TO: Board of Trustees, Salisbury School

FROM: Dr Andrew Butler and Catherine Marks

DATE: 25 July 2016

SUBJECT: School closure - Challenges based on NZBORA and HRA

Introduction

1. On 14 June 2016, Minister of Education, Hon Hekia Parata, ("**Minister**") advised the Board of Trustees ("**Board**") of Salisbury School ("**Salisbury**"), that she was initiating consultation on whether Salisbury should close. The consultation period closes on 12 August 2016. Salisbury is a single-sex residential school for post primary girls **("girls**").

2. At the same time, the Minister initiated a consultation on an application from Halswell Residential College ("**Halswell**") to become fully co-educational. In her letter to the Board of 14 June 2016, the Minister stated the consultations were being initiated together because any changes to one school will affect the other. Halswell is a single-sex residential school for post primary boys **("boys")** with approval to take up to five girls. The consultation period on Halswell closed on 15 July 2016.

3. Relevant to decisions in relation to Salisbury and Halswell is the Ministry of Education's ("**Ministry**") Intensive Wraparound Service ("**IWS**"). Under IWS, since 2012, enrolment at residential special schools, including Salisbury and Halswell, is conditional on eligibility for IWS.

4. You have asked us to consider:

   (a) whether the IWS eligibility criteria breach the right to freedom from discrimination guaranteed by s 19 of the New Zealand Bill of Rights Act 1990 ("**NZBORA**") and / or Human Rights Act 1993 ("**HRA**");

   (b) if so, the implications for a decision to close Salisbury; and

   (c) whether a decision to close Salisbury would be likely to meet the requirements of s 98(2) of the Education Act 1964 ("**1964 Act**"), given the decision in *Board of Trustees of Salisbury Residential School v Attorney-General,*[1] and / or might otherwise be unlawful.

5. We have also considered the relevance of *Salisbury v AG* in relation to a decision whether to make Halswell co-educational.

6. The Board is in the process of obtaining evidence in support of its concerns. For the purpose of this advice, we have assumed that evidence will be available – including by way of discovery.

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1 *Board of Trustees of Salisbury Residential School v Attorney-General* [2012] NZAR 228.

Summary

7. In our view, there is a good argument that the IWS eligibility criteria are in breach of the right to be free from discrimination on the ground of disability in s 19 of NZBORA to the extent that:

   (a) they operate to exclude students with a severe intellectual disability ("**ID**") and autism spectrum disorder ("**ASD**") but no conduct disorder from access to residential special education;

   (b) these students are excluded notwithstanding that they have high-level complex needs that cannot be adequately met without residential support (their only point of difference being that they do not have a conduct disorder); and

   (c) such students are materially disadvantaged by the IWS eligibility process compared to students, including ID / ASD students, who have a conduct disorder.

8. Discrimination at the IWS eligibility level is relevant to any decision to close Salisbury as:

   (a) the relevant future cohort of girls who could be placed at Salisbury if students with a severe ID / ASD but no conduct disorder could enrol is likely to be considerably larger than the number being considered by the Minister as a reason for closure of the school (applying NZBORA rights-consistent criteria); and / or

   (b) to the extent the Minister is relying on a diminishing roll at Salisbury as a reason for closure, this is unlawful and / or an irrelevant consideration.

9. It is less arguable that single-sex residential special education to girls is unlawful as a breach of the right to be free from discrimination on the grounds of sex in s 19 of NZBORA.

10. We understand the Board is concerned that Māori children are less able to access residential special education under the IWS eligibility process than previously. This could amount to unlawful discrimination based on race if there is evidence that demonstrates that Māori children have been disadvantaged under the IWS eligibility process.

11. Notwithstanding the issues of discrimination, it is arguable that a decision to close Salisbury under s 98(2) of the 1964 Act would be unlawful on the ground that the Minister has failed to assess, or reasonably assess, the risk of sexual or physical abuse to girls if they were enrolled at Halswell. As set out in *Salisbury v AG,* protection from physical and sexual assault is a mandatory relevant consideration under s 98(2), requiring a robust approach to the substance of the concerns over girls' safety.[2]

12. We note that Dobson J in *Salisbury v AG* concluded that:[3]

> As a matter of common sense, the risk of sexual abuse for girls with impaired intellect is likely to increase, the more they are in the company of potential abusers. Intellectually impaired boys are potential abusers, as Mr Campbell's experience demonstrates. No great leap in logic is required to recognise the

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2 *Board of Trustees of Salisbury Residential School v Attorney-General*, above n 1, at [82] and [83].

3 *Board of Trustees of Salisbury Residential School v Attorney-General*, above n 1, at [81].

> validity of concerns over having boys and girls together for the educational aspects of residential special needs education, even if completely effective separation of the residential aspects of schooling in a co-educational setting is achieved. Those changes introduce a risk that would not be present in the single-sex environment at Salisbury School.

13. In light of that conclusion, one would expect a Court will be looking for strong evidence from the Ministry to justify a conclusion that:

    (a) the obvious logic referred to by Dobson J is false; and

    (b) the safety risks can be safely managed.

14. We understand that concerns raised in the reports of Professor Briggs and Mr Campbell (referred to in *Salisbury v AG*) have not been rigorously assessed by the Ministry. The Ministry undertook a literature review; the following points are salient:

    (a) it confirmed ID / ASD girls are at greater risk of sexual abuse and noted an absence of research in relation to risk for ID / ASD girls at co-educational establishments;

    (b) it considered that policies and supervision could minimise risk based on a limited review of other residential establishments (most of which were not directly relevant); and

    (c) it did not assess the extent of the increased risk for girls placed at Halswell, even if policies and security measures were put in place.

