

International Developments

Education Law in New Zealand¹

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Last year's review of developments in New Zealand's education law sketched the constitutional and legal framework within which primary and secondary education is delivered. This year's begins by doing the same for the tertiary sector, which is presently in a period of review and transition. As to primary and secondary education, there has been little action in the courts, although a change of government in the 1999 election has brought important legislative changes.

Tertiary Education in New Zealand

New Zealand is a relatively young country, dating from 1840. As in other areas of public life, government was required to take the lead in the establishment of institutions necessary for its development. In the field of education, this meant establishing publicly funded universities and technological institutes. A free tertiary education was available until the early 1990s, when partial fees were introduced. These have steadily crept up, despite much opposition, but are still modest compared to tuition fees in North America. To this day there are no private universities. It is unlikely that any broad spectrum private university could survive if it sought to charge both the full cost of tuition as well as recoup its establishment costs. While the reforms to be described below have enabled private providers to enter the tertiary education market and receive the government-funded allowance for each enrolled student, they do not draw enough revenue to fund the acquisition of a large asset base.

The current legal regime within which tertiary education institutions (TEIs) operate is the *Education Act* 1989. That is the same Act whose impact on primary and secondary education was addressed in the *Education Law Yearbook* last year. The Act was designed to vest a degree of community control over educational institutions. The governing bodies of TEIs, like schools, were to produce Charters that set out, after community consultation, their educational mission. The Charters were to be approved by the Secretary of Education, and enforceable by him. In practice these Charters turned out to be rather general and bland, with little that one could disagree with or even remember for very long. But their importance lay in the symbolic effect: of independent councils responding to community concerns, within a framework of national concerns reflected in those provisions of the *Education Act* imposing mandatory functions and duties.

The Act recognised four categories of TEI: universities, polytechnics, colleges of education (concerned with teacher training) and wananga (concerned with Maori knowledge, and discussed further below). These could be public or private. In a back-handed way, the Act set out a partial definition of a university. In a section conferring power on the Minister of Education

formally to recognise (and so legally establish) a new TEI, the Act set out the criteria that should guide him in deciding whether the body should be designated a university, polytechnic, college of education, or wananga. It says that a university has ‘all the following characteristics and other tertiary institutions have one or more of [them]’.²

They are principally concerned with more advanced learning, the principal aim being to develop intellectual independence:

Their research and teaching are closely interdependent and most of the teaching is done by people who are active in advancing knowledge:

They meet international standards of research and teaching:

They are a repository of knowledge and expertise:

They accept a role as critic and conscience of society:

There then follow some more specific descriptions of each type of institution. A university, it is said:³

Is characterised by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence and promotes community learning.

Merger and Acquisitions in the Tertiary Sector

The above definitions have been the subject of much study in certain quarters. The funding formula for TEIs is driven by EFTS (equivalent full-time students), meaning that institutions need to be able to attract students in sufficient numbers if they are to remain viable. This leads to a certain jockeying for position, both in a geographical sense (establishing branches in other population centres so as to gain access to a larger pool of students, for example) and in a branding sense (as when a polytechnic renamed itself ‘Unitec’ and another sought a formal change in status to a university). All TEI managers have had to keep their eyes firmly fixed on their bottom line.

But a related way of gaining EFTS is to acquire or merge with another institution. This then generates questions about the status of the merged or acquired institution. If a university acquires a polytechnic, for example, is the whole new enterprise a university? In 1997 and 1998 these questions arose in connection with the planned acquisition by Massey University, operating in Palmerston North and Auckland, of Wellington Polytechnic, operating (as its name suggests) in Wellington. To accomplish that amalgamation, for which there was no specific procedure in the *Education Act*, Massey proposed that the Minister should disestablish the Polytechnic. Its assets and courses would then be taken over by, and become part of, the University. The Minister was disposed to agree. But a legal challenge was brought by another polytechnic, and interim injunctive

relief was granted in December 1997, the judge noting that there is a ‘strong argument with a reasonable chance of success that it was not the intention of the Legislature that the *different types of educational institutions provided for by the Act could be merged* in the way proposed ...’.⁴

But in early 1998 the then Government introduced legislation that pre-empted that litigation. This legislation was tacked on to an unrelated measure and passed under urgency. Stated to ‘clarify the law’, the new provision expressly authorised the amalgamation of TEIs as proposed. This of course did ‘clarify the law’ in favour of the enjoined parties, and the litigation was subsequently struck out as incapable of success. The amalgamation duly proceeded. The Government’s speedy law change, without normal consultation processes, was criticised.⁵

On a related note, the long-standing application of the Auckland Institute of Technology to be reclassified as a University was successful during 1999 and came into effect on 1 January 2000. It is now the Auckland University of Technology.

