



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 37

Crown Liability
and Judicial Immunity
A response to *Baigent's* case
and *Harvey v Derrick*

May 1997
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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19 May 1997

Dear Minister

I am pleased to submit to you Report No 37 of the Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey v Derrick*.

This report forms an important part of the Commission's reference to examine the legal position of the Crown, the basis of which is to give further effect to the principle that the state is under the law. Work on the remaining aspects of the reference, including the criminal liability of the Crown and reform of the Crown Proceedings Act 1950, is continuing.

The Commission has concluded that there should be no general legislation removing or circumscribing the remedy for breach of the New Zealand Bill of Rights Act 1990, which *Baigent's* case held to be available. It considers that legislation should, however, be enacted to prevent actions against the Crown (or judges themselves) for breaches of the Bill of Rights Act by judges of the Court of Appeal, High Court, Employment Court, District Court (including the Environment Court) and Māori Land Court. The policy reasons underlying the current law of judicial immunity, in particular the need for finality in litigation and the availability of adequate rights of appeal, also weigh against allowing Bill of Rights Act litigation in respect of judicial conduct.

In view of the Court of Appeal's decision in *Harvey v Derrick*, the Commission also recommends that the immunity of District Court judges, and judges of the Environment Court and Māori Land Court, be expanded to equate with that of High Court judges.

The Commission proposes that there be a systematic review of existing legislation which confers on the Crown and public bodies powers not enjoyed by citizens, and immunities from liability to which they would otherwise be subject, to ensure that those provisions are no wider than necessary to attain their purpose.

Finally, the Commission recommends that consideration be given to enacting legislation to compensate citizens who have suffered punishment as the result of a miscarriage of justice, in accordance with article 14(6) of the International Covenant on Civil and Political Rights.

Yours sincerely

The Hon Justice Baragwanath
President

Hon Douglas Graham MP
Minister of Justice
Parliament Buildings
Wellington

Preface

This report is a response to the following reference, given to the Law Commission by the Minister of Justice in August 1989:

To give further effect to the principle that the state is under the law to ensure that as far as practicable legal procedures relating to and remedies against the Crown (as representing the State) are the same as those which apply to ordinary persons.

With this in mind the Law Commission is asked to examine aspects of the legal position of the Crown, including but not limited to,

- (i) the civil liability of the Crown, its officers and agencies, and in particular special rules limiting or excluding that liability
 - (ii) the Crown Proceedings Act 1950, with a view to its reform and simplification
 - (iii) the criminal liability of the Crown, its officers and agencies, and relevant procedures,
- and to make recommendations accordingly.

The Commission's initial work in response to this reference was undertaken in the context of its review of s 5(k) of the Acts Interpretation Act 1924 and its report on that Act in 1990. In the following years the Commission was unable to give comprehensive attention to the reference in light of other priorities. However, the Commission completed related advisory work during the 1991–1992 financial year, in particular advice pertaining to the constitutional status of the Auditor-General and the nature of Parliament's coercive powers, and reviewed the law of public interest immunity in connection with its work on privilege, under its evidence project. The Commission also continued to give attention from time to time to other aspects of the reference in the course of its advice to Ministers on a range of constitutional issues.

Simpson v Attorney-General (Baigent's case) [1994] 3 NZLR 667 was decided by the Court of Appeal in July 1994. In September 1995, as part of the Government's consideration of issues raised by *Baigent's case*, the Minister of Justice asked the Law Commission to give priority to its review of the Crown Proceedings Act 1950, and to include within that review a discussion of issues relating to Crown liability under the New Zealand Bill of Rights Act 1990.

The Commission consulted extensively within the public sector on the impact of *Baigent's case*, before issuing a draft report on 1 April 1996. The draft report – written by the then President of the Commission, Hon Sir Kenneth Keith, with assistance from Diane

Stephenson, a senior researcher at the Commission – was then circulated to government departments and ministries, Crown entities, the New Zealand Law Society, and certain legal academics and practitioners.

We are grateful for the thoughtful responses we have received, which have confirmed most of the proposals contained in the draft report, and led to the modification of some others. Appendices A–C contain only minor alterations from the earlier draft; the decision in *R v Grayson and Taylor* CA 255/96; 256/96 28 November 1996, part of which is reproduced as appendix D, was delivered after the draft report was circulated. A list of contributors is annexed to the report as appendix E. Assistance in completing the report was received from Padraig McNamara, a Commission researcher.

In this report, we have considered the liability of the Crown and public bodies for breaches of the Bill of Rights Act. Questions as to the need for, and the scope of, public sector powers and immunities are at the heart of this issue. Consequently the report also includes recommendations arising from the Court of Appeal's decision in *Harvey v Derrick* [1995] 1 NZLR 314, which concerned judicial immunity and, in particular, the statutory provisions relating to the immunity of District Court judges. Legislation reversing the effect of this decision is currently before Parliament: Summary Proceedings Amendment Bill (No 2) 1995.

Chapter 2 of the report presents a discussion of the principle of equality as well as the principles expressed in the Bill of Rights Act. Chapter 3 suggests possible consequences in law and fact of *Baigent's* case. Chapter 4 considers whether a legislative response to the decision is required. In chapter 5 we recommend a review of existing powers and immunities vested in the Crown and public bodies, including those of law enforcement which were at issue in *Baigent's* case. Finally, chapter 6 of the report examines more specifically the position of judges and other participants in the justice system, paying particular attention to judicial immunity.

We have confined the report to those aspects of the civil liability of the Crown which are of particular urgency and interest. The 1989 terms of reference raise wider issues of public sector liability which also need to be addressed. In particular, over and above the review of statutory powers and immunities which we recommend, the Crown Proceedings Act requires reform and simplification. We intend to report further on the Crown Proceedings Act.

The third aspect of the original reference, with which this report is not concerned, is the criminal liability of the Crown. The

Commission's report entitled *A New Interpretation Act* (NZLC R17, 1990) recommended reversing the presumption in the Acts Interpretation Act 1924 s 5(k) that legislation does not affect the rights of the Crown. The Commission gave further consideration to this issue in advice to the Attorney-General in July 1996, in response to the report of the Commission of Inquiry into the Cave Creek tragedy. However, additional work on the criminal liability of the Crown is still required, and the Commission proposes to report further on this aspect of its reference.

1

Summary and context

INTRODUCTION

- 1 **T**he New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act” or “the Act”) states fundamental rights and freedoms of New Zealanders. In this report we make recommendations concerning the enforceability of rights conferred by the Act. We also make recommendations regarding the scope of public sector powers and immunities, the immunity from suit of judges and others in the judicial process, and the provision of compensation for those wrongly convicted of a criminal offence.
- 2 In September 1995 the Law Commission was asked to advise, in the context of its work on the liability of the Crown, what legislative response (if any) should be made to *Simpson v Attorney-General* (*Baigent’s case*) [1994] 3 NZLR 667 (CA) (see paras 9–13). On 1 April 1996 we issued a draft report which was circulated to Government departments, Crown agencies, the New Zealand Law Society and certain legal academics and practitioners. We express our appreciation for the thoughtful responses, which have confirmed our major ideas and have led to the modification of others.
- 3 We have considered the position of the Crown and also of public bodies which are bound by the Bill of Rights Act. Since issues of public sector liability and immunity are at the heart of the question, the Commission has included within its examination the Court of Appeal decision in *Harvey v Derrick* [1995] 1 NZLR 314 (see para 14). Legislation which is before Parliament would reverse the effect of *Harvey v Derrick*: Summary Proceedings Amendment Bill (No 2) 1995. Consideration of that topic raises in turn New Zealand’s compliance, in cases of wrongful conviction, with article 14(6) of the International Covenant on Civil and Political Rights, to which the Bill of Rights Act refers.

CONCLUSIONS

- 4 We have reached the following conclusions:
- No legislation should be introduced to remove the general remedy for breach of the Bill of Rights Act held to be available in *Baigent's* case.
 - The Crown is liable under s 3(a) of the Bill of Rights Act for breaches of the Act by the Executive, insofar as those breaches may be considered acts of the Crown, eg, breaches by Ministers and departments. Public bodies, other than the Crown, performing "public functions" in terms of s 3(b) of the Act should have primary responsibility for their own conduct and that of their personnel which entails breach. The Crown should be liable only to the extent that it was a party to the relevant conduct of the public body.
 - The Attorney-General (or in criminal cases the relevant Crown Solicitor) should be served with, and have standing to appear in, all proceedings involving construction or application of the Act. Consideration should be given to whether the Crown should be subject to residual liability¹ for breaches of the Act by public bodies where the redress available is deficient.
 - There should be systematic review of existing legislation conferring on the Crown and public bodies powers not enjoyed by citizens and also immunities from suit or liability to which citizens would be subject. Such a review should ensure that such powers and immunities are effective to attain their purpose and that they are of the minimum extent possible to do so. The review should extend to existing Crown prerogative powers and immunities.
 - The present immunity from suit of High Court judges should be extended to judges of the District Court (including Environment Court judges) and Māori Land Court judges.
 - Legislation should be enacted preventing actions against the Crown for breach of the Act by judges of superior courts, the Employment Court,² the District Court (including Environment Court) and the Māori Land Court. Legislation should also specify

¹ We use this expression to refer to a possible liability on the Crown for breaches of the Act by someone other than the Crown or its servants. We do not use the term to characterise *Baigent* liability as being such as can only be imposed if tort remedies have been exhausted (as has been suggested by some commentators).

