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**The School Donation Debate: Shining a Light on the  
Legal Vacuum Behind Persisting Inequality in New  
Zealand Education**

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***Abstract***

*In the Court of Appeal decision of Attorney-General v Daniels, the content of “the right to free education,” provided for in s 3 of the Education Act 1989, was narrowly defined as a procedural rather than a substantive right. The court also identified alternative accountability mechanisms, which protected the right to free education. Some commentators have criticised the procedural right as being inconsistent with the substantive right to education contained in New Zealand-ratified international instruments. De facto compulsory donations in New Zealand state schools undermine the right to free education. Prolonged government education underfunding has resulted in state schools relying on donations to fill funding gaps. The persistence of this issue despite public dissatisfaction highlights the inadequacies of the current accountability framework for the protection the right to free, quality education in New Zealand. Where government policy causes breaches of s 3, the accountability via the legislative framework and alternative mechanisms is inadequate. The inadequacies reveal inconsistency with New Zealand’s international obligations, which require governmental accountability and sufficient government funding to education. The discussion demonstrates the need for better governmental accountability for the right to free, quality education in New Zealand.*

**Keywords**

Right to Free Education—s 3 Education Act 1989—School Donations—Education inequality—*Attorney-General v Daniels*

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## *I Introduction*

Section 3 of the Education Act 1989 provides each New Zealander aged 5 – 19 with the right to free education. The Ministry of Education advises that compulsory school donations are inconsistent with the right recognised in s 3.<sup>1</sup> However, “voluntary” school donations, which are in reality de facto compulsory, are well known to many New Zealanders. Save for a slight revision of its guidance on s 3 earlier this year, the government has taken little action to address de facto compulsory donations. At times, the Ministry of Education even seems to implicitly encourage them. This paper uses the de facto compulsory nature of school donations to evaluate whether there is adequate legal protection for the right to free education in New Zealand. Donations raise two issues regarding the protection of this right. They undermine the rhetoric of a “free” state education. The resulting resource disparity between schools’ revenue also brings into question whether there is education of comparable quality across state schools.

Section 3 of the Education Act 1989 provides:<sup>2</sup>

Except as provided in this Act, every person who is not an international student is entitled to free enrolment and free education at any State school or partnership school kura hourua during the period beginning on the person’s fifth birthday and ending on 1 January after the person’s 19th birthday.

The Act does not define “free education.” In *Daniels v Attorney-General*, the “most authoritative” interpretation of s 3,<sup>3</sup> the Court of Appeal limited the right to what was provided for in the legislative framework.<sup>4</sup> The Court justified its narrow interpretation by identifying existing alternative accountability mechanisms. The Court’s reasoning suggests that it viewed the legislative framework and alternative accountability mechanisms as adequately protecting the right to free education. Previous commentary has criticised *Daniels* for being inconsistent with the substantive right to education recognised in a number of New Zealand ratified international instruments. However, this commentary fails to evaluate the content of

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<sup>1</sup> Ministry of Education *Circular 2018/01 Payments by parents of students in schools* (22 June 2018).

<sup>2</sup> Education Act 1989, s 3.

<sup>3</sup> Keakaokawai Hemi “Daniels, disability and the human right to education” (2017) 9 NZLJ 404.

<sup>4</sup> *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [83].

the right provided for in the legislative framework and the effectiveness of the alternative accountability mechanisms identified in *Daniels*.

This paper evaluates whether the right to free education is adequately protected in New Zealand with reference to the reasoning in *Daniels*. The paper first considers who is accountable for the provision of the right to free education under the legislative framework referred to in *Daniels*. It then considers the effectiveness of the accountability mechanisms that the Court identified in *Daniels*. Accountability and corresponding remedies are integral to the meaningful recognition of rights. As stated by the United Nations Committee on the Rights of the Child in General Comment No 5: “[f]or rights to have meaning, effective remedies must be available to redress violations.”<sup>5</sup> New Zealand’s various international obligations regarding the right to free education are used as a benchmark in the discussion of the adequacy of accountability.

The de facto compulsory nature of donations can be traced back to the 1990s Tomorrow’s Schools reforms (Tomorrow’s Schools) which decentralised the New Zealand education system, shifting responsibility for the provision and management of education from the government to individual school Board of Trustees (BOT). The present Government’s recent decision to review the education system makes it an appropriate time to consider whether the right to free education is adequately protected in New Zealand. It is implicit in the ordering of these reviews that the government accepts that it bears the ultimate responsibility to provide a certain quality of education for all New Zealanders. If this is the case, the limitation of accountability for free education solely to BOT is inadequate. In one review, due to finish in November 2018, the Government has directed the taskforce to consider whether the “management and administration of the schooling system is fit for purpose to ensure that every learner achieves educational success.”<sup>6</sup> Similarly, the 2018 Education Funding System Review is set to consider “how education resources might better support equity in schools, nga kohana reo and early childhood education services,

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<sup>5</sup> UN Committee on the Rights of the Child, *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 34<sup>th</sup> sess, UN Doc CRC/GC/2003/5 (27 November 2003) at [24].

<sup>6</sup> Ministry of Education *Terms of Reference for the Review of Tomorrow’s Schools* (13 March 2018) at 1.

especially for learners from socio-economically disadvantaged backgrounds.”<sup>7</sup>

## *II Issues Relating to the Right to Free Education in New Zealand*

### *A Free Education*

Persisting de facto compulsory donations, despite clear governmental advice of its illegality, raises the question: is the right to free education adequately protected in New Zealand? Section 3 does not define the content of the right to “free” education. The Ministry of Education’s *Education Circular 2018/01: Payments by parents of students at state schools* (“the Circular”) is the “main source of guidance for schools” regarding compliance with s 3.<sup>8</sup> According to the Circular, s 3 means that schools must not charge students for curriculum related costs. These include: enrolment, course fees, Internet, course-related camps, photocopying, or programmes associated with delivery of the curriculum.<sup>9</sup> The Circular advises that schools can request payment of voluntary school donations, however, which can be used for specific or for general purposes. The Circular repeatedly advises schools that compliance with s 3 mandates voluntary donation payments.

Despite the Ministry’s advice, donations are de facto compulsory; it is common for schools to enforce payment and for parents to experience social pressures to pay. In 2016 Palmerston North Boys High School were caught “labeling subject-related voluntary charges as “fees” in its curriculum handbook” and withholding privileges, including the school magazine.<sup>10</sup> In 2017, Botany Downs Secondary College students were allegedly told they would not be allowed to sit their NCEA exams if their school donation were left unpaid.<sup>11</sup> Other past examples include students not being allowed to attend the school ball, or having their leavers’ jersey withheld.<sup>12</sup> Schools are permitted to send donation reminder notices, which can be an enforcement pressure. One mother has described fear of social stigma regarding non-payment of school

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<sup>7</sup> Ministry of Education “Education Funding System Review” (21 June 2018) Education in New Zealand <[www.education.govt.nz](http://www.education.govt.nz)>.

