

## Religion and the State in New Zealand

### I. THE RELIGIOUS DEMOGRAPHY OF NEW ZEALAND

If a typical rugby-loving, suburban dwelling New Zealander was asked by a pushy social scientist or pollster to take an annoying word association test, his or her response to the word “religion” might be a muffled yawn accompanied by an answer such as “irrelevant,” “boring,” or “outdated.” Public interest, debate, or for that matter, consternation over matters religious is rare: religion, church, and “all that God stuff” are not pressing concerns in the lives of most of New Zealand citizens. In one sense, the widespread cultural disinterest in organized religion that typifies much of our history may be viewed as a positive thing. It can hardly be a cause for regret that New Zealand has, by and large, not witnessed the large-scale and bitter religious turmoil that has beset many nations.<sup>1</sup>

New Zealand’s largest religious affiliation is Christian, and within Christianity, the largest denominations are Roman Catholic, Anglican and Presbyterian. Unspecified numbers of Pentecostals and Evangelicals are a growing sector within Christianity as well. The actual churchgoing is significantly less than the census figures, with the latest International Social Survey Programme report (in 2009) recording that some 20 percent indicated that they attended church service at least once a month.<sup>2</sup> Notably, the “no religion” sector has grown significantly in each six yearly census since the 1970s and the latest census recorded some 38 percent. “Kiwis are turning their backs on God in record numbers”, declared one newspaper.<sup>3</sup> Certainly, Christians as a whole are now a minority with just on 1.9 million (out of 4.242 million) affiliated to Christianity of one form or another. The major groups are summarized in Table 1.

Table 1: Religious Affiliation in New Zealand (2013 Census)<sup>4</sup>

Religion	Total (4.242m)	Percentage
Christian		55.6
Anglican	459,771	10.8
Roman Catholic	491,421	11.6
Presbyterian,	316,329	7.5
Methodist	97,320	2.3
Baptist	58,212	1.3
Pentecostal	45,777	1.1
Christian (not further defined)	217,177	5.1
No Religion	1,635,348	38.6
Muslim	45,963	1.1
Hindu	89,082	2.1
Buddhist	58,212	1.4

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1. Rex Ahdar, “Reflections on the Path of Religion-State Relations in New Zealand,” 2006 *BYU L. Rev.* 619. For a comprehensive recent treatment see Laurie Guy, *Shaping Godzone* (Wellington: Victoria University Press, 2011).

2. Massey University: International Social Survey Programme, *Religion in New Zealand* (Palmerston North: Department of Communication Journalism and Marketing, Massey University, 2009).

3. Ben Heather, “Census Points to Non-Religious NZ,” 11 December 2013, available at: <http://www.stuff.co.nz/national/9501270/Census-points-to-non-religious-NZ>.

4. Statistics New Zealand, *2013 Census Totals by Topic*, Table 28, “Religious Affiliation,” available at: <http://www.stats.govt.nz/Census/2013-census/data-tables/total-by-topic.aspx>.

## II. SECULAR FOUNDATIONS

New Zealand has never had an established church. There were, to be sure, various early regional attempts at religious establishment by the European immigrants. Otago and Southland were Free Church of Scotland settlements. There was, at most, a modest initial preference for the Anglican Church leading some to describe that Church as having a quasi-establishment role in the colony. But “the Anglican Church’s pre-eminence was a shadowy affair in comparison with its position in the home country or in older established colonies of settlement.”<sup>5</sup> New Zealand was settled as a British colony at the time when the principle of non-establishment was gaining favour in Britain and the disestablishment of the Church of England was being seriously debated. In the nineteenth century there was a substantial formal separation of church and state, the Freethinkers of the 1880s did not need to mount a constitutional campaign for the separation of church and state as “the two were relatively separate” already.<sup>6</sup>

The Supreme Court in *Carrigan v. Redwood*,<sup>7</sup> could thus confidently state at the turn of the twentieth century:

There is no State Church here. The Anglican Church in New Zealand is in no sense a State Church. It is one of the numerous denominations existing in the Dominion; and, although no doubt it has a very large membership, it stands legally on no higher ground than any other of the religious denominations in New Zealand.