² The status of judges of the Employment Court is not defined in the Employment Contracts Act 1991 or elsewhere in statute.

that the Crown is liable for breaches of the Act by justices of the peace, registrars, bailiffs and other officials participating in the judicial process, and relieve those persons of personal liability for breach of the Act if acting in good faith.

- Consideration should be given to enacting legislation to compensate citizens who have suffered punishment as the result of a miscarriage of justice. That course would bring New Zealand law into compliance with article 14(6) of the International Covenant on Civil and Political Rights.

TERMINOLOGY

- 5 Throughout this report we use the term “the Crown”. That term is often used to refer to the executive branch of government. However, it has a more specific meaning in law, which includes the Queen in right of New Zealand, Ministers, and departments of state. This meaning is reflected in the definition contained in s 2 of the Public Finance Act 1989:

Crown or Her Majesty

- (a) means Her Majesty the Queen in right of New Zealand, and
- (b) includes all Ministers of the Crown and all departments, but
- (c) does not include
 - (i) an Office of Parliament, or
 - (ii) a Crown entity, or
 - (iii) a State enterprise named in the First Schedule to the State-Owned Enterprises Act 1986.

- 6 In addition, legislation may deem a person or body to be the Crown or its servant or agent in particular circumstances. Nevertheless, the question “who is the Crown?” can sometimes be difficult to answer: see *A New Interpretation Act* (NZLC R17, 1990), para 152. In this report, we refer to “the Crown” in terms of the definition contained in the Public Finance Act.
- 7 Section 3(a) of the Bill of Rights Act states that the Act applies to acts done by the legislative, executive and judicial branches of government. Section 3(b) extends the operation of the Act to:
any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.
- 8 Whether or not a person or body is carrying out a public function may involve difficult questions of interpretation of s 3(b). We use the term “public body” in this report to refer to any body with public functions, recognising that such a body may be a Crown entity, a State-Owned Enterprise, an office of Parliament, or indeed (in some limited circumstances), a private organisation.

THE DECISIONS CONSIDERED

Baigent's case

- 9 In *Baigent's* case and the related case, *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720, the plaintiffs sought damages for the established tort (wrong) of trespass, as well as for breach of the right under the Bill of Rights Act to be secure from unreasonable search and seizure. The plaintiffs in *Baigent* pleaded that an unlawful search of Mrs Baigent's house was performed by police officers, and alleged that an officer asserted in a telephone conversation to Mrs Baigent's daughter: "[w]e often get it wrong, but while we are here we will have a look around anyway".
- 10 The plaintiffs pleaded that in entering, remaining on, or searching the property in the circumstances, the officers conducted an unreasonable search in violation of s 21 of the Act. The Crown denied that the Bill of Rights Act gave rise to a cause of action in damages. It also pleaded that statutory immunity was available to the Crown under s 6(5) of the Crown Proceedings Act 1950, which provides:

No proceeding shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.
- 11 The Crown contended that the search warrant was judicial process and therefore the Crown was not vicariously liable under s 6. The Court of Appeal – by a majority – held that, on the facts as pleaded, the Crown was liable not only vicariously but also directly for the conduct of the police. Section 6(5) did not provide a defence, because the Court was prepared to read in a requirement of good faith in executing the search warrant, which was not met on the pleaded facts ([1994] 3 NZLR 667, 674, 690, 696, 716). The alleged infringement of the Bill of Rights Act provisions entitled the plaintiffs to claim damages for the breach.
- 12 The case raises two particular issues. First, all four judges of the majority in *Baigent* emphasised that the action for breach of the Act was one of public law, rather than one of tort (and vicarious liability in particular). This raises a question as to the precise nature of the liability. In particular, may such liability be seen as strict liability; and if the Crown is to be held liable for the breach, what is the relevance, if any, of the Crown's powers of responsibility and control over the person committing the breach of the Act? We address these questions in paras 89–92.

- 13 Second, Cooke P characterised the remedy as being against the state (677), while McKay J referred to an “independent cause of action against the Crown” (718). In the only two cases in which damages have been awarded since *Baigent’s* case, the awards were against the Crown. However, the conduct in each case was by officers (the police and a judge respectively) whose conduct would clearly be considered that of the Crown in terms of the wide conception in s 3(a) of the Act. This raises the question (which we address in paras 87–88) whether the Crown’s liability extends beyond breaches by those who would conventionally be considered part of the Crown, to include breaches by any public body referred to in s 3(b). It also leaves open the question whether s 3(a) and (b) may be seen as defining the scope of liability for the Crown and public bodies, respectively, for breaches of the Act.

Harvey v Derrick

- 14 In *Harvey v Derrick* the plaintiff alleged that the defendant, a District Court judge, had directed the issue of a warrant of committal under which the plaintiff was imprisoned for 12 days, without complying with preconditions laid down by law. The proceedings alleged false imprisonment and negligence against the judge. The defendant pleaded the provisions of s 193(1) of the Summary Proceedings Act 1957: that no action should be brought against a District Court judge or justice of the peace for any act done by that person “unless he has exceeded his jurisdiction or has acted without jurisdiction”. The Court of Appeal held that the conduct would, if proved, render the judge liable for acting in excess of, or without, jurisdiction.

2 Principles

- 15 To see the issues in perspective we have considered two overlapping sets of broad principles:
- The principle of equality before the law and the Crown's subjection to it.
 - The fundamental rights and freedoms of New Zealanders stated in the Bill of Rights Act.

THE PRINCIPLE OF EQUALITY

- 16 The principle of equality under the law is the focus of the Law Commission's existing reference concerning the legal status of the Crown, under which it was asked to consider the implications of *Baigent's* case:
- To give fuller effect to the principle that the State is under the law and to ensure that as far as practicable legal procedures relating to and remedies against the Crown (as representing the State) are the same as those which apply to ordinary persons.
- 17 The Bill of Rights Act reflects the general principle that, except to the extent of legal authority, no one (whether Crown or citizen) may lawfully interfere with another's interests of personal integrity and civil rights to which the Act refers. *Baigent's* case gives weight to that principle by providing that a breach of these interests and rights should receive a remedy in law.
- 18 The Act develops the protection of the citizen in chapter 29 of Magna Carta 1297 (UK) which states that:
- No freeman shall be taken or imprisoned, or be disseised [dispossessed] of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him but by lawful judgment of his peers or by the law of the land . . . (RS 30, 26)

- 19 Possession of power presents temptations to abuse it; and the disparity between the respective powers of the state and the citizen is immense.³ The *general principle* remains, however, that all natural and legal persons, including the Crown, are equal before the law and are subject to it.

Exception to the principle

- 20 In the case of the Crown, however, there are certain public functions that must be performed. The Crown must therefore have or acquire, by way of *exception to the general principle*, certain additional powers not enjoyed by citizens. These must also be performed according to law. Examples are the powers to tax and the powers of the police. In a modern state, the range of public functions and powers is necessarily extensive, as appears from the list contained in appendix C.

A necessity test

- 21 Our present law does not sufficiently reflect the principle of equality and its limited exception. It retains a residue of the discredited notion that the King can do no wrong, which led to Cromwell's revolution and the original Bill of Rights 1688 (UK) (RS 30, 42) which, to a significant extent, subordinated the sovereign to the law. Subsequent legislative and political changes culminated in the Crown Proceedings Act 1950, which was a major advance. That Act, while for its time bold and principled, is now out of date, as is the presumption in the Acts Interpretation Act 1924 s 5(k) that legislation does not affect the rights of the Crown. In its report *A New Interpretation Act* (NZLC R17, 1990), the Commission recommended reversal of s 5(k).
- 22 We propose a necessity test for the exception to the principle of equality. The Crown and other public bodies should have no power or immunity beyond those of the citizen, except to the extent necessary to allow its public functions to be duly performed. Anything more would impact adversely upon the rights of the citizen; anything less would impair the efficiency of government by inhibiting public officials in the proper performance of their functions.

³ The exception of the substantial multi-national organisation with a New Zealand presence does not affect the general point.