<sup>8</sup> Controller and Auditor-General *Inquiry into state schools requesting payments in connection with out-of-zone places* (May 2017) at 8.

<sup>9</sup> Ministry of Education *Appendix to Circular 2018/01 – Payments by parents of students in schools: Further information* (31 July 2018).

<sup>10</sup> Laura Walters “Under-pressure schools get dodgy with donations” *Stuff* (online ed, Auckland, 26 September 2016).

<sup>11</sup> Helen King “Auckland school reprimanded after school donation ‘misunderstanding’” *Stuff* (online ed, Auckland, 3 November 2017).

<sup>12</sup> Ciara Pratt “No fees, no ball” *Stuff* (online ed, Auckland, 29 May 2013).

donations:<sup>13</sup>

There are constant reminders ... thank you to those who have paid the donation, and just a reminder please pay' and ... if you dont pay it, you get the reminders and you do feel ... people are going to know.

The Ministry's more specific ban of enforcement tactics earlier this year recognises the de facto compulsory nature of donations in New Zealand. Aside from this clarification however, the government has taken little action towards addressing the issue. Most significantly s 3 was left untouched by the Education (Amendment) Act 2017 – the “most comprehensive update of New Zealand’s education legislation in almost 30 years.”<sup>14</sup> The persistence of de facto compulsory donations despite wide spread public awareness suggests that the right to free education is inadequately protected in New Zealand. The 2018 revised Circular more specifically bans schools using enforcement tactics:<sup>15</sup>

students, or their families, should never be pressured or otherwise made to feel embarrassed over non-payment of either a debt or a requested donation ... no student should be harassed or denied information or privileges because a parent has not paid a donation.

### *B Curriculum Distribution*

The comparable quality of education across state schools is also affected by de facto compulsory donations. Section 3 does not define the content of the right to “education”. However, the Court of Appeal in *Daniels* noted that the legislative framework provides for a certain quality of education.<sup>16</sup> Furthermore, New Zealand’s school funding system is structured to compensate for any educational barriers socio-economically disadvantaged students may face, in part to ensure equality of education quality.<sup>17</sup> Lower socio-economic parents cannot afford to pay donations whether

<sup>13</sup> Patrice Dougan “School costs: \$40,000 for ‘free’ state education” *The New Zealand Herald* (online ed, Auckland, 20 January 2017).

<sup>14</sup> Ministry of Education “Education Act Update – the Education (Update) Amendment Act 2017 (24 August 2017) Education in New Zealand <[www.education.govt.nz](http://www.education.govt.nz)>.

<sup>15</sup> Ministry of Education, above n 1.

<sup>16</sup> At [83].

<sup>17</sup> Ministry of Education “School deciles” (26 July 2018) Education in New Zealand <[www.education.govt.nz](http://www.education.govt.nz)>.

compulsory or otherwise. Higher-socio economic parents can afford to pay. The resulting disparity means that higher-socio economic schools can fund a more varied and comprehensive curricula.

In the New Zealand education funding system, “operational funding” is intended to cover the curriculum costs that schools must not charge parents in order to comply with s 3.<sup>18</sup> “Targeted funding” is a component of operational funding whereby lower decile schools receive more government funding than higher decile schools. School deciles are a relative measure of a school community’s socio-economic demographic.<sup>19</sup> In 2015, decile 1 schools received “between \$731 and \$905 in extra funding per student,” whereas decile 10 schools received no extra funding.<sup>20</sup> However, the de facto compulsory nature of school donations detracts from the equitable aims of targeted funding. Parents in lower decile schools do not have money to donate “voluntarily” or otherwise. In 2014, 44 percent of the 242 decile 1 schools “declared no voluntary parental donations whatsoever.”<sup>21</sup> Additionally, a review of the funding system in 2015 found a “key theme” to be that lower decile schools were less able to raise money than higher decile schools.<sup>22</sup> These differences create significant disparities in revenue income between schools. In 2014, \$329 million were “voluntarily” donated to decile 10 schools. This accounted for 30.8 percent of total donations in that year. In contrast, decile 1 schools received around \$2.8 million. This accounted for 2.6 percent of total donations.<sup>23</sup>

Anecdotal evidence suggests that the disparities in revenue from donations have a consequential impact on the quality of education that schools can offer. In 2010 the Human Rights Commission found that some students reported choosing subjects based on their associated costs.<sup>24</sup> A 2014 Ombudsman decision on the issue of school

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<sup>18</sup> Ministry of Education *Stock-take of funding system for school-age education in New Zealand* (14 July 2015) at 57.

<sup>19</sup> Sally Varnham “Daniels v. Attorney-General: Children with Special Needs and the Right to Education in New Zealand” (2005) 2 IJELP 236 at 237.

<sup>20</sup> Andy Fyers and Katie Kenny “Decile 10 schools take lion’s share of school donations” *Stuff* (online ed, Auckland, 20 January 2016).

<sup>21</sup> Fyers & Kenny, above n 20.

<sup>22</sup> David Moore, Gary Blick, Michael Ryan and Selena He *Perspectives on School Funding Model* (Sapere Research Group, 18 October 2015) at 8.

<sup>23</sup> Fyers and Kenny, above n 20.

<sup>24</sup> Human Rights Commission/Te Kāhui Tika Tangata *Human Rights in New Zealand/Nga Tiki Tangata O Aotearoa* (2010) at 179.



costs recorded that a school justified course related costs by telling a student to choose another subject if they could not afford to buy the required materials. “We offer over forty courses in each of year 12 and 13, so there are plenty of options available to students of families who are unable to pay fees.”<sup>25</sup> A survey of public secondary schools in 2015 also found a correlation between schools experiencing financial difficulties and the quality of the curriculum provided. 46% of surveyed schools reduced spending to manage the budget. Of those schools, 59% viewed budget reduction as negatively impacting the quality of curriculum resourcing, and 29% percent believed that it negatively impacted curriculum options offered to years 11 to 13.<sup>26</sup>

Data about the most popular NCEA subjects taken at levels 1, 2 and 3 at decile 1, 2 and 3 schools, compared with that of decile 9 and 10 schools in 2017, also suggests that access to different funding impacts education quality. Data regarding subject choices for students of decile 1, 2 and 3 schools were compared with that of students from decile 9 and 10 schools from 2017. The data reveals that students at decile 9 and 10 schools were more likely to take Chemistry, Physics, Biology, Economics, Accounting, Geography and Mathematics with Calculus. In contrast, students at decile 1, 2 and 3 schools were more likely to take Study Skills, Maths, Life Skills/Personal Development, Travel/Hospitality/Tourism, Te Reo Maori, Health, Transition Pre-Employment, and Technology.<sup>27</sup> There are different costs associated with these two groups of subjects. Chemistry, Physics, Biology and Geography each have equipment requirements. In contrast, subjects such as Study Skills or Travel/Hospitality/Tourism do not require equipment related to the curriculum – and therefore do not have curriculum-related costs.

