

IN THE MATTER OF

A claim under Part 1A of the Human Rights Act 1993

BETWEEN

DAVID HINES

First plaintiff

TANYA JACOB

Second plaintiff

AND

THE ATTORNEY GENERAL OF NEW ZEALAND

Defendant

FIRST AMENDED STATEMENT OF CLAIM
May 2018

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The Plaintiffs say:

Introduction

1. The plaintiffs bring these proceedings as complainants pursuant to section 92B(1)(b) of the Human Rights Act 1993 (the Act). They have taken a complaint to the Human Rights Commission but their complaint has not been resolved.
2. The plaintiffs seek from the Tribunal under s92J of the Act a Declaration that certain sections of the Education Act 1964 and Education Act 1989 are inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.

The parties

3. The first plaintiff is a preacher belonging to the Unitarian Church, a member of the Council of the New Zealand Association of Rationalists and Humanists (NZARH) and a spokesperson for the Secular Education Network (SEN). NZARH set up SEN in March 2012 to further its interests. One of SEN's main activities is a Facebook Group which offers moral support to people who have problems with religion in state primary and secondary schools.
4. The second plaintiff is the mother of two school-aged children at a state school and the South Island representative for SEN.
5. The Attorney General is named as the defendant in these proceedings in respect of the Ministry of Education and the law making function of Parliament.

The legislation

6. Section 20 of the Education Act 1989 (EA1989) provides that education is compulsory between the ages of 6 and 16.

Primary schools

7. Section 77 of the Education Act 1964 (EA1964) applies to primary schools and states:

Teaching in every State primary school must, while the school is open, be entirely of a secular character.

8. Section 78 (EA1964) states:

Notwithstanding anything to the contrary in section 77 or section 65B of the Education Act 1989, if the school's board for the school district in which the school is situated, after consultation with the principal, so determines, any class or classes at the school, or the school as a whole, *may be closed at any time or times of the school day for any period or periods exceeding in the aggregate neither 60 minutes in any week nor 20 hours in any school year, for any class, for the purposes of religious instruction given by voluntary instructors approved by the school's board and of religious observances conducted in a manner approved by the school's board or for either of those purposes; and the school buildings may be used for those purposes or for either of them.*" [emphasis added].

9. The EA1964, section 78A states:

Notwithstanding anything in section 77 and 78, in any case where the Minister is satisfied that the majority of the parents of pupils attending a school wish their children to receive religious instruction additional to that specified in section 78 and he is satisfied that such additional religious instruction will not be to the detriment of the normal curriculum of the school he shall, generally or in any special case, after consultation with the school's board, authorize the additional religious instruction up to such an amount and subject to such conditions as he thinks fit."

10. Section 79 EA1964 provides a mechanism for a parent or guardian to opt their child out of any religious instruction or observances. It states:

No pupil enrolled at a State primary school shall be required to attend or take part in any such instruction or observances if any parent or guardian of the pupil does not wish the pupil to take part therein and makes his or her wishes known in writing to the principal of the school.

Primary and Secondary schools

11. Section 25A EA1989 applies to both primary and secondary schools (that are not state integrated schools) and states:

(1) A student aged 16 and above, or the parent of a student aged under 16, may ask the principal to release the student from tuition in a particular class or subject.

- (1A) A request under subsection (1) must be made in writing, and at least 24 hours before the start of the tuition.
- (1B) This section applies only to students enrolled at a State school that is not a State integrated school.
- (2) Unless satisfied that –
- (a) the parent or student has asked because of sincerely held religious or cultural views; and
 - (b) the student will be adequately supervised (whether within or outside the school) during the tuition, -
- the principal shall not release the student.

Effect and consequences of provisions

12. For primary schools, the provisions of s77, 78, 78A and 79 EA1964 create a situation where, although the attendance at school is compulsory and the teaching is to be entirely secular, the school may be used for religious instruction and religious observances regardless of the religious or ethical beliefs or wishes of all of the parents or guardians or pupils attending that school. The only recourse the parents who do not want their children to receive the specific religious instruction or participate in the specific religious observances is to make a written application for their child to opt out of religious instruction.
13. Consequently, a school board at a state primary school may determine that any class or classes at the school may be closed for the purposes of religious instruction given by voluntary instructors and religious observances approved by the school's board for up to 60 minutes a week and 20 hours a year or greater time if a majority of the parents want further time.
14. Further under section 78A, if the Minister is satisfied that the majority of parents of pupils wish their children to receive additional religious instruction over the amount specified in s78 and such religious instruction will not be to the detriment of the normal curriculum, the Minister may authorise additional religious instruction. The views of parents who belong to minority religious or non-religious groups may be overruled.