THE NEW ZEALAND BILL OF RIGHTS ACT

- 23 The Bill of Rights Act is a further and major step towards vindicating fundamental individual rights. Its long title describes it as:
- An Act
- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
 - (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.
- 24 Its general provisions commence:
- 2 **Rights affirmed**
The rights and freedoms contained in this Bill of Rights are affirmed.
 - 3 **Application**
This Bill of Rights applies only to acts done
 - (a) by the legislative, executive, or judicial branches of the government of New Zealand, or
 - (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.
- 25 The International Covenant on Civil and Political Rights, to which the long title refers, includes the undertaking given in article 2(3) by each state party:
- (a) *To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
 - (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop possibilities of judicial remedy;*
 - (c) *To ensure that the competent authorities shall enforce such remedies when granted. [Emphasis added]*
- 26 Most – but not all – of the rights in the Bill of Rights Act are recognised by the International Covenant. The rights in the Act are also, for the most part, recognised by the common law; eg, the ss 8–11 rights:
- not to be deprived of life;
 - not to be subjected to torture or cruel treatment;
 - not to be subjected to medical or scientific experimentation; and
 - to refuse to undergo medical treatment.
- 27 The Bill of Rights Act also includes rights of real importance which, at common law, were and remain qualified, eg, freedom of expression, which is subject to the controls of the Defamation Act

1992. Other rights are expressed by the Bill of Rights Act itself in qualified terms, eg, the right not to be subject to unreasonable search and seizure (s 21), and the right not to be arbitrarily arrested or detained (s 22).

- 28 The outstanding feature is the recognition of these rights by the New Zealand Parliament as warranting special protection.

APPLICATION OF THE PRINCIPLE OF EQUALITY

- 29 The principle that the citizen should, in general, be treated equally with the Crown is seen not only in New Zealand law, but also in that of some other comparable societies. At this stage we refer to the comparative material by way of illustration only.
- 30 Other states have balanced the inequality between the state and the citizen by structural safeguards of various kinds. These include a judicial function of striking down legislation which infringes fundamental rights.⁴ In New Zealand that course, although proposed in the White Paper, *A Bill of Rights for New Zealand* (1985) AJHR A6, was not accepted; nevertheless Parliament recognised the need for legislation to protect the citizen against the Crown.

New Zealand

- 31 The experience in New Zealand, both before and after the enactment of the Bill of Rights Act, shows the need for the Act to exist and be effective.⁵
- 32 The equality principle is already recognised by ss 3 and 6 of the Crown Proceedings Act 1950, which provide that the citizen has the right to sue the Crown, effectively as an equal, in claims for damages in tort and certain other causes of action. The contractual liability of public bodies is for the most part governed by the ordinary law of contract, although particular defences may be available only to public bodies. In *The Power Company Ltd v Gore District Council* (unreported, Court of Appeal, 4 November 1996, CA 267/95), 35, the Court of Appeal, in discussing frustration of contract, observed that "conventional frustration principles will not necessarily be applicable or fully applicable to long term supply contracts between Government agencies".

⁴ See discussion in *Cooper v Attorney-General* [1996] 3 NZLR 480, 485–486.

⁵ See, for example, *Fitzgerald v Muldoon* [1976] 2 NZLR 615; *Professional Promotions and Services Ltd v Attorney-General* [1990] 1 NZLR 501; *R v Goodwin (No 2)* [1993] 2 NZLR 390; and *Baigent's* case itself.

33 There remains, however, a large sphere of activity in which the Crown and public bodies enjoy unnecessary protection. First, there are extensive statutory powers and immunities which do not satisfy the necessity test (see chapter 5). Second, there remain substantial prerogative rights, powers, and immunities. The courts have extended the common law to control abuses of such powers.⁶ The common law's remedies for unlawful administrative action – including those under the Judicature Amendment Act 1972 – are, however, overdue for review.

⁶ See, for example, *Council of Civil Service Unions* [1985] AC 324; *Burt v Governor-General of New Zealand* [1992] 3 NZLR 678; *R v Secretary of State for the Home Department, ex p Bentley* [1974] QB 349. The courts may be expected, in their development of the common law relating to judicial review of the prerogative, to recognise the importance of allowing the Crown to continue to exercise its public responsibilities without unnecessary constraint. An example is provided by the Immigration Act 1987 which in s 13A, 13B and 13C refers to the Crown's prerogative of controlling entry into New Zealand: *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102. In the area of the prerogative, as in that of statute law, we would expect the law to develop in accordance with the necessity test.

Where the Crown is exercising public functions the judge-made common law does not at present provide compensation for those injured by invalid administrative action, unless the officer deliberately or recklessly acted outside the power conferred, and either knew that that conduct would cause damage to the plaintiff or was recklessly indifferent to the consequences: *Bourgoin v Minister of Agriculture Fisheries and Food* [1986] QB 716 (cf *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 281); *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC); *Garrett v Attorney-General* [1993] 3 NZLR 600, 603–604; *Whithair v Attorney-General* [1996] 2 NZLR 45, 55–56; *Elguzouli-Dat v Commissioner of Police* [1995] 1 All ER 833–840; *Bennett v Metropolitan Police Commissioner* [1995] 2 All ER 1, 14; *Three Rivers v Bank of England (No 2)* [1996] 2 All ER 363. The Court of Appeal has reviewed the elements of the tort of misfeasance in public office in *Garrett v Attorney-General* (unreported, Court of Appeal, 19 December 1996, CA 129/96). In *Rawlinson v Rice* (unreported, Court of Appeal, 19 March 1997, CA 246/96), the Court of Appeal held that an action for misfeasance in public office against a retired District Court judge should not be struck out, but referred to a Court of Appeal bench of five judges, the question whether the tort of misfeasance in public office can apply to a holder of a judicial office.

In its report No 226, *Administrative Law: Judicial Review and Statutory Appeals* (9 September 1994) para 2.32, the Law Commission of England and Wales observed:

The fact that English law does not provide for such compensation has long been the subject of criticism, and a number of factors, including developments in European Community law, suggest that the general unavailability of compensation against public authorities for invalid administrative action requires reconsideration. However, whether compensation should be available and, if so, what its scope should be calls for deeper study than we could conveniently give it in the present exercise. We agree, however, with those consultees to our consultation paper who said that the time is now ripe for such study.

England

- 34 New Zealand has largely adopted English constitutional principles, including the deficiencies of the common law. The strengths of English constitutional law include the Magna Carta, the 1688 Bill of Rights and the principles stated in Dicey, *An Introduction to the Study of the Law and the Constitution* (10th ed, MacMillan, London, 1959). Dicey saw the idea of equality before the law as an essential component of the rule of law. Equality before the law meant that no one is above the law and that everyone, regardless of their status, is subject to the ordinary law of the land and the jurisdiction of the ordinary courts. These principles remain important within the English legal system, notwithstanding the statutory and common law immunities of public bodies and the development of a body of administrative law applicable only to public bodies or persons. The strengths of the English law now include the influence of European law, eg, in *M v Home Office* [1994] 1 AC 377 where the House of Lords overruled the former immunity of a Minister of the Crown from liability for contempt of court.

France

- 35 French law has, by contrast, developed principles of liability for losses caused by a far wider range of governmental activity. As a basic principle, the state is liable for acts of the executive which cause loss, although some public services (such as assessment of taxation) only incur liability where loss is caused as a result of "gross" fault.⁷ The civil code requires public burdens to be borne equally:
- The French State . . . considers itself totally liable for service-connected faults of public officers and State agencies. . . . In effect, the *droit administratif* is developing in the direction of absolute liability to ensure equitable sharing among all citizens of the burden of government action.⁸
- 36 Further, the state can be held liable for loss caused by legislation if the harm is found to be sufficiently serious, and if the legislation does not explicitly ban indemnification of those who suffer as a result of it. The harm must also be limited to an individual or a

⁷ De Latournerie, "The Law of France" in Bell and Bradley (eds), *Governmental Liability: A Comparative Study* (United Kingdom National Committee of Comparative Law, London, 1991).

⁸ Abraham, *The Judicial Process* (6th ed, Oxford University Press, New York, 1993), 385. See also de Latournerie, note 7 above, and Bell, "English Law and French Law: Not so Different?" [1995] 2 Current Legal Problems 63, 96–97.

small number of people: those affected by general social or economic policies cannot recover.⁹

Europe

- 37 In Europe, the rights of individuals extend to a cause of action against their national government for passing legislation inconsistent with Community law, and for failing to amend legislation which is contrary to Community law: *Brasserie du Pêcheur SA v Federal Republic of Germany*; *Reg v Secretary of State for Transport, ex p Factortame Ltd & Ors (No 4)* [1996] QB 404. The European Court of Justice has held that, where a state has a wide legislative discretion in a field covered by Community law such as the EEC treaty, individuals are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious, and there is a direct causal link between the breach and the damage suffered.¹⁰ Underlying state

⁹ Ahmedouamar, "The Liability of the Government as a Consequence of its Legal Activities" (1983) 11 Int J of Legal Information 1, 6.