15. The Minister also commissioned a report by Standards and Monitoring Services ("**SAMS**") on the suitability of Halswell as a co-educational establishment. This 2013 report considered that Halswell was capable of making a transition to a safe co-educational school but subject to a number of conditions, including around entry criteria (noting risks around admission of children with conduct disorders but not intellectual disability). Again, there was no assessment in the SAMS report of the extent of the increased risk for girls placed at Halswell, even if policies and security measures were put in place (to the contrary, ongoing incidents of sexual abuse were identified). Additionally, no further reports have been done since 2013 and since girls have been enrolled at Halswell.

16. We consider a decision by the Minister to close Salisbury would be vulnerable to challenge unless a more rigorous assessment of risk is undertaken. We consider that a court would adopt an intensive review of the reasonableness of the Minister's approach in any judicial review given the gravity of the potential risk and the high importance of access to education.

17. Applying the reasoning in *Salisbury v AG*, protection from physical and sexual assault is also a mandatory relevant consideration for the Minister when deciding whether to declare Halswell a co-educational school under s 146A of the Education Act 1989 ("**1989 Act**"). Accordingly, any such decision would be similarly vulnerable to challenge on the basis that protection from sexual abuse has been disregarded and / or not adequately considered.

Background

18. As set out above, the Minister is currently consulting on the potential closure of Salisbury. The consultation on Halswell's application to become co-educational has now closed.

19. The Board was given notice of the preliminary decision to close Salisbury by way of letter from the Minister dated 14 June 2016, and has 28 days to provide arguments in favour of Salisbury staying open.[4] After considering all the arguments received from the Board and satisfying the conditions in s 98(2) of the 1964 Act, the Minister may decide to close the school. In addition to the conditions set out in s 98(2), the Minister is constrained by administrative law principles, including the requirement to act reasonably and to act in accordance with NZBORA.

20. The Minister's reasons for proposing closure of Salisbury are:[5]

    (a) The low roll of Salisbury, which the Minister states was an anticipated effect of the successful implementation of the IWS, which has led to a decrease in the demand for residential schooling.

    (b) A co-educational Halswell, in combination with IWS, would mean that sufficient provision is made for students who would otherwise be eligible for enrolment at Salisbury.

IWS eligibility criteria and impact on declining roll at Salisbury

21. Special education is defined in s 2 of the 1964 Act as:

> education for children, who because of physical or mental handicap or of some educational difficulty, require education treatment beyond that normally obtained in an ordinary class in a school providing primary secondary or continuing education.

22. Section 8 of the 1989 Act provides that:

> People who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education in state schools as people who do not.

23. Under s 9 of the 1989 Act, special education can only be provided pursuant to an agreement between the Ministry and a parent (including for access to special residential schools).

24. The Ministry has developed a Special Education Policy that guides how it meets special education needs in accordance with the 1989 Act. It is also guided by the NZ Disability Strategy and the UN Convention on the Rights of Persons with Disabilities.

25. The IWS is a service that implements the Ministry's policy approach in relation to special education. It has no special legal status. The IWS is intended to provide support to those children with highly complex needs where the usual support of the education system has not been able to meet those needs.[6] If accepted into the service, a plan will be put in place which can include enrolment at a residential special school.

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4 Education Act 1989, s 154(1).

5 Letter from the Minister to the Board, dated 14 June 2016.

6 The Ministry's overview of the IWS service can be found on its website at: www.education.govt.nz/school/student-support/special-education/intensive-wraparound-service-iws/.

26. Since 2013, children can only be referred to residential special education if they satisfy the IWS eligibility criteria. Previously, children were referred to Salisbury by way of a panel that included Ministry staff, referrers (such as psychologists and Resource Teachers: Learning and Behaviour ("**RTLB**") and Salisbury staff. Since IWS eligibility has become a prerequisite to residential schooling, Salisbury's roll has fallen from 72 students up until 2012 to ten in term three of 2016, and the ten current placements are due to end in December 2016.

27. The IWS is one component of a policy shift by the Government to address special education needs as much as possible within the community rather than in residential schools. However, there is a recognised residual and ongoing need for residential services for some children whose needs are unable to be met within the community (even with the IWS provision). The ongoing need for residential capacity is reflected in the current consultation on closure of Salisbury, where Halswell is put forward as an alternative for girls who would otherwise be placed at Salisbury.[7]

28. The Board advises that there are children with ID / ASD who have high-level and complex educational needs that cannot adequately be met in the community (even with IWS funded local support). The Board is concerned that criteria and guidelines applied by IWS reflect a change from the previous enrolment criteria, such that children with high-level needs are no longer approved IWS support unless they also have a conduct disorder.

29. Because many high-level need children with ID / ASD without a conduct disorder do not receive IWS approval and funding, they are effectively excluded from the provision of residential schooling.

30. The IWS terms of reference appear to confirm the Board's concerns. For example, the IWS criteria require that a child must have highly complex *and* challenging needs in order to qualify for IWS support. Factors listed to be considered when assessing the risk of not intervening refer to offending, serious harm to the child or others, and anti-social behaviour.[8]

31. In practice, we are advised that IWS eligibility panels seldom approve applications for IWS funding for children with ID / ASD who do not also have a conduct disorder.

32. The Ministry also appears to accept that only children with conduct disorders are accepted into IWS and / or then referred to residential schools. Specifically, the Ministry considered a proposal by Salisbury to provide residential education for high need students with ID / ASD without a conduct disorder whose needs cannot be adequately met in the community. That is, these children matched the IWS criteria for support except for having a conduct disorder. In reports from the Ministry to the Minister on Salisbury and Halswell dated 16 March 2016 and 13 June 2016[9] ("**March 2016 and June 2016 reports**"), the Ministry accepts that the IWS service is for children with behavioural needs, advising that children who are not also disruptive in class have a lower level of need than those that qualify for IWS. The Ministry notes that allowing

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7 See also *Salisbury v AG*, above n 1, at [45] where Dobson J refers to Crown evidence accepting the ongoing need for provision of residential schools and at [86] where Dobson J finds that the Minister could not place stand-alone reliance on the expanded IWS without Halswell at least providing fallback provision.