15. If religious instruction and religious observances are held, parents who do not want their child to participate must write to the principal making their wishes known.
16. Children under the age of 16 are not able to seek exclusion from religious instruction or religious observances unless their parents support them and make an application. This is despite many children becoming independent of their parents' views on religion and ethical issues at an earlier age and the school system recognising this by enabling pupils from at least intermediate school upwards to elect to specialize in various school topics.
17. Children over the age of 16 are only able to be released from religious *tuition* if the principal is of the view that the request comes from a sincerely held religious and cultural view. They are not able to be released from religious observances. This is because, unlike s 78 EA1964 which applies to religious instruction and religious observances, s25A EA 1989 refers only to tuition.
18. Under s77 of EA1964, the teaching at state primary schools must be secular. Under s78, exceptions are required for religious instruction and religious observances. This rule and this exception have led to a situation where some schools deem a secular environment is not required at all or at all times in the school environment or when children are under the schools' care.
19. The plaintiffs have evidence of the following:
 - (a) School camps that have included religious observances
 - (b) Religious clubs operating on school premises
 - (c) Chaplains and paid youth workers selected on a religious basis [doing what?]
 - (d) Schools and school Boards openly promoting the Christian religious beliefs of a majority group of parents
 - (e) Schools openly advertising themselves to be "mission fields", promoting Christianity as part of the school's mission, promoting religious instruction as part of their values programmes and sometimes claiming their religious programmes have Ministry of Education approval.

Monitoring of religious instruction and religious observances and references to religion or lack of them in the New Zealand curriculum

20. Under Part 7 of the EA1989, control of schools is devolved from the Department of Education to local boards of trustees. The Secretary and/or Minister of Education and the Education Review Office are given powers to monitor and intervene in the performance of schools and the welfare of children (EA1989, section 78H and Part 28 respectively).
21. However, these powers of the Secretary and Minister do not include powers to monitor and intervene in cases of religious or ethical belief discrimination in schools where religious instruction is being taught. Particulars:
 - (a) The first plaintiff asked the Ministry for help to obtain information about religious instruction classes being held in an estimated 800 state primary schools in 2014. The Ministry replied that it did not have the right to make that enquiry under ss 78H. The plaintiff then made a complaint to the ombudsman's office. It supported the view that the ministry did not have this right, and said the law presumes that Religious instruction does not affect student welfare, since it is authorized by S 78 – 79 EA1964.
 - (b) The first plaintiff expressed concerns to the Ministry that schools' own teaching under the NZ curriculum was inadequate in representing religious diversity in state schools. When the Ministry was asked whether schools taught about a variety of religions and nonreligious views, it replied that it was part of the NZ curriculum to do so but could not say whether schools carried out this policy because it did not have the power to monitor for it, under s78H of the EA1989.
 - (c) The plaintiffs have evidence of pressure being placed on parents who question religious discrimination in state schools and friends who offer support.

22. The ERO and the Ministry have also rejected calls to investigate the activities set out in paragraph 19 above, on the grounds that such activities are beyond their mandate.

The content of religious instruction

23. Operating under the entitlement to provide religious instruction established by the legislation, the boards of a significant number of state primary and secondary secular schools throughout New Zealand have allowed and continue to allow religious instruction and/or religious observances on the school grounds and in school buildings during times when pupils have been required compulsorily to attend at the school.
24. The religious instruction or religious observances are predominantly if not exclusively in or of Christian religious beliefs and Christian values. The plaintiffs have evidence that the main producers of Religious Instruction programmes frequently refuse to make their syllabus materials available to parents or to members of the public. Despite this, the plaintiffs have obtained copies of most of them. A professional review of this material concludes that it does match the producers' claims that it is suitable for use in classes which include non-Christian children and reinforces the values of the New Zealand curriculum.
25. Religious studies experts consider such teaching and programmes are harmful, may be deemed a coercive practice and are inconsistent with the values of a religiously plural, liberal democratic-nation state. In addition, the plaintiffs have evidence that the leaders of minority religious object to Christian religious instruction.

International human rights guarantees and state obligations

26. Several international human rights instruments affirm a right to be free from religious belief discrimination, including the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of the Child and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on religion and belief.

Unlawful Discrimination

27. The plaintiffs say that the said provisions of the Education Acts, when read together, constitute unlawful discrimination which is contrary to Part 1A of the Human Rights Act 1993, in that they are inconsistent with the right to be free from discrimination on the grounds of religious and/or ethical belief further to section 19 of the New Zealand Bill of Rights Act 1993. Particulars are set out in the following paragraphs:

There is a distinction

28. The particular religious instruction or educational programme that a school board elects to have operate at its school inevitably separates out from the body of students whose families adhere to the faith and beliefs being taught, or who do not object to them being taught, those students who adhere to other faiths or beliefs including those who have no religious faith or beliefs at all.
29. Those students or parents of students who do not adhere to the religious belief or education being taught and do not wish their children to be exposed to it must take steps, further to s 79EA 1964, that other students and families at the school do not have to take. Further, taking those steps requires the disclosure of private information about their and/or family's beliefs or lack of belief thereof which others do not have to provide. Students over the age of 16 must satisfy the principal that their wish to opt out is based on a sincerely held religious or cultural view.
30. In addition, in contrast to all other teaching at the school, teachers of religious instruction or leaders of religious observances do not have to be qualified and registered and the classes are not subject to the critical scrutiny required by law that other classes are subject to. The plaintiffs have evidence of unprofessional behaviour by such teachers and leaders and this impacts on children whose beliefs or whose parents' beliefs are different from those of the teachers or leaders.