¹⁰ *Brasserie du Pêcheur SA v Germany*; *Reg v Secretary of State for Transport, ex p Factortame Ltd (No 4)* [1996] QB 404; *R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd* [1996] 2 CMLR 391. In *Brasserie* the Advocate General stated in relation to English law:

In contrast, where the breach falls solely within the ambit of public law, liability may be claimed only for misfeasance in public office. This is the only tort which covers relations between private persons, but specifically the public authorities. However, the requirement of intentional unlawful conduct makes the possibility of obtaining damages a remote one, even where the loss or damage arises out of infringements of Community law . . . (438)

He continued:

The idea of state liability for loss or damage caused by legislative activity does not seem at all surprising. The basic principle of most of the civil rules on non-contractual liability is *neminem laedere*, as variously interpreted and limited, under which everyone is bound to make good loss or damage arising as a result of his conduct in breach of a legal duty. (Albeit that principle does not have the same general scope in all the legal systems – suffice it to cite the British system, in which there is a limit in terms of the (restricted) scope of the duty of care – it nonetheless remains that, in as much as it refers to the idea of wrongful damage, it may be regarded as the starting point for any discussion of liability.) It is undeniable that reference is made to that principle by the various rules, mostly created by the courts, governing liability on the part of the public authorities, even though that liability has special features peculiar to itself in view of the activities carried out by those authorities, in particular in the case of legislative activity. Liability of the public authorities is also closely, if not indeed necessarily,

liability in these cases is the obligation upon national legislatures to act in accordance with superior European law. The sovereignty of Parliament in New Zealand is not limited in this way. However, the Advocate General in the *Brasserie* case emphasised two further factors in favour of liability (453–454), which may be of greater relevance in the New Zealand context. The first is the accepted principle that the state is liable for a breach of *international law*, even if the legislature has committed the breach. Under this unitary conception of state liability, no distinction is drawn between breaches caused by a legislative rather than an executive act or omission.¹¹ The second factor is that in most legal systems compensation is paid when the legislature *lawfully* causes loss to individuals, eg, by passing legislation expropriating land for public works. Therefore the state should – as a matter of logic and principle – compensate where loss is caused as a result of a legislative act.

connected to wrongful damage by the fact of its having to have been caused by the unlawful conduct; in a manner of speaking, this is the other side of the coin.

Admittedly, in the case of the public authorities, precisely because of the nature of the activity which they perform and of the consequences which would ensue were there held to be liability and an obligation to compensation generally, the tendency has invariably been to limit the scope of liability in various ways. The extent of that limitation, which may be encapsulated, by way of initial approximation, in the well known formula according to which the liability in question is ‘neither general, nor absolute’ (judgment of the French Tribunal des Conflits of 8 February 1873 in *Blanco*, D 1873, II, 20) is consequently related to the need to balance the opposing, competing interests at stake: on the one hand, the injured party’s interest in obtaining at least financial restitution for the loss or damage he sustained as the result of an activity – in particular legislative activity – of the state; on the other, the state’s interest in not having to answer invariably and in any event for loss or damage caused by the activities of its organs in performing the institutional tasks entrusted to them.

Manifestly, over time significant changes have taken place with regard to the limitation of the scope of responsibility, varying according to the legal system considered. In particular the emergence of the *state governed by the rule of law* has resulted in an increasing shift of emphasis, at least in the more advanced legal systems, from the conduct of the perpetrator of the damage to the rights of the injured party, as in the case of liability generally. From this point of view, state liability and the resulting obligation to make reparation have ended up by becoming a means of penalising unlawful and/or, in any event, harmful conduct and thereby of achieving effective protection for individuals’ rights. (440–441)

¹¹ Craig, “Once More unto the Breach: The Community, the State and Damages Liability” (1997) 113 LQR 67, 69.

The USA

- 38 The Federal Tort Claims Act 1946 provides that the United States may be liable for:
injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹²
- 39 Exceptions include any defence based upon judicial or legislative immunity which otherwise would have been available to the employee whose act or omission gave rise to the claim. The statute provides an express defence in the case of
any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved was abused . . .

FUTURE DEVELOPMENT: BALANCING THE INTERESTS

- 40 The need for careful appraisal of how far we should respond to overseas trends¹³ should be considered in the development of New Zealand law. While the interest in providing adequate freedom of movement for those exercising public functions is important (see for example *Stovin v Wise* [1996] 3 All ER 801 (HL)),¹⁴ so too is the removal of immunities that are unnecessary. As already noted,

¹² 28 USC s 1346(b). The Federal Tort Claims Act is concerned only with tort claims, rather than breaches of the Constitution per se. A claim under the Act is against the United States and is based on vicarious liability. For the liability of State and Federal officials for breaches of the Constitution see appendix B.

¹³ See Craig, "Francovich: Remedies and the Scope of Liability" (1993) 109 LQR 595, discussing the implications of the European jurisprudence.

¹⁴ The House of Lords held that a local authority should not be subjected to liability for failure to improve a dangerous intersection because of the need for it to evaluate budgetary priorities among its commitments. See also *Garrett v Attorney-General* (unreported, Court of Appeal, 19 December 1996, CA 129/96), in which the Court of Appeal observed:

In any modern society administration of central or local government is complex. Overly punitive civil laws may oftentimes deter a common sense approach by officials to the use or enforcement of rules or regulations. (30)

American law provides the government with a defence in the event that an official exercised due care and where the claim relates to the exercise of a discretion. It therefore appears to be far more concerned than European law to protect the governmental interest where this conflicts with the citizen's interest in having a breach of a right remedied. European law, in extending liability to unlawful legislative as well as executive acts, may be seen as leading attempts to redress the imbalance in power between the citizen and the state.

- 41 These issues will be the subject of further consideration by the Commission in the context of continuing work on its Crown reference.



3

The Bill of Rights Act, *Baigent's* case and its implications

THE NORMATIVE, EDUCATIVE AND INCENTIVE ROLES OF THE BILL OF RIGHTS ACT

- 42 **W**e have observed that the Bill of Rights Act confers rights which are both fundamental and, for the most part, well established at common law.
- 43 A major achievement of the Act was to bring together into a coherent set of principles the most important rights of the citizen. The result is both educative – by informing the public of what their rights are – and normative – by influencing conduct so as to conform with these rights.
- 44 Before *Baigent* the Court of Appeal in *Minister of Transport v Noort & Ors* [1992] 3 NZLR 260, *R v Goodwin (No 2)* [1993] 2 NZLR 390, and other decisions, had given effect to the rights conferred by the Act by developing standards to be applied by the police and other arresting authorities. These have been generally accepted.
- 45 One effect of *Baigent's* case is to provide a disincentive to breaching the rights, by allowing for damages for breach. The Bill of Rights Act contains no express remedies clause, however, failure by the courts to recognise the rights would have made the Act toothless. Just as the European Court of Justice has created remedies to give effect to the rights established by the EEC treaty (see para 37), so the New Zealand courts have given effect to the Act and to aspects of the International Covenant which the Act affirms.¹⁵

¹⁵ As noted in para 26 the Bill of Rights Act does not conform exactly with the International Covenant.

THE POSSIBLE CONSEQUENCES IN LAW OF *BAIGENT'S CASE*

- 46 The principal possible consequences in law of the *Baigent* decision are the following:
- Since some of the rights stated in the Bill of Rights Act might not ordinarily be supported by a remedy (particularly a monetary remedy) under the general law, the *Baigent* action would fill that gap. A possible instance is the right of those deprived of liberty to be treated with humanity and with respect for their inherent dignity: s 23(5). Moreover, the monetary remedy may be in addition to a remedy already available in the exercise of other judicial process, eg, the remedy of stay ordered in *Martin v District Court of Tauranga* [1995] 2 NZLR 419. The decision points the way to other remedies, such as injunctions, which may be added to those of stay of proceedings and exclusion of evidence that had been employed prior to *Baigent's* case.
 - A legislative or common law protection of a public official might be avoided by the *Baigent* action. An instance is the immunity of District Court judges from suit – which was in issue in *Harvey v Derrick* – or s 6(5) of the Crown Proceedings Act – which was pleaded by the Crown in *Baigent's* case.
 - It may be argued that an action is available against the Crown (in some broad sense as a “guarantor” of the Bill of Rights Act) instead of, or in addition to, the person or body who breached the right, even though the Crown would not otherwise be liable. We discuss this possibility in paras 94–107.
- 47 Each of these possible consequences has been seen to entail direct challenges to Parliament's declared intent:
- Parliament, in 1990, did not include an express remedies provision in the Act. That omission can be considered the more significant given that the 1985 draft *did* include such a provision, with, according to the White Paper para 10.186, “a residual role – but an important one, nonetheless”.
 - Parliament, in many statutes, has protected those acting under them, and others who might be liable, from liability or suit in varyingly defined circumstances. The *Baigent* remedy against the Crown might avoid that expressly conferred protection.
 - Parliament has set up many bodies distinct from the Crown and protected them from control or direction by Ministers and departments. General Crown legal responsibility for their actions would be likely to bring pressure for corresponding Crown powers of control – a pressure contrary to Parliament's design.

We consider each of these three issues in turn.