The persistence of de facto compulsory donations raises questions regarding the adequacy of the protection of the right to free education in New Zealand. The interference of de facto compulsory donations with the right to free education is not novel, and the Ministry’s update of the Circular this year reflects the government’s

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<sup>25</sup> Professor Ron Paterson *Complaint about the decision of a Board of Trustees to compulsorily charge for curriculum-related items* (March 2014) at 10.

<sup>26</sup> Cathy Wylie and Linda Bonne *Secondary schools in 2015: Findings from the NZCER national survey* (NZCER, May 2016) at 135.

<sup>27</sup> Ministry of Education “Subject enrolment” (2017) Education counts <[www.educationcounts.govt.nz](http://www.educationcounts.govt.nz)>.

awareness of the need to address the issue. The Court in *Daniels* appeared to take the view that the right to free education was adequately protected. This paper seeks to evaluate whether this is the case, by testing the Court of Appeal's justification in the context of de facto compulsory donations.

### III Attorney-General v Daniels

*Attorney-General v Daniels* was a judicial review of a government policy decision regarding special education. The Court considered the meaning of s 3. In the High Court, Baragnawath J found that s 3 guaranteed a substantive right to free education.<sup>28</sup> On appeal the Court of Appeal declined to adopt Baragnawath's interpretation finding. However, the Court emphasised that the justiciability of the right to free education under s 3 was not an "all or nothing" issue, still finding that a right to education existed.<sup>29</sup>

the rights are essentially those specifically established by and under the legislation which ... do in themselves provides for regularity and system and are designed to ensure appropriate equality.

Following *Daniels* there is no substantive generally enforceable right to education under s 3. This narrow interpretation is commonly criticised for being inconsistent with the right to education, as defined in international instruments ratified by New Zealand. A general substantive right would more strongly protect the right to free education, as the Ministry of Education could be sued for breaches of s 3. However, the Court of Appeal judgment suggests the Court viewed the right to education as adequately protected. The Court did not expand on what the legislative framework provided but may have hinted that the narrow interpretation did not necessarily mean limited protection of the right. Keith J stressed:<sup>30</sup>

some of the failures of a school to comply with its obligations could give rise to legal proceedings ... the schools have duties correlative to the students' statutory rights and those general rights are capable of legal enforcement.

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<sup>28</sup> *Daniels v Attorney-General* HC Auckland M1615-SW99, 3 April 2002.

<sup>29</sup> At [83].

<sup>30</sup> At [79].

The Court also identified alternative accountability mechanisms which protected the right to education.

This paper now turns to consider the adequacy of the protection of the right via the accountability provided by the legislative framework and alternative accountability mechanisms, referred to in *Daniels*.

#### *IV Legislative Framework Accountability*

Following Tomorrow's Schools, New Zealand's legislative framework shifted responsibility from the Government onto individual school BOT for the financing and administration of education, as well as for the provision of quality educational outcomes.<sup>31</sup> It holds individual BOT solely accountable for providing free and quality education.<sup>32</sup> BOT are Crown entities which "control the management of their local school within a national accountability framework."<sup>33</sup> They are subject to the law<sup>34</sup> and have legal obligations to comply with legislation, regulations and the school's charter. These obligations are set out in the Education Act 1989.<sup>35</sup> A school charter:<sup>36</sup>

sets out accountabilities to the Government and to the local community ... Charters have to cover student achievement, general government policy objectives, and the management of the school's and board's capability, resources, and assets and liabilities.

BOT legal obligations are set out in Schedule 6 of the Education Act. Section 5 provides:

A board's primary objective in governing the school is to ensure that every student at the school is able to attain his or her highest possible standard in educational achievement.

Section 2, of schedule 6 provides:

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<sup>31</sup> Kerstin Martens, Alexander-Kenneth Nagel, Michael Windzio and Ansgar Weymann (Eds.) *Transformation of Education Policy* (Springer, New York, 2010) at 159.

<sup>32</sup> New Zealand Schools Trustees Association "Board of Trustees" (2018) NZSTA <[www.nzsta.org.nz](http://www.nzsta.org.nz)>.

<sup>33</sup> Ministry of Education *Effective governance: Working in partnership* (2010) at 3.

<sup>34</sup> At 4.

<sup>35</sup> New Zealand Schools Trustees Association *Trusteeship: a guide for school trustees* (2018) at 10.

<sup>36</sup> Controller and Auditor-General *Ministry of Education: Monitoring and supporting school boards of trustees* (June 2008) at [1.15].

To meet the primary objective, the board must ... (c) comply with its obligations under sections 60A (in relation to curriculum statements and national performance measures), 61 (in relation to teaching and learning programmes,) and 62 (in relation to monitoring of student performance).

The 2017 education reforms clarified BOT's responsibilities reaffirming BOT accountability.<sup>37</sup>

#### *A Free Education*

If BOT can be sued for compulsorily acquired donations, it may suggest that the right to “free” education is adequately protected – having an enforceable right in the courts in an effective accountability mechanism. BOT have been sued in the past for breaches of the Education Act 1989. In *Stephen W Bovaird and Board of Trustees of Lynfield College v Litigation Guardian* a BOT and principal were sued on the basis of unjust expulsion.<sup>38</sup> It is likely that BOT could also be sued for breaches of s 3 for compulsorily acquired donations. Section 3 provides that every child has the right to a free education. BOT are subject to the law and are accountable for financing their schools.<sup>39</sup>

The meaning of “free education” is left undefined by the Education Act. The Circular gives crucial interpretative guidance. The Circular would therefore play a vital role if a BOT were to be sued. However, its uncertainty and contradictory nature detract from its overall effectiveness in holding individual BOT accountable via the courts. The Controller and Auditor-General recently commented on the importance of the Circular in interpreting s 3:<sup>40</sup>

The [Education] Act does not refer to donations, the ability of the schools to ask for donations, what constitutes a donation, or what types of things donations can be asked for. Without any direction in the Act, the Ministry's Circular is the main source of guidance for schools.