University Governance and the New Public Sector Management

The governing bodies of TEIs are called ‘Councils’, and are made up of at least 12 but no more than 20 persons. Government is entitled to appoint only four members. The remaining 8 to 16 places are distributed amongst the Chief Executive, academic and general staff, and relevant professional associations. There can be co-opted members as well.

In the years since the 1989 reforms there has been constant financial pressure on TEIs, especially the universities. Responding to the problem, university administrators have been forced to look for efficiencies. This has led to redundancy for staff in fields that do not bring in sufficient numbers of students, and new allocation of resources to the subject areas perceived to be in demand. Since, in the aggregate, students preferences tend to reflect the perceived attraction of a course to future employers, the overall result is a shift away from courses with no practical market application, and towards law and business. Then, when university managers respond to this, the result can seem like a pandering to ‘applied’ research and away from pure research in traditional academic fields.

The funding problems have also led university managers to streamline the organisation of universities through internal ‘restructuring’. Such measures are not, of course, directly forced upon universities by government, but being a response to funding shortfalls they might be said to be indirectly so. For its part, however, Government has said that it is looking for efficiencies and rationalisations, greater accountability, and for research linkages with the private sector that remove some of the burden of funding from the public purse. There is no bottomless pit of money available for tertiary education in the modern world.

This dialogue between government and universities has been taking place over the past three years through consultation papers. A *Green Paper* in September 1997 set out the government’s ideas on possible options for tertiary reform, and sought submissions. Many ideas were floated, one contentious one being the separation of research funding from teaching, and making the former contestable amongst institutions. Another contentious area concerned ownership and governance: government signalled a need to influence governance of TEIs in light of its ‘ownership interest’ in them, especially those at risk of failure and hence financial

underwriting. There was the suggestion of levying capital charges on the established institutions. This raised the question: who really *owns* universities?

Submissions were received, and in response a *White Paper* was released by Government in November 1998. This maintained the broad themes. As to control and ownership, TEIs would continue to be allowed full control of their assets, but the Council membership would be streamlined down to between 7 and 12 members. The proposal was that they should be ‘function focused’ rather than ‘representation focused’ – that is, council members would be chosen for their expertise in business management, and members of the institution itself were to be in the minority. This reflected the new public sector management theories, which had been applied in other fields but not, to this point, in education.

Some minor aspects of the proposed reforms were introduced but the more radical ones have not. With a change in Government in November 1999 – to a centre-left coalition – the future progress of these proposals now seems unlikely. However, reforms aside, the inability of government to fund universities as they would like will continue to mean that the universities and other TEIs look for efficiency.

The Waikato University Litigation

At the height of the debate over the *White Paper* an important case was brought over structural reforms introduced at the University of Waikato, based in Hamilton, 100 miles south of Auckland. This case served as a symbol for the battle waged between academic traditionalists, on the one hand, and the new breed of university manager, intent on efficiency and rationalisation, on the other.

Waikato is a relatively new university located in the heart of a region where Maori are numerically and culturally strong. The University has always had a strong Maori influence: for example, when a new Law School was established there in 1990 it was stressed as a special feature of the institution that it would offer an ‘alternative’ legal education, striving to recognise Maori aspirations for change in New Zealand. But Waikato had financial pressures like other institutions and its vice-chancellor, Bryan Gould, proposed a radical restructuring that would, amongst other things, fold the Law School into the Faculty of Management and merge the School of Maori Studies into the Faculty of Education. These were deeply unpopular proposals, and the foundation Dean of Law, along with a Maori studies professor and the national university staff union, brought injunction proceedings.

The case, *Association of University Staff v University of Waikato*,⁶ came before Hammond J in the High Court. Justice Hammond had been, before his judicial appointment, Dean of the Faculty of Law at Auckland University as well as a law professor in Canada and the United States, and therefore had a keen inside knowledge of university workings. With some eloquence, he noted the conflict between the demands of a free university and the demands of the new managerialism that feels rationalisations are vital to ensure the survival of the institution. As he put it:⁷

The University is bowing more and more to corporate values, because Parliament says it will have to. The university then becomes a battleground, wherein accountability becomes conflated with accounting. Talk, much of it empty, about

‘excellence’ evades more fundamental questions of values, whilst disguising narrow questions of cost and benefit. On the other hand, plainly something has to give. Everyone knows that the University must be ‘reformed’. But what lies at the deep level, behind all of this, is a struggle of the utmost importance which is unfolding over the appropriate knowledge structures for the 21st century.