Parliament did not include an express remedies provision in the Act

- 48 Several respondents challenged our draft report on the basis that Parliament itself had refrained from legislating so as to provide a remedy, so why should the courts now provide for it? We do not agree with the challenges, but accept that they warrant consideration.
- 49 Parliament did address the issue of whether to provide a remedies clause. The White Paper recommended both that the rights recorded in the Bill of Rights should constitute superior law, overriding all inconsistent laws, and that the courts should have power to strike down or disapply inconsistent legislation. Parliament rejected the concept of superior law and did not adopt the proposal for judicial power to strike down, nor enact the remedies clause.¹⁶
- 50 In responses to the draft report it was argued with force (but, notably, by only one department) that Parliament should be taken to have rejected the judicial enforcement of any provisions of the Bill of Rights Act; they should be treated as standards but not as justiciable.
- 51 It does not necessarily follow that, because Parliament rejected the concept of superior law and its enforcement or failed to enact a remedies clause, *Baigent's* case was decided contrary to its will. It is true that Parliament could, had it chosen, have expressly conferred power on the courts to give effect to the Bill of Rights Act, but did not do so. However, the courts acted conventionally in declining to strike out the plea in *Baigent's* case alleging violation of the Act. It is the constitutional function of the judicial branch of government both to construe statutes enacted by Parliament as the legislative branch and to develop and enforce the judge-made common law which makes up a high proportion of our legal system. It is the courts' function to decide cases: to do so they must determine what is the law. It would be inconsistent with principle, and in many instances undemocratic, for the courts to maintain a common law which is outmoded and inconsistent with Parliament's policies as expressed in current legislation: see *Ervin Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731. Through the Act, Parliament established rights, and it was in accordance with conventional practice for the courts to apply the principle that where there is a right the law will provide a remedy: *Ashby v White*

¹⁶ In *Baigent's* case Cooke P (677) and Hardie Boys J (698–699) linked the removal of the remedies clause to a rejection of the concepts of superior law and judicial power to strike down legislation.

(1703) 2 Ld Raym 938; 92 ER 126. Irrespective of whether *Baigent's* case is seen as being contrary to Parliament's intention in passing the Bill of Rights Act, it is of course open to Parliament to limit or override the judge-made law which emerges from the Court of Appeal's decision.

The Baigent remedy might avoid protective provisions

- 52 Some respondents criticised the *Baigent* decision as being inconsistent with, and circumventing, statutory immunity provisions. They suggested it opened the door to wholesale avoidance of statutory protections in respect of Crown conduct. We do not accept these arguments.
- 53 It is important to emphasise, as did Cooke P in *Baigent*, that the judicial branch of government, like the legislative and executive branches, has been subjected by Parliament to the Bill of Rights Act: s 3(a). It follows that, where they may legitimately do so, the courts must apply the Act in performance of their functions in order to give effect to the will of Parliament. Those functions include the construction of legislation. Where the legislation falling to be construed is a provision conferring a power or an immunity, the courts will construe it in the light of all relevant pointers to construction, which now include the expressions of Parliament's will in the Bill of Rights Act. Among those expressions are the presumption that, in the construction of legislation, the Bill of Rights Act provisions will be given effect (s 6), and the direction that the courts will not decline to apply any provision by reason only that it is inconsistent with a provision of the Bill of Rights Act (s 4). The courts must determine in any given context which result better conforms with Parliament's expression of its intention in the three provisions: the provision being construed, s 6, and s 4.
- 54 Such a process is not novel but part of the everyday business of the courts. In *Baigent* Gault J was of the opinion that, having regard to s 4, the immunity provision in s 6(5) of the Crown Proceedings Act should not be circumvented by a Bill of Rights Act claim (708). The majority were of a different opinion, placing greater weight on s 6 of the Bill of Rights Act in determining the scope of the immunity in s 6(5) of the Crown Proceedings Act: see comments by Cooke P (674).
- 55 In performing the function of construction, as in all other aspects of their work, it is frequently necessary for the courts to weigh competing public values and make a judgment between them. *Baigent* is not to be interpreted as a judicial reversal of all powers and immunity provisions; as each case comes before it, the courts

will assess the competing values and make a balanced judgment as to how they should apply. Until Parliament has completed the task we propose of reviewing such clauses, it will be necessary for the courts to continue seeking to strike the correct balance in each case. In doing so, they should bear in mind both the values that led to the conferment of the original power or immunity and the propriety (or otherwise) of a construction that would lead the Bill of Rights Act to override it.

- 56 Existing protection and immunity provisions contained in the statute book are listed in appendix C, and are considered in chapter 5. It is apparent that they have been enacted without regard to any systematic principle, and in terms of the necessity test some are too wide and some are too narrow. In chapter 5 we recommend a review of all such provisions.

Likely pressure for increasing Crown powers in respect of bodies distinct from the Crown

- 57 We later recommend that public bodies carry primary responsibility for their breaches of the Bill of Rights Act while exercising their public functions. Except where the Crown is a party to such conduct it will not be liable, unless it is decided that there should be a residual Crown liability in the unusual case where the public body is unable to make compensation. We do not see any such residual liability as contradicting to any significant extent the substantial removal of Crown responsibilities to, for example, State-Owned Enterprises.

The merits

- 58 The fundamental question in our view is not whether it was open to the Court of Appeal to adjudicate as it did, but whether the public interest should lead Parliament to view the matter differently. That issue was the major focus of our draft report, which concluded that Parliament should refrain from doing so. In this report, we confirm that view.

THE LIKELY CONSEQUENCES IN FACT

- 59 In assessing the consequences of *Baigent's* case we note:
- In almost all proceedings (actual and anticipated) where *Baigent* compensation is sought, a remedy in tort under the general law appears also to be available. It would be surprising were that not so, given that the rights in the Bill of Rights Act have, in

general, long existed in our law and the courts have developed monetary and other remedies to give effect to the rights the law recognises and confers. The great bulk of the current proceedings concern law enforcement powers where common law tort remedies are generally available. In practice, the most relevant remedy sought has been, and is likely to continue to be, the rejection of illegally obtained evidence in the event that criminal proceedings are brought. It is when criminal proceedings are not brought – as in *Baigent* and similar cases – or fail, that a monetary remedy becomes more significant.

- *Baigent's* case was decided in 1994; since then only two awards based on that case have, we understand, been given by a court (see paras 68–70). Other claims have been settled before reaching trial.
- The experience in other comparable legal systems (set out in appendix B) indicates that the impact of the *Baigent* remedy might be quite limited. In Canada the Charter of Rights and Freedoms has, for 14 years, enabled those whose rights under the Charter have been infringed or denied, to apply for such remedy as the court considers appropriate and just in the circumstances. The conclusion of the extensive study done for the Commission is that the damages aspect of that remedy has not been significant; American and Caribbean experience is similar.

Incentive effect

- 60 It was argued by some respondents to the draft report that the *Baigent* remedy deters law enforcement agencies from undertaking legitimate action to protect the public. This argument, in general, assumes that the officer is acting outside the power conferred, but within the extra range of a protection provision. If that extra protection can be justified in terms of the essential role of law enforcement, then it should be included directly in the grant of power as we propose later (paras 127–131). If it is not included, it is possible, for example, that evidence taken outside the power (but within the protection) has been taken unlawfully and, accordingly, might be held inadmissible. As well, depending on the wording of the protection, the Crown might still be vicariously liable, in which case the protective provision may not completely deny a remedy to the aggrieved person. We record in paras 118–121 our view that in some cases a limited provision, protecting only the individual wrongdoer, might be justified. If there is no protective provision the official acting outside the statutory power is subject to liability

in tort, as is the Crown. In that situation, as well as where the protective provision does not prevent the action, the *Baigent* remedy does not have to be invoked.

- 61 Some law and economics proponents assert that negligence rules tend to help ensure careful behaviour. Protective provisions might undermine that incentive. On the other hand, it may be argued that immunities are needed so as not to “chill” efforts at law enforcement. We mention that argument when proposing that the individual might be protected for actions taken in good faith, while leaving the aggrieved person with a remedy. This second version of the incentive argument may be more significant for volunteers; for instance in emergencies and, indeed, more broadly, with members of public bodies such as school boards of trustees. Consider, also, the position of the citizen who is obliged to help the police (see the Police Act 1958 s 53).
- 62 The possible incentive effect of tort law has to be seen in context. In the case of judges and others exercising decision-making power, the continued integrity of the decision-making process and concern for personal reputation are critical spurs to the exercise of best judgment. So, too, are the careful processes of adjudication. There is, further, the prospect of being overturned on appeal or review.
- 63 For state employees who are carrying out the functions, the effect of poor job performance on employment prospects and promotion is likely to be a more immediate concern than the threat of tort action. Performance appraisal should also be more effective in correcting and preventing shortcomings in performance that might be tortious.
- 64 What studies there have been of the effect on behaviour of the law of negligence do not in fact suggest that, in general, that law has a strong impact: see, for example, Donald Harris “Can the Law of Torts Fulfil its Aims?” (1990) 14 NZULR 113, which drew on major recent research. The impact of insurance and the costs involved in bringing proceedings are likely to distort incentives which might otherwise be felt. The law of tort is, of course, not the only mechanism the law provides for encouraging safe behaviour. Regulatory requirements about food, vehicle maintenance, the provision of health care, and the suitability of building materials are only examples of a vast array of legal rules prescribing minimum standards of compliance. The importance of accreditation, or continued compliance with the standards of professional licensing and disciplinary bodies, can also operate as strong practical incentives to professional behaviour.