The Court of Appeal affirmed this more recently in *Mabon v. Conference of the Church of New Zealand*: “Unlike England and Scotland, New Zealand does not have a national established church.”<sup>8</sup>

In *Doyle v. Whitehead*,<sup>9</sup> Sir Robert Stout, Chief Justice of the Supreme Court, made what appears to be the only judicial statement pronouncing New Zealand to be a secular state. The Wellington City Council passed a by-law prohibiting playing golf on Sundays in Town Belt Reserves. Following a complaint from the Ministers’ Association and clergymen of the Presbyterian Church (concerned it seems at the bad example to the young at the adjacent Presbyterian orphanage) the respondent, who breached this by-law, was charged. A Magistrate acquitted him on the grounds that the by-law was made for no other reason than to enforce Sunday observance and was thus bad in terms of the relevant legislation. The Supreme Court unanimously upheld this finding. Stout CJ declared:

Considering that the State is neutral in religion, is secular, and that the State has provided for Sunday observance only so far as prohibiting work in public or in shops, &c, is concerned, and not prohibiting games, it cannot be said that this by-law is a reasonable by-law. It has also to be borne in mind that recreation on Sunday is not an offence even in countries where the Christian religion is established.<sup>10</sup>

## III. RELIGIOUS EQUALITY AND RELIGIOUS FREEDOM

Historically, New Zealand has had an ongoing commitment to religious equality. We can trace this back to the Treaty of Waitangi, a founding document whereby the leaders of the indigenous inhabitants, the Maori people, ceded sovereignty to the British Crown in

5. G. Antony Wood, “Church and State in New Zealand in the 1850s,” *Journal of Religious History* 8 (1975): 255-270.

6. Peter Lineham, “Freethinkers in Nineteenth-Century New Zealand,” *New Zealand Journal of History* 19 (1985): 61-80.

7. (1910) 30 NZLR 244, 253.

8. [1998] 3 NZLR 513, 523.

9. [1917] NZLR 308.

10. *Id.*

return for becoming the British subjects and securing the continued protection of their lands. The signing of Treaty of Waitangi<sup>11</sup> on 6 February 1840 saw the unexpected inclusion of an assurance concerning religious freedom and equality: “*E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki, e tiakina ngatahitia e ia.*” (“The Governor says the several faiths of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.”)

The earliest Parliamentary debates are also indicative of this desire for religious equality. The opening session of the first sitting day of Parliament, 26 May 1854, witnessed a snap debate on the question of an opening prayer. James Macandrew, a Presbyterian from Dunedin, offered to fetch a nearby Anglican parish minister to ensure there should be “an acknowledgement of dependence on the Divine Being.” A counter-motion was immediately put that the House of Representatives “be not converted into a conventicle, and that prayers be not offered up.” A vigorous debate ensued. Some considered such a prayer would seem “to involve the question of a State religion, the very appearance of which ought to be avoided” by the House. The House eventually passed this resolution:

That, in proceeding to carry out the resolution of the House to open its proceedings with prayer, the House distinctly asserts the privilege of a *perfect political equality in all religious denominations*, and that, whoever may be called upon to perform this duty for the House, it is not thereby intended to confer or admit any pre-eminence to that Church or religious body to which he may belong.

The Rev F. J. Lloyd was introduced, read prayers and never appeared again, the prayer being said thereafter by the Speaker of the House.

In the modern era, the passing of the New Zealand Bill of Rights Act 1990 (“NZBORA”) marked a new epoch in New Zealand constitutional history.<sup>12</sup> The Act applies only to the actions of the government and to persons exercising “public” functions. Regarding religious freedom, there are four provisions of direct relevance.

Section 13 provides: “Freedom of thought, conscience, and religion – Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.”

Section 15 next addresses the outward, social expression of such belief, and states: “Manifestation of religion and belief – Every person has the right to manifest that person’s religion or belief in worship, observance, practice or teaching, either individually or in community with others, and either in public or private.”

Section 20 provides protection for religious and other minorities: “Rights of minorities – A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or use the language, of that minority.”

Finally, section 19(1) states: “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” Turning to the latter Act, we see that section 21(1) sets out 13 prohibited grounds of discrimination, including: “(c) Religious belief; (d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions.” Thus, state discrimination based on a person’s religion or lack of religion is not permitted.

#### IV. PRAGMATIC SECULARISM: THE EDUCATION QUESTION

A third theme in New Zealand’s religion-state history has been what I shall characterize as “pragmatic secularism.” This is a secular stance born of a practical desire

11. See <http://www.nzhistory.net.nz/category/tid/133> [last consulted 13 July 2010].

12. Paul Rishworth et al., *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003).

to avoid religious friction, rather than representing an ideological animosity to institutional religion.