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<sup>37</sup> Ministry of Education, above n 14.

<sup>38</sup> *Bovaird and Board of Trustees of Lynfield College v J* [2008] NZCA 325, [2008] NZAR 667.

<sup>39</sup> New Zealand Schools Trustees Association, above n 35, at 11.

<sup>40</sup> Controller and Auditor-General, above n 8, at 8.

It is unlikely that the Circular's lack of enforceability detracts from the ability to hold BOT accountable under s 3 via the courts. Mass acceptance of the Circular implies that a court or anyone else interpreting s 3 would follow it. A 2014 Ombudsman decision and a 2017 Controller and Auditor-General report both noted that the Circular "clarifies" what parents can and cannot be charged for in complying with the right to free education.<sup>41</sup> Most significantly, in the 2014 Ombudsman decision, the school in question argued that it was entitled to take a different interpretation of s 3 than what was provided in the Circular. The Ombudsman rejected this argument. In commenting on the weight to be given to the Circular, he observed that "the Ministry decides the funding of schools, and in providing taxpayer funds it has a legitimate expectation that its guidance about authorised use of funds will be followed."<sup>42</sup>

However, the Circular's content is still changing and this may limit the effectiveness of the court system as an accountability mechanism. The courts need to know the content of the right to free education under s 3 to apply it. Certainty is also central to the rule of law.<sup>43</sup> In 2017 the Auditor-General noted that the advice contained in the Circular is "still evolving."<sup>44</sup> The Auditor-General provided the example of how, in February 2017, the Ministry stated that some schools could ask for donations to cover enrolment administration costs. However, where there are more people trying to enroll in the school than there were places, schools were prohibited from requesting the payment. This is because the request for donation has the same operative effect as a compulsory fee for pre-enrolment, which the Ministry considers to be unlawful.<sup>45</sup> This advice was "not reflected" in the flowcharts appended to the Circular – it was not suggested that requests for such donations could be unlawful.<sup>46</sup> Although the revised Circular has fixed this particular uncertainty, the example demonstrates the changing nature of the Circular's content.<sup>47</sup>

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<sup>41</sup> Controller and Auditor-General, above n 8, at 8; Paterson, above n 25, at 13.

<sup>42</sup> Paterson, above n 25, at 19.

<sup>43</sup> Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 586-589.

<sup>44</sup> Controller and Auditor-General, above n 8, at 10.

<sup>45</sup> Controller and Auditor-General, above n 8, at 9.

<sup>46</sup> "Changes to the Secretary's Instructions Issued Under Section 11G of the Education Act 1989" (13 July 2017) 73 New Zealand Gazette 1 at 1.

<sup>47</sup> At 1.

Aspects of the Circular's advice are contradictory, which may make the court system a less meaningful accountability mechanism. The Circular advises schools that compulsory charging for donations is contrary to s 3, while simultaneously allowing the de facto compulsory nature of donations by implicitly encouraging schools to ask for donations to fill the gaps. The Circular's contradictory advice may limit the remedies a court could grant in finding a breach of s 3. The Circular repeatedly states that payment of donations must be voluntary. However, the Ministry undermines its own advice in the Circular by advancing donations as a legal alternative to compulsory course-related costs. For example, the Circular states that charging for programmes used to deliver the curriculum is unlawful but that; "[b]oards can ask parents for a donation to contribute towards the cost of a programme." The Circular also states that charges for trips related to the curriculum cannot be enforced, yet "[b]oards can ask parents for a donation to contribute towards the cost of a trip." The Circular also provides that parents cannot be compelled to pay for compulsory workbooks, although a "Board may ... ask for a donation towards its cost."<sup>48</sup> Simultaneously, the Ministry's revised version acknowledges the de facto compulsory nature of donations by identifying commonly recognised tactics used by schools to enforce payment.<sup>49</sup>

The Circular's contradictory advice may mean the court system inadequately protects the right to free education. A court may be hesitant to grant the necessary remedies to compensate for the breach of s 3. This occurred in a 2014 Ombudsman decision which considered compulsory course-related costs. The Ombudsman found that the school had breached s 3. However, he did not recommend the school refund the complainant. He reasoned that to do so would also require a recommendation for all parents to be refunded, which would be "significantly financially adverse to the school" and might "compromise the school's immediate financial future."<sup>50</sup> This suggests a potential limitation of the courts scope with regards to the protection of the right to education. Broader policy factors that may contribute to breaches of s 3 are outside the courts' scrutiny. The problems to the right to free education, posed by de

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<sup>48</sup> Ministry of Education *Payments by Parents* (November 2016).

<sup>49</sup> Ministry of Education, above n 1.

<sup>50</sup> Paterson, above n 25, at 24.

facto compulsory donations, require wider legislative accountability mechanisms to address these policy considerations.

### *B Curriculum Distribution*

Under the legislative framework, BOT are also accountable for providing education of a certain quality. BOT are accountable via formal and informal mechanisms to the government, instead of being held accountable via the courts to individuals. BOT accountability, in a number of cases, effectively protects the right to quality education. However, de facto compulsory donations highlight an inadequacy in holding BOT solely accountable for the right to free, quality education. BOT accountability is inadequate where policy decisions (beyond the control of BOT) make compliance with s 3 difficult for BOT. BOT are legally required to report to the Ministry of Education each year on their progress in complying with the school's charter. BOT are also subject to review by the Educational Review Office (ERO). ERO consider "how effectively school governance contributes to student learning, wellbeing, achievement and progress and makes advisory suggestions in their report to the board of trustees."<sup>51</sup> When the Ministry of Education is notified of a concern, there is a range of options available for implementation. The Ministry can "support schools and kura needing help with operational risks or risk to the welfare or educational performance of their students" through statutory interventions. "Operational risks" include "inadequate curriculum management" and "persistently low student achievement in relation to comparable schools."<sup>52</sup> Statutory interventions include:<sup>53</sup>

a requirement to provide information, to engage specialist help, to develop, present, and implement an action plan, a case conference between the board, management and Ministry, a specialist audit where a third party assesses the situation, a performance notice requiring a remedy of a breach of performance, a statutory appointee to the board to guide the board back to self-governance, the appointment of a limited statutory manager to the board of a school or the dissolution of the board of trustees, and appointment of a Commissioner.

<sup>51</sup> Education Review Office/Te Tari Arotake Matauranga *School Trustees Booklet: Helping you ask the right questions* (2017) at 2.

<sup>52</sup> Ministry of Education "Interventions in state and integrated schools and kura" (15 June 2018) Education in New Zealand <[www.education.govt.nz](http://www.education.govt.nz)>.