- 65 However, even if the threat of tort liability does not provide strong behavioural incentives for individuals, the availability of tort actions against those exercising statutory powers carries an important message. It gives effect to the principle that the state must act within the law. We recall the principle of equality before the law. As a practical matter, the tort action or an action for compensation provides relief to plaintiffs injured by unlawful acts breaching their rights and causing them loss.

An increase in the Crown's liability?

- 66 Also relevant to any assessment of the likely consequences are, first, the Crown's contingent liability, especially as stated by the police in their submission (appendix A); second, predictions made by the police of "a dramatic increase" in claims which they say are being borne out; and, third, the cost of processing the claims. Consideration of these matters has to take account of the matters listed in para 59: for instance, allegations of an unlawful search or arrest would, in general, appear likely to give rise to an action for damages whether the *Baigent* action was available or not. Whether the *Baigent* remedy leads to significantly higher total payments of damages than have been made in past tort actions remains to be seen. The costs of processing claims are partly caused by uncertainty as to the scope and application of the new remedy. It can be expected that those uncertainties, and the associated costs, will lessen over time. Potential plaintiffs may also seek to avoid some of those uncertainties by emphasising the traditional torts and their standard remedies, although we accept that they cannot be compelled to do so.
- 67 There is one qualification to the point that a remedy in tort will usually be available anyway in circumstances in which *Baigent* compensation is claimed. Where a protective provision exists, and it is limited to tort liability (eg, Crown Proceedings Act s 6(5)), it will be avoided by the *Baigent* action.

AWARDS OF DAMAGES SINCE *BAIGENT'S* CASE

- 68 In assessing the likely consequences of *Baigent's* case it is worth looking at two later cases in which courts have awarded damages. In *Upton v Green* (unreported, High Court, Christchurch, 10 October 1996, CP 91/94), the plaintiff alleged a breach of the right to a fair and public hearing under s 25 of the Act, and breach of natural justice under s 27 of the Act, after he was allegedly denied the opportunity to be heard before being sentenced by the first

defendant, a District Court judge. Tompkins J was unable to conclude whether, if the plaintiff had been fairly and fully heard, the District Court judge would have imposed a lesser sentence. Tompkins J awarded \$15 000 on the basis that the plaintiff had suffered loss of a chance; ie, that of persuading the District Court judge to impose a lesser sentence. The reasonable possibility that the District Court judge might have been persuaded to impose a lesser sentence was sufficient to lead to the award of compensation. Tompkins J noted that the compensation awarded “must be substantially less than would be appropriate for damages for wrongful imprisonment”. The observation recognised the possibility of higher awards where, unlike the case in question, the imprisonment had been imposed without jurisdiction.

- 69 The second case in which damages have been awarded for a breach of the Bill of Rights Act is *Kerr v Attorney-General* (unreported, District Court, Timaru, 7 August 1996, NP 233/95). In that case, the plaintiff gang member was awarded \$20 for breach of the right to freedom of movement, after being prevented from travelling further down State Highway 1. The nominal sum reflected in part the absence of any suggestion of actual or measurable loss as a result of the breach, but also the judge’s view that “an assessment of damages in these circumstances must endeavour to reflect the general standing of a plaintiff in the community”; thus the plaintiff should recover less than “a clearly decent and law-abiding person”.
- 70 We consider that the latter approach is inconsistent with the objective emphasised by members of the Court of Appeal in *Baigent* – providing a remedy to “vindicate human rights”. The availability of those rights does not depend upon the identity or the character of the plaintiff. The amount awarded was insufficient to provide any effective vindication of the right breached.

PRINCIPLES GOVERNING THE *BAIGENT* REMEDY AND LEVELS OF COMPENSATION

- 71 Many of the submissions we received on our draft report expressed concern about the levels of monetary compensation which may be awarded pursuant to *Baigent’s* case. This concern may stem from the remarks of Cooke P that in the case before him “an award of somewhat less than \$70 000 would be sufficient vindication on all or any causes of action” (678). Some have interpreted this statement as implying that a substantial award of damages would have been appropriate in that case; while in cases of more serious breach an award of \$70 000 or more would be appropriate. The position has not been clarified by the *Upton* and *Kerr* cases. In

Upton, the damages awarded were higher than has been the courts' practice in respect of tort claims, while in *Kerr* the amount awarded was nominal and not, we think, a helpful basis for future awards.

- 72 Nevertheless, we do not accept the arguments that the Commission in this report, or Parliament by statute, should seek to develop principles governing levels of compensation or otherwise limit the *Baigent* remedy. The scope of the Act is so wide and the range of potential situations which it will encounter so large that it is, in our view, not practicable to propose rules to control judicial decision-making. We consider that the preferable course is for Parliament to delegate that function in the first instance to the courts, which have taken particular care to handle the issues sensitively. The Court of Appeal's reasoned approach, carefully balancing all relevant factors, is illustrated by *R v Grayson and Taylor* (unreported, Court of Appeal, 28 November 1996, CA 255/96; CA 256/96). Appendix D includes the Court's discussion of the principles governing remedies for breach. If Parliament takes a different view as to policy from that developed by the courts, it may then intervene with the benefit of specific cases on which to focus.
- 73 The development of a principled Bill of Rights jurisprudence will also be assisted by the Attorney-General (or in criminal cases the relevant Crown Solicitor) being served with all Bill of Rights proceedings, and having the right to apply to be made a party and to be heard, whether or not there is potential liability of the Crown. We accept the advice of the Solicitor-General that small agencies lack the resources required to defend complicated claims, let alone to meet large compensation awards. The regular presence of the Australian Solicitor-General in constitutional litigation before the High Court of Australia should, in our view, be paralleled by an opportunity for the New Zealand Solicitor-General to do likewise in Bill of Rights Act litigation.
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4 A legislative response?

THE *BAIGENT* REMEDY: MAINTAIN OR REVERSE?

- 74 **W**e return to the question whether the *Baigent* remedy should be altered or abolished by legislation. We do not think that it should be, for three main reasons:
- the need to provide an effective remedy for breaches of rights under the Bill of Rights Act;
 - the development of common law remedies to protect rights and interests similar to those in the Act, is likely to be slow and sporadic;
 - international law supports linking remedies to rights.

The need for an effective remedy

- 75 First, we recall the reasons accepted by Parliament for enacting the Bill of Rights Act in the first place. They are stated in broad terms in the long title to the Act (see para 23).
- 76 While the Act does state new rights, in very large measure it restates existing rights, although at times giving them greater precision. In most, *but not all* cases of breach, the courts will be able to provide a remedy from their existing armoury. The Court of Appeal in *Baigent's* case took the view that provision of an appropriate remedy is a critical aspect of giving substance to the Act. Without appropriate remedies, the Act would not be what the executive proposed and Parliament purported to enact: a statement of fundamental rights of New Zealanders, which would constrain the power of the state (in the absence, of course, of legislation inconsistent with the Act – s 4). Appropriate remedies – including the rejection of evidence, the ordering of habeas corpus, the terminating of a trial, the declaration of illegality, the award of a

monetary remedy – are all essential means of emphasising that the state is subject to the law. The provision of sanctions adds to the recognition of the Act as an overarching set of principles by which all New Zealanders, including decision-makers, are guided and protected.

The development of common law remedies

- 77 Gault J, dissenting in *Baigent*, expressed the view:
The dynamics of the common law will not cease with the enactment of the Bill of Rights. There will continue to be the evolution of rights with consequential questions as to the interrelationship between the various rights recognised in the law in different ways. (709)
- 78 The Commission agrees, but is of the view that the argument supports our second reason why Parliament should not intervene. The common law may be expected, in time, to develop in areas where it does not currently provide remedies for interferences with rights and interests of the kind expressed in the Bill of Rights Act. In this way, common law will reflect the courts' view of society's current priorities and needs. The resulting remedies would be unlikely to be very different from the remedies provided for a breach of the Act itself. During the period of development of the common law, however, there would be considerable uncertainty which could be resolved only by successive proceedings. Hardie Boys J recognised this:
While it might be argued that the conventional common law doctrines must needs be developed in accordance with the spirit and intentment of the Bill of Rights, that would at best be a piecemeal approach, conducive to much uncertainty. (698)
- 79 It is the obligation of any state to ensure that, by the rule of law, its laws are sufficiently stable to allow citizens to be guided by their knowledge of the content of the law: Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980), 270. The cost and uncertainty in working out common law rights that would result from reversal of *Baigent* can, and in our view should, be avoided.