Hammond J went on to uphold the legal challenge to the Vice-Chancellor’s restructuring proposal. The V-C had, he said, acted unlawfully. The Education Act vested ‘management’ in the V-C as chief executive officer, while ‘governance’ lay with the University Council. Further, the Act required the establishment by Councils of an Academic Board, to which questions of an academic nature had to be put. Accordingly, if the decision to embed the School of Law into Management, and Maori studies into Education, was an academic one, then it was, by law, one that the academic board had to first consider. Had Council then approved, the V-C as ‘manager’ could have implemented the decision. But until that had happened, it was beyond the V-C’s power to implement restructuring of the faculties mentioned.

This decision therefore turns on characterising a restructuring as ‘academic’ in nature. In this respect, the V-C in evidence was hoist by his own petard. He apparently ‘conceded’ that there was an ‘academic rationale’ in moving Law into Management: it rested on a view that ‘law’ is moving in the direction of the kinds of matters that are taught in management schools’. Hammond J agreed that that may well be so, but noted that there were different views. And therein lay the whole point. As he put it:

The question of *where* something is taught is no ‘mere’ or ‘incidental’ matter. It is a matter of the greatest academic significance. The structure of courses, how they are taught, what the purpose of the course is perceived to be, how well they will be supported, and so on, turns on a fundamental appreciation of the general philosophy and direction of an academic entity. That explains why (and this often bewilders members of the public) there are so many tiffs within the academy over just such matters.

The case resulted, therefore, in a setback to the management. Although an appeal was filed, it was later withdrawn. It was a victory for the notion that the notion of an ‘academic’ matter is a broad one. That vested power in the university’s Academic Board, with whom its Council was bound to consult. And it limited the power of management.

The Maori Dimension in Tertiary Education

Maori are New Zealand’s indigenous people, now making up about 13% of the population. In 1840 a treaty – now known as the Treaty of Waitangi – was made on behalf of Queen Victoria with the chiefs of the majority of Maori tribes. That Treaty now forms much of the moral basis of the nation’s constitution, given that it legitimated the subsequent exercise of power by the colonial, and later the independent, government. The precise effect of the Treaty is now much debated – did it really transfer the sovereignty of Maori tribes to the English Queen? Or did it instead simply authorise the Queen to exercise her authority over non-Maori in New Zealand, with the Maori retaining their full sovereignty as before? New Zealand legal history has proceeded on the former

basis, but the argument that the latter was in fact what was really intended by Maori is not without force. Crucially, the Treaty document itself is genuinely ambiguous as between the two. For a start it is in two versions, Maori and English, and they say different things and are not translations of each other. But the bottom line is that the Treaty itself can not really settle this type of issue. When investigating the legal authority of a government, the principle is that even though might not be right, it is certainly what matters most.

That, of course, still leaves the subject of possible constitutional change open for debate. We have been having that debate, in a small way, for some years. But the debate is now growing in urgency and intensity, and has been given impetus by the election of the new Government whose Attorney-General has, as a former law academic,⁸ written in support of constitutional change to accommodate Maori aspirations. Those aspirations turn out to be far from uniform. Some (but few) would advocate Treaty fundamentalism – a reorganisation of the state to reflect what they think the 1840 generation really meant. Some argue for reform of constitutional structures so as to give Maori more say in legislation and government: perhaps a Senate with equal Maori representation. Others would say that Maori aspirations are appropriately dealt with through existing structures, by devolving to the modern successors of the historic Maori tribes a degree of public power and responsibility for service delivery. This last option happens to some extent already and the argument is that it can happen even more. Some Maori organisations are bulk-funded to deliver services that would otherwise be a matter for government. This approach is played out in health and social welfare, but not yet in education save to the extent that (as we shall see below) tertiary funding effectively operates in this way so far as Maori TEIs are concerned.

