus a parent who entered into a contract with a school to provide education for his child did so on terms which gave up some of his rights and privileges in respect of that child. Sometimes the limits of that authority were defined and explicit. At other times they were implied and the bounds were therefore to be interpreted by the schoolmaster. It was clear that the parent could not override the authority he had delegated, and to do so was an indication that the contract was breached. (In Price v. Wilkins[12] the court said the school was justified in expelling a boy who had been kept home after the holidays for a longer time than the school rules permitted.) The parent could only end the contract if he wanted to regain his rights.

The "in loco parentis" doctrine also extended into the definition of the duty of care owed by a teacher to his pupils. In Williams v. Eady[13] Lord Esher M.R. established the standard of care as being such as a careful father would take of his boys.

This situation was, however, altered with the introduction of compulsory education in Britain in 1870 and in New

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10. (1888) 4 T.L.R. 623
11. [1929] 2 K.B. 416
12 (1888) 58 L.T. 680
13. (1893) 10 T.L.R. 41

Zealand in 1877. The removal of the contractual basis for education meant a removal of the term, implied or explicit that a parent delegated part of his authority to the schoolmaster as part of the contract. If a parent was forced by law to send his child to school, the contract--ual version of the "in loco parentis" rule could no longer apply. Prendergast C.J. addressed himself to this problem in Hansen v. Cole.[14]

> "In the present case the child is at school not by virtue of any contract, nor can the father remove the child - that is, he is compellable to have him educated either at a common school or elsewhere . . . . In my opinion the authority arises, not out of any supposed delegation of the parent's authority but out of the necessities of the case. I have not been able to find that Blackstone, in stating the law in the way he does, was proceeding upon any authority or precedent."

With this comforting reflection in mind, the Chief Justice went on to hold, on the basis of inferences from dicta in United States cases that ". . . .it is not because the parent puts the master "in loco parentis" that the master has the authority but because the master is (howsoever it happens) for the time being "in loco parentis" that he has the authority".[15]

There does not seem to have been much questioning of this adaptation of the doctrine and it was not until 1964 that it was considered in detail by a superior court. In deciding whether the Crown as employer was liable for the negligence of a teacher, the High Court of Australia considered the question of the origin of a teacher's authority in the case of Ramsay v. Larsen.[16] Three

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14. (1890) 9 NZLR 272, 278
15 ibid
16. [1964] 111 C.L.R. 16

of the judges considered the problem. McTiernan, Kitto and Taylor, J.J. all seem to agree that the powers a teacher had were akin to those of a parent - McTiernan J. summed it up as "quasi-parental authority."[17] Likewise, they agreed that this authority no longer derived from a delegation of the duties of a parent by that parent. However they do not seem quite so unanimous about where the authority derives from. McTiernan J. would see it as an exercise of the power of the Crown. The teacher is placed "in loco parentis" 'only in virtue of his appointment by the Crown as a teacher'.[18] However Kitto J. sees that a school-teacher's authority ". . . . exists, at least under a system of compulsory education, not by virtue of a delegation by the parent at all, but by virtue of the nature of the relationship of schoolmaster and pupil and the necessity inherent in that relationship of maintaining order in and about the school."[19] Taylor J. considered that "a public school teacher is exercising an authority delegated to him by the Crown in respect of obligations assumed by the Crown."[20] He quoted this with approval from the judgment of Fergusson J. in the Full Court.[21]

> "Pupils of the prescribed school age attending public schools have, during school hours, been compulsorily removed by the authority of the Crown, from the protection and control of their parents. In view of that compulsion, by the establishment of public schools for the reception of such pupils and the provision of teachers to impart instruction and maintain discipline the Crown must be regarded as having taken over in respect of the pupils those obligations of which their parents have been deprived. . . . "

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17 ibid 25
18 idem
19 ibid 29
20 ibid 38
21 (1963) 80 W N (NSW) 1634, 1635

Thus Kitto J. agrees with Prendergast C.J. (whom he cites with approval) in Hansen v. Cole[22] that this quasi-parental authority arises from "the necessities of the case" - that is, the inherent relationship between schoolmaster and pupil. McTiernan J. and Taylor J. seem to incline more to the view that the quasi-parental authority derives from an exercise of power by the Crown, Taylor J. going further to define this as a duty owed by the Crown to parents as compensation for taking away their rights over their children.

Having regard to such judicial uncertainty, it is submitted that it is time to abolish the doctrine of "in loco parentis" except as a historical curiosity. Firstly as outlined above, there is considerable conceptual difficulty in squaring the doctrine with the modern realities of compulsory education. There are other ways of determining the relationship between teacher and pupil without judicially distorting the concept of "in loco parentis" to do it. Secondly, it should be abolished because it defines the relationship between pupil and teacher as an incident of parenthood and this reinforces the notion that children are merely the chattels of their parents. Thirdly, as will be seen most clearly in Chapter IV, the doctrine, based as it is on the outmoded notions of a contract between parent and teacher, is still nevertheless being used to justify decisions made by the school which are in direct opposition to the wishes of the parents.

Two judges in Ramsay v. Larsen[23] seemed to be of the opinion that, the state having imposed compulsory education, the Crown was in some way responsible for the authority delegated to the teacher. It is submitted that, once the "in loco parentis" doctrine is abolished, this approach is the correct one. The authority of a teacher over his pupils

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22. (1890) p NZLR 272
23. [1964] 111 C.L.R. 16

should be defined by the legislature, whether in statute, regulation or by-law rather than the present situation where gaps in the legislation which defines a teacher's authority are plugged by a rather too ready reliance on the "in loco parentis" doctrine. Under legislation, parents, pupils and teachers would know more clearly the limits of the authority of a schoolteacher and would no longer be dependent on an unskilful adaptation of a common - law doctrine.

COMPULSION TO ATTEND.

New Zealand has had compulsory education since the Education Act 1877. That Act made the distinction which is still maintained today between the age which a child can attend school ("school age") and the age for compulsory enrolment. Section 83 of the 1877 Act set the school age as being between five and fifteen. No child could attend a state primary school if he was younger than five or older than fifteen. During the Depression (1932 - 36) the lower limited was raised to six years but after 1936 it returned to five. The present Education Act 1964 defines in section 2 school age as being between five and fifteen for most children.[24]

The Education Act 1877 made education compulsory for children between seven and thirteen (section 89). The upper limit was raised to fourteen in 1901, fifteen in 1944 and the lower limit was dropped to six in 1965.

Parents may, under section 111 of the Education Act 1964, have their children exempted from compulsory enrolment on two grounds: -

(a) That the child is elsewhere under instruction as regular and as efficient as in a registered school; or

(b) That the child is unable to attend school regularly or is unable to be educated by reason of physical or mental handicap.

Certificates are to be granted by the headmaster of a primary school or the principal of a secondary school, whichever is appropriate (section 111 ss 1 and ss 2) Subsection 5 provides for a right of appeal by the parents against refusal, either to the Education Board of the

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24. There is a proviso for this to be extended up to the age of 21 for children who are deemed to need special tuition.

district or to the governing body of the secondary school. It is submitted that there could be grounds for a decision by such a body to be in breach of the rules of natural justice because of bias - the appeal body being the employing authority of the original decider and therefore more likely to support him/her.

The first ground of section 111 is easier to establish for children of primary age than for secondary where an almost impossible degree of specialisation is required (unless, for instance, a parent was able to arrange for a series of tutors for a child). The words "under instruction as regular and as efficient as in a registered school" link the criteria for what is taught and how to the curricula prescribed by the state. It is likely that a parent who believed that simple numeracy was all that a person needed to know and therefore stopped teaching the child maths at the age of eight or nine would run the risk of having the Certificate of Exemption revoked under section 111 (9) since "efficient instruction" in a registered school provides for compulsory mathematics to the end of the fourth form. Thus children who are exempted from compulsory enrolment are still tied reasonably closely to what is taught in schools - the only radical break in their education is the fact that they do not have to attend school to get it.