The principle of linking remedies to rights, and international law obligations

- 80 The third principle that supports the maintenance of the *Baigent* remedy is the central principle that where there is a right there should be a remedy. This principle was traced by McKay J back to the thirteenth century. It is also expressed in article 2(3) of the International Covenant on Civil and Political Rights (see para 25;

see also articles 9(5) and 14(1) and (6) of the Covenant; the latter is quoted in para 179). The significance of the international obligation is given added force by the comment, made in 1995 by the Human Rights Committee elected under the Covenant, on the most recent New Zealand report on its compliance with the Covenant.

- 81 The Committee knew about the decisions of the Court of Appeal in *Baigent's* case and the related *Auckland Unemployed Workers' Rights Centre* case (see para 9).¹⁷ Nevertheless, in its comment on the New Zealand report, the Committee expressed concern at para 12 about the absence of express provision for remedies for all those whose rights under the Covenant or the Bill of Rights Act have been violated.
- 82 That concern about the lack of an express remedy appears in para 19 of the Committee's suggestions and recommendations:
The Committee recommends that the State Party take appropriate measures . . . to provide remedies for all persons whose rights under the Covenant have been violated.
- 83 The response might be made to the Committee that the way in which the remedy is made available – by constitutional provision, legislation, administrative act, or court decision – is not the Committee's concern. All that international law requires is that there be an effective remedy. In our legal system, like many others, the matter of remedies has, in large measure, been left in the hands of the courts.¹⁸ That historical development makes it clear that express constitutional and legislative remedies are not the only, or even the main, remedies. The basic requirement is that an effective remedy be available, as article 2(3) makes clear. *Baigent's* case indicated that, in limited circumstances, the courts might once again supplement the remedies they have traditionally made available.
- 84 The Commission accordingly concludes that no legislation should be introduced to remove the general remedy for breach of the Bill of Rights Act that the Court of Appeal held to be available in *Baigent's* case. As a matter of principle and international obligation,

¹⁷ *Human Rights in New Zealand: Report to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights* (MFAT Information Bulletin No 54, Wellington, June 1995), 36.

¹⁸ See, for example, the contribution of Lord Taylor CJ to the debate on a proposed Bill of Rights for the United Kingdom which was introduced by Lord Lester qc and given all three readings in the House of Lords: [1995] Public Law 198.

a remedy should be available for breach of a right protected by the Act which tort law, or other law,¹⁹ does not already adequately remedy.

PRIMARY LIABILITY

- 85 We now turn to the question of who bears liability for breach of the Act. This depends not only upon who has actually committed the breach, but also upon the characterisation of the Crown's liability in *Baigent's* case.

The Crown

- 86 The Crown is primarily liable under s 3(a) for breaches of the Act by the executive, insofar as those breaches may be considered acts of the Crown, eg, breaches by Ministers and departments. In *Baigent* the Court of Appeal accepted that the Crown could be liable for breaches of the Act by the police. The members of the court did not expressly rely, to reach this conclusion, on the statement in s 3(a) that the Act binds acts of the three branches of government. Instead it relied on *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC), and in particular the statement in that case that a breach of the constitution created a liability in public law of the state itself. Nevertheless, for reasons which we outline below, we do not accept that a breach of the Bill of Rights Act, by any person or body exercising a public function, can of itself lead to the Crown being liable. Only McKay J appears to give express support to this proposition (718). We prefer to read the Court of Appeal's decision as simply recognising that the actions of the police were clearly those of the Crown.

Public bodies

- 87 We have recorded that conduct of public bodies other than the executive is subject to the Bill of Rights Act by reason of s 3(b). We see no reason in principle why *Baigent* liability should not extend to breaches of the Act for which those bodies are responsible. We note, however, that there are, as yet, no decided cases in which a court has granted a *Baigent* remedy against a public body rather than the Crown itself. We attribute this to the cases

¹⁹ For example, the power of the courts to declare State action to be unlawful or to reject evidence obtained unlawfully, or the remedies in the Electoral Act 1993 in the case of the right to vote.

so far not having concerned public bodies which are distinct from the Crown, rather than to any principle that the remedy is available only against the Crown.

- 88 We consider that public bodies' liability in terms of *Baigent's* case should match the scope of their public functions, powers and duties. Where there has been devolution of such public authority and responsibility, whether to local government, to State-Owned Enterprises, or otherwise, that public body is the appropriate defendant to a *Baigent* claim in respect of its conduct. It would be inappropriate to cut across the Public Finance Act 1989 by relieving public bodies of legal and financial liability for their own breaches. Imposing liability would strengthen the incentives for public bodies to comply with the Act. The Crown should not be subject to primary liability in such cases, unless it is party to the relevant conduct.
- 89 The degree of supervision and control exerted by the Crown over different public bodies varies considerably. In some instances the Crown appoints officers of the public body, or some of them; in others the Crown may give directions. It is appropriate to leave the courts to determine whether the Crown's conduct is such as to make it liable as principal or as a party; it is a conventional function of the courts to apportion liability. Relevant considerations are likely to include the nature and extent of the Crown's powers of supervision and control in relation to the public body, and the way in which those powers have been exercised leading up to the breach. The courts might also be expected to consider the respective moral blameworthiness and causative potency of the conduct of the Crown and the public body.²⁰ Regard could be had to decisions in analogous spheres such as *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 512, in which the Privy Council rejected the imposition of liability on the appointor of directors to a company's board. The indications in *Baigent* that Bill of Rights Act cases should not be tried before a jury (678, 692) show the courts' awareness of the need for care and sensitivity in applying its principles.

²⁰ See *New Zealand Apple and Pear Marketing Board v Watts and Attorney-General* [1967] NZLR 205. The ultimate responsibility of the Crown to secure performance of the Act may lead the courts in some cases to apply the principle of *New Zealand Māori Council v Attorney-General (Broadcasting case)* [1994] 1 NZLR 513 (PC), that Crown power to rectify a state of affairs which is not exercised may engage responsibility. This is the law of England (and was, before the accident compensation legislation, the law of New Zealand) in respect of occupier's liability: *Wheat v Lacon* [1966] AC 552.

- 90 We prefer that the proposals which we advance be achieved by judicial rather than legislative clarification. A preference for the former method could point to the facts of *Baigent's* case and the associated case: neither concerned a public body distinct from the Crown. In a case which did concern a public body the points we have made above could be stated and no doubt developed. Further, it has been for the courts in general to develop and refine the remedies that they award to protect rights. A statutory expression of principles governing when the Crown is liable as a party for breaches of the Act by a public body may hinder a court's ability to do justice in a particular case. Finally, as discussed in the previous paragraph, there is such variation in the control the Crown exerts over public bodies, that it would in our view be impracticable to develop principles in legislation as to when the Crown would be liable for breaches of the Act by public bodies, based on an underlying concept of control. As observed at para 72, however, Parliament retains full authority to intervene if it sees reason to do so.

Strict liability?

- 91 In para 12 we raised the question whether *Baigent* liability could be characterised as strict liability. In *Whithair v Attorney-General* [1996] 2 NZLR 45, 57, Eichelbaum CJ considered that there was no principled basis for the courts to circumscribe a remedy for breach of the Act by imposing an additional requirement that the breach be intentional or reckless. The Act's focus on the position of the citizen whose right is affected makes it in our view appropriate that there should be strict liability. This conclusion is consistent with the "rights-centred" approach of the Court of Appeal in several cases.²¹
- 92 A point of principle is that the development of a satisfactory Bill of Rights Act jurisprudence requires systematic consideration of the issues by the courts. The most efficient course, supported by the Solicitor-General, is to require all such proceedings to be served on the Crown Law Office or (in criminal cases) on the relevant Crown Solicitor (see para 73).

Crown Proceedings Act 1950 section 6

- 93 In the meantime, consideration could be given to amending s 6 of the Crown Proceedings Act to make the Crown directly liable for

²¹ For example *MOT v Noort* [1992] 3 NZLR 260; *R v Goodwin (No 2)* [1993] 2 NZLR 390; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Grayson and Taylor* (unreported, Court of Appeal, 28 November 1996, CA 256/96).

all the torts and civil wrongs for which it is responsible; at present its liability is mainly vicarious and there are gaps in the coverage. There are very helpful proposals by the Ontario Law Reform Commission in its report *The Liability of the Crown* (1989), Professor Peter Hogg qc oc (who has also written about the related New Zealand position) in *Liability of the Crown* (2nd ed, Carswell, Ontario, 1989), and the Public and Administrative Law Reform Committee in its 1980 report on *Damages in Administrative Law* (Report No 14). Earlier New Zealand legislation is also instructive. The Crown Suits Amendment Act 1910, for instance, provided that proceedings could be brought, independent of contract, against the Crown for a wrong or injury for which an action for damages would lie if the defendant was a subject of His Majesty.