In education the principal concerns of Maori have been (1) the preservation of the Maori language, (2) ensuring access by Maori persons to higher education, and (3) the regeneration of Maori knowledge. The attainment of these goals requires, of course, a political will, and the associated grants of public money. But there will always be competing demands for public money, and this prompts governments to insist on accountability. All that is to say that the extent to which New Zealand's educational structures deliver results for Maori remains a political question. An annual review of education *law* tends to focus on litigation. But, as in other areas of education law, litigation about Maori education is rare. That said, there has been some; it is noted next (as well as in the section of primary and secondary education under the school closure heading).

Funding of Maori Tertiary Institutions

The *Education Act* 1989 provides, as we saw, for the establishment of wananga, a category of TEI. A wananga is defined as follows (s 162(4)(b)(iv), translations in parentheses are found in the original):

A wananga is characterised by teaching and research that maintains, advances, and disseminates knowledge and develops intellectual independence, and assists the application of knowledge regarding ahuatanga (Maori tradition) according to tikanga Maori (Maori custom).

Three wananga have been established under this section since 1989. Prior to 1990 wananga existed as private institutions that were not recognised as 'established' under the

predecessor Act. They would, even so, have received some grants for capital works from government. After 1990, capital grants were abolished on the basis that, thenceforth, general access to 'per student' subsidy entitlements would fund both capital development and tuition expenses. The assumption was that the capital needs of TEIs up to that date would have been met by the ability to access grants prior to 1990. However the wananga, now established under the Act, disputed that their capital needs had been properly accommodated under the old or new regimes. Their ability to progress this complaint as one of law for determination by a court was limited. It was a complaint about government policy. But, as Maori institutions, they had access to an alternative dispute resolution method, the Waitangi Tribunal.

The Waitangi Tribunal is a statutory body created by legislation in 1975⁹ that hears complaints by Maori persons that the principles of the Treaty of Waitangi have been breached.¹⁰ It may make findings and recommendations only; it is not a court. However, it generally follows a court-like procedure, with the hearing of evidence (albeit with major allowances to facilitate giving evidence of oral history and tradition) and the making of reasoned recommendations. It may inquire both into the merits of past land transactions, and into past, present and proposed governmental policy. Its current Chairperson is also a High Court judge.

Before the Waitangi Tribunal the wananga contended that they were prejudiced by the new tertiary funding allocation system, and that it was a Treaty breach. The Tribunal agreed. It said that *te reo Maori* (Maori language) and *matauranga Maori* (Maori knowledge) were *taonga* – treasured possessions. Therefore they were guaranteed by Article 2 of the Treaty, which provides in part that Maori are guaranteed 'rangatiratanga' (chiefly authority) over 'taonga'. Because wananga were the modern means of promoting Maori authority over language and knowledge, they were, said the Tribunal, protected by the Treaty. It followed that the Crown was obliged by the Treaty to protect wananga, especially in light of the failings of past policies in education which have made their protection all the more urgent. And, having established them, it was obliged to fund them adequately.

This decision reflects the generous 'updating' approach to Treaty interpretation that is favoured by the Tribunal. To say that wananga as such did not exist in 1840 is beside the point: language and knowledge did, and *they* were protected by the Treaty. Hence a modern institution that served to preserve that language and knowledge was also protected. There are interpretative issues here that would no doubt be of interest to American constitutional lawyers, but it is important to appreciate that, in a context where the Tribunal's findings are recommendatory only, the stakes are much lower than in constitutional litigation. The Tribunal is best understood as part of the political process, and not as a court.

The government responded to that Report by offering each wananga a lump sum injection of capital development funding. One wananga accepted the amount offered (\$5.2 million) as a first instalment; another refused \$3.4 million offered on the ground that it was insufficient and because the process of unilateral offer, rather than a negotiated settlement, offended the *mana* (dignity, esteem) of the wananga.

Maori in General Tertiary Education

The *Association of University Staff v University of Waikato* case described above has a bearing on the legal recognition of the Maori dimension in universities. The starting position is that the *Education Act 1989* imposes on TEI councils a legal obligation to ‘acknowledge the principles of the Treaty of Waitangi’ when carrying out its functions and exercising its powers (s 181(b)). By restructuring the Maori studies department into a larger academic unit along with the School of Education, Hammond J held that it was doubtful that the university had honoured the Treaty principles. But he did not have to finally decide that point, since the reconstitution of the university departments was unlawful for separate reasons.