Education is often a major battlefield for church-state conflict and New Zealand is no exception. The churches began their own schools at first. Private religious schools continue today as “integrated schools” under the Private Schools Conditional Integration Act 1975. They receive public funding provided they follow a national educational curriculum and accept a small (5 percent) coterie of students who do not adhere to that school’s religion. In 2005 there were 2607 such schools, the largest number being Catholic.<sup>13</sup>

Turning to state schooling, the abolition of the provinces in 1876 meant there was a need for a national policy on public education and a clarification of the roles of church and state. The debate on education in the late 1870s was conducted “against the background of increasing sectarian tension.”<sup>14</sup>

The Education Act 1877 established a national system of education that was to be free, secular and compulsory. The famous “secular clause” (section 84(2)) read: “The school shall be kept open five days in each week for at least four hours, two of which in the forenoon and two in the afternoon shall be consecutive, and *teaching shall be entirely of a secular character.*”

Scholars emphasize that the secularity of the national education programme was not due primarily to anti-religious sentiment or the advocacy of secularism, but rather was an attempt to defuse sectarian strife:

Careful study of the debates and divisions shows that there was very little doctrinaire secularism among members. Although [some] members of the Legislative Council... signed a protest against the secular provisions of the act, others saw parliament’s action as a necessary way of distinguishing the sacred from the secular, or at the very least as a practical political solution to the educational tensions caused by denominationalism.<sup>15</sup>

#### V. AN ALTERNATIVE HISTORICAL ANALYSIS: A *DE FACTO* OR CULTURAL CHRISTIAN ESTABLISHMENT

While New Zealand may not have had a legally established church, or for that matter an established religion, a solid case, I suggest, can be made that there was a *de facto* or cultural establishment of a generic Christianity.<sup>16</sup> The laws and institutions in New Zealand naturally reflected Christian values given the religious composition of the population. For example, according to the 1896 Census figures, some 94 percent of the population were Christian. Anglicans were the largest denomination (at 40 percent). Moreover, the governing elite were also predominantly Christian.

While, as we saw earlier, public education was ostensibly secular, schools (beginning in 1897) permitted religious, specifically Protestant, teaching on a limited basis under the “Nelson system” – named after a Nelson clergyman, Rev J. H. McKenzie. It was argued that as schools were open for five hours a day, three in the morning and two in the afternoon, a school might declare either the first or last hour of the morning as one designated for voluntary religious instruction. This was possible under the 1877 Education Act since that legislation allowed school buildings to be used on days and at hours *other than* those used for public school purposes. The sharp-witted realized this

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13. Anne Marie Mooney Cotter, *Heaven Forbid: An International Legal Analysis of Religious Discrimination* (Aldershot: Ashgate, 2009).

14. Allan K. Davidson, *Christianity In Aotearoa: A History of Church and Society in New Zealand*, 3rd ed. (Wellington: Education for Ministry, 2004).

15. Ian Breward, *Godless Schools? A Study of Protestant Reactions to Secular Education in New Zealand* (Christchurch: Presbyterian Bookroom, 1967).

16. Rex Ahdar, “A Christian State?,” *Journal of Law and Religion* 13 (1998): 453-482; Rex Ahdar, *Worlds Colliding: Conservative Christians and the Law* (Aldershot: Ashgate, 2001).

enabled religious instruction as well as the statutory minimum four hours of secular education to take place within the customary school hours.

The legislation currently in force, the Education Act 1964, repeats the secular clause, simply formalizing this long-standing arrangement. Section 78 authorizes the technical “closure” of a school for up to one hour per week to allow religious instructors to give instruction or religious observances to be conducted during school hours in a manner approved by the board of that school. Such instruction has to be undertaken by voluntary instructors, not teachers, but may take place within school buildings. Section 78A allows “additional religious instruction” if the majority of parents of pupils at a school desire it and the instruction does not detract from the normal curriculum. Under section 79, parents have the right to withdraw their children from any such religious instruction or observances if they so wish.

In 1972, Sir Ivor Richardson surveyed the religious dimension of New Zealand laws and rejected the view that Christianity was part of New Zealand law or that New Zealand was a Christian State. As he put it: “If this means that the doctrines and principles of Christianity are legally binding on all citizens or that the political apparatus of government is subject to the mandates of the Christian religion, then the statement is incorrect.”<sup>17</sup> However, he continued:

Nevertheless there is a certain amount of truth in the statement that Christianity is part of our law. In the first place, the Christian religion has played an important part in shaping our culture, our tradition, and our law. As Lord Sumner pointed out in *Bowman v. Secular Society Ltd*,<sup>18</sup> the family is built on Christian ideals, and Christian ethics have made a tremendous impact on the development of our law, as is only natural considering the majority of New Zealanders come from a Christian background.

New Zealand has its own instances of what some American scholars have dubbed “ceremonial deism.” The symbolic or ceremonial examples of Christianity’s special position in society include

- The opening prayer said by the Speaker of the House of Representatives;
- The swearing of oaths on the Bible (but affirmation is available also);
- Public holidays such as Christmas Day, Good Friday and Easter Monday;
- The monarch, Elizabeth the Second, is “by the grace of God”, the Queen of New Zealand, and one of her titles is *Fidei Defensor*, the “Defender of the Faith”;
- The national anthem, a hymn entitled “God Defend New Zealand”;
- Blasphemous libel on the statute book as a criminal offence (section 123 of the Crimes Act 1961).