A POSSIBLE CROWN RESIDUAL LIABILITY

- 94 Statements in *Baigent's* case can be, and have been, read as indicating that the Crown is, in a sense, a total guarantor of the Bill of Rights Act. In particular, McKay J stated that where "a right is infringed by a branch of government or a public functionary, the remedy under the Act must be against the Crown" (718). On this reading, any breach of the Act might be the subject of proceedings or a remedy against the Crown, either alone or against the wrongdoer as well; and regardless of whether the Crown (essentially Ministers and departments – see para 6) had anything to do with the matter at all.
- 95 We reject this as the correct statement of principle to emerge from *Baigent*, which imposed direct liability on the Crown on the grounds of breach by an element of the executive in terms of s 3(a).²² We do not consider that such a broad principle of Crown residual liability can be justified. First, *Baigent's* case and the associated case did not involve public bodies which are distinct from the Crown; the general liability of the Crown for unlawful police actions was not in any doubt. Compare, for instance, cases involving a school board of trustees.
- 96 Second, any general guarantor proposition faces major hurdles in respect of non-monetary relief. For instance, a declaratory order (rather than an injunction) under s 17 of the Crown Proceedings Act issued against the Crown, which may have no relevant powers of control or direction over the body which has acted unlawfully, could be of no direct effect in the particular case. The same is true of the remedies available in the regular course of criminal

²² The police have autonomy for many purposes but for the purposes of the Act fall clearly within s 3(a) rather than s 3(b).

proceedings (eg, the rejection of evidence or the ending of the trial), especially if central government is not the prosecutor. In that context a remedy against the Crown as “guarantor” does not appear to have any point.

- 97 A third comment concerns the undertaking of each state party to the International Covenant on Civil and Political Rights to ensure that any person whose rights or freedoms are violated has an effective remedy (article 2(3) – see para 25). These provisions reflect the essential principle that where there is a right there is a remedy. They do not, however, say that the remedy must in every case be against the state party. Rather, the state party, through its own constitutional processes, must ensure that there is an appropriate remedy against an appropriate defendant.
- 98 Finally, it would be inconsistent with the structure of government worked out over our nation’s history – especially in the last 10 years – for the Crown to have a general responsibility under the law to ensure that all who are subject to the Bill of Rights Act comply with it, and also to have a correlative duty to pay monetary compensation for breach. More particularly it would be inconsistent with the financial autonomy of public sector bodies under the Public Finance Act 1989. Parliament has made deliberate decisions about that structure, dividing the power of the state and placing limits on the authority of central government (particularly Ministers) in respect of the separate parts. If there is to be Crown responsibility, then there must, in general, be power to meet the responsibility as well. But given the structural decisions that have been taken, there cannot be such power. That responsibility and the pressure for a related power would also extend to *private* bodies and persons exercising public power: see s 3(b) of the Bill of Rights Act.
- 99 The significance of a general guarantor proposition is demonstrated by the principal case cited in support of it. In *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* the Privy Council held that the plaintiff, who had been deprived of his liberty for contempt of court, without due process of law and in breach of the Constitution, had a claim in public law against the state to monetary compensation. That direct claim, based on the Constitution which included a specific remedy provision (a precedent for the remedies clause in the 1985 White Paper), avoided the immunity of the High Court judge from liability or legal proceedings.
- 100 Judicial immunity is an example of the public interest justifying protection of an individual officer performing a public function. But there is a competing public interest in providing a remedy for

someone whose rights have been breached. The solution offered by *Maharaj* was a direct liability on the state.

A limited principle of residual liability?

- 101 The provisional view expressed in our draft report was that the Crown (or to use Cooke P's term in *Baigent*, "the state") should not in general be liable for breaches of the Bill of Rights Act when it does not have relevant powers of direction and control over the body or persons whose action is challenged.
- 102 We have revisited our original total rejection of Crown residual liability and invite the Government to give further consideration to this topic. There is force in the argument that, for normative and educative reasons, and also to ensure that the citizen's right is not empty, the Crown should assume a residual liability where there would otherwise be no effective remedy. This would be subject to the application of any relevant immunity clause. Further, it may be argued that in terms of article 2(3) of the International Covenant on Civil and Political Rights (see para 25) it is desirable that the state – which is ultimately responsible for the whole of the system of government – should have both the incentive and the opportunity to ensure that the Bill of Rights Act is effective. It is emphasised that the Act applies in relation to acts of the legislative, executive and judicial branches; accordingly, any gap in the system of protection is likely to entail breach by New Zealand of its international responsibility.
- 103 A concept of residual liability and the requirement that the Attorney-General (or in criminal cases the relevant Crown Solicitor) be served, and have rights of audience, would add emphasis to the status of the Bill of Rights Act as an overarching constitutional measure. The existence of an effective remedy would provide a sanction for breach; a remedy to the person affected; and evidence that the rights are taken seriously within New Zealand institutions. The total result would afford increasing recognition within the public sector of the importance of the Bill of Rights Act norms and the need for public sector conduct to conform with them.
- 104 On the basis that the Crown's liability would be residual only, and limited to cases where there was no effective remedy against the public body, the costs would be substantially contained. The prospect of a State-Owned Enterprise becoming insolvent is remote; there is greater prospect of impecuniosity in relation to such entities as the 2 600 school boards of trustees.

- 105 If it were considered desirable to provide for residual liability on the Crown, the following provision could be inserted into the Act:
If a person or body (not being the Crown) found liable under section 3(b) for a breach of this Act is unable to make redress, the Court may direct provision of redress by the Crown in such manner as the Court may think just.
- 106 The question whether the Crown should assume a residual responsibility is finely balanced. To support it would give a clear message that the rights are indeed recognised as fundamental in society. Looked at from the standpoint of the citizen whose rights are breached, it may be said that the state must either provide an effective remedy or itself accept the responsibility for failing to do so. This is the result reached in the European cases (see para 37). The opposing argument focuses rather on the position of the infringing party, and asks why the taxpayer should have to assume responsibility for conduct to which the Crown did not contribute.
- 107 The topic was not raised in our draft report and so we do not have the advantage of others' views on it. We mention it for consideration at this stage and will return to it in the course of further work on the Crown reference.

CONCLUSIONS

- 108 To summarise, the Law Commission has concluded:
- (1) No legislation should be introduced to remove the general remedy for breach of the Bill of Rights Act established in *Baigent's* case.
 - (2) The Crown is liable for its breaches of the Act, and those of its servants and agents: s 3(a). Public bodies are liable for their breaches, and those of their servants and agents: s 3(b).
 - (3) The Crown should not be primarily liable for breaches of the Act by public bodies when its conduct is not such as to make it liable as a principal or as a party.
 - (4) Residual Crown liability warrants consideration where there would otherwise be no effective remedy for a breach of the Act.
- 109 It would follow from propositions (2) and (3) that the Crown would not be primarily liable for, say, the actions of a State-Owned Enterprise. That consequence would have no effect on the entitlement of the plaintiff to seek monetary relief from the State-Owned Enterprise.

5 Review of existing powers and immunities

110 **A**ll existing public sector protections and immunities should be reviewed in the light of the principles of the Bill of Rights Act and *Baigent's* case. This substantial task is perhaps best approached by inviting each department to review the statutory powers and immunities, and like provisions, in legislation which it is responsible for administering (see appendix C). Departments should consider the justifications for the power or immunity in terms of the necessity test, or suggest possible deletion of or amendments to the relevant provisions. A decision may then be made as to how the necessary reforms can be made systematically and efficiently. In the meantime, existing statutory protections and immunities will continue to have effect insofar as, on their proper construction, they give protection from *Baigent* claims.

THE RANGE OF PROTECTIVE PROVISIONS

- 111 The statute book contains hundreds of provisions giving protection from liability or legal suit in respect of the exercise of statutory power. We have collected those provisions and commented on them in appendix C. That commentary also raises some broader issues as the protection provisions vary greatly in the following ways:
- (1) *Whether they are included at all:* For instance, most labour legislation does not include protection provisions but confers powers on inspectors in what are presumably considered adequate terms. The consequence is that action outside those powers, for instance by way of search or seizure, might be the subject of civil proceedings for trespass.
 - (2) *Who is protected:* Provisions may protect one or more of the persons exercising the power, the body to which they belong or by which they are employed, the members of the body, or

the Crown. *Baigent's* case suggests the possible significance of the differences. Section 6(5) of the Crown Proceedings Act protected the *Crown* from tort proceedings under that Act in respect of the execution of judicial process (in *Baigent's* case a search warrant). By contrast, other relevant provisions, for instance in the Crimes Act 1961, protected the officials (the police officers) and not necessarily the Crown – but see the next point.

- (3) *The thing in respect of which protection is afforded:* Section 6(5) of the Crown Proceedings Act gives protection from tort proceedings. A Bill of Rights Act action, however, would not be covered by that protection. Another significant difference in the provisions is that some merely prevent legal proceedings being brought against the individual, but leave that individual's substantive liability unaffected, with the consequence that an employer (such as the Crown) may still have vicarious liability. The provisions also vary in respect of the protection they give against criminal and disciplinary liability.
- (4) *The actions in respect of which protection is afforded:* Sometimes the act must be *in exercise* of the power, while in other provisions acts in *purported* exercise of the power are also protected. The restructuring statutes (see para 114(4)) protect things effected or authorised by or under the reorganising legislation.
- (5) *The requirement (or