8 Ministry of Education, *Intensive Wraparound Service Regional Prioritisation Panel, Terms Of Reference*, revised January 2015 at 7 and 9.

9 Education Report: *Update on the three residential special schools: Halswell, Westbridge and Salisbury*, 1M60/116/52/3, 16 March 2016; and Education Report: *Initiating consultation about the possible closure of Salisbury School (Nelson) and the co-educational application for Halswell Residential college*, IM60/116/52/3, 13 June 2016.

such children to receive residential support would involve "lowering" IWS entry thresholds.[10] The Ministry's reasons for concluding such children have lower-level needs appears to be simply because they did not fall within the IWS criteria.

33. The Board strongly disputes that ID / ASD children will always have lower-level needs because of the absence of a conduct disorder. We understand that there are ID / ASD students who are at the severe end of the spectrum who do not participate in class and whose educational needs cannot be met without receiving the intensive support only a residential placement can provide.

34. Given the IWS approach, the fall in Salisbury's roll since 2012 is not wholly due to the IWS successfully meeting needs within the community. There is a cohort of potentially eligible girls who do not have the same access to IWS support as children with conduct disorders.

35. We understand that girls with ID / ASD are less likely than boys to have conduct disorders. The Ministry advises that only 20% of students supported by IWS between 2013 and the end of 2015 were girls. The Ministry also notes that, proportionately, girls are more likely to want a residential placement than boys.[11]

36. In this respect, girls are disproportionately impacted compared to boys by the policy change. The decline in placements for girls since 2012 appears to reflect this impact (where the drop in the number of girls accepted for residential placements is higher than the drop in numbers of boys).[12]

37. We note that the Minister has stated that parents are choosing not to send their daughters with ID / ASD (but no conduct disorder) to Salisbury, and has used this in the media to justify her decision to consult on closing Salisbury.[13] However, as will be apparent from the summary above, in reality parents of daughters with ID / ASD (but no conduct disorder) have no such choice; their daughters are simply ineligible to enrol at Salisbury due to the IWS eligibility criteria.

Relevant factors for the purpose of this advice

38. Given the above, for the purpose of this advice we have assumed that the Board would be able to establish that:

    (a) the IWS eligibility criteria are operating to exclude ID / ASD children without a conduct disorder from access to residential schools; and

    (b) there are children with ID / ASD who have high and complex needs that cannot be appropriately met in the community. These children have educational needs that are at least as high and complex as the needs of children with conduct disorders who are accepted into IWS. That is, the presence of a conduct disorder does not determine the extent of special educational needs.

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10 See for example the March 2016 report, at [8] and [20], where the Ministry specifically states that "[t]he IWS support many children with ASD, however, Salisbury's proposal would be for those with ASD who are not disruptive at school".

11 June 2016 report, at [13].

12 From 2012 to 2015 (since IWS has operated), residential placements for girls at dropped from 43 to 14 (9 at Salisbury and 5 at Halwell), whereas placements for boys at Halwell has dropped from 31 to 18, and for Halswell and Westbridge together from 56 to 38. See table in June 2016 report at 5.

13 See www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11658541.

39. The adequacy of the assessment of the safety of girls at Halswell is discussed in further detail at the end of this advice.

Discrimination claims

40. As part of the executive branch of the New Zealand Government, the Ministry must abide by NZBORA and Part 1A of the HRA[14] in setting the eligibility criteria for IWS (and, by extension, admission to Salisbury).

41. In particular, under both NZBORA and HRA, the Ministry is obliged to observe the right to freedom from discrimination in s 19 of NZBORA, which states:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993...

42. The prohibited grounds of discrimination listed in s 21 of the HRA include sex and disability (including intellectual or psychological disability or impairments).[15]

43. In order to establish a breach of Part 1A of the HRA, the Board would have to show that the Ministry's exercise of its power under s 9 of the 1989 Act (by way of the Ministry's IWS eligibility criteria):

    (a) limits the right in s 19(1) of NZBORA; and

    (b) is unjustifiable under s 5 of NZBORA.[16]

44. To determine whether the IWS eligibility criteria limit the right in s 19(1), two questions must be asked:[17]

    (a) Is there differential treatment or effects between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination?

    (b) Does that treatment have a discriminatory impact, in that it involves material disadvantage to that group?

45. If it can be proven that the eligibility criteria limit the right in s 19(1), the next step is for the Ministry to prove that the discrimination is justifiable under s 5. In order to show that the discrimination is justifiable, the Ministry would have to show:[18]

    (a) that the discriminatory elements of the IWS eligibility criteria serve a purpose sufficiently important to justify curtailing the right in s 19(1); and

    (b) that the discriminatory elements of the IWS eligibility criteria:

        (i) are rationally connected with their purpose;

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14 NZBORA 1990, s 3(a); HRA, s 20J(1)(a).

15 HRA, s 21(1)(a) and (h).

16 HRA, s 20L.

17 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].

18 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

(ii) do not impair the right in s 19(1) any more than is reasonably necessary for sufficient achievement of its purpose; and

(iii) are in due proportion to the importance of the objective.

46. We now analyse in turn the potentially discriminatory aspects of the IWS eligibility you have asked us to assess.

Discrimination on the basis of conduct disorders under the IWS

47. The Ministry's IWS eligibility criteria have the effect of treating two groups differently:

(a) children with ID / ASD without a conduct disorder ("**non-CD**"); and

(b) children with ID / ASD and a conduct disorder ("**plus-CD**").

48. As set out above, non-CD children are not eligible for the IWS (or at least, the effect of the eligibility criteria is that very few are), and therefore not eligible for residential special schooling, while plus-CD children are eligible for both.

49. That is, one group of disabled children (non-CD children) are treated differently from another group of disabled children (plus-CD children) because they happen to have disabilities that do not include conduct disorders.

