

23 February 2010

New Zealand Union of Students'
Association
PO Box 10-191
Wellington

Contact: Hayden Wilson/Robert Cahn

Attention: David Do/Pene Delaney

Student association membership – freedom of association

1 Introduction

- 1.1 You have asked us to advise NZUSA on whether the present law with respect to universal student union membership is inconsistent with the provisions of the New Zealand Bill of Rights Act 1990 ('**NZBORA**').

2 Summary of advice

- 2.1 We consider that sections 229A to 229D of the Education Act 1989 ('**Act**') are not inconsistent with the NZBORA because students have the opportunity to decline membership in the Association pursuant to section 229A(6) of the Act. There are further, less conclusive, reasons why the Act is not inconsistent with the NZBORA.

3 Background

- 3.1 NZUSA is a federation of Students' Associations. NZUSA has 14 constituent Associations at Universities, Institutes of Technology and Polytechnics that represent over 175,000 students.
- 3.2 Associations are incorporated societies, registered under the Incorporated Societies Act 1908.
- 3.3 Associations provide a number of services and benefits to students; including welfare, advocacy and representation with respect to the Institution, entertainment and social activities, media and publications, and National representation.
- 3.4 Many of the services and benefits provided are collective, they benefit the student body as a whole, rather than individual students. Activities such as representation (both within the Institution and nationally) benefit all students, and cannot practically be confined to fee-paying members. Because of this, most Associations in New Zealand are operated on a universal basis – that is all students at the related institution are automatically members. This is to prevent students from enjoying the benefits of Association membership, without contributing to the cost of its activities.

4 Universal Association membership and freedom of association

- 4.1 Sections 229A to 229D of the Act currently provide for the membership of Associations, as follows:

- a Section 229A of the Act enables the Association to collect compulsory membership fees, or for the Institution to collect them on the Association's behalf.
 - b Section 229A of the Act further provides for the following:
 - i A student may be exempted from paying the membership fee of the organisation on the grounds of hardship, but may nonetheless be a member.
 - ii That students may opt-out of being members of the Association ('**Opt-out**'). Subsection 6 provides that:

A student association may exempt any student from membership of the association on the grounds of conscientious objection; and, if exempted, the association must pay the student's membership fee to a charity of its choice.
 - c Section 229B of the Act provides that mechanism by which the student body of an Institution can reject universal Association membership. Students may present a petition signed by at least 10% of the students at the Institution, requiring the Institution to conduct a vote of the students with respect to whether membership of the Association should, or should not, be universal.
- 4.2 It has been suggested by opponents that the universal membership of Associations under the Act is inconsistent with section 17 of the NZBORA, which provides, under the heading 'Freedom of association', that 'Everyone has the right to freedom of association'. It is clear that Institutions and Associations are both among those entities to which the NZBORA applies, as they act pursuant to a public power conferred upon them by statute, when collecting Association fees.
- 4.3 Our view is that the provisions of the Act are not inconsistent with section 17 of the NZBORA. This is because section 229A(6) of the Act (as quoted at paragraph 4.1(b)(ii) above) provides that any student may Opt-out of membership of the scheme on the grounds of conscientious objection. Accordingly, any student is free to choose not to associate with an Association, and any right to freedom of association is not breached.
- 4.4 In addition to the Opt-out provision, we also consider that the following points make strongly arguable that the Act is not inconsistent with the NZBORA:
- a The Act clearly does not breach the positive right in section 17, granting freedom to enter into associations. The allegation is that it breaches a negative right, proscribing their freedom to refuse to associate.
 - b In addition to members being able to individually opt out of Associations, a student body as a whole can remove universal Association membership from their Institution through a vote, pursuant to sections 229B and 229C of the Act. Accordingly students, by adopting universal membership, or by declining to oppose it, are making a choice to associate with Associations.
 - c Section 5 of NZBORA provides that the rights in NZBORA are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and

democratic society'. Due to the important role that Associations play in providing benefits to students, including many benefits that can only be delivered collectively, we consider that there is a strong argument that sections 229A to 229D of the Act are able to be demonstrably justified in a free and democratic society. It is further justified when considered in conjunction with the Opt-out provision.

- 4.5 There has been international consideration of whether the right not to join an association is infringed in circumstances where an 'opt-out' provision exists but where a payment is nevertheless required. We consider that the correct view is that the right to freedom of association is not infringed where an 'opt-out' clause exists, irrespective of the requirement to make a payment of services (*Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 122, 332).
- 4.6 Accordingly we conclude that sections 229A to 229D of the Act are not inconsistent with the provisions of the NZBORA relating to freedom of association.
- 4.7 It should be noted that, even if sections 229A to 229D of the Act were inconsistent with the NZBORA, the provisions of the Act would not be affected. Section 4 of the NZBORA provides that no other enactment shall be effected by inconsistency with the NZBORA.

5 Conclusion

- 5.1 The NZBORA applies to Institutions and Associations, and provides that everyone has the right to freedom of association.
- 5.2 We consider that sections 229A to 229D of the Act are not inconsistent with the provisions of the NZBORA because section 229A(6) provides for students to individually Opt-out of membership if they so choose, and therefore students are free to not associate with Associations.
- 5.3 We further consider that the following further reasons that the Act is not inconsistent with the NZBORA are arguable:
- a It is not clear that section 17 of the NZBORA provides for a negative right to not associate, in addition to the positive right to associate. If it does not, the Act is not inconsistent.
 - b Under sections 229B and 229C students are able to vote to abandon (or refuse to adopt) universal student membership. This casts doubt on whether the Act is inconsistent with the NZBORA.
 - c It may be considered that providing for universal Association membership is a reasonable limitation justified in a democratic society, and as such is not inconsistent with the NZBORA due to section 5 of that Act.
- 5.4 Even if the Act were not consistent with the NZBORA it would not be affected by NZBORA, due to the provisions of section 4 of the NZBORA.

If you have any questions arising out of this letter, or if we can give you any further advice about this matter, please contact us.

Yours faithfully
Kensington Swan



Hayden Wilson
Partner

Telephone: +64 4 915 0782/+64 4 9150801

Email: hayden.wilson@kensingtonswan.com/Robert.cahn@kensingtonswan.com