<sup>53</sup> Education Act, s 78.

Statutory interventions replaced other interventions, including the Secretary of Education's ability to take the BOT to court over the charter in the early 2000's.<sup>54</sup> The 2014 Review of Statutory Interventions in State and State Integrated Schools found that less than three percent of the 2500 state and state integrated schools had a statutory intervention in place. This was viewed positively by the Working Group as reflecting overall good BOT management.<sup>55</sup> However, statutory interventions were amended in the 2017 reforms. More statutory interventions were introduced and the threshold for statutory intervention implementation was lowered.<sup>56</sup> This suggests that the barriers to the right to free quality education are not only the result of poor management by BOT, but more importantly due to there being no scope for scrutiny of the government's funding decisions provided for in the legislative framework.

In some cases, the legislative framework does provide a thorough accountability relationship between individual BOT and the Ministry. There are a number of options open to the Ministry for addressing low-quality education, resulting from BOT management. However, in the context of de facto compulsory donations, BOT accountability is inadequate. De facto compulsory donations can be symptomatic of wider policy issues, such as underfunding, rather than blatant breaches of s 3 by BOT. These issues are beyond the scope of individual BOT management. Where such issues arise, the legislative framework's BOT accountability mechanisms fail to hold the correct actor (the government) to account. This means that the issue persists unaddressed: as has been the case for school donations in New Zealand, interfering with the right to quality education.

### *V Alternative Accountability Mechanisms*

Alternative accountability mechanisms might address the apparent accountability shortcoming. The Court in *Daniels* identified these mechanisms which monitored compliance with s 3:<sup>57</sup>

In addition to the system created by and under the Education Acts to promote

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<sup>54</sup> *Attorney-General v Daniels*, above n 4, at [77].

<sup>55</sup> Ministry of Education *Review of Statutory Interventions in State Schools and State Integrated Schools: Final Report and Recommendations to the Minister of Education* (1 November 2014) at 5.

<sup>56</sup> Education Act, pt 7A.

<sup>57</sup> *Attorney-General v Daniels*, above n 4, at [78].



education, external scrutiny is provided by the Ombudsmen, the Controller and Auditor-General, the responsibilities of the Ministers to the House, the parliamentary processes of scrutiny including estimates and financial and annual reports, professional and public scrutiny and comment, and international review, through bodies such as the OECD.

The question is: how effective are these mechanisms in vindicating the right to free, quality education in the context of the challenges posed by de facto compulsory donations.

#### *A The Office of the Ombudsman*

The Office of the Ombudsman can investigate “administrative acts, decisions, omissions and recommendations of a Board of Trustees” under s 13(1) of the Ombudsmen Act.<sup>58</sup> Under ss 22(1) and (2) of the Ombudsman Act, an Ombudsman can consider whether BOT conduct was fair and reasonable.<sup>59</sup> Parents who have complained to their BOT but feel unsatisfied with the school’s response can request an Ombudsman’s involvement.<sup>60</sup> Recommendations by the Ombudsman, although not legally binding, have political sway.<sup>61</sup>

A 2014 Ombudsman decision considered the interaction of charges for course-related costs, and the right to free education under s 3. The decision reveals that the Office of the Ombudsman, as an accountability mechanism, offers limited protection of the right to free education in the context of de facto compulsory donations. The decision came after a parent had complained to the school for compulsory costs associated with the delivery of the curriculum. The BOT insisted it was entitled charge for the costs. The complainant then took their complaint to the Ombudsman.<sup>62</sup> The Ombudsman relied on s 3 and the Circular to make his decision. Overall, he found that, in compulsorily charging for workbooks, the BOT “appeared” to have acted contrary to law, having breached section 3 of the Education Act 1989. He further

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<sup>58</sup> Paterson, above n 25, at 3.

<sup>59</sup> Paterson, above n 25, at 3.

<sup>60</sup> Office of the Ombudsman *Good complaints handling by school boards of trustees* (6 August 2012) at 3.

<sup>61</sup> Kishore Singh, *Report of the Special Rapporteur on the right to education: Justiciability of the right to education*, UN Doc A/HRC/23/35 (10 May 2013) [36].

<sup>62</sup> Paterson, above n 25, at 2.

found:<sup>63</sup>

the BOT has acted unreasonably in this matter, in that it is refusing to apply the advice of the Ministry as set out in the Education Circular ... and has charged the complainant for curriculum-related material that he was lawfully entitled to have provided to his children free of charge.

The Ombudsman recommended that the BOT apologise to the complainant and “confirm to the complainant that the practice of compulsory charging for curriculum-related material will cease.”<sup>64</sup>

Although Ombudsmen recommendations wield political power, the Ombudsman is limited to making recommendations on the facts before them. Recommendations cannot be made on wider policy issues. The non-binding nature of Ombudsman recommendations may be seen as their weakness as an accountability mechanism. Schools can ignore Ombudsman recommendations. However, the Ombudsman wields political power. In the decision, the mere involvement of the Ombudsman compelled the school to change its practices. At the end of the decision, the Ombudsman noted:<sup>65</sup>

since this investigation has commenced, the practice of compulsorily charging for curriculum related items at the school has ceased. The school has also provided a letter of apology to the complainant.

Arguably this political power is especially strong where, schools depend on donations for core function, as is the case in New Zealand. The more parents pay the donation, the more politically enforceable payment becomes.

However, contradictions in the decision highlight a limitation of Ombudsman as a protection mechanism of the right to free education. The Ombudsman is limited to making recommendations on the facts before them. This is inadequate where a policy-related issue, such as the de facto compulsory nature of school donations, interferes with the right to free education. As previously mentioned in Part IV of the paper, the

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<sup>63</sup> Paterson, above n 25, at 22.

<sup>64</sup> At 23.

<sup>65</sup> At 24.

Ombudsman declined to recommend a refund for the successful complainant because he was concerned for the school's financial position. However, the Ombudsman also rejected the school's argument that it was entitled to charge for course-related costs because of financial difficulty.<sup>66</sup> Therefore, according to the Ombudsman, financial difficulty was not a valid justification for breach of s 3. However, financial difficulty was the reason the Ombudsman did not recommend a refund after finding a breach of s 3. This contradiction highlights the need for an accountability mechanism with a wider scope of scrutiny. The Ombudsman identified a breach of s 3 but wider policy issues regarding funding prevented him from vindicating the successful complainant's rights.