IWS eligibility criteria prima facie limits s 19(1) right

Intra-ground discrimination

50. The first issue is whether a claim for intra-ground discrimination, such as this one between different groups of disabled persons, is in principle available in New Zealand.

51. In our view, it is. That is because:

(a) the Attorney-General has acknowledged that intra-ground discrimination on the basis of disability (between people who are totally blind and other people with disabilities) can limit the right to be free from discrimination in a report he prepared in respect of the Social Security Legislation Rewrite Bill 2016;

(b) the Attorney-General is recorded as having accepted that intra-ground discrimination claims are possible in *B v Waitemata DHB*;[19]

(c) the Court of Appeal accepted in *B v Waitemata DHB* that "in principle" an intra-ground discrimination claim on the ground of disability is possible, although the Court did not find such discrimination made out on the facts;[20] and

(d) Canadian authorities also recognises intra-ground discrimination.[21]

Conduct disorder a "disability"?

52. The second issue is whether a conduct disorder (or, from the perspective of the disadvantaged children, a disability that does not include a conduct disorder) would qualify as a "disability" under s 21(1)(h).

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19 *B v Waitemata District Health Board* [2016] NZCA 184 at [89].

20 *B v Waitemata District Health Board*, above n 18, at [89].

21 See *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703.

53. A conduct disorder refers to challenging behaviour that is difficult to manage within a classroom because it is disruptive, anti-social or dangerous.

54. Given this, it seems likely that a conduct disorder would fall under s 21(1)(h)(iv) "psychological... impairment" or (v) "any other... abnormality of psychological function".

55. In our view, the courts are likely to take a broad approach to what amounts to a "disability", given that they have held that the HRA is to be interpreted generously and purposively in terms of the meaning of disability.[22]

56. A conduct disorder is likely to amount to a disability for the purposes of the HRA, and so the differential effect of the IWS can be said to be based on disability, which is a prohibited ground of discrimination.

Plus-CD an appropriate comparator group?

57. The third issue is whether plus-CD children are an appropriate comparator group. In our view, they are the obvious comparator group, given that they clearly illustrate the effect of the eligibility criteria and mirror the non-CD group apart from the factor which the Ministry uses to discriminate between them: a conduct disorder. The Court of Appeal has endorsed that approach in *Atkinson*:[23]

> The selection of the comparator group must be conducive to a determination of the potential impact of the impugned policy without a negation of its relevance.

58. Similarly, in the disability context, the Court of Appeal recently endorsed the following passage in *B v Waitemata District Health Board*:[24]

> ... the most natural and appropriate comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground.

59. We note however, that in *Purvis v New South Wales*, the High Court of Australia took a narrow approach to identifying the comparator group, and held that the appropriate comparator for a disabled child with behavioural issues was a non-disabled child with similar behavioural issues.[25]

60. To the extent that non-CD and plus-CD children have materially different needs, an argument could be made that plus-CD children are not an appropriate comparator group. In our view, such an argument would be unlikely to succeed; it would confuse the issue of justifiability with whether the right in s 19(1) had been limited to start with.[26] The relative needs of non-CD and plus-CD children are considered later in this memorandum under the headings "minimal impairment" and "proportionality".

Discriminatory impact (material disadvantage)

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22 *Trevethick v Ministry of Health* (2008) 8 HRNZ 485 at [28]. See also Butler & Butler at [17.8.22]-[17.8.23]

23 *Atkinson*, above n 16, at [69].

24 *B v Waitemata District Health Board*, above n 18, at [84]-[85].

25 *Purvis v New South Wales* (2003) 217 CLR 92 (HCA). See also Butler & Butler at [17.10.4]-[17.10.5].

26 See for instance *Moore v British Columbia (Education)* 2012 SCC 61 at [30]: "comparing [the disabled child] only with other special need students would mean that the District could cut all special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers."

61. The fourth issue is whether that treatment has a discriminatory impact. The Court of Appeal has held that:[27]

> differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.

62. It seems clear to us that non-CD children are materially disadvantaged in their access to residential special education, as compared to plus-CD children. This is because IWS operates to exclude non-CD children from IWS support, even when, like some plus-CD children, they have needs that cannot be met in the community and can best be met in a residential setting.

Summary: IWS eligibility criteria likely to be found to limit right in s 19(1) NZBORA

63. In our view, assuming the appropriate evidence can be obtained, the IWS eligibility criteria are likely to be found to limit the right in s 19(1) of NZBORA. The question then becomes whether that limit is justifiable. At this point, the onus shifts to the Ministry to prove that the limit is justifiable.

Limit on rights unjustifiable?

Prescribed by law?

64. To recap, the first step in assessing whether the limit can be justified under s 5 of NZBORA is to ask whether the limit is "prescribed by law". That requires the IWS eligibility criteria to have been made within the discretion conferred on the Ministry, sufficiently precise and accessible.[28]

65. Assuming that the Ministry's IWS eligibility criteria are sufficiently clear, it is likely that they will meet the minimum threshold of having been prescribed by law.

Purpose sufficiently important?

66. The second step in assessing whether the limit can be justified under s 5 of NZBORA is to ask whether the discriminatory elements in the IWS eligibility criteria serve a sufficiently important purpose to justify curtailing the right in s 19(1). This step is approached as a threshold issue by the Courts, with little substantive engagement until the later steps of the test.[29]

67. The Ministry may be able to provide evidence that it has chosen to discriminate for a sufficiently important purpose. We note that the Ministry will need to provide evidence of what the purpose of its decision to discriminate was, rather than merely asserting a purpose.[30] We expect the Ministry's purposes will likely revolve around its policy of keeping children with special educational needs in their communities wherever possible, with IWS providing for those children with the highest level of need.

68. The Ministry's purposes may also involve limiting public expenditure on special education as part of a broader resourcing decision and / or ensuring the best use of funds. We discuss this further below under the heading of "minimal impairment".

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27 *Atkinson*, above n 16, [109].