## VI. CULTURAL DISESTABLISHMENT: EROSION OF THE *DE FACTO* CHRISTIAN ESTABLISHMENT

The unquestioned reflection of the Christian ethic and a diffuse Christianity continued until about – and exactitude is of course difficult – the 1960s. This decade might be described as the beginning of the erosion of the cultural or *de facto* establishment of Christianity. There has been a gradual but unmistakable disestablishment or wresting of generic Christianity from its position of cultural ascendancy.

The various Christian observances and practices historically protected in New Zealand law are continually being challenged. Some have been overturned, while others face, I submit, a precarious future.

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17. Ivor L. M. Richardson, *Religion and the Law* (Wellington: Sweet & Maxwell, 1962).

18. [1917] AC 406, 464-465.

The Speaker's prayer in Parliament remains intact, but criticisms are regularly voiced, such as those of one MP who in 2003 who complained that the prayer "is no longer appropriate for the Parliament of a diverse and multicultural nation."

Sunday observance by the commercial sector is a thing of the past, with shop trading on Sundays allowed for all retailers. Restrictions on the sale of liquor on Sundays took a little later to be repealed but such sales are now also permitted. The Good Friday and Easter Sunday shop trading ban still prevails but defiant shop openings at Easter may test the remaining bans on trading on these Christian festive days as well. Bills to repeal these remaining restrictions continue to come before Parliament, although none has yet succeeded. There must be some prospect that these remaining religious-based trading prohibitions will be eliminated if an anti-establishment style, freedom *from* religion interpretation of the freedom of religion protections in the NZBORA 1990 is adopted.

Returning to the issue of shop trading restrictions to mark religious holidays, an interesting recent case which tested the law was *Department of Labour v. Books and Toys (Wanaka) Ltd.*<sup>19</sup> The defendant traded as a bookshop, Wanaka Paper Plus, in the popular South Island tourist resort, Wanaka. On Easter Sunday 2004 it decided to open for trading in direct contravention of section 3(1)(b) of the Shop Trading Hours Act Repeal Act 1990. This provision requires shops to be closed on Good Friday, Easter Sunday, Christmas Day and ANZAC Day morning. The defendant pleaded guilty and, despite the offence carrying a maximum penalty of a NZ\$1000 fine, the District Court ordered that it be convicted and discharged without any financial penalty. A major contributing factor to this leniency was, as the court noted, the "anomalous" nature of the trading ban, since certain other nearby shops (some selling the very same items as the defendant's) had been allowed to trade on the day in question. These shops were in a zone that, historically, had been able to secure an exemption under the legislation for retailers operating in a designated tourist area. Wanaka Paper Plus however was just outside this narrow zone. The interest in the case lies in the submission that the Easter trading ban in was an unreasonable limitation on the defendant's right of religious freedom under sections 13 and 15 of the NZBORA.

Although, as noted earlier, the New Zealand courts have no power to declare that legislation inconsistent with the NZBORA is invalid or ineffective, courts have discovered the power to issue "indications of inconsistency." These judicial pronouncements declare that although the enactment in question must still be enforced and cannot be nullified, it's continued existence calls for the attention and remedial work of Parliament. However, in this case, Judge Noel Walsh ruled that to question the Shop Trading Act would, he cautioned be unwise and "would have the potential to undermine public confidence in my role as a District Court judge, and in the judiciary's independence from the political process." He added that even if he did have jurisdiction he would have refused to make the declaration sought here. The genuineness of the defendant's religious liberty claim was doubted: "in reality [Wanaka Paper Plus] opened on Easter Sunday purely for economic reasons, and not on the basis that the 1990 Act infringed any of the rights guaranteed by the NZBORA." Although the applicant failed to overturn the trading ban or even secure an indication of inconsistency, the groundwork has been laid for future applicants to succeed. Once an indication of inconsistency is signalled, Parliament may well decide to abolish the Christian based trading restrictions.

The blasphemy offence is now all but a dead letter. In March 1998, the Museum of New Zealand, *Te Papa*, ran a controversial exhibition containing two works highly offensive to many Christians (Mortensen). The exhibition included the *Virgin in a Condom* statue (a 7.5cm statue of the Virgin Mary clad in a contraceptive) and a contemporary version of Leonardo da Vinci's *The Last Supper*, with a topless woman at the centre of the table in place of Christ. Notwithstanding Catholic (and other religious) protests – and even an attack on the statue – the Museum refused to withdraw the exhibits. In a pluralist society where the Museum acted as "a forum within a varied social and cultural mix," the chances of one cultural or social group being offended was "a daily risk" and so censorship would simply be inappropriate, defended senior Museum officials.