A related issue is that the Ombudsman considered the complainant's socio-economic status when deciding whether to recommend a refund of the illegal costs that had been imposed by the BOT. The Ombudsman commented, "Although the complaint was made in a personal capacity about the charges the complainant faced, the complainant's concerns were not based on personal hardship."<sup>67</sup> Section 3 provides every child aged 5 -19 with the right to free education: the Ombudsman failed to recognise this right in referring to the complainant's socio-economic status as a justification for not recommending a refund. This may suggest that the informal, inquiry based nature of the Office of the Ombudsman ultimately detracts from the extent of accountability for the realisation of the right to free education. Reliance on the complainant's socio-economic status reiterates the fact that the school's non-compliance with s 3 was linked to wider policy issues which were outside the Ombudsman's scope.

Overall, the Office of the Ombudsman does provide an avenue of accountability. Through the inquiry process, BOT are accountable to the Ombudsman to explain and justify their conduct. Ombudsmen can pose questions and then pass judgment in the forms of recommendations. BOT may face socially enforceable consequences as a result of these recommendations. However, in the context of issues that are the result of policy decisions, such as de facto compulsory donations, the ability of an Ombudsman decision to ensure effective and comprehensive accountability is more

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<sup>66</sup> At [56].

<sup>67</sup> At 23.

limited. Notably, the wider related issues of inadequate government funding to education did not feature in the Ombudsman's decision.

### *B The Controller and Auditor-General*

The Controller and Auditor-General (the Auditor-General) is another alternative accountability mechanism identified in *Daniels*. The Auditor-General audits New Zealand's public entities to ensure they are "operating and accounting for their performance" consistently with Parliament's intentions.<sup>68</sup> The Auditor-General, under the Public Audit Act 2001, can complete annual and performance audits. The Auditor-General can also make general inquiries into a public entity's use of resources.<sup>69</sup> Performance audits consider aspects including: the public entity's "effectiveness and efficiency; compliance with statutory obligations; use of public resources; probity and financial prudence."<sup>70</sup> Anyone, including members of the public, can suggest the Auditor-General make an inquiry where there is concern regarding a "significant financial, accountability, or governance issue in a public entity."<sup>71</sup> BOT are Crown and public entities and are therefore subject to review.

A 2017 report of the Auditor-General and the Ministry of Education's revision of the Circular in response, indicate that the Auditor-General can protect the right to free education. The Auditor-General made recommendations to the Ministry regarding clarification of the Circular's advice, which the Ministry then incorporated in to the 2018 revision. In 2017 the Auditor-General issued a report titled "State Schools Requesting Payments in Connection with Out-of-Zone Places." The enquiry was undertaken in response to Member of Parliament Chris Hipkins' request to investigate the lawfulness of such charges. The Auditor-General reviewed five Auckland schools for charging donations or fees for out-of-zone enrolments and recommended certain schools change their practices in order to comply with s 3. It concluded the report by recommending that the Ministry "improve its guidance to schools and ensure that schools are given coherent and consistent advice on payments in connection with out of zone places."<sup>72</sup> In a Ministry Bulletin for School Leaders in October 2017 the

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<sup>68</sup> Controller and Auditor-General *About the Controller and Auditor-General* (2017) at 3.

<sup>69</sup> At 8.

<sup>70</sup> At 8.

<sup>71</sup> At 8.

<sup>72</sup> Controller and Auditor-General, above n 8, at 20.

Ministry wrote:<sup>73</sup>

You may be aware that in May this year the Office of the Auditor-General released a report on its inquiry into state schools requesting payments in connection with applications for out-of-zone places ... We will be updating the Circular in light of the OAG's report.

The Ministry released a revised Circular in June 2018, addressing the Controller and Auditor-General's concerns.

However, the Auditor-General only offers limited protection of the right to free, quality education. The Auditor-General cannot question government policies.<sup>74</sup> Furthermore, in the 2017 report it was noted that the Auditor-General "cannot ultimately determine questions of lawfulness – that is the role of the courts."<sup>75</sup> The Auditor-General's power is therefore hampered similarly to statutory interventions and Office of the Ombudsman; the focus is on individual BOT. Consequently, larger policy considerations, including government funding, are outside its scope.

### *C Accountability via Political and Public Scrutiny*

In the High Court of *Daniels* the Crown submitted:<sup>76</sup>

the nature of the 'entitlement' in s 3 ... is such that it is not justiciable by the Courts. It is rather a matter for the Crown, for which its Ministers are accountable to the electorate via the ballot box. There is too large a component of policy as to what budgetary allocation should be made, as against other public policies with which it competes. And the entitlement – to 'education' – is expressed in such broad terms as to fall outside the classification of being a law on which the Courts can pronounce."

In turn, the Court of Appeal identified accountability mechanisms relating to government's political accountability for the protection of the right to free education:<sup>77</sup>

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<sup>73</sup> Ministry of Education "Ministry Bulletin for School Leaders" (24 October 2017) at 3.

<sup>74</sup> Controller and Auditor-General, above n 68, at 3.

<sup>75</sup> Controller and Auditor-General, above n 8, at 5.

<sup>76</sup> *Attorney-General v Daniels*, above n 4, at [65].

<sup>77</sup> At [78].

external scrutiny is provided by ... the responsibilities of the Ministers to the House, the parliamentary processes of scrutiny including estimates and financial and annual reports, professional and public scrutiny and comment ...

The government is subject to political and public scrutiny via the election process. This alone, however, insufficiently ensures governmental accountability for the right to free, quality education. In an election, multiple issues may influence voter choice. Furthermore, the effectiveness of political and public accountability is limited where the education system is based on individualistic ideas regarding responsibility for education. This is reflected in the government's response to international criticism of education underfunding. In the last UPR cycle (January 2014), two countries recommended that New Zealand address the inequitable impact of the hidden costs of education.<sup>78</sup> In both instances the New Zealand government responded, "New Zealand already ensures children have access to free education."<sup>79</sup>

#### *D Human Rights Commission*

The Human Rights Commission (HRC) is an additional accountability mechanism that the Court in *Daniels* did not identify. The HRC is an independent Crown Entity and is New Zealand's national human rights institution.<sup>80</sup> The HRC's main functions are set out in section 5(1) of the Human Rights Act 1993. Section 5(1) requires the HRC to "advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society." As a part of this function, the HRC reports on New Zealand's compliance with domestic law and international human rights instruments. The HRC also responds to human rights complaints.<sup>81</sup>

The HRC performs an important function in monitoring the right to free education in New Zealand. In the context of de facto compulsory donations, however, the protection of the right to free education by the review function is limited, as the HRC has no judicial function.<sup>82</sup> In 2010 the HRC reported on the state of human rights in New Zealand. As a part of this review it considered the realisation of the right to free

<sup>78</sup> *Working Group on the Universal Periodic Review A/HRC/26/3* at [128.139]– [128.140].