28 *Attorney-General v IDEA Services Ltd (in stat man)* [2012] NZHC 3229, [2013] 2 NZLR 512 at [186] and [190].

29 Butler and Butler at [17.21.4].

30 *Heads v Attorney-General* [2015] NZHRRT 12 at [145]-[146].

Rational connection

69. The third step is to assess whether there is a rational connection between the Ministry's objective (focussing on community-based education, with IWS providing for children with the highest needs) and the discriminatory elements of its IWS eligibility criteria (non-provision of IWS support, including residential special education, to non-CD children).

70. The Ministry would likely argue, as it has in its March 2016 and June 2016 reports, that children without a conduct disorder have lower-level needs and that their needs are being met within the community. We understand this is not the case, because there are non-CD children who are not disruptive but who are so disengaged from schooling that they require the 24/7 stability and intensity of a residential learning environment in order for them to receive effective schooling.

71. It is arguable that there is no rational connection between the eligibility criteria and the discrimination because the presence of a conduct disorder does not determine how high and complex a child's special educational needs are, or whether they are being sufficiently met without residential provision. The Ministry's position that these children have lower-level needs does not appear to be based on any research or assessment.

72. Further, educational needs cover more than disruptive behaviour. Focussing on classroom management is arguably not rationally connected to the broad educational needs of children who need special education because of "physical or mental handicap or of some educational difficulty" (as defined in s 2 of the 1989 Act). It also appears to be inconsistent with the Ministry's Special Education Policy Principles which among other things state that:

> Our primary focus is to meet the individual learning and developmental needs of young children and students
>
> All young children and students with identified special education needs have access to a fair share of the available special education resources.

73. Even if a court considers that there is a rational connection, it could still find that the approach is discriminatory on the basis of minimal impairment, as discussed below.

Minimal impairment

74. The fourth step is to consider minimal impairment. In our view, the Board has good grounds to argue that the IWS eligibility criteria impair the right in s 19(1) more than is reasonably necessary to achieve its purpose.

75. As noted above, the purpose of the eligibility criteria is to prioritise access to IWS services (including residential education) based on need by excluding non-CD children, whose special education needs are supposed to be catered for in the community.

76. In order to prove minimal impairment, it would be necessary for the Ministry to show that non-CD children have a lower-level need and can always be managed within the community. As discussed above in the "rational connection" section, the Ministry is unlikely to be able to provide that proof, given no substantive assessment of non-CD children's broader educational needs appears to have been undertaken.

77. The underlying premise of the IWS eligibility criteria is that the greatest assistance should go to the children with the greatest educational need. Assuming that some non-CD children's education needs are greater than or equal to plus-CD children, the IWS eligibility criteria undermine their own purpose by preventing high-needs non-CD

children from accessing residential special education. The eligibility criteria are therefore likely to impair the right in s 19(1) more than is reasonably necessary to achieve their purpose.

78. We note that the Ministry relies on the UN Convention on the Rights of Persons with Disabilities in support of its general policy shift from residential education to wraparound services delivered in local schools. That general principle does not detract from the Ministry's obligation to accommodate the specific needs of individual non-CD children, who have a clear need for residential education. We note that the preamble to the Convention recognises the importance of responding to individual needs:

> The need to promote and protect the human rights of all persons with disabilities, **including those who require more intensive support.**

79. The Ministry is likely to argue that its eligibility criteria impair the right in s 19(1) no more than reasonably necessary, because it has made "reasonable accommodation" for the needs of non-CD children.

80. That argument is immediately undermined by the fact that this is not a case where the Ministry is making progressive efforts to accommodate non-CD students. Rather, as we understand the facts, the Ministry's efforts have been regressive. It has actually eliminated the accommodation that used to be available for non-CD students (both literally and figuratively).

81. The Ministry's position appears to be that the IWS eligibility criteria are a triaging system that allocates the greater part of a limited resource (residential special education funding) to those with greater needs.

82. Assuming that the evidence shows non-CD and plus-CD children have a similar need for residential special education, the Ministry is unlikely to be able to demonstrate it has made reasonable accommodation for non-CD children, given the Ministry's position appears to be that the discrimination is justified by differing needs.

Relevance of resources

83. It is possible that the Ministry's evidence of purpose will reveal that it chose to discriminate in its IWS eligibility criteria to save additional public expenditure on residential special education.

84. It should be emphasised that increased public expenditure is not, in itself, a justification for discrimination: "cost is only a factor to be considered in the mix" of whether a rights-limiting measure is justified.[31] For instance, in *Ministry of Health v Atkinson*, the High Court held that the additional cost of around $17 million to the Ministry of Health of implementing non-discriminatory policy did not justify its discriminatory policy.[32]

85. Rather, the Ministry must prove it had considered reasonable alternative non-discriminatory policies, and none of them could achieve the same or similar budgetary outcomes.[33] It is unlikely that the Ministry would be able to demonstrate this, given that it seems to us the IWS criteria could be reformulated based on need to make non-CD children eligible. This need not necessarily involve increasing any cap on funding for residential special education. It could simply mean some plus-CD children would likely be de-prioritised based on need.

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31 *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC) at [280].

32 *Ministry of Health v Atkinson*, above n 30, at [280].

33 *Attorney-General v IDEA Services Ltd (in stat man)*, above n 27, at [230].

Proportionality

86. Having conducted a minimal impairment analysis, the courts do not tend to enter into a detailed analysis of the overall question of proportionality.[34] In our view, assuming that the purposes of the IWS eligibility criteria are as stated above, the discriminatory elements of the IWS eligibility criteria are likely to be disproportionate to the importance of achieving its purpose.

87. Again, "reasonable accommodation" concepts are helpful. While *excessive* cost can justify a refusal to accommodate, decision-making should not undervalue the accommodation of disability.[35] It seems likely that less discriminatory policies could be implemented at a similar cost, and the IWS eligibility criteria appear to undermine their own purpose in respect of non-CD children.