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19. (2005) 7 HRNZ 931.

Compared to (what Christians perceive as) the unquestioned acceptance of religious ideas in the era of cultural ascendancy, this looks like, and is experienced as, a downgrading of religion, a marginalization. An application to invoke the long-disused criminal prohibition against blasphemous libel was rejected by the Solicitor General. Such a prosecution, he said, would be inconsistent with the NZBORA's protection of freedom of expression in section 14.

Queen Elizabeth II may still be the "defender of the faith," but explicit acknowledgment of the Christian faith in her presence in her outermost former colony was recently deemed inappropriate. In February 2002, the Prime Minister, Helen Clark, came under attack for her decision to drop the saying of grace at the Commonwealth Heads of Government banquet attended by Queen Elizabeth and other dignitaries. She defended: "There was no grace for the same reason as there is none now in New Zealand, because we're not only a society of many faiths, but we're also increasingly secular. In order to be inclusive, it seems to me to be better not to have one faith put first. We haven't had the grace at state banquets for the last two years."

## VII. RENEWED TENSIONS OVER RELIGION IN STATE SCHOOLS

The Nelson system of voluntary religious instruction in state primary schools preserved by the Education Act 1964, which I summarized earlier, has not yet been directly challenged. But the climate sympathetic to its abolition exists.

An interesting pointer to this is the debate that erupted in 2005 over a weekly lunchtime religious club run at a Wellington state primary school.<sup>20</sup> The board of trustees of Seatoun School banned the weekly "KidsKlub" meeting, a Christian club attended by around a third of the School's 400 pupils and which had run since 2002. The board pointed to its obligation under the Education Act 1964 to "deliver a secular education" and it had "chosen to maintain a level of consistency by operating in the same manner outside of teaching hours, while the school is open." The board's legal advisers backed its position. KidsKlub is based on a Scripture Union program and similar groups are held in 18 other primary schools throughout the country. The club meetings—involving Bible stories, craft activities, dances and songs—were voluntary, held during the school's lunch-break and taught by trained volunteer parents and grandparents. Children who wanted to attend needed the permission of their parents to do so.

A group of parents, stung by the incoming board's ban, sought a legal opinion from Sir Geoffrey Palmer, a former Attorney General and Prime Minister and the principal architect of the NZBORA 1990. In his written opinion, Palmer concluded that the ban breached the Act's religious freedom guarantee. Pupils who did not wish to participate in KidsKlub were free to decline: there was no evidence of any compulsion, nor was there any suggestion of any peer pressure exerted on children who did not wish to go. However, as for the religious rights of those pupils who wished to attend, there was a clear infringement here. Section 5 of the NZBORA provides that rights and freedoms may be subject "only to such reasonable limits prescribed by law and demonstrably justified in a free and democratic society." The Education Act did not proscribe voluntary religious programs at schools. Just the opposite: voluntary religious programs were expressly permitted. KidsKlub was in accord with the statutory scheme. The reasonableness of the ban here was similarly suspect. It was difficult to see how those who did not wish to attend had experienced any curtailment of their rights. Furthermore, children who wished to attend had to have parental consent. In other words they had to positively "opt-in." This then was a different situation from those where religious instruction or observances were a built-in part of the school program and those not wishing to participate had to positively "opt-out."

In some nations, such as Canada, courts have invalidated such opt-out programs on the basis that the requirement on non-participating pupils to withdraw meant the pupils incurred stigma and concomitant peer pressure to conform and hence their religious

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20. See Ahdar, "Reflections on the Path," *supra* n. 1.

freedom was impinged.<sup>21</sup>

The Seatoun School fracas was raised in Parliament. The Minister of Education, Trevor Mallard, was reluctant to become embroiled in the debate simply responding that school boards were autonomous bodies: "I do not back the decision but I back the board's rights to make it." After reconsidering the matter and perhaps dismayed by the adverse publicity, the board eventually resolved to reinstitute the KidsKlub meetings.

The Seatoun School case did not involve the more traditional and prevalent form of religious instruction program run at state primary schools, namely, those run in school hours (not lunchtimes) where the presumption is that children will attend unless their parents take active steps to excuse them.