<sup>79</sup> *Working Group on the Universal Periodic Review A/HRC/26/3/Add.1* at 4.

<sup>80</sup> Human Rights Commission/Te Kāhui Tika Tangata *Annual Report Pūrongo ā Tau* (2017) at 6.

<sup>81</sup> Human Rights Commission/Te Kāhui Tika Tangata "What the Commission does" (2018) <[www.hrc.co.nz](http://www.hrc.co.nz)>.

<sup>82</sup> Human Rights Commission/Te Kāhui Tika Tangata, above n 80, at 7.

education in New Zealand.<sup>83</sup> The Commission made a number of recommendations on how the right to education could be better implemented. Two recommendations were to address underachievement by “ensuring equitable access to quality education for all” and to “remov[e] any financial and other barriers to full participation in education.”<sup>84</sup> Although such recommendations are likely to wield political power, they represent a limitation of the effectiveness of the HRC as an accountability mechanism. For example, the practical issues outlined by the HRC in 2010 remain unresolved.

Consideration of de facto compulsory donations and the right to free quality education reveal that the alternative accountability mechanisms identified in *Daniels* offer limited protection. The Ministry’s advice is clear: compulsorily acquired donations are illegal. However, de facto compulsory donations are becoming a characteristic of the New Zealand state education system. The issue remains unaddressed due to the narrow focus on individual BOT in providing the right to free, quality education. Notably, Tomorrow’s Schools mean that the government is not held accountable for the right. This suggests that the right to free, quality education needs to be better protected in New Zealand. One way to achieve this is to make the government unequivocally accountable for the right as well.

## *VI De Facto Compulsory Donations: A Policy Issue*

The preceding discussion has used the de facto compulsory nature of donations to evaluate whether the right to free education is adequately protected in New Zealand. The discussion reveals inadequacies where wider policy issues influence whether the right is upheld. The government is the most appropriate actor to provide greater accountability for the right to free education. BOT have considerable influence over the provision of a free, quality education at their schools. However, the government’s funding of state schools influences BOT’s ability to perform. The de facto compulsory nature of school donations is a systemic, policy-related problem that has origins in Tomorrow’s Schools. It is a symptom of the inadequacies of government funding, rather than the failing of individual schools to comply with s 3. Such issues

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<sup>83</sup> Human Rights Commission/Te Kāhui Tika Tangata, above n 24, at 68.

<sup>84</sup> At 183.

stem from policy decisions which cannot be scrutinised by the courts or by the accountability mechanisms that hold BOT to account - the Office of the Ombudsman or the Auditor and Controller-General.

The decentralisation of the education system via the Tomorrow's Schools reforms has contributed to the de facto compulsory nature of school donations. Tomorrow's Schools introduced into education neoliberal ideas regarding decentralisation, individualism, and personal responsibility. The Education Act 1989 was a component of Tomorrow's Schools. The individualist attitude towards responsibility for the right to free, quality education is still evident in government policy decisions today. For example, the government has recently restated that responsibility for the funding of "bring your own device" (BYOD) school policies rests with parents and school communities.<sup>85</sup>

By harnessing the collective buying power of over 200 State sector agencies and 2,500 schools, the Government is able to achieve substantial cost savings, provide productivity gains for schools and suppliers, and ultimately improve competitiveness.

A survey in 2015 found that in 58% of surveyed secondary schools, parents provided digital devices.<sup>86</sup>

Tomorrow's Schools has led to education underfunding. After completing a 10-year longitudinal study of Tomorrow's Schools, Cathy Wylie commented that "[t]he longer New Zealand schools experience self-management, the more it appears they find their government funding inadequate."<sup>87</sup> Evidence reveals that increases to education funding in the past have only accounted for population growth. In 2017 the Child Poverty Action Group commented:<sup>88</sup>

While the current Government claims that education has increased significantly since it was elected in 2008, much of the new expenditure is attributable to population growth. In reality, spending on the education sector has not kept pace with actual costs of

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<sup>85</sup> Ministry of Education "Device funding" (2018) Te Kete Ipurangi <<http://elearning.tki.org.nz/Technologies/Learning-with-1-1-digital-devices/Funding>>.

<sup>86</sup> Wylie and Bonne, above n 26, at 136.

<sup>87</sup> Cathy Wylie *Ten Years On: How Schools View Educational Reform* (NZCER, 1999) at 10.

<sup>88</sup> Child Poverty Action Group *A New Zealand where children can flourish* (2017) at 2.



educational services, or with the growing educational needs that are the consequence of the chronic economic and social inequalities.

Funding inadequacies are also reflected in the “Better Funding. Better Learning” campaign led by New Zealand’s largest education trade union - NZEI Te Riu Roa. The movement is a response to the “effective freeze” to the operational grants to Early Childhood Education (ECE) since 2010, and the freeze to school operational grants in 2017. The campaign recognised the slight increase to operational funding in 2018, but has also noted that this increase “will barely cover population growth.”<sup>89</sup>

Funding inadequacies result in schools become dependent on school donations for their core functions. In 2016, Palmerston North Boys High School (a decile 8 school) sent a letter to parents stating, “[w]e could not exist in our current form on the Ministry of Education Operation Grant. Thus, we really do rely on the goodwill of parents to support what we do.”<sup>90</sup> Tim O’Connor, Principal of Auckland Boys Grammar (a decile 9 school) has also described how the school works “hand-to-mouth” with donation money, and that “[Grammar] couldn’t operate as we do” without school donations.<sup>91</sup> Schools are incentivised to push the boundaries of legality. In the 2014 Ombudsman decision, the school justified its illegal compulsory course related costs by arguing that funding inadequacies meant it had to make the choice between taking away a subject for all students, or imposing costs that may exclude a few students:<sup>92</sup>

Are we better to require payment as a prerequisite of [a] course, or take [a] course off our curriculum in order to protect our financial position? As students do not have to enroll in [a] course, we believe the answer is obvious.

The school’s argument is telling of the wider policy issues at play with breaches of s 3 by de facto compulsory donations. It reveals the limits of holding BOT accountable when s 3 infringements are the result of inadequate government funding.

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<sup>89</sup> NZEI Te Tiu Roa “Better Funding Better Learning” (2018) <<https://campaigns.nzei.org.nz/better-funding-better-learning/>>.

<sup>90</sup> Walters, above n 10.

<sup>91</sup> Simon Collins “‘Hand-to-mouth’ Grammar School needs donations” *New Zealand Herald* (online ed, Auckland, 17 February 2018).

<sup>92</sup> At 10.