Conclusion on justifiability

88. In our view, subject to the evidential assumptions we have stated, and the uncertainty of what discovery of documents might reveal the Ministry's purposes to be, the Board has a good arguable case that the Ministry's IWS eligibility criteria breach NZBORA / HRA and are therefore unlawful.

Relevance to consultation on Salisbury

89. Discrimination at the IWS eligibility level is relevant to any decision to close Salisbury as the discrimination impacts on the current roll of the girls and the extent to which Halswell is able to provide sufficient alternative provision.

90. When exercising powers to close Salisbury under section 98(2) of the 1964 Act, the Minister is constrained by administrative law principles, including the requirement to act reasonably and to act in accordance with NZBORA.

91. If the IWS criteria are discriminatory the relevant future cohort of girls who could be placed at Salisbury is likely to be considerably larger than the number being considered by the Minister (applying NZBORA rights-consistent criteria).

92. To the extent the Minister is relying on a diminishing roll at Salisbury as a reason for closure, this is unlawful and / or an irrelevant consideration. Based on the Minister's reasons for considering closure of the school in her 14 June 2016 letter, and the Ministry's reports to the Minister of March and June 2016, the reduced roll has been a key factor in the Minister's preliminary view that the school should close and/or that the IWS and Halswell can offer sufficient alternative provision. In our view, in order for the Minister's decision to be lawful, it would be necessary for her to consider and consult on the potential closure based on the relevant future cohort of girls if discriminatory practices were not applied. Accordingly, we consider that the Minister's decision under s 98(2) of the 1964 Act would be vulnerable to challenge if the Ministry's IWS eligibility criteria were found to be unlawful because they breach NZBORA / HRA.

93. A decision to close the school under s 98(2) of the 1964 Act would also be vulnerable to challenge for the reasons set out in paragraphs 116 to 132 below.

Discrimination between boys and girls if Minister decides to close Salisbury

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34 See Butler and Butler at [17.21.5].

35 See Butler and Butler at [17.20.4].

94. If the Minister decides to close Salisbury that will likely have the effect of treating two groups differently:

(a) girls requiring residential special education; and

(b) boys requiring residential special education.

95. Salisbury is the only single-sex school for girls providing residential special education in New Zealand. If it is closed, girls requiring residential special education will be directed to attend Halswell , which is nominally a single-sex boys' school, but has a limited number of girls attending and could potentially become co-educational.

Decision to close Salisbury would prima facie limit s 19(1) right

96. In our view, if the Minister decides to close Salisbury, that is likely to prima facie limit the right in s 19(1).

97. The decision has the effect of treating boys and girls differently on the basis of sex, which is a prohibited ground of discrimination.[36]

98. The appropriate comparator group is obvious: boys requiring residential special education.

99. We understand there is evidence that demonstrates severe ID / ASD girls requiring residential special education face additional risks of sexual abuse in co-educational environments. As such, there is a particular need for girls requiring residential special education to have access to a single-sex school, particularly those girls who have already been sexually abused or are particularly vulnerable to being victims of sexual abuse. In this respect girls requiring residential special education are arguably materially disadvantaged, compared to boys, given girls will be placed at greater risk of sexual abuse than boys in a co-educational residential school. While ID / ASD boys can be at risk of sexual abuse, we understand that ID / ASD girls are significantly more likely to be victims of abuse than boys in co-educational residential environment. .

100. The question then becomes whether that limit is justifiable. At this point, the onus shifts to the Ministry to prove that the limit is justifiable.

Limit on rights potentially unjustifiable

101. The Minister's decision to close Salisbury would be made under s 98 of the 1964 Act. Therefore it would be a limit "prescribed by law".

102. It is likely the courts would accept that there is a rational connection between closing Salisbury and the Ministry's objective of reducing public expenditure.

Minimal impairment

103. In our view, it is arguable that the Minister's decision is likely to impair the right in s 19(1) more than is reasonably necessary to achieve its purpose.

104. The Ministry's position appears to be that it would be too costly to continue to provide residential single-sex education to girls, because at present Salisbury receives around $215,000 of funding per student, while Halswell and Westbridge receive around $150,000 of funding per student.

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36 NZBORA, s 21(1)(a).

105. Increased public expenditure is not, in itself, a justification for discrimination: "cost is only a factor to be considered in the mix" of whether a rights-limiting measure is justified.[37] The onus is on the Minister to prove she had considered reasonable alternatives to closure, and none of them could achieve the same or similar budgetary outcomes.[38]

106. The primary reason for the higher level of funding per student actually enrolled at Salisbury is because of the roll reduction precipitated by the Ministry's unlawful IWS eligibility criteria. Assuming the Board can provide evidence demonstrating that the additional costs of providing single-sex residential education at Salisbury are not drastically larger once the effects of the IWS eligibility criteria are discounted, it would be difficult for the Minister to prove that the decision to close Salisbury impairs the right in s 19(1) no more than is reasonably necessary to reduce public expenditure. We understand that the Board has identified other errors in the financial information provided to the Minister by the Ministry.

107. In addition, we understand the Board will obtain evidence demonstrating that ID / ASD girls requiring residential special education are at a much higher risk of sexual abuse in a co-educational environment as opposed to a single-sex environment.

108. We note Dobson J in *Salisbury v AG* concluded that girls were considerably more likely than boys to be at risk of sexual abuse in a residential co-educational environment as clearly set out in the following passage of the judgment:

> [81] As a matter of common sense, the risk of sexual abuse for girls with impaired intellect is likely to increase, the more they are in the company of potential abusers. Intellectually impaired boys are potential abusers, as Mr Campbell's experience demonstrates. No great leap in logic is required to recognise the validity of concerns over having boys and girls together for the educational aspects of residential special needs education, even if completely effective separation of the residential aspects of schooling in a co-educational setting is achieved. Those changes introduce a risk that would not be present in the single-sex environment at Salisbury School.