Affirmative Action in the Tertiary Sector

The legitimacy of affirmative action and quotas is, of course, a well-litigated issue in the United States. It is not in New Zealand. The *New Zealand Bill of Rights Act 1990*, which operates as a statutory rather than constitutional bill of rights and so cannot invalidate legislation, expressly allows for ‘measures taken for the purpose of advancing [disadvantaged persons]’. This reflects the traditional New Zealand egalitarianism. Affirmative action describes a multitude of possible approaches, but even the most rigid and inflexible – quotas – is a fixed part of the tertiary education sector. The Faculty of Law at the University of Auckland, for example, has a quota of 32 places for Maori and 13 for Pacific Island applicants, out of a total number of 270 places. Generally, the Maori quota is undersubscribed, so that the remaining quota places revert to the general pool. But, even so, the position remains that there will be successful quota applicants who have lower grades than unsuccessful general applicants, and the scene is set every year for a potential case along the lines of *Bakke v University of California*.¹¹

But this never happens, and it is not clear that any such case would succeed. The justification given for the quota system and other affirmative action is that the University should strive for a constituency that reflects its community, and that it is desirable that there be more legally trained Maori and Pacific Islanders. Another justification that has been given is that, independently of those pragmatic concerns, the Treaty of Waitangi requires it. The University can also point to a specific statutory duty in this area: as well as the Bill of Rights allowing for ‘measures ... to assist or advance persons disadvantaged by discrimination’, the *Education Act* imposes on TEIs a *duty* to ‘acknowledge the principles of the Treaty of Waitangi’ and to ‘encourage the greatest possible participation’.

So this is a relatively unexamined area, but likely to be scrutinised at some stage as competition for scarce university places increases. There has been one affirmative action case, in which a local fishing company attacked the decision of a polytechnic to offer *all* places in a fishing course to Maori applicants.¹² (The TEI in that case was responding to the reality of government funding which made it advantageous for it to do this.) As it transpired, the TEI did not seek to defend its scheme before the Tribunal. It was duly found to be in breach of the *Human Rights Act 1993* (a general public and private sector anti-discrimination statute that has a broadly similar savings clause for affirmative action). In the absence of a defence by the TEI, the Tribunal hearing

the complaint could not be satisfied that Maori could be, in the words of the statute, ‘reasonably ... supposed to need assistance’.

If nothing else, that case drew attention to the fact that there are three enactments relevant to affirmative action: the *Bill of Rights*, the *Human Rights Act*, and the *Education Act*, and they all say something slightly different.

Academic Freedom for Me but not for Thee

Responding to concerns that the new managerialism in university administration has come at the cost of academic freedom, the Association of University Staff (a union representing general and academic staff at universities, and the named plaintiff in the case against Waikato University described above) commissioned a report by a Canadian academic and educational consultant, Dr Donald Savage. This report, released in March 2000, identified external and internal threats to academic freedom.¹³ The external threat lay, said the report, in the ‘unprecedented invasion of university autonomy and attack on academic freedom by central government’. This invasion downplayed ‘collegial structures in favour of a managerial approach used by private corporations’. In short, the pressures placed on universities, described above, were put in terms of their impact on academic freedom.

Another source of external threat identified was that from outside persons or bodies who sought that a university punish or retaliate against its academic staff for publishing their views. A number of instances were referred to, and it was suggested that universities need to defend their staff more. In this regard the report drew attention to the problems inherent in private sector support of university research. The answers to such problems lay, said the report, in clear and effective procedures that ensured academic control of university research.

As to internal challenges to academic freedom, the Report observed that UNESCO’s recent policy statement had laid emphasis on ‘collegial self-government as an essential operational part of academic freedom’. It was critical of some aspects of the new managerialism which insisted on simplistic performance indicators and the ‘quantification’ of the output of the university. The report is to be published in book form during 2000 by a New Zealand publisher, Dunmore Press.

A trivial but revealing incident raising academic freedom concerns arose in March 2000. A Victoria University of Wellington academic (serendipitously named Paul Dunmore) circulated an email message announcing that he was not going to attend a university ceremony to open new university premises since it was to include a Maori ceremony for the lifting of tapu. This he saw as an unwarranted genuflection to superstition and ritual which had no place in a university community. His comments attracted the strong criticism of the Maori Vice-President of AUS. He doubted Dunmore’s claim that he (Dunmore) was not ‘Maori-bashing’ and would similarly object to all types of ritual, Maori or otherwise. This, said the Maori Vice-President, only reflected a ‘culturally myopic view of what is valid knowledge’. So far, no problem: the academic freely made his opinions known, and the Maori Vice-President freely replied with his. Of more concern, however, is the fact that the Vice-President of AUS expressed support for a student newspaper’s editorial calling for Dunmore to be taken before the University disciplinary committee to explain himself. And, the Vice-President went on to say, the incident emphasised the ‘urgent need for

education of university staff in relation to Treaty issues'. Both Dunmore, and another academic who supported him publicly, were said to have 'acted rashly and risked damaging the standing of academic freedom and academia'.