The distinction is by reason of religious or ethical belief

31. Whereas the religious views and beliefs of some pupils and or their families are being promoted and taught at a particular secular school the religious or ethical views and beliefs of other students and their families at that school are not being taught or promoted. The difference between such groups is the different respective religious beliefs and/or ethical views of the parents and pupils.

The distinction creates material disadvantage

(i) For children

32. Children whose parents opt them out of religious instruction suffer material disadvantage in the form of being segregated and singled out from their peers based upon their or their parents' religious or ethical beliefs. This in itself is a risk to their mental health. They are also exposed to other serious risks to their mental health such as alienation, anxiety, fear, shame, bullying, and humiliation. Some parents feel forced to take their child out of the school to find another which does not teach religious instruction or practice religious observances.
33. The plaintiffs have evidence of the following types of material disadvantage occurring in individual cases as a result of a particular school board's election to close the class so as to have religious instruction at a time when all students are compelled to attend at school,
- (a) Children being identified by their religious and ethical beliefs and feeling segregated and singled out.
 - (b) Children being exposed to taunting, interrogation and bullying by their peers in relation to their and/or their parents different religious beliefs or for their lack of belief in God.
 - (c) Children being being told they would 'go to hell' as they did not believe in God.

- (d) Children feeling that their beliefs and/or the beliefs of their parents are inferior.
- (e) Children being required to stay in the same room or an adjoining room during the religious instruction and hearing the lessons, thereby overruling their and/or their parents' religious or ethical beliefs.
- (f) Children being given menial and humiliating alternatives while religious instruction classes are taking place such as having to sit in with junior classes; wash dishes; pick up rubbish, vacuum classrooms. In contrast, often the children who attended religious instruction/education classes are rewarded with games and lollies.
- (g) Secondary students being expected to participate in prayers, hymns and scripture readings at assemblies against their religious or ethical beliefs and being expected to take a bible at a Gideon run assembly.
- (h) Children of different religious beliefs to those being taught in religious instruction, who have not opted out, learning material that conflicts with their own and their families' religious beliefs.

(ii) *For parents*

- 34. Parents who opt their children out of religious instruction suffer material disadvantage in that they are forced to disclose deeply private details relating to their religious and/or ethical belief to the principal just to ensure their child is not taught religious beliefs they do not agree with.
- 35. The plaintiffs have evidence of the following examples of material disadvantage experienced by parents as a result of the particular school electing to exercise the option of closing school to enable religious instruction of pupils.
 - (a) Parents experiencing disapproval from school management and teachers for their choice and this negatively impacting upon their and their child's relationship with school management and teachers in other areas.

- (b) Parents not wanting to have to ‘opt out’ due to the associated disadvantages and finding it difficult to locate another suitable school without religious education that is in-zone.
- (c) Parents not being informed at all, or adequately, that:
 - (i) religious instruction would take place at their child’s school and so not having been able to exercise their rights
 - (ii) that there was a right to ‘opt out’ of the religious instruction and so not having been able to exercise their rights
 - (iii) that religious observances were taking place at school
- (d) Parents being treated with hostility and disrespect after they exercised the right to opt their children out of religious instruction and experiencing their children as being punished by the school management and/or teachers for them electing not to have their child take religious instruction

There is no justification for the discrimination

36. Though it is for the Defendant to establish demonstrable justification for unlawful discrimination the plaintiffs deny that the legislative provisions in the Education Acts 1964 and 1989 are a justified limit on the right to be free from discrimination by reason of religious or ethical belief for the reasons that:

- (a) They conflict with the statutory requirement that education in state primary schools is secular.
- (b) they create unhealthy divisions between students in state schools where religious instruction and religious observances are held, based upon religious and ethical belief. Further, they can create a stressful and hostile learning environment for pupils. based upon their and/or their parents and family’s religious and ethical beliefs.

(c) There are many alternatives outside the state schooling system that can provide religious instruction or religious observances for children.

Relief Sought:

37. The plaintiffs seek a Declaration further to s92J of the Act that the combination of sections 77, 78, 78A and 79 of the Education Act 1964 and section 25A and sections 78H and 78I of the Education Act 1989 creates a statutory inconsistency with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.
38. The plaintiffs seek costs.