109. In light of that conclusion, one would expect a Court will be looking for strong evidence from the Ministry to justify a conclusion that:

(a) the obvious logic referred to by Dobson J is false; and

(b) the safety risks can be safely managed.

110. The onus is on the Minister to prove that she has considered the evidence and undertaken a rigorous assessment. It is not clear that she has done so. We discuss issues with the adequacy of reports undertaken by SAMS and the Ministry in 2013 in relation to protection of girls in paragraphs below at 122 to 132.

Proportionality

111. Further, based on that evidence, and the importance of the need to reduce the risk of sexual abuse to vulnerable girls, it is arguable that the harm of the Minister's decision to close Salisbury would be disproportionate to the purpose of achieving cost savings that are likely to be relatively minor.

Conclusion

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37 *Ministry of Health v Atkinson*, above n 30, at [280].

38 *Attorney-General v IDEA Services Ltd (in stat man)*, above n 27, at [230].

112. In our view, if the Minister decided to close Salisbury, assuming there is evidence, that severe ID / ASD girls are at materially greater risk of sexual abuse than boys in a co-educational residential environment, that would unjustifiably discriminate against disabled girls requiring residential special education, and therefore be unlawful. At the very least, we could expect that the Minister would have fully assessed the extent to which this cohort of girls may be at greater risk.

Discrimination between Māori and other New Zealand children under the IWS

113. As we understand it, it is extremely difficult for children, even those who ultimately prove to be eligible, to have their applications approved by the IWS. Parents often find their applications are rejected on multiple occasions. The paperwork burden is crushing. We are advised that this policy has a disproportionate effect on Māori families, and has all but eliminated Māori students from being accepted into the IWS and enrolling in Salisbury.

114. To the extent that there is clear statistical evidence demonstrating that the administrative burden of the Ministry's IWS eligibility criteria has the effect of disadvantaging Māori students in their access to IWS and special education, that suggests that discrimination is occurring.

115. In addition, to the extent that evidence can be provided demonstrating that the IWS fails to take into account the cultural needs of Māori families, there is potential for a discrimination claim. Both of these matters could substantiate a discrimination claim, if the appropriate evidence can be obtained.

Section 98(2) assessment: assessment of risk of sexual abuse

116. s 98(2) of the 1964 Act provides the Minister with the power to disestablish a special school where certain criteria are met, which are that the Minister must be:

(a) dissatisfied with the manner in which the school, class, clinic, or service is being conducted; or

(b) considers that sufficient provision is made by another similarly established special school, class, clinic, or service or by any other school or class in or reasonably near to the same locality.

117. As in *Salisbury v AG* the relevant factor is whether the Minister is satisfied that sufficient provision can be made by another similarly established school. There is no suggestion that the Minister is dissatisfied with the conduct of Salisbury or that the locality applies to a school with national reach.

118. The Minister in her letter of 14 June says that sufficient provision can be made through IWS and provision at Halswell.

119. In *Salisbury v AG*, the Court held that the Minister's decision under s 98(2) was unlawful because:

(a) only a limited number of girls could be accepted at Halswell while it was a single-sex school; and

(b) the Minister had disregarded the prospect of sexual and physical abuse to girls who would otherwise reside in a single-sex girls' residential special needs

school, it they were enrolled at a co-educational residential special needs school.

120. In relation to the finding in (b), the Court's discussion of the obligations on the Minister remains relevant to the Minister's current consultation on closure of Salisbury. We set this out in full below:[39]

> [80] Ms Jagose accepted that the general proposition that children with intellectual impairment are at greater risk of physical and sexual abuse is not in dispute. Once that is recognised in the context of whether alternatives to Salisbury School constituted sufficient provision for the needs of the learners there, it was not a consideration that could lawfully be resolved on the narrow or technical grounds that the Ministry adopted.
>
> [81] As a matter of common sense, the risk of sexual abuse for girls with impaired intellect is likely to increase, the more they are in the company of potential abusers. Intellectually impaired boys are potential abusers, as Mr Campbell's experience demonstrates. No great leap in logic is required to recognise the validity of concerns over having boys and girls together for the educational aspects of residential special needs education, even if completely effective separation of the residential aspects of schooling in a co-educational setting is achieved. Those changes introduce a risk that would not be present in the single-sex environment at Salisbury School.
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> [82] The obligations imposed on the Minister under s 98(2) require a more robust approach to the substance of the concerns over girls' safety. Different risks are created, and in this context it is an abrogation of the responsibilities involved in making a decision under s 98(2) of the 1964 Act to treat the safety of students as a matter for which the Trustees would be responsible.
>
> [83] In administrative law terms, the protection of girls from physical and sexual abuse if placed in a co-educational special school setting at Halswell, was a mandatory relevant consideration in assessing the sufficiency of that solution as an alternative to providing for girls at Salisbury School. The Minister's decision failed to have regard to available warning signals raised by and on behalf of the Trustees about greater levels of risk of abuse in a co-educational setting. Alternatively, this component of the Minister's decision was influenced by the irrelevant proposition that there is an absence of research which confirms that girls would be exposed to a relatively greater level of risk in a co-educational setting, which caused an otherwise relevant concern to be dismissed.
>
> [84] On either basis, the decision is flawed in a respect that renders it unlawful.

121. The Court also rejected any stand-alone reliance by the Minister on the expanded IWS, without availability of places at Halswell.[40]

122. Given the above, it is clear there is a requirement on the Minister to ensure girls who would otherwise be placed at Salisbury would not be at greater risk if placed at Halswell. Given it is accepted that ID / ASD girls are at high risk of sexual abuse, then it follows as a matter of logic that such girls will be exposed to a risk at Halswell that would not be present at Salisbury. In these circumstances, the Court was clear that a robust approach to the substance of the concerns was required. It was not enough to rely on the absence of research and evidence of sexual abuse in co-educational schools.