The longstanding "Bible in Schools" program, run by the Churches Education Commission (a body representing major Christian denominations), continues to operate in many state primary schools, but is under unceasing challenge. A survey in 2013 indicated that approximately one in three primary and intermediate schools teaches religious instruction, but that figure is declining. Some 62 schools had abandoned the practice since 2011.<sup>22</sup> Inflammatory headlines such as a "'Go to hell' class stirs dad" are becoming more common. Here, Paul Bennett, the father of a girl enrolled at Point View School, Auckland, was upset after Emily was told by the over zealous Bible-in-Schools volunteer instructor that she would go to hell after Emily stated that she did not believe in God.<sup>23</sup> Bennett said he would become a member of the Secular Education Network, a group formed to oppose religious education in state schools. Other Auckland parents were dismayed to learn their 7-year-old daughter, Violet, had been sent to the "naughty corner" of the classroom with a book whilst the religious instruction was being held at Red Beach School.<sup>24</sup>

In January 2014, Roy Warren, a parent of a child enrolled at St Heliers Primary in Auckland laid a complaint to the Human Rights Commission arguing that his ability to withdraw his five-year-old son from the weekly 30-minute classes was not enough. His rights as a parent (and those of his son) were still, he insisted, violated, and he wanted the classes terminated.<sup>25</sup> A month later, following Human Rights Commission mediation, the Board of Trustees of St Heliers School announced it would move its religious education classes to outside school hours.<sup>26</sup>

It may well be that New Zealand courts follow the Canadian courts and similarly rule such Bible in Schools programs as violations of the non-participating children's religious freedom.

#### VIII. OFFICIAL STATE ENDORSEMENT OF INDIGENOUS (MAORI) SPIRITUALITY

As the cultural disestablishment of Christianity accelerates, the appearance of a more genuine secular state has been belatedly thwarted by a recognition and adoption of a resurgent traditional Maori spirituality.<sup>27</sup> This represents a stark *volte-face*, because, historically, New Zealand governments were decidedly unsympathetic to Maori religion. The Tohunga Suppression Act of 1907 is a well-known example. Here, the Government sought to curb the activities of Maori traditional healers or *tohunga* by making the practice of their medicinal arts a criminal offence.

Official government support for Maori and their spiritual concerns can be traced to the state's belated desire to honour its obligations under the Treaty of Waitangi. Perhaps some commentators are not far from the truth in their argument that Maori culture and

21. See Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed. (Oxford: Oxford University Press, 2013), 258-259.

22. Nicholas Jones, "Passions High over Bible in Schools," *NZ Herald*, 1 August 2013; "Editorial: Religious Instruction no Longer a School Role," *NZ Herald*, 5 August 2013.

23. Nicholas Jones, "'Go to Hell' Class Stirs Dad," *NZ Herald*, 23 September 2013.

24. Vaimoana Tapaleao, "Bible-Class Stance Dismays Father," *NZ Herald*, 4 December 2012.

25. "Second Complaint Laid Over School's Religion Classes," *NZ Herald*, 23 January 2014.

26. "Religion Ban Fears Growing," *NZ Herald*, 1 March 2014.

27. Rex Ahdar, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments," *Oxford Journal of Legal Studies* 23 (2003): 611-637.

spirituality were a particularly suitable focus in a climate made up of such diverse ideological streams as post-modernism, anti-colonialism, post-colonial guilt feelings and fascination with New Age values.<sup>28</sup> Examples of the official recognition of Maori spirituality are numerous.

In 2002, construction on a major four-lane highway was halted, and the road was eventually re-designed, when the local Maori sub-tribe, Ngati Naho, expressed concern that the expressway would disturb the lair of “Karu Tahi,” a one-eyed *taniwha* (spiritual guardian or monster). When AgResearch, a Crown agricultural research facility, sought to develop through genetic modification a class of Fresian cow that would produce milk containing the human myelin basic protein, local Maori, amongst others, vigorously objected. The sub-tribe, Ngati Wairere claimed that alteration of *whakapapa* (genealogy) of humankind by mixing the genetic makeup of humans with other species would be deeply offensive and contrary to *tikanga* Maori (Maori custom). Both *whakapapa* and *mauri* (roughly, life-force possessed by all things) were intangible *taonga* (treasures) deserving of active protection in terms of the relevant legislation and the Treaty of Waitangi. The Foreign Affairs and Trade Ministry came under criticism in 2001 for funding the travel of *kaumatua* (elders) to overseas embassies to perform *hikitapu* or spiritual cleansing ceremonies in the buildings concerned. Aside from these controversy-generating instances, the recognition of Maori spiritual concerns is a fairly unobtrusive and commonplace thing: for example, the use of *karakia* (prayers) to commence court proceedings or public meetings is increasingly permitted and sacred sites (*waahi tapu*) are acknowledged and protected under environmental legislation. The Ngai Tahu Claims Settlement Act 1998 contains extensive statutory acknowledgement of the mythological and sacred origins of natural landmarks, such as Aoraki (Mount Cook), and Ngai Tahu’s special cultural and spiritual association with them. Rather than simply multiply further instances I shall take one recent example and explain it in more detail.