## *VII Implications for New Zealand's International Obligations*

Governmental accountability for the right to free, quality education makes sense, given the government's financial influence. Even more importantly, governmental accountability is required by New Zealand's international obligations. These require the government to allocate sufficient funding, take on sufficient accountability, and define the right to education as including the right to free, quality education. New Zealand has ratified a number of international human rights instruments containing the right to free education. These include but are not limited to: Article 1 and 4 of the UNESCO Convention against Discrimination in Education, the Universal Declaration of Human Rights, article 13 of the International Covenant on Economic, Social and Cultural Rights, article 28 of the Convention on the Rights of the Child, article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women, and Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

UNESCO's Convention Against Discrimination in Education provides that States must:<sup>93</sup>

ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent.

In the United Nations Committee on the Rights of the Child General Comment No 1, the content of the right to education included the right to a certain quality of education:<sup>94</sup>

Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs.

General Comments are an "authoritative interpretation of the treaties"

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<sup>93</sup> Convention against Discrimination in Education 429 UNTS 93 (opened for signature 14 December 1960, entered into force 22 May 1962), art 4(b).

<sup>94</sup> UN Committee on the Rights of the Child, *General Comment No 1: Article 29(2) The Aims of Education*, 26<sup>th</sup> sess, UN Doc CRC/GC/2001/1 (1 April 2001).

provisions.”<sup>95</sup> A right to education encompassing a right to quality was echoed in the 2010 Millennium Review Summit, where goals of providing “equitable educational and learning opportunities for all children” and ensuring quality education were discussed.<sup>96</sup> Ensuring comparable quality was central to the right to education as defined by the Special Rapporteur of Education in 2013 who commented “The State obligations for the right to education must be understood in terms of the right to quality education”<sup>97</sup> The development of the 4-A standards by the then United Nations Special Rapporteur on the right to education Katarina Tomasevski also reflects the centrality of quality education. The 4-A standards were used to evaluate the right to education. One of the standards, “accessibility”, involves eliminating the discrimination in access to education by the formal and informal costs of education.<sup>98</sup>

The international instruments also require sufficient governmental accountability. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 9, discussed the nature of States’ obligations under the Convention. Sufficient governmental accountability was a central State obligation. The Committee observed:<sup>99</sup>

[There is an] obligation upon each State party to use all the means at its disposal to give effect to the rights recognised in the Covenant ... the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

However, the Committee recognised that “governmental accountability” did not require recourse to the courts noting, “[a]dministrative remedies will, in many cases, be adequate.”<sup>100</sup> The preceding discussion demonstrates that current administrative accountability mechanisms inadequately protect the right to free, quality education in

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<sup>95</sup> Child Rights Connect “General Comments” (2018) <<https://www.childrightsconnect.org/>>.

<sup>96</sup> Singh, above n 61, at [51].

<sup>97</sup> Singh, above n 61 at [18].

<sup>98</sup> Human Rights Commission/Te Kāhui Tika Tangata, above n 24 at 176.

<sup>99</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No 9: The domestic application of the Covenant*, 19<sup>th</sup> sess, UN Doc E/C.12/1998/24 (3 December 1998) at [2].

<sup>100</sup> At [9].

New Zealand. Persisting de facto compulsory donations are the consequence of insufficient governmental accountability for the provision of the right.

The international instruments also require sufficient allocation of government funding to education. In 2013 the Special Rapporteur commented that the international obligations regarding the right to free education “make it the State’s responsibility to provide necessary resources for its realisation, including financing of education.”<sup>101</sup> This inadequacy has not gone unnoticed internationally. On 1<sup>st</sup> May 2018 the fourth periodic report on New Zealand by the Committee on Economic, Social and Cultural Rights, recommended that New Zealand “[t]ake effective steps to address indirect schooling costs, including by implementing a scheme to increase funding to public schools, so as to ensure equal access to education by all children and students.”<sup>102</sup>

### *VIII Conclusion*

The Court of Appeal’s narrow interpretation of the right to free education in *Daniels* has been criticised for being “at odds” with the substantive right to education contained in international instruments that New Zealand has ratified.<sup>103</sup> The Court of Appeal justified its narrow interpretation by accepting that a right to free education did exist in New Zealand and by identifying alternative accountability mechanisms. Where BOT blatantly breaches s 3, the accountability mechanisms effectively protect the right to free, quality education. The de facto compulsory nature of donations, however, exemplifies the limited protection of the right where wider policy factors are responsible for breaches of s 3. In New Zealand, prolonged government underfunding to education following Tomorrow’s Schools has led to schools depending on donations to perform their core functions. This has incentivised schools to use enforcement tactics to ensure payment. It has also created a social stigma around non-payment. These wider policy factors are outside the scope of BOT accountability as provided for in the legislative framework, and are outside the scope of the alternative accountability mechanisms identified in *Daniels*. This lack of wider accountability is not only inadequate, but it is inconsistent with New Zealand’s international

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<sup>101</sup> Singh, above n 61, at [18].

<sup>102</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of New Zealand*, 63rd sess, 28th mtg, UN Doc E/C.12/NZL/CA/4 (1 May 2018) at [49].

<sup>103</sup> Hemi, above n 3, at 410.

obligations. New Zealand is a signatory to international instruments where the right to free education mandates governmental accountability, as well as sufficient government funding.

The Government has proposed reforms to address de facto compulsory donations, however, the proposed reforms would inadequately address the issue. In the 2017 election the Labour party made an election promise to give each school \$150 per student if they withheld from requesting school donations. This solution would only address the de facto compulsory nature of donations if all schools accepted the offer. However, evidence shows that higher decile schools that expect to receive more from school donations will continue to ask for school donations. Auckland Boys Grammar School requests school donations of \$1225. In 2016, Auckland Boys received \$2.9 million in donations. In 2018 Auckland Boys Grammar School Principal, Tim O'Connor, commented that Grammar would not be accepting Labour's offer.<sup>104</sup>

The importance of governmental accountability to enable the realisation of the right to free, quality education was foreshadowed in the review of Tomorrow's Schools in 2007. "The responsibility for improving student achievement overall and reducing the disparities of educational achievement needs to be shared if we are going to make real headway."<sup>105</sup> Eleven years on, the ideal expressed by Wylie is still to be achieved. A good start would be to establish legally enforceable governmental accountability for a free, quality education for all.

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<sup>104</sup> Simon Collins "‘Hand-to-mouth’ Grammar School needs donations" *New Zealand Herald* (online ed, Auckland, 17 February 2018) <[https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11994149](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11994149)>.

<sup>105</sup> Cathy Wylie *School governance in New Zealand – how is it working?* (NZCER, 2007) at 55.

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