The main criticism levelled against the second ground of exemption from enrolment is the fact that it is there at all.[25] It operates particularly in the case of the multiply handicapped whose parents (and, of course, the state) are exempt from providing any education for them merely by proving that they are sufficiently handicapped. It can be argued that these children have a right to be treated on the same terms as other children, and if compulsory education is the norm, there should be compulsory education for all children regardless of the extent of their disability.

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25. Cf Diane Sleek "The Rights of Mentally Disordered Children in New Zealand (1980) 10 VUWLR 317

Section 112 makes special provision for the Director - General to exempt a pupil over fourteen from enrolment "having regard to the pupil's level of progress, his conduct, and the degree of benefit he may gain from the education facilities available at any convenient school. . ." This provision is mostly invoked by schools to rid themselves of the pupil who is making a considerable nuisance of himself/herself and obviously filling in time until s/he can leave school. A parent could seek such an exemption but would only be likely to succeed if the school agreed that the pupil could no longer receive any benefit from schooling.

Attendance.

The obligations towards compulsory education do not end once a pupil is enrolled. There is also an obligation to attend regularly. In the 1880s it was not uncommon for a quarter of the children on the school roll to be absent for three days out of four, and another quarter two days out of four.[26] Many escaped school altogether. The initial provisions for compulsory attendance were therefore very modest in their requirements and also laxly enforced. Section 89 of the Education Act 1877 required attendance of every child of school age who ".... lives within the distance of two miles measured according to the nearest road from a public school within a school district ....." The pupil was to attend for at least one half of the period during each year during which the school was usually open. A series of amendments[27] led finally to the adoption in 1910 of the words which remain in S117 of the present Act - ".... every child required to be enrolled. . . is hereby required to attend the school whenever it/is open."[28]

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26 Unpublished Department of Education paper on School Age

27 In 1885 and 1901.

28 As laid down in the Education (Terms and Holidays) Regulations 1977 and the Education (School Attendance) Regulations 1951.

Section 118 provides the grounds for parents to apply for their child to be exempt from attendance. Firstly, if the child has to walk from his/her home a distance of more than two or three miles (depending on whether the child is over or under ten) to the nearest public transport, s/he is exempt from attendance (but would probably be required to enrol with the Correspondence School).

Secondly, the pupil is exempt attendance ". . . by reason of sickness, danger of infection, infirmity, severe stress of weather, sudden and serious illness of a parent or other sufficient cause." It is for the Principal of the appropriate school applied to to decide what constitutes "other sufficient cause". The case of Jenkins v. Howells[29] is not exactly in point as the wording in the English statute is "unavoidable cause". The court held that this implied something in the nature of an emergency and something which actually affected the child itself. The New Zealand section is less stringent and also includes an item unrelated to the child itself - the sudden and serious illness of a parent. It is debatable whether this would have covered the situation in Jenkins case where a girl was kept home to do the housekeeping for her mother whose illness was serious but not sudden.

The third ground for excusing attendance is the impassibility of roads. Subsection (9) makes it clear that a pupil who satisfies the school that s/he has good reason can be absent for up to five school days without needing a certificate of exemption from attendance.

What happens when a pupil, perhaps encouraged by the indifference or ignorance of his parents decides to disobey the attendance provisions? Section 123 of the Education Act 1964 provides for the appointment of

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29. [1949] 2 K.B. 218

attendance officers. Subsection (5) states: -

> "Any Attendance Officer appointed under this section, on production of a distinctive badge or other evidence of his appointment may at any time during school hours detain any child who appears to him to be of school age and is not then present at school, and may question him as to his age, name and address, the school at which he is enrolled and the reason of his absence from school. If in any such case the child fails to give a satisfactory reason for this absence from school, the Attendance Officer may take the child to his home or the school at which the Attendance Officer believes that he is or should be en-rolled and shall report the matter to a Social Worker."

The pupil's parents may be fined for the irregular attendance of their child at school under S120, but the fines are not very severe - up to $40 for a first offence and up to $100 for a second or subsequent conviction. The Attendance Officer, as stated above, has a duty to report the truancy to a social worker and this may result in the pupil being brought up before the Children's Board under the Children and Young Persons Act 1974.

Under section 15 of that Act the Social Worker may, on receiving the report of the Attendance Officer, decide to report the complaint to the Children's Board. This Board can warn or counsel the child or his parents, arrange for them to have counselling or medical or psychological or psychiatric assistance. Or they may recommend a complaint to the Children and Young Persons Court under section 27 -

> (1) Any member of the Police or any Social Worker who reasonably believes that any child or young person is in need of care, protection

> or control may make a complaint under this section requiring the child or young person to be brought before a Children and Young Person's Court to have the matter heard and determined in accordance with the provisions of this Act. (2) A child or young person shall be in need of care, protection or control within the meaning of this Act if - . . . .(e) Being of school age within the meaning of the Education Act 1964, he is persistently failing to attend school without reasonable cause."

However this can only apply to children under ten years of age. An Older child can only appear under subsection 2 (f) as committing

> ". . . an offence or offences, the number, or nature or magnitude of which indicates that he is beyond the control of his parent or guardian or that it is in the interests of his future social training or in the public interest that a finding be made in terms of this section of the Act."

Thus a truant of nine may have to undergo the alarming experience of appearing before the Children and Young Persons Court whereas an older brother or sister would have to do something potentially more serious before s/he had to face the Court. The only other option for the older truant is fining the parents under section 120 of the Education Act 1964, and this provision is used comparatively rarely because it is not seen as a positive or effective measure for dealing with truancy.[30]

The Children and Young Persons Court can make a variety of orders under S31 ranging from admonition of the child or his parents to removing him to the guardianship of the Director - General of Social Welfare. Many of these orders will be inappropriate to truanting - since

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30 Department of Education Circular on Truancy 22 May, 1981 No 1981/63 Wellington.

very often a pupil truants without his parents' knowledge, it is, as with section 120 of the Education Act 1964, of little point in punishing the parents. In many cases truancy may occur in conjunction with other offences. It is submitted however that if the complaint is simply one of persistent truancy, there should be some procedure set up under education legislation to deal with the matter. This would remove simple failure to attend school from the area of the quasi-criminal at least in the first instance. The powers of attendance officers under section 123 could be widened to allow them to bring cases of truancy before the school's controlling authority. The close link between schools and their controlling authority might instigate speedier inquiry into the root causes of truancy. The Department of Education considers that in recent years truancy has declined, largely through improved detection and follow-up procedures by schools and attendance offiers and "the provision of a curriculum more relevant to pupils at risk".[31] This would indicate that the answers to the problems of truancy lie more with the schools than with the courts.

Both the International Covenant on Economic, Social and Cultural Rights and the Declaration of the Rights of the Child have adopted the principle of compulsory education. The International Covenant in Article Thirteen, 2 (a) says "Primary education shall be compulsory and available free to all". The Declaration in Principle 7 says "the child is entitled to receive education which shall be free and compulsory, at least in the elementary stages."

However some writers and educationalists[32] are beginning to question the concept of compulsory education as being a denial of the fundamental right of liberty."The only

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31 Departmental Circular on Truancy 1981/63 op. cit.
32 Such as Ivan Illich; John Holt; A. S. Neill.

people in our society who are incarcerated against their will are criminals, the mentally ill, and children in school".[33] John Holt, one of the world's leading educational authorities says[34]

> "The requirement that a child go to school for about six hours a day, a hundred and eighty days a year, for about ten years, whether or not he learns anything there, whether or not he already knows it, or could learn it faster or better somewhere else is such a gross violation of civil liberties that few adults would stand for it. But the child who resists is treated as a criminal."