This exchange of views reflects the high value placed, in New Zealand circles, on tolerance and egalitarianism. It also reminds us that academic freedom comes at a cost. That cost ought not to be the disciplining of a person like Mr Dunmore; on the above facts the cost must be borne instead by those who would prefer that a Maori ceremony go uncriticised. To their credit, the Victoria University authorities appear to have acted as the AUS's own Academic Freedom Report would suggest that they should. As the executive summary of that Report says, 'real changes in the participation of [disadvantaged] groups depends more on the investment of resources than on matters such as speech codes'. (p 9).

Primary and Secondary Education

School Closure and its Impact on Maori

In October 1999 the High Court decided an important case on the legality of a school closure decision taken by the Minister of Education.¹⁴ The Minister may disestablish schools if he is 'satisfied' that a school ought to be closed. The school in this case was at a rural North Island location, once a prospering sawmilling area, but now sadly bereft of employment opportunity and hence of population. The school was on land that had in 1901 been gifted to the government by a Maori Chief for educational purposes. The school could take 40 pupils, but after years of a falling roll it now had only 8, at various levels. The school had also been the subject of a series of critical reports by the Education Review Office (the public authority established by the Education Act 1989 to review the quality of the delivery of education by schools).

In terms of cost, the government funded this school to the extent of an estimated \$11, 541 per pupil in 1999, compared to the national average of \$3252. And the ongoing maintenance obligation was significant. Further, there were two other schools nearby, and the evidence suggested that students could attend them without travelling any further than they did already.

What made this case contentious, however, was that the pupils were Maori, and the curriculum was being delivered in a bilingual mode. Indeed, the school received additional Ministry of Education funding under a formula that produced an extra \$420 per pupil (justified on the basis that between 51% and 80% of the curriculum was taught in Maori). The school was not (as it might have been under the Act) designated as a Maori immersion school, but nothing prevented its Board of Trustees from orienting the curriculum toward its Maori students in this way. There was no objection to that. But the question became whether the Maori dimension to the school justified its being treated differently from other schools in a similar situation.

The school closure procedure required consultation by the Minister with the school's elected Board of Trustees (every state school has one of these under the *Education Act*). That took place, but the Board was unsatisfied with the final decision. It commenced injunction proceedings claiming that the decision was unlawful: that the Minister took into account irrelevant considerations; failed to take into account relevant considerations; that he had 'denied the right of

an ethnic minority to speak their language' contrary to s 20 of the *New Zealand Bill of Rights Act* 1990; and that the decision to close the school was inconsistent with the obligations of the Crown in the Treaty of Waitangi.

All these claims failed, and the school was duly closed. Hammond J in the High Court stressed that the Minister had had all relevant facts before him and that his assessment of their cogency was a matter with which a Court should not interfere. As to the Treaty of Waitangi, the judgment is an important one. It affirms that there is no general legal obligation in the *Education Act* that the Crown act in accordance with the Treaty of Waitangi. (In that respect the *Education Act* differs from some other recent enactments that expressly provide that, in their sphere of operation, the Crown is not entitled to act in a manner inconsistent with 'the principles of the Treaty of Waitangi'. Needless to say, this then requires the Courts, in those fields, to develop a jurisprudence about what the principles of the Treaty *are*). Hammond J noted that the Maori dimension to education is spelled out in the Act through recognition of kura kaupapa Maori (immersion schools) but that there is no overarching and diffuse obligation in the Education Act that guarantees, as a matter of law, that the Treaty must be adhered to in *every* decision.

Even if there were such a general obligation to adhere strictly to the Treaty, the reality is that the Treaty itself deals with matters of general principle and so cannot speak with precision on matters such as school closures. Those general principles, articulated in the courts' jurisprudence in other fields, include the principle that the Crown must deal with Maori in good faith and not inhibit its capacity to protect Treaty rights. But Hammond J commented that he could not see how the Treaty jurisprudence extended to implying a 'right to education in a particular place on the basis of historical and whakapapa links'.¹⁵ As the Crown lawyer noted, 'any such implication would incur unimaginable practical difficulties'.