123. Following this decision, the Ministry undertook a literature review in relation to potential increased risks in a residential co-educational setting to girls with an intellectual

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39 *Board of Trustees of Salisbury Residential School v Attorney-General*, above n 1, at [80] to [84].

40 *Board of Trustees of Salisbury Residential School v Attorney-General*, above n 1, at [86].

impairment ("**Literature Review**")[41] and commissioned SAMS to undertake a report on the report on the suitability of Halswell as a co-educational residential special school ("**Suitability Report**").[42] Both reports were completed in April 2013. As we understand, there has been no further assessment of the likely increased risk to girls since then.

124. The Literature Review again identifies an absence of research on sexual abuse in co-educational schools. However, rather than undertake an intensive assessment of likely increased risk to the cohort of girls at Salisbury if placed in a co-educational setting, the Literature Review appears to rely on:

(a) limited case studies with few being directly relevant, and discussions with a principal of a co-educational school in the US (the extent of these discussions is unknown); and

(b) ERO reports, which are not intended to provide substantive assessment of risk.

125. The Literature Review then concludes that co-educational schools can work well, provided that policies and procedures are put in place. There is no comprehensive assessment of the policies applied in the other relevant case studies overseas. Nor is there consideration of the extent to which single-sex schools remain available to the most vulnerable girls.

126. The Suitability Report advises that Halswell could provide a safe co-educational establishment conditional on the application of entry criteria that are known to work, and the right staff in place trained in procedures and policies and with time to establish them. The Suitability Report also notes that the admission of children with conduct disorders but who are not intellectually disabled presents a challenge for Halswell in terms of management of risk (which is a potential outcome of a proposal to combine Westbridge and Halswell). There appears to have been no further assessment to consider whether these conditions have been met and / or concerns have been addressed.

127. Other factors to note in relation to the Suitability Report are as follows:

(a) SAMS refers to five incidents of sexual abuse in 2012 and notes that serious sexual offences occur on average once a year. No account is taken of unreported abuse.

(b) While it refers to Halswell having security in place for the residential units, the only other safeguards appear to be a proposed plan "to promote the culture of safety" and "provide for the possibility of transgressions".

(c) There is no consideration of the risk of sexual abuse to vulnerable girls irrespective of policies and security procedures, nor of the practical limitations on staffing and security where girls cannot be closely supervised 24 hours a day.

128. Other factors that have not been fully considered in the Suitability Report include:

(a) A proposal to combine Westbridge and Halswell schools, possibly on one site. According to SAMS, staff at Halswell have expressed concerns about the resulting move away from a mix of children with ID and behaviour problems

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41 Ministry of Education, *Literature Review; Potential increased risks in a residential co-educational setting to girls with an intellectual impairment*, April 2013.

42 Standards and Monitoring Services, *Report on the Suitability of Halswell Residential College as a Coeducational Residential Special School; Report to the Ministry of Education,* 7 April 2013.

(Westbridge takes boys and girls with severe behavioural problems but not with ID / ASD). The Suitability Report appears to acknowledge that this would increase risks for the cohort of girls who would otherwise be placed at Salisbury (hence SAMS emphasise the importance of appropriate entry criteria). However, no further assessment of this potential risk appears to have been undertaken.

(b) Halswell's financial issues, where its ability to provide appropriate levels of staff and procedures may be compromised.

129. The Ministry has advised the Minister that it considers that it has "compelling evidence that sufficient and safe and alternative provision for girls who might otherwise attend Salisbury can be achieved through the [IWS] and by making Halswell fully co-educational". Given the limited nature of the reports undertaken, this considerably overstates the correct position.

130. Given the above, we consider the Minister would be vulnerable to challenge by way of judicial review. While the grounds would not be as strong as in the previous judicial review (where the Minister had disregarded concerns raised in the Briggs and Campbell reports) it could still be argued that the Minister:

(a) in effect disregarded the substantive concerns to the extent she relies on absence of research and / or limited case studies; and / or

(b) the assessment of the risks to the girls is otherwise inadequate or unreasonable.

131. We consider that a court would adopt a high intensity review approach in any judicial review given the gravity of the potential risk and the high importance of access to education. That is, a court would be more willing to review the reasonableness of the Minister's decision. This approach is reflected in the reasoning in *Salisbury v AG*, including where Dobson J rejected arguments by the Crown that the Court should be cautious to interfere because the Minister's decision involved matters of policy.

132. The decision to close could also be challenged on the grounds that the declining roll is an irrelevant or erroneous consideration to the extent it is based on an unlawful or discriminatory policy (as set out above).

Assessment of Halswell as a co-educational school

133. Applying the reasoning in *Salisbury v AG*, protection from physical and sexual assault is also a mandatory relevant consideration for the Minister when deciding whether to declare Halswell a co-educational school under s 146A of the 1989 Act.

134. In that case, Dobson J found that, in administrative law terms, the protection of girls from physical and sexual abuse, if placed in a co-educational special school setting at Halswell, was a mandatory relevant consideration in assessing the sufficiency of that solution as an alternative to providing for girls at Salisbury.

135. We consider that the same reasoning must apply to a decision to make Halswell co-educational. That is, protection of girls from sexual abuse must be a paramount consideration.

136. Accordingly, any decision to make Halswell co-educational would be similarly vulnerable to challenge on the basis that protection from sexual abuse has been disregarded and / or not adequately considered.

Conclusion

137. Overall we consider that the IWS, and any decision to close Salisbury would be vulnerable to challenge:

(a) where the IWS eligibility criteria are arguably in breach of the right to freedom from discrimination guaranteed by s 19 of NZBORA (which in turn has contributed to Salisbury's reduced roll); and / or

(b) where the Minister has arguably failed to undertake a robust assessment of potential risk of sexual abuse to girls who would otherwise be placed at Salisbury.

138. Any decision to make Halswell co-educational would also be vulnerable to challenge under (b), above.