There seems to be little logic in the notion that by forcing a child to attend school s/he thereby becomes educated. The compulsory nature of education is a way in which the law does differentiate between the rights of children and the rights of adults. It is an example of the way the law "protects" children by imposing on them what the community thinks is "good for them" because they are children - the compulsoriness of education is related solely to age rather than, say academic standards.

The proponents of compulsory education argue that to do away with compulsory attendance will result in numbers of illiterates becoming an exploited work-force. However strictly enforced labour laws can prevent exploitation and there would be few if any parents who would not ensure that their children received some sort of schooling. The Adult Literacy Programme is frequently discovering people who have been at school until age fifteen and are nevertheless illiterate, while schools have ever increasing numbers of pupils over the age of fifteen who could leave but who do not, either because they cannot

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33. R. Farson Birthrights (Penguin, 1974) 96
34. J. Holt Escape from Childhood op. cit 184

get jobs or because they want to continue their education.

The increasing trend towards continuing education should therefore be fostered, thereby allowing people of any age to return for education when they feel the need. A bursary system could facilitate such a process. Then, as more such services were provided, the school leaving age could be progressively lowered until it was finally abolished. In this way education would be a more efficient and effective process rather than the unrewarding prison it undoubtedly is for some children at present.

THE RIGHTS OF THE PERSON.

Once pupils are enrolled at school, the school is able to make rules which affect a large number of their personal rights. Their choice of what they can wear or other facets of personal appearance such as hairstyles may be severely curtailed. The school may make rules which allow it to enforce a certain code of behaviour not only inside school but often outside the school premises and outside school hours. The right to property may be affected by confiscation or prohibition. Punishment can take the form of physical confinement (detention) or physical assault (corporal punishment). This section examines these infringements on the personal rights of school pupils.

It goes without saying that in the large community which constitutes a school, some rules regulating behaviour and allowing punishment will greatly ease the task of making that community run smoothly. Most schools have a number of rules, partly for this purpose and partly fulfilling a protective function towards children. Legally a school's power to make rules rests on two foundations. Firstly, the "in loco parentis" doctrine which assumes that the parent delegates to the school the power to regulate the behaviour of the child, a power which traditionally belongs to the parent. Secondly a school relies on the powers given to its controlling authority under the Education Act 1964. Primary schools rely on section 26 (1) (a) which gives to the Education Board of each district the power to "(e)stablish, maintain and control state Primary Schools . . ." Secondary school boards are given a similar power in section 61 (a) to ". . . have the control and management of the school". Both types of controlling authority are given a power to make such by-laws as are necessary or desirable to allow them to exercise the duties and functions imposed on them.[35] Thus, any school rules which are made by the controlling

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35 Section 26(5) - Education Boards section 61(2) Secondary School Boards

authority have the status of by-laws. As such they can be challenged as unreasonable, this requirement being encapsulated by the words "necessary or desirable". "Control" and "management" are such wide terms that a challenge that a rule was ultra vires the powers of a controlling authority is very difficult.

Uniform and Appearance.

It is accepted that a school cannot insist on the wearing of school uniform as a condition of enrolment. Under section 109 of the Education Act 1964 children between the ages of six and fifteen must be enrolled at school and the state school therefore has a corresponding duty to enrol them and cannot insist on conditions. However the English case of Spiers v. Warrington Corporation[36] held that once enrolled, a pupil had to comply with the rules of dress and appearance as a condition of attendance. In this case a pupil was sent home from school for wearing slacks and her father was prosecuted for failing to ensure that she attended regularly. Lord Goddard at 66 said that the headmistress's action did not amount to suspension.

> The headmistress did not suspend this child at all. She was always perfectly willing to take her in; all that she wanted was that she should be properly dressed. Suspending is refusing to admit to the school; in this case the headmistress was perfectly willing to admit the girl but was insisting that she be properly dressed.

The issue then becomes one of the school's right to discipline a pupil for failure to observe the school rules and a parent who fails to send his child to school in the proper uniform can be prosecuted for failure to have his child observe the attendance provisions.

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36 [1954] 1 QB 61

The Spiers case is now generally recognised as the leading case where children are presented for school dressed in such a way that admission is refused as a matter of discipline.[37] Two New Zealand cases have therefore concentrated on challenging the school's right to make dress and appearance rules rather than the school's right to enforce those rules. Both cases attacked the rules on the basis that they were unreasonable and that they were ultra vires the powers of the Board of Governors - in both cases that of Onehunga High School. In Attorney - General (ex relatione Winn v. Board of Governors of Onehunga High School and C. J. McCarthy[38] Wilson J. in an oral judgment held that the requirement that the wearing of a prescribed uniform was compulsory was not unreasonable.

> "There is scope for a difference of opinion as to what is the most desirable clothing for children attending school to wear, but the fact that one opinion is held by the Board of Governors and another is held by the parents does not mean that the Board of Governors is unreasonable in its view.

In Edwards v. Onehunga High School Board of Governors and Anor[39] the New Zealand Court of Appeal also thought that it was reasonable. Speight,J. at 244 said

> . . . we have the evidentiary fact that a school board comprised of parents, men and women, presumably of the locality in which the school is situated, with all their experience as parents and members of the board thought it was necessary to prescribe hair-length.

Another challenge to the reasonableness of the hair-length rule was that it was an extreme and unwarranted intrusion on a personal liberty in that, unlike uniform, it also affected a pupil outside school hours. The court did not appear to find this a strong argument and did not discuss it, holding that "necessary or desirable" required an

37. Barrel G. R. Legal Cases for Teachers (London, 1970) 168
38. Unreported (1964) M 165/64 Auckland Registry
39. [1974] 2 N.Z.L.R. 238

objective test which allowed the Court to decide whether a rule was "necessary or desirable." They held that the onus of proof lay on the person objecting to the rule to show that it was not authorised by the Act. The plaintiff had not discharged this onus. It is submitted that Trevor Riddle's[40] suggestion should be the correct approach - that "the onus should be on the person infringing a personal liberty to show that the rule is necessary or desirable."

Both the Winn case and the Edwards case also challenged the rules as being ultra vires the power of the Board. In the Winn case Wilson, J. confessed to being initially attracted by the argument that the prescription of uniform was not for the "good management of the school".[41] However he finally came down on the opposite side ". . .I am persuaded that it is in the interests of the good government of the school that the pupils attending it should be uniformly attired in a uniform which has received the approval of the parents themselves." In Edwards the Court of Appeal was more definite.[42]

> 'It appears to this Court that 'control and management' of the school are wide and substantial topics including in their scope, of course, the control and management of pupils. The behavioural checks necessary, let alone desirable for such control in the day - to - day running of the school may be infinite and incapable of complete codification but it certainly appears to us that a reasonable governing of appearance and dress fall properly within the ambit of matters authorised to be so controlled.

It is interesting to note the evolution of the "in loco

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40 Trevor Riddle. The Rights and Duties of Parents in the Education of their Children. LLM Research Paper Victoria University of Wellington 1979 37.