It is significant, however, that the Crown through its lawyers made the concession that 'in any decision which touches on a taonga of Maori, such as the Maori language, the proper approach is a precautionary one, to ensure that the Crown does not inhibit its capacity properly to address Treaty principles to the extent that they are relevant'.¹⁶ The Crown thereby acknowledged the relevance, to this closure decision, of Maori language and cultural values. Hammond J seems to have viewed this concession as super-erogatory. He certainly did not treat it as a basis for scrutinising the Minister's decision: it was enough that, the relevance of the Treaty obligations being conceded, the Minister could show he had addressed them.

That decision exemplifies the limits of law in this field. The consistency of the school closure decision with the Treaty of Waitangi was essentially a matter for elected officials. The court's role was to ensure they had approached that decision in the proper way, and here they plainly had. The School's Board of Trustees has complained to the Waitangi Tribunal about this closure, and a decision by the Tribunal is imminent.¹⁷

Other Litigation

Litigation arising out of schools in 1999 was almost entirely devoted to employment disputes between principals or teachers, on the one hand, and boards of trustees (their employers) on the other. The principles governing these disputes are no different from those governing employment

contracts generally. If the underlying dispute were to arise about, say, the rights of a teacher to freedom of religion or expression in a school context, then the case might generate principles uniquely tailored to education. As it is, however, the cases tend to be about competence and performance issues, and exemplify no particular aspect of education law.

The year was, in other respects, a quiet one in the courts. There were the usual news stories about educational disputes that generated brief controversy and then died away. One of these is worth noting: a secondary school suspended an Indian girl for refusing to remove a stud in her nose, said by her to be an aspect of her culture. The student and her family complained to the Race Relations Conciliator (a division of the Human Rights Commission established under the *Human Rights Act* 1993) contending that this was discrimination against her on the grounds of her race. The incident was capable of another type of characterisation as well: that the student's freedom of expression under s 14 of the *New Zealand Bill of Rights Act* 1990 was infringed, and also her 'right not to be denied the right ... to enjoy her culture' under s 20 (which in turn reflects Article 27 of the *International Covenant on Civil and Political Rights*). It is significant that the case was classed as a discrimination rather than a freedom issue, for only on that basis could it fall within the Race Relations Conciliator's jurisdiction. That is in effect a free advocacy service for complainants. It appears that a confidential settlement was reached. This reflects the strengths and weaknesses of New Zealand education law. The strength is that a speedy resolution was attained at relatively low cost. The weakness is that there is no precedent set, and schools will wonder how the case resolved and whether they are empowered to adopt rules against personal adornment, or rules about appearance generally.

New Legislation about Suspension and Exclusion of Students

In July 1999 a new set of rules came into force about the suspension and exclusion of students.¹⁸ These are designed to allow more flexibility to principals. This is attained by retaining the old *grounds* for disciplinary action against students resulting in permanent or temporary exclusion from the school, but adding new possible *remedies*. The new remedies are a 'stand down period' for up to 5 days at the principal's discretion (without reference to the school board) and the ability to make re-entry to the school after suspensions by the board contingent upon the performance by the student of conditions that are related to the resolution of the student's problems. These new procedures were welcomed by schools and appear to be working well.

New Legislation Introduced on School Zoning and Enrolments

This has been a contentious issue for many years in secondary and sometimes even primary education. There are some schools in New Zealand with high reputations, and parents are keen to enrol their children at them. This has long had an impact on residential land values surrounding the popular schools, since each school had a geographic zone within which there were rights of entry.

The 1989 reforms were designed in part to alter this approach. They revolved around the concept of parent choice in school enrolment, the idea being that any student could go to any state school. Schools should compete for students, and this would encourage excellence. A school could turn an applicant down only if it had an approved 'enrolment scheme' in place, and if it duly

applied that scheme by making a decision about that applicant in accordance with the scheme's criteria (which may or may not emphasise geographical proximity to the school). An enrolment scheme could be promulgated only if the school was 'overcrowded'. Since the popular schools were always oversubscribed, they all were overcrowded and had enrolment schemes. The content of a scheme was, in general terms, left to school boards of trustees. But a typical feature was that schemes left a large measure of discretion in deciding whether to admit a student. This quickly exposed schools to the charge that they selected for academic and sporting prowess so as to enhance the school's reputation. This was perceived as unfair to the general pool of applicants, especially when the result was that those close to a school could not get in but others from further afield did.