#### IX. BEWARE THE MAORI “DRAGON”

There was an urgent need for a prison in Northland and, in 1999, the Government selected Ngawha, a rural location, as the site. The Northland Regional Council, however, declined to grant the necessary resource consents. The Minister of Corrections on 3 April 2001 appealed to the Environment Court against the Council’s refusal and various persons appealed against the Minister’s original designation of the site as a prison. The Council’s refusal of the consents was solely due to the harmful effects the installation would have on the cultural, spiritual and other interests of certain local Maori. Following a lengthy 21-day hearing, the Environment Court delivered a 200-page decision upholding the original decision to designate the site for a prison and granting the resource consents needed by the Government.<sup>29</sup> Unlike the Council, the Court did not find that Maori cultural, spiritual or health interests would be adversely affected.

Maori concerns are expressly mentioned in the purpose provisions of the Resource Management Act 1991 (RMA). Of the various concerns raised by the Maori opponents to the prison – and not all Maori were against the proposal – the most fascinating contention was that the prison would interfere with the relationship of the *tangata whenua* (native people) with a *taniwha*, a spiritual monster or dragon-like creature, named “Takauere.” It was claimed that Takauere’s domain encompassed the prison site at Ngawha and the installation would interfere with his pathways to the surface and his *mana* (authority or prestige).

Several pages of the Environment Court decision were devoted to summarizing the evidence about this *taniwha*. Of the ten who testified, three saw the development adversely affecting Takauere, the spiritual guardian of this area. He was not some sort of

28. Erich Kolig, “Of Condoms, Biculturalism and Political Correctness: The Maori Renaissance and Cultural Politics in New Zealand,” *Paideuma* 46 (2000): 231-252.

29. Ian H. Williams, “The Minister’s Prison and the Cultural Prison: Lessons from the Northland Prison Litigation,” *New Zealand Univ. L. Rev.* 20 (2003): 320 ff.

mere “mascot” in the *Pakeha* (European) sense, said one, and the proposed construction would hinder his free movement and “literally throw mud in his eyes.” On the other hand, seven other witnesses denied the installation would have any effect on the *taniwha*. One elder doubted its *ana* (lair) embraced Ngawha and, even if it did, the *taniwha* was adaptable and “would simply find other passageways and other places to reside. The prison and the *taniwha* can co-exist.” Another witness suggested that Takauere “was being misused to fight a prison” in a way that he found offensive.

The Court accepted that there were those who sincerely believed in the existence of the *taniwha*, Takauere, which it described for present purposes as “a mythical, spiritual, symbolic and metaphysical being.”

The Court respected such sincere spiritual beliefs and noted Parliament enjoined it to do so by virtue of sections 13 and 15 of the NZBORA. It emphasized that nothing in its ruling ought to be taken as “belittling” the believers in the *taniwha* nor “the importance that their belief in Takauere has for them.” But there were limits both in terms of policy and practical decision-making. It observed:

Even so, the Act and the Court are creations of the Parliament of a *secular State*. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of *taniwha*, or other mythical, spiritual, symbolic or metaphysical beings.... Neither the statutory purpose, nor the texts of [the Act], indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.

Practically speaking, the Court admitted to difficulties in evaluating questions about such metaphysical matters. In the wake of conflicting evidence about the *taniwha* it had no reliable or objective way to resolve the dispute. For instance, “the *taniwha*’s pathways are not physical passages that can be measured and (at least on some accounts) the dimensions of the *taniwha* range from time to time.”

Furthermore, the tribunal had to be persuaded on the facts that the being existed and would be impinged upon. In light of the evidence presented:

None of us has been persuaded for herself or himself that, to whatever extent *Takauere* may exist as a mythical, spiritual, symbolic or metaphysical being, it would be affected in pathways to the surface or in any way at all by the proposed prison, or any earthworks, streamworks, or other works or development for the prison.

An opponent of the prison proposal appealed to the High Court. The appellant’s case was that the Environment Court had erred by confining the ambit of that provision to tangible, physical matters, whereas spiritual, metaphysical concerns, such as the *taniwha*’s plight, ought to have been properly considered.

In the High Court decision, *Friends and Community of Ngawha Inc v. Minister of Corrections*,<sup>30</sup> Wild, J. noted that *if* the lower court had excluded *taniwha* from its section 6(e) evaluation it would have erred. An important earlier High Court case on genetic engineering and Maori belief (*Bleakley v. Environmental Risk Management Authority*)<sup>31</sup>, had made it abundantly plain that “taonga embraces the metaphysical and intangible (e.g., beliefs or legends) as much as it does the physical and intangible (e.g. a treasured carving or mere).” However, the Environment Court had clearly cited and applied *Bleakley*. That Court had spent some considerable time on the existence and vulnerability of the *taniwha*. It had concluded that Takauere would not be harmed by the proposal: “That is a factual

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30. [2002] NRMA 401.