41 section 61 (2) Education Act 1964

42 op cit 243.

parentis" rule. Originally the right to govern dress and appearance would have been a parent's prerogative. This right would have been delegated to the school as part of the contract between the parent and the schoolmaster. Now it is regulated by law, although elements of the parent's right still remain. Firstly it is the School Committee (for Primary Schools) and the Board of Governors (for secondary schools) which decide on uniforms and these bodies have a high proportion of parents as representatives. Secondly, the court's decision about the reasonableness of uniform rules appears to be based on what the majority of parents consider reasonable, not what the majority of pupils consider to be reasonable. However the individual parent has been left with no rights in the matter of dress and appearance. Thus The Times of 8 July, 1966[43] reported a conviction by the Ascot Justices of the parents of a boy who was refused admission because of his long hair. In imposing the maximum fine of £1 the Chair--man told the defendant

> The headmaster depends on discipline and would be a laughing stock if he did not exercise his rights. We think you as a father should exercise more control over this boy in future at home.

And in the Spier's case, Lord Goddard commented[44]

> If it was a matter of whether parents reasonably believed that it was in the best interests of the child to wear some particular dress, as I pointed out in the course of the argument,. . . . there are people in this country who believe, and honestly believe, that at any rate in the summer it is desirable in the interests of their children that they should wear no clothes at all except what the barest necessities of decency require. One sees in

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43 G. R. Barrel op cit 168

44 [1954] 1 Q B 61, 68 - 9

> London squares and certainly in the country little children running about with no clothes except bathing slips, and one cannot suppose that a headmistress or headmaster would be obliged to admit children to school wearing no clothes at all.

It seems unlikely that statute law will be altered in the foreseeable future to either restrict the powers of controlling authorities to make rules about dress and appearance or to define those powers more closely. The twin justifications for the prescription of a uniform were set out clearly by Wilson J. in the Winn case[45]

> It is in the interests of the majority of pupils and in the long run of all pupils that as far as possible under our compulsory system of education there shall be no distinction discernible between the pupils attending that school by reason of the class of society in which their parents live or the financial status of the parents.
> . . . the wearing of a uniform helps the maintenance of discipline and the promotion of a good tradition in the school itself.

Most schools who retain uniform would still agree with these. However it would seem that economic necessity may to some extent be doing what argument in and out of the courts cannot. A recent Consumer article[46] indicates that many schools have been forced by rising costs to diversify the items of their uniform, so that in some cases "uniform" consists merely of a requirement to wear clothes of a certain colour. Some schools[47] have abolished uniform completely. Others have mufti for the senior forms. A court would probably now listen much more sympathetically to a plea that a uniform requirement

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45. op cit 4
46. October 1980 p 274
47. For Example Onslow College and Fairfield College.

was not "necessary or desirable" if it involved considerable expense.

It is however likely that students are always going to feel their liberties are infringed in this area. Especially secondary students/who are at a stage of desiring to experiment with their appearance and rules laid down by controlling authorities are liable to be unpopular. Philip Edwards may be comforted to learn that in 1981 pupils have been sent home for having all their hair shaved off. A "Saturday Review" article called Long Hair and Mini Skirts[48] made the point

> 'Public school officials have always been to some extent custodians of the mores, and it seems unlikely that the public will soon exempt them from that responsilibity. But neither a school official nor a judge can hope to succeed in the role of arbiter of fashion.

Punishment.

It has been accepted as a tenet of the common law that a parent has the right to punish his child. Blackstone specifically mentioned this power when discussing the "in loco parentis" doctrine[49] ". . . he (the father) may also delegate part of his parental authority during his life to the tutor or schoolmaster who is then 'in loco parentis' and has such a portion of the power of the parent committed to his charge viz that of restraint and correction as may be necessary to answer for the purposes for which he is employed." The most contested source of case-law has undoubtedly been in the area of corporal punishment.

The earliest and still the leading case in New Zealand

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48 21 Jan 1967

49 Stephen's Blackstone op cit 296

in this area is Hansen v. Cole.[50] The right of the schoolmaster to administer corporal punishment was challenged on the grounds that compulsory education under the Education Act 1877 meant that there could be no implied delegation of authority by the parent since the relationship no longer arose from contract. In the absence of any ruling in or under the Act on corporal punishment, Cole, the defendant teacher, had no right to cane the plaintiff, Hansen.

The Chief Justice rejected this view, largely, it would appear on policy grounds and based on dicta in United States cases. He said[51] "In my opinion the authority arises not out of any supposed delegation of the parent's authority but out of the necessities of the case." And at 279 "At any rate, it may be said that it is not because the parent puts the master "in loco parentis" that the master has the authority but because the master is (howsoever it happens) for the time being "in loco parentis" that he has the authority." Thus we now are in the position illustrated by the latest English case on corporal punishment, Happe v. Lay[52] where the parents of the plaintiff had made it clear to the school that they were strongly against corporal punishment. The school tried other punishments, but it was decided to cane the boy after he was found guilty of theft. The judges of the Queen's Bench Division unanimously held that this was a reasonable punishment despite the clear opposition of the boy's parents to corporal punishment.

Prendergast, C.J. in Hansen v. Cole (supra) also pointed

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50. (1890) 9 NZLR 272
51. ibid 278
52. (1976) L.G.R. 313

out that the Act by section 87 conferred a right to "correct" and in the absence of any regulations, such correction must be left to the teacher's discretion. However, it has been held in subsequent cases[53] that even though the punishment has been directly contrary to regulations, a teacher still has a defence to a charge of assault. In New Zealand today the position is governed by section 59 of the Crimes Act 1961.

> (1) Every parent or person in the place of a parent and every schoolmaster is justified in using force by way of correction towards any child or pupil under his care, if the force used is reasonable in the circumstances
> (11) The reasonableness of the force used is a question of fact.

The court in White v. Weller[54] refused to consider the question of whether any form of corporal punishment which was outside regulations on corporal punishment could ever be considered "reasonable punishment" in terms the Australian equivalent of section 59 (2). The question was not raised in issue in the appeal and, while the court considered it to be of "gravest importance" they did not wish to "decide on an issue which might open up far-reaching questions".[55] Some help was given on what is meant by reasonable punishment in Hansen v. Cole.[56]

> In determining what is reasonable punishment various considerations must be regarded, the nature of the offence, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, size and strength of the pupil to be punished.

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53 Notably Mansell v. Griffin [1908] 1 KB947 and White v. Weller Ex parte White I 1959 I Qd. R 192

54 White v. Weller supra 199

55 ibid 199

56 supra 281

Mansell v. Griffin[57] indicates that the teacher should not be actuated by any bad motive. Absence of bad motive does not, of course, justify excessive punishment causing death as in R v. Hopley[58] where the accused in a statement before the examing magistrates stated that he was not at all in a passion or in anger but he felt he was doing his duty and he repeatedly requested the deceased to give in and spare him the pain of inflicting further punishment on him.[59]

Gardner v. Bygrave[60] held that caning on the hand was not prima facie unreasonable. White v. Weller (supra) held that on the facts of that case blows to the head which caused the plaintiff little discomfort were prima facie reasonable (although in contravention of Queensland State regulations on corporal punishment.) In Ryan v. Fildes[61] a blow on the head which caused the plaintiff permanent injury to his hearing was held to be unreasonable because this contravened rules on corporal punishment, although the judges expressed considerable sympathy with the defendant headmistress who did something "which was a natural thing to do, and something which in nine hundred and ninety-nine cases out of a thousand, probably would have produced no ill - consequences."[62]

It is submitted that, based on these cases, the unreasonableness of the punishment appears really to depend on the damage to the plaintiff. If a court is called on to decide whether a breach of regulations is prima facie unreasonable in terms of section 59(2) then it should decide in the affirmative, bearing in mind that but for this section the action would be assault. A standard which allows one blow to be unlawful because it causes damage, while a similar blow is lawful because it happens to cause no lasting damage seems to be very

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57. [1908] 1 KB 947
58 (1860) 2 F & F 202
59. cited in G. R. Barrel op cit 211
60. (1889) 53 J.P. 743
61. p [1938] 3 All E. R. 517
62 ibid 521

arbitrary. The pupil who is damaged in the one case out of a thousand may suffer from that damage for the next sixty years. Moreover, if dicta in Hansen v. Cole[63] are to be followed, more weight is to be given to the teacher's evidence. ". . . if there be any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt." It is submitted that a person attempting to justify what would otherwise be assault should not be given such a benefit; instead any reasonable doubt should weigh in favour of the plaintiff; this being the usual practice of the ciminal law.

New Zealand primary schools will mostly[64] be subject to Bylaw No 32 of the Education Board's Bylaws 1980, a copy of which forms Appendix B. In Secondary schools, discipline is the responsibility of the Principal under regulation 57 of the Secondary School Boards Administration and Employment Regulations 1965. Secondary school boards could make by-laws on corporal punishment similar to those of Education Boards but they rarely do. It is submitted that this is unsatisfactory and secondary pupils have a right to know the limits of punishment of this kind which may be inflicted on them.

The topic of corporal punishment is at present generating considerable debate in educational circles. Only the United Kingdom and Eire of all European countries still permit corporal punishment in schools. In New Zealand in 1969 a petition to Parliament for the prohibition of corporal punishment of infants and senior secondary school pupils received a "favourable consideration". However the government decided that any attempt to achieve the petition's objectives through legislation would be inadvisable.[65] Surveys by John and Jane Ritchie[66] in 1963 and 1979 indicate that corporal punishment is on the increase among parents and that the majority of samples, male and female, adult and child, endorse the use

63 supra 282

64 The Education Board Bylaws have been adopted by 9 of N.Z.'s 10 education boards; the Nelson Education Board still prefers

Footnotes (continued)

64 (cont.) to make its own individual rules.

65 L Familton "Punishment in Schools" The Rights of the Child and the Law N.Z. Commission for I.Y.C. 1979 51.

66 J. and J. Ritchie. "Crime, Punishment and the Law" The Rights of the Child op cit. 47 - 48

of corporal punishment in schools. It would seem then that any moves to abolish corporal punishment must come from within the teaching profession itself.

Yet if children are to have the same rights as adults, corporal punishment should be abolished. ". . . where adults relate to adults (as wives or workers) physical discipline is no longer allowed but the human right to be protected at law from physical assault has not yet been extended to children in their relations with their parents and school teachers. . ."[67] Corporal punishment should be first abolished in the education system and indeed some schools have already done so. Ideally then section 59 should also be repealed making it illegal for anyone to hit a child.

Another common form of punishment is detention. The legal basis for this seems to rest on dicta in some cases founded on the "in loco parentis" doctrine and, in the case of most primary schools on regulation 28 of the Education Board Bylaws 1980.

The power of restraint as a disciplinary measure was given to the parent as a right at common law. As such it was extended to the schoolmaster under the "in loco parentis" doctrine. Field j. observed in Hutt and anor v. The Governors of Haileybury College and Others[68]

> "The law therefore does justify a parent in a case where he honestly considers correction necessary in administering blows in a reasonable and proper manner. But then this power is not limited to corporal punishment but extends to detention and restraint. I think that the father parts with all these powers and delegates them to the master under whose charge he places his child. . ."

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67 J. J. Ritchie op. cit. 48

68 (1888) 4 TLR 623,

The limits of a teacher's rights to detain a pupil were further explored by dicta in Mansell v. Griffin[69] Phillimore J. said

> "It is, I suppose, false imprisonment to keep a child locked up in a classroom or even to order it to stop under penalties, in a room for a longer period than the ordinary school time without lawful authority. Could it be said that a teacher who kept a child back during play hours to learn over and say his lesson again ... - could it be said that such a teacher would be liable in an action for trespass to the person?"

Actions for false imprisonment have proved inconclusive in helping to define a teacher's rights in imposing detention. In Herring v. Boyle[70] the plaintiff child was unaware that he was being detained and therefore no action was held to lie. Similarly in Fitzgerald v. Northcote[71] the plaintiff was too busy packing (and apparently so delighted at being expelled) that he did not mind being locked in for several hours.

In the case of many secondary schools there seems little more than the dicta above to justify the use of detention although it is common practice for schools to officially state that school ends an hour later than pupils are usually released so as to allow for detentions. Most primary schools will however be subject to the more precisely defined limits of Bylaw 28 of the Education Board Bylaws 1980.

> "Teachers shall exercise discretion in detaining pupils after school hours as a punishment or for additional tuition but this must not exceed half an hour and must be supervised by a teacher. No pupil shall be detained during

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69. op cit 167

70. (1834) 3 L.J. Ex 344

71. (1865) 4 F & F 656

> any part of morning or afternoon interval or during the midday recess. Without prior notification to parents no child shall be prevented from catching a bus to home."

It is unlikely that there will be the same public outcry over detention as a punishment as there is over corporal punishment. It is however a considerable liberty that is being denied and as such a secondary pupil should have the right to have the limits of that interference outlined at least in the way that it has been done for primary school children.

Confiscation.

It is quite common for pupils to bring property to school only to have it confiscated by staff. This may be done if the possession of the property contravenes the law. For example a teacher would have power to confiscate a dangerous weapon, or drugs, or stolen goods (And presumably would have in some cases a duty to inform the police). Other types of property may be forbidden by school rules - knives, cigarettes, liquor and jewellery may fall into this class. Other property is confiscated under the umbrella of the 'in loco parentis' rule. This was upheld in the case of Fitzgerald v. Northcote and Anor.[72] The plaintiff, the patrician Fitzgerald had a notebook which contained incriminating details about the backgrounds of the more plebian clerical students who were given much-resented powers of discipline over their fellow lay-students. The notebook also contained details of the"Anti-Bunker Confederacy" - "Bunker" being the school slang for the clerical students - an organisation which the defendant headmaster described as a "secret society which was subversive of the good discipline and order in the school and calculated to create ill-will, discomfort, disaffection and disorder among the pupils therein."[73] The pocketbook was confiscated - it was alleged by force. Cockburn C. J. said[74] that a

72 (1865) 4 F & F 656

73 ibid 657

74 ibid 683

parent believing his child to have something he should not would ". . . rightly think himself justified in demanding it and if it were witheld, then . . . taking it from him." This authority is probably rather stretched to include confiscation of valuable articles to protect their owner against his fellow students (taperecorders, for instance) or confiscation of potentially disruptive items (pocket mirrors, balls, comics). It is submitted also that the 'in loco parentis' rule should not justify the wholesale searches of bags or lockers without the consent of the owners or occupiers. If a teacher does confiscate an item s/he should not keep it longer than the end of a school day (that is, the time when the pupil can remove the property from the school premises). It is difficult to decide on what legal basis a teacher holds the confiscated property. Can it be said that there is implied consent of the pupil to a bailment? However undoubtedly the teacher is required to exercise a reasonable standard of care of over the property.

Enforcement of Rules Outside School.

The 'in loco parentis' rule is relied on very heavily to justify the enforcement of school rules outside school hours or outside the school premises. The power given to controlling authorities in section 26 or section 61 (depending on whether they are primary or secondary schools) is for "control and management of the school." This must make it more difficult for schools to justify the enforcement of rules which regulate the behaviour of pupils outside school hours. However several cases provide some support for the authority of the school outside its gates and these in turn rely on the 'in loco parentis' rule. In Cleary v. Booth[75] Collins J. said

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75. [1893] 1 QB465

> In my opinion the purpose with which the parental authority is delegated to the school-master who is entrusted with the upbringing and discipline of the child must to some extent include an authority over the child while he is outside the four walls.

The test which the judge applied was whether the parents contemplate authority by the schoolmaster.[76] He also held that it was a question of fact whether the act was done outside the delegated authority of the parent. In R. v. Newport (Salop) Justices ex p. Wright[77] however the right of the school to punish for a breach for a rule forbidding pupils to smoke in the street was upheld even though the parent believed the boy to be acting under his own authority. The boy, Frank Wright, called at his father's place of business on his way home from school and his father allegedly gave him permission to smoke. The judges adopted the reasoning that the father having sent his child to the school gave the school the authority to punish for breach of a reasonable school rule; the rule was reasonable, known to the boy and deliberately broken by him.

While in some cases it may seem ridiculous, as the judges in Cleary v. Booth (supra) pointed out, if a school's authority ended the moment a pupil stepped outside the gate, it is submitted that the authority of teachers over pupils outside school hours must necessarily be very limited.

> The best view is that students may be disciplined for breaches of reasonable school rules relating to conduct outside the school grounds and outside school hours but that the misconduct must, in some way be incidental to the maintenance of school discipline or school rules.[78]

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76 ibid 468

77 [1929] 2 KB 416

78 A. E. Knott and Others Australian Schools and The Law (University of Queensland Press, 1980) 111

Thus it could be sensibly claimed that the school would have authority over pupils at official school functions held outside school hours such as prizegivings, school sports gatherings or other similar school occasions, whether or not they are held on school premises. But areas such as going to and from school must remain grey areas. Many arguments and justifications of rules revolve around uniform - because a school pupil can be easily identified as a member of a school because of his/her uniform, his/her misbehaviour brings discredit on the school, and therefore the school can justify rules which regulate behaviour outside school hours. Many rules forbid conduct which is not intrinsically bad but which merely tarnishes the school's public image. This is the sort of rule which most infringes a pupil's liberty and ought to be vulnerable to legal challenges as unreasonable.

THE RIGHT TO A VOICE

The rights considered in this section fall into two main categories. The first is the right to have a say in matters which affect the pupil personally; the second is the right to have a say in the education system. Under the first category will be discussed rights in suspension and expulsion, decisions about leaving school, and the question of police interviews at school. Under the second category will be discussed pupil representation on school boards, pupil pressure groups, and influence on curriculum.

Rights in Suspension and Expulsion.

This section will look at two things; the grounds on which a pupil may be suspended or expelled and what rights are granted to the pupil in the course of such procedures.

Section 130 of the Education Act 1964 governs suspension and expulsion. Suspension is divided into two types - suspension for a specified period up to three days and suspension for an unspecified period. Suspension for an unspecified period is further divided into two sorts - that for pupils under 15 and that for pupils over 15. Only pupils over 15 can ultimately be expelled. Those under 15 for whom a school will not lift suspension must be reported to the Regional Superintendant of Education who will try to find another school for the pupil to transfer to. If all else fails, s/he may have to enrol at the Correspondence School. Answering a question in the House last year, the Minister of Education stated that in 1980 there had been 703 three-day suspensions and 234 indefinite suspensions.[79] This is therefore an area which affects significant numbers of pupils.

Under Section 130

A pupil shall not be suspended from attendance

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79 N.Z. Parliamentary Debates Vol 435 1980 5263.

> at a school unless, in the opinion of the Principal -
> (a) By reason of his gross misconduct or incorrigible disobedience, the pupil is an injurious or dangerous example to other pupils attending the school: or
> (b) The continued attendance of the pupil at the school is likely to have a seriously detrimental effect on himself or other pupils.

The first thing to be noted is that the section imposes a subjective test. The pupil has to be guilty of misconduct of the required standard "in the opinion of the Principal". This means that it is very difficult to argue that the suspension has been exercised ultra vires. A court would only hold it to be so if if was clear that no reasonable principal could ever have held the opinion that the pupil's misconduct would fall into these categories.[80]

A second difficulty in challenging a suspension has been highlighted in both the leading New Zealand cases on suspension. In Edwards v. Onehunga High School Board of Governors[81] the pupil suspended had refused to have his hair cut and this was challenged as not being "gross misconduct" or "incorrigible disobedience" which made him a "dangerous example to other pupils" or likely to have a "seriously detrimental effect" on them. However Speight J. said at 224

> We accept that the length of a boy's hair may not be a very serious matter for many of us and that our experiences with young people show that views vary widely about such things. But the case of Philip Edwards became much more than an issue of the length of this hair. It became a test between him and the school as to whether a resolution of the board

80. per Speight, J. in Edwards v Onehunga High School Board of Governors [1974] 2 NZLR 238 245

81. [1974] 2 NZLR 238

> formally made was to be obeyed by him. The headmaster was placed in the very difficult situation of being obliged to carry out a resolution of his governing body. ... The boy, notwithstanding a number of different requests to him, made it clear that he was not going to obey and he took his stand on a right to defy the authority of the board in such matters.
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> One would normally be loath to use the word 'incorrigible' for an apparently well-mannered lad but it is the quality of his act not his character which is under review. The 'Shorter Oxford English Dictionary' gives 'incorrigible' as 'bad beyond correction or reform'. 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 . . . .

In Rich v. Board of Governors of Christchurch Girls' High School,[82] the plaintiff had walked out of assembly and helped to distribute leaflets protesting against the religious nature of the assembly. McCarthy P. delivering the judgment of the Court of Appeal said[83] "It is patent that the girls were not expelled for walking out of assembly but for their action in organising opposition to the school authority."

It would seem then not only difficult to challenge suspension or expulsion as ultra vires, but that any protest or challenge to or breaking of the school rules may be treated as a direct challenge to the authority of the school and therefore as satisfying the conditions for

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82. [1974] 1 NZLR 1

83 ibid 7

suspension and expulsion which seem at first sight to be rather stringent. Thus any form of action by pupils against school rules or even established practices could lead to suspension, which can be upheld not because of the seriousness of what was actually done but because the action challenges the authority of the school.

Section 130 grants no rights to a hearing to the pupil who is being suspended or expelled. Under S 130 B (2) the parents of a pupil who has been suspended for a specified time may be granted an interview with the principal if they request it. This is the only place where there is anything approaching a hearing. In Rich v. Christchurch Girls' High School Board of Governors (No 1) it was quite clearly held[84] that the rules of natural justice applied in the case of suspension and explusion. McCarthy J. said:

> I would think, for example, that if a Principal sought to introduce a new matter of importance which could militate against the interests of the pupils charged, the Board would be required to inform the pupils or their representitives of this new matter and to give them an opportunity to be heard on it. This would be required by the audi alteram partem rule.

It is submitted however that this requirement of natural justice should be written in to the proceedings outlined in the statute and it should be a right granted to the pupil rather than his parents. S/he may of course choose to exercise it through parents and this may be most likely with younger pupils. But older pupils may wish to make their own explanation and they should be given this opportunity, since parents may not understand the situation which has given rise to the suspension fully or may sympathise with the Principal. The fact that in most cases the pupil will have been interviewed by the Principal is not sufficient. Since the Principal

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84 supra 9.

has to justify the decision to the controlling authority, the pupil should be given the chance to put his/her side of the matter to them (rather than the Principal) as the ultimate judge.

Decisions About Leaving School.

Legally it is far from clear what choice a pupil has vis a vis his parents about the time when he leaves school. Under section 2 of the Guardianship Act 1968 guardians (for example, parents) have the right of control over the upbringing of a child until s/he is twenty years old. Section 2 defines "upbringing" as including education.

However, once a child reaches fifteen there is no way the law of education can be invoked to insist that a pupil attend school. Can a fifteen year old leave school or continue to attend school against his parent's wishes? At common law parents had an absolute right to custody and control of their child until the age of majority, but this was tempered by equity. In In re Agar-Ellis Agar - Ellis v. Lascelles[85] it was held that habeas corpus would not be granted to a parent if the child was over the age of discretion. The basis of this was that the child was then old enough to consent to where he was to be.

This equitable aspect has been to a certain extent included in section 23 (2) of the Guardianship Act 1968 which states that in any proceedings relating to guardianship the Court shall ascertain the wishes of the child and give them such weight as the Court shall think fit, having regard to the age and maturity of the child. Thus if leaving school was an issue in any action covered by the Guardianship Act 1968, the Court would give great weight to the wishes of the child. However this situation is likely to be most rare.

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85 (1883) 24 ChD 317

Despite the fact that Sections 24 and 25 of the Guardianship Act 1968, section 39 of the Domestic Proceedings Act 1968 and section 52 of the Matrimonial Proceedings Act 1963 all implicitly recognise that a child of sixteen has some independent status, there is only one way that this independence could be asserted in decisions about leaving school. That is by use of section 14 of the Guardianship Act 1968 where a child of sixteen or over may apply to a District Court Judge to review a decision of the child's guardian in a matter of importance. While it is true to say that a decision about education would probably be regarded as a matter of importance, it is equally true to say that few, if any schoolchildren would be aware of the existence of this section let alone use it.

It would seem therefore that despite possible legal rights for a pupil to make a decision about leaving school, this decision will continue to be largely a question between parent and child.

Police Powers to Question Pupils At School.

Should the police be allowed to take advantage of the fact that a child must attend school to question him/her during school hours? Certainly the police have no right to remove that pupil from school or detain him without arrest.[86] Police interviews are held at school and mainly justified by the fact that it is convenient for the police who might otherwise have difficulty finding a child.

Bylaw 34 of the Education Boards Bylaws 1980 lays down the following rule: -

> A police officer may interview a pupil at school provided that such officer is in plain clothes and the interview is held in the presense of the Principal. Any such interview shall take place in the Principal's room or in some other place of privacy and the Principal

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86. Blundell v. Attorney-General [1968] NZLR 341

> shall endeavour to notify a parent or guardian of the pupil concerned in order that such parent or guardian may have an opportunity of ettending."

In R v. C. (an infant)[87] Andrews, J. considered generally the problem of police interviews with children. He said[88]

> . . .where a child is being interrogated as to his complicity in a very serious offence, conviction of which could result in serious consequences for him, all reasonable steps should be taken to minimise the risk of his being overborne by the circumstances in which he then finds himself, and, in particular the position of dominance of police officers albeit acting in good faith.

It is submitted that a pupil interviewed at school by the police may well be subjected to double the risk of "being overborne by the circumstances" if the headmaster as well as the police is present. For most pupils the principal may well be an authority figure as overbearing as the police officer, and this may add to the pressure and unfairness of the interview even though the school authorities think they are acting in the pupil's best interest. The convenience of the police in obtaining a "captive interviewee" at school should not be allowed to override the possible coercion of a child by an atmosphere of authority. An interview at school as opposed to home should always be the exception not the rule, and if it is necessary to interview at school, the pupil should have the right to chose his witness - possibly his class teacher or someone who knows him personally may lessen the atmosphere of tension.

Influencing the System.

Section 17 of the Education Act 1964 says that no person may be a member of an Education Board unless they have attained the age of eighteen years. This of course means that effectively no pupil (except adult pupil) can be on

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87. [1976] Qd 341

88 supra 341

the elected board which runs the school he attends. However regulation 16 of the Secondary School Boards Administration and Employment Regulations 1965 makes no mention of any age limit for persons eligible to be on the Board of Governors of a secondary school. Thus potentially a student could serve as a member of the Board, and in 1972 several pupils stood as candidates (unsuccessfully). The Labour Party promised in its 1972 Election campaign to introduce both teacher and student representatives on Boards of Governors. However the only part of this policy which was implemented was the inclusion of a teacher representative. A number of arguments have been advanced against having pupils on Boards. Firstly, that the functions of a Board include the appointment, dismissal and disciplining of teachers and the disciplining of pupils. Secondly, that the Board controls the school's finances. The first argument must apply with equal force to teacher's representatives but in practice seems to have given rise to very few problems. The second objection probably also has little substance - a sixth or seventh former may well have a better grasp of financial matters than some adult board members and anyway is not likely to persuade the Board to spend money on frivolous matters. There is however some authority at common law (largely based on Grange v. Tiving[89]) that a minor cannot hold public office or exercise the rights of citizenship or perform civil duties. This authority does not seem to be strong and would undoubtedly be overturned by explicit statutory provisions. This was the implication in Royal Naval School, Seymour v. R.N.S .[90] where it was held that the reference "any person" in the statute could not have been intended to include minors since the

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89 (1665) O. Bridg. 107, 124 ER 494.
90 [1910] Ch 806

legislation was enacted in 1840 and was concerned with the establishment and management of/school. Clear expression by statute would however, by implication, not be overturned by common law dicta.

Should it be compulsory for there to be a student representative as well as a teachers' representative on the Board of Governors? This aspect of the Labour Party's 1972 Manifesto was never implemented and it would be likely to meet with considerable opposition from members of the community who felt that pupils lack the discretion, discernment and disinterest to act as governors. A more palatable and possibly more practical alternative would be to give a student representative privileged rights as an observer with a right to be heard but without a right to vote or attend in camera decisions. The Principal (who is not a member of the Board) already has this status. Such an arrangement would allow students to put their case to the Board on issues which concerned them. It is submitted that the present position should also be maintained, so that a pupil could also be elected to the Board of Governors as a parents' representative.

Most secondary schools have now adopted some form of School Council to provide a forum for student views.

One good example is the longest established school council in New Zealand at Fielding Agricultural High School which has been running for sixty years and which even has its own separate council chanbers. Each form in the school elects a representative and all seventh formers are on the council. The council members then elect the officers - chairman, treasurer and secretary. Any teacher may also be a member of the council. The council receives each year part of the activities fees paid by the parents, a sum amounting to several thousand dollars. For this money they are accountable to the Board of Governors. The council operates

the school lunch service, an activity which also provides them with revenue. Pupils and pupil clubs may then apply for grants from this finance for their activities, for extra sports equipment or for such things as beautifying the school. The council also publishes a school/community newspaper ("Echo") which is delivered free to Fielding homes twice a term. It is also the task of the council to control sports activities and to maintain law and order - it has power to punish minor breaches of discipline. The effectiveness of the council has however tended to be impaired by the conflict inherent in its dual role - on the one hand the pupils' advocate with authority; on the other the reinforcement of that authority in its "policeman" role. The Principal has a power of veto which is not frequently exercised.

The powers of school councils seem to vary from school to school - some being little more than a grievance or social committee and others having an administrative or even disciplinary function and some limited financial independence. The United Kingdom National Council for Civil Liberties comments[91]

> It is odd that in a country which is supposed to set great store on its value of democracy, the one place where all its citizens have to spend at least ten years of their lives . . . is also the one place in which . . . it is more or less unheard of that children, even from fourteen years upward should ever be brought into this dialogue.

Since it must be of enormous educational value to students to actively be part of a council which helps in the running of the school, it is suggested that the idea of school councils should be extended to primary schools as well. A council will be of little value and will be frustrating rather than educational if it has few

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91 Children Have Rights N C C L Pamphlet. London. No date of publication 4.

real powers or if decisions are constantly overridden by school authorities. It would be worth considering an amendment to the Education Act 1964 which grants pupils the right to establish a school council and defines the powers of the council. Care must be taken, however, that these powers are not so generally worded as to be able to be vetoed in effect by any school authorities who wished to do so. The Education Act 1964 grants pupils few rights and the right to a council by statute might be a good start to redressing the balance.

It may be necessary for each school to determine its own constitution - schools with a large seventh form might not, for instance, favour all seventh formers having a right to sit on the Council. A council should fullful three roles - a liason/advocate role between staff and pupils; an administrative role (helping to run the school); and a disciplinary role. The council should also have a statutory right to funds which could be a fixed percentage of the activities fees. Practical considerations would probably dictate that the Principal should have a power of veto but the exercise of this should be restricted to situations where the welfare of the school is likely to be affected in some major way. Although there may be some problems with conflict between the different functions of the council, the three functions reflect all aspects of the school life and reflect the ambit of powers of other school persons and bodies such as the Principal and the Board of Governors itself.

There are few pupil unions or associations in New Zealand - the main centres tend to have such bodies at least in name but they tend to wax and wane with the enthusiasm of individual members.[92] The main problem is the essentially transitory nature of school pupils. Most who are interested are senior pupils who have only a year or so before they cease to be pupils. It is

92 A Wellington union was active in 1980 but has done very little in 1981.

unlikely that such bodies will be a great force for change unless they are enthused over some particular issue.

Pupils generally have an indirect influence on curriculum and teaching methods and it is unlikely that they would ever be given a statutory right to a voice in these matters even though they are the primary consumers. However it is interesting to note that Mr Justice Kirby in an address to Teachers College Students in May 1979[93] referred to two cases in the United States where students sued teachers who had failed to teach them properly. Legal commentators made it clear that traditional legal principles provide "an ample basis for fashioning a viable cause of action enforceable in the courts against teachers and schools for incompetent or out-of-date teaching."

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93 Quoted in Grant, Knott and others Australian Schools and the Law op cit 169

CONCLUSION.

It is clear that school children in New Zealand have few, if any rights. Both legislators and courts have adopted a largely protective role in line with the traditional way of regarding children as objects in need of care and protection. It is time we stopped regarding children in this light and started to guarantee them the rights which adults enjoy.

Obviously some of the changes suggested in this paper will be a long time in coming. It is unlikely that community attitudes would favour the lowering of the school leaving age to the point where it is finally abolished. We would have to change our concept of education as something which is largely a process to which those under twenty are subjected to. Our school system would have to become more flexible, and programmes more tailored to the individual. However present educational trends show a move in these directions and there may be a growing realisation that the right to education need not necessarily entail compulsion to attend and the right should be that of everyone, not just children.

The personal rights of schoolchildren would be much easier to guarantee. Firstly, if the now outmoded doctrine of "in loco parentis" were abolished, the relationship between a child and his school would have to be governed by legislation, regulation or by-law. The definition of what rules the school was legally entitled to impose on a pupil would consequently become much clearer, and the need to justify rules as reasonable may mean that pupils will gain rights. (Take away the "in loco parentis" doctrine, for instance, and there can be no legal justification for a teacher confiscating a ball with which a pupil is disrupting a class. The teacher would have to adopt some other form of punishment for the disruptive

behaviour) Many of the personal rights must seem very trivial - whether or not pupils should wear a uniform; whether or not small items of property should be confiscated; whether or not pupils should be permitted to smoke in the streets after school. These things may seem trivial because they are rights which adults take for granted. However most of these personal rights could be implemented by schools as a matter of policy rather than by reform imposed by legislation. The one exception is corporal punishment. Section 59 of the Crimes Act 1961 should be abolished. However school policy could lead the way to this reform if schools themselves abolished corporal punishment.

The right to a voice is one area where rights could be guaranteed by statute. The right to a hearing in cases of suspension and expulsion should be given by an amendment to section 130 of the Education Act 1964. The Act should not be amended so that pupils under eighteen are prevented from becoming governors of a secondary school and there should be a new section which grants to a pupil observer or observers the right to attend meetings of the Board of Governors and to be heard at them. A new amendment should also grant a statutory right to a school council and define its powers.

It is in this last area that change should begin. Once pupils are granted the right to a voice in their own affairs and in the running of the school they may become their own best advocates for rights in the education system and learn a great deal in the process.

APPENDIX A.

The Structure of the State Education System in New Zealand.

In its early days, education was largely administered by the provincial governments and as a result state education in New Zealand still has a strong regional authority.

Primary schools are controlled and maintained by Education Boards of which there are ten. Under section 26 of the Education Act 1964 an education board has the power to establish, maintain and control the schools for which it is responsible, appoint teachers and provide equipment and other things necessary for the running of the school. Each individual school is managed by a school committee under section 46. The school committee is under the general direction of the education board and has responsibility for such things as the repair, order, cleaning, and heating of the school.

Secondary schools are controlled by a Board of Governors established with powers given by section 61 of the Education Act 1964. In most cases each secondary school has its own Board of Governors although there is a trend towards the establishment of secondary school councils, which are more regionally based. Some secondary schools are controlled by education boards and these have a committee of management (set up by the Committees of Management Regulations 1981) to control their everyday activities. A Committee of management has wider powers than a school committee but not as many powers as a board of governors.

The Department of Education has an overall supervisory and administrative function but it must be stressed that controlling authorities (education boards and boards of governors) are autonomous bodies and the Department cannot order them to take a certain course of action.

APPENDIX B.

Education Boards Bylaws 1980

32. Corporal Punishment:

(a) The principal shall be held responsible for the nature and extent of all punishments inflicted in his school but he may delegate to or withhold from any of his assistants the authority to inflict corporal punishment. (The Board takes a serious view of the mis-use of corporal punishment and regards its frequent use as an indication of defective discipline).

(b) Corporal punishment shall not be inflicted for minor misdemeanours, failure to achieve a/standard of work or degree of correctness, or for inability to learn or neglect to prepare home lessons. If administered at all, it is to be reserved for serious offences and administered only if likely to act as a deterrent to further misconduct. In no case is it to be needlessly severe, and it is never to be administered except after due consideration.

(c) Corporal punishment, when used, shall be inflicted with a natural leather strap (undivided) not exceeding 46cm in length and not less than 4cm in width and on the palm of the hand. Punishment with any other instruments, or with the hands, or on any other part of the body is expressly forbidden.

(d) Only in exceptional circumstances should girls be strapped and in no case is corporal punishment to be administered on girls over 10 years of age.

(e) Records of corporal punishments shall be kept by the principal for a period of six months. Such records shall be treated as confidential but on request they shall be made available to the Board or to any Inspector of Schools.

(f) IN THE CASE OF SECONDARY PUPILS in schools under the Board's control the Principal may establish a policy within the spirit of this bylaw for the infliction of corporal punishment by means other than that specified in sub clause (c)

SELECT BIBLIOGRAPHY

Adams, P. (ed) Children's Rights (London, 1972)

Ashbridge, C. K. Teachers' Legal and Service Handbook (Wellington, 1965)

Aries, P. Centuries of Childhood (London, Cape, 1962)

Barrell, G. R. Legal Cases for Teachers (London, 1970)

Holt, J. Escape from Childhood (Penguin, 1974)

Knott, A. E., Tronc, K. E. and Middleton, J. L. Australian Schools and the Law (University of Queensland Press, 1980)

McBridge, J. Civil Rights Handbook (Wellington, 1980)

National Council of Civil Liberties Children Have Rights (London, no date of publication)

New Zealand Commission for the International Year of the Child The Rights of the Child and the Law (1979)

Porson, R. Birthrights (Penguin, 1974)

Riddle, W. T. The Rights and Duties of Parents in the Education of their Children. Research paper for Family Law LLM (Wellington 1979)