Over the years since 1989 various solutions were sought to the issue of students who could not get into their nearest school. It was a political issue, and some sort of legislative attempt was made to sort it out in late 1998. The new amendment, coming into effect in December 1998, was rather Delphic. It required that enrolment schemes 'reflect the desirability of students being able to attend a reasonably convenient school' and that schemes should 'enable the Secretary of Education to make reasonable use of the existing network of schools'.¹⁹ The peculiar thing about this amendment was the reluctance to actually direct schools to formulate a geographic zone within which students had a right of entry. And the reason that the direct approach was avoided was that it would have signalled a complete about-face from the underlying philosophy of the 1989 reforms – to allow choice in school enrolments.

Most schools interpreted the new law to require that they develop a so-called 'home zone', and so they followed the spirit of the new law. But some schools, in particular Auckland Grammar School which is the paradigm example of a school that is overcrowded because of its perceived quality, rebelled. It declared not a zone but a 'sphere of influence', within which there was no absolute right to enrolment but a measure of priority. This stratagem was unpopular with politicians, but they should really have blamed themselves for framing a law that avoided the 'zoning' word.

With the change of government in November 1999 came a promise of further reform and at the time of writing a bill has been introduced.²⁰ If enacted, this will now require that overcrowded schools define a 'home zone'. It also provides for 'priority groups' from out of the zone, to take such places as remain in the school. These groups are: applicants for any special programme at the school, siblings of existing and former students, and all other applicants. These are selected, within each category as there is space, by ballot.

That ballot procedure would remove the dissatisfaction that has surrounded the selection process to date. When schools have been free to define their own selection criteria it is inevitable that there will be unhappiness amongst disappointed applicants. And there seems something wrong with publicly funded schools having a power of choice. The ballot system deals to that, although some might say it generates a philosophical problem of its own. Should life's chances, such as admission to a desirable school, be resolved by arbitrary ballot and so discourage individual effort? There are many cases where the ability of a good school to take a promising pupil from outside its area has served the pupil well. But a perfect scheme is unattainable, and the one now proposed does have some advantages.

In any event, this bill if enacted will complete a pendulum swing in education policy about school enrolments. And being a pendulum swing, we will no doubt find ourselves revisiting this area again in a few years time.

Endnotes

1. The original version of this paper appeared as an entry for New Zealand in the Yearbook of the Education Law Association, Dayton, Ohio, United States. It was written in March 2000. In two places footnotes have been added to note subsequent developments in the areas discussed: one, the release of a Waitangi Tribunal Report on the Mokai School closure, the second, passage of legislation to re-introduce school zoning as from 2001.
2. Section 162(4).
3. Ibid.
4. *Manawatu Polytechnic v Attorney-General* High Court, Wellington, 15 December 1997, Doogue J, emphasis added.
5. M Taggart, 'Déjà vu all over again' [1998] NZLJ 234.
6. High Court, Hamilton, CP 12/99, 23 March 1999, Hammond J.
7. Ibid., p 24
8. Indeed, the Attorney-General is the very person who was foundation Dean of Law at Waikato and a plaintiff in the case just discussed.
9. The Treaty of Waitangi Act 1975.
10. The Treaty of Waitangi is not itself cognisable in New Zealand law, because of the Anglo-New Zealand rule that treaties have no domestic impact unless incorporated into legislation by Parliament.
11. 438 US 265 (1978).
12. *Amatal Fishing Co v Nelson Polytechnic* [1996] NZAR 97.
13. The report was at the time of writing available in summary form on the Association of University Staff website, <http://www.aus.ac.nz/>, and the quotations herein are from the executive summary written by Dr Savage.
14. *Osborne v Attorney-General*, High Court Hamilton, 4 October 1999, M 198/99, Hammond J.
15. Whakapapa may be translated 'genealogical' in this sentence. The passage is at p 17.
16. Ibid, p 17.
17. The Decision, *Mokai School Report* was published on 31 March 2000 and concluded that the Crown had not acted consistently with the principles of the Treaty of Waitangi in the chain of events that led to the closure of the school. It recommended that the school be reopened with more support from the Crown.
18. Education Amendment Act (No 2) 1998.
19. Section 11B Education Act 1989, as introduced by s 5 of the Education Amendment Act (No 2) 1998.
20. Since enacted as new ss 11A to 11PB 92019 of the Education Act 1989.