31. [2001] 3 NZLR 213.

finding which was open to the Court on the differing evidence it heard.” A rather optimistic submission that the Court had been remiss in concentrating too much on the *taniwha* himself at the expense of Maori belief in him was rebuffed. It was going too far to say belief about *taniwha* came within the definition of “environment” under the RMA. Wild J. expressed “difficulty in following how beliefs can be regarded as a natural and physical resource, or how they can be sustainably managed.” The appellant’s argument that the Treaty duty of active protection under section 8 of the RMA had been breached was rejected. For one thing, the land in question was not and had not been Maori land for over a century. Although the Court was not, strictly speaking, required to consider alternatives to the challenged proposal, it had done so anyway here. The Court of Appeal refused to grant leave to hear an appeal. The lower courts had given proper consideration to Maori spiritual beliefs concerning the *taniwha*.

State recognition of Maori religious concerns has not gone unchallenged. Criticisms have been voiced that it unfairly privileges one religion over another, or worse still, that it simply enables some Maori to cynically exploit traditional religious beliefs for pecuniary gain. For secular liberals, rationalists and sceptics in the Enlightenment tradition, it represents a regrettable reintroduction of religion “through the back door.”<sup>32</sup> That back door still seems to be ajar. The *New Zealand Herald* sounded exasperated at the prospect of a much-needed urban rail network for New Zealand’s largest city being stymied:

Taniwha are everywhere. These mythical creatures of Maori legend haunt the natural landscape to be summoned forth by any believer who wants to frighten mere mortals planning to tamper with nature. The proposed Auckland central underground rail connection—still of mythical status itself—is the latest project to face the apparition.<sup>33</sup>

## X. CONCLUDING THOUGHTS

The secularity of public life remains a live issue. There is a constituency that would potentially favour a “naked public square,” given, as I just noted, that nearly a third of New Zealanders indicate they have no religion. Some 50 percent of the population believe that churches and religious organizations have about the right amount of power in the nation, 15 percent stating they have too much, 10 percent too little, with the rest undecided.<sup>34</sup>

The last vestiges of public Christian ritual and symbolism are just that. There is a steady pattern of dismantling these historic Christian remnants from the public square. With each passing year, people of faiths other than Christianity, as well as atheists and agnostics, have less to complain about. Indeed, it might be replied that it is the Christian community that has been remarkably tolerant. Not only are most of their cherished historic public observances being expunged, but they face regular galling reminders of that Christianity must “know its place” in 21<sup>st</sup> century New Zealand. For instance, the Broadcasting Standards Authority recently dismissed a complaint by a Presbyterian pastor about a promotion run on the state-owned television station. According to the Authority, the exclamation, “For Christ’s sake!” in the commercial, was not a blasphemous phrase and did not call for censure by the state watchdog.<sup>35</sup>

There is no small irony here. The same Human Rights Commission that expresses pleasure at the explicit state recognition of indigenous spirituality seems oblivious to the offence that a much greater segment of New Zealand society feel when their privileged religious symbols and institutions are criticized, if not outright dismantled. Privileging of

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32. Erich Kolig, “Coming Through the Backdoor? Secularisation in New Zealand and Maori Religiosity,” in *The Future of Christianity in the West: Historical, Sociological, Political and Theological Perspectives from New Zealand*, ed. John Stenhouse, Brett Knowles, and Anthony Wood (Adelaide: ATF Press, 2004), 183-206.

33. “Editorial: Taniwha Rears Head to Sabotage Cause,” *NZ Herald*, 11 June 2011.

34. Massey University: International Social Survey Programme, *Religion in New Zealand*, supra n 2.

35. See further Rex Ahdar, “The Right to Protection of Religious Feelings,” *Otago L. Rev.* 11 (2008): 629-656.

Maori spirituality is fine; privileging of Christianity, however, implicates religious liberty.

Perhaps the state's belated adoption of Maori ritual is the beginning of a civil religion with a strong indigenous flavour. The question whether New Zealand has ever had a significant "civil religion" is one that has exercised many sociologists and historians.<sup>36</sup> The recent recognition of Maori spiritual concerns in state ceremonies and in environmental and other laws may be a harbinger for the inclusion and recognition of further religious values and rituals. Or, it may be that Maori spirituality remains as an exception justified on historic, bicultural grounds. As the twenty-first century unfolds, the answers may hopefully become clearer.

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36. Michael Hill and Wiebe Zwaga, "Civil and Civic: Engineering a National Religious Consensus," *New Zealand Sociology* 2 (1987): 27; Richard V. Pierard, "'In God We Trust . . . All Others Pay Cash': Reflections on Civil Religion," *Stimulus* 10 (2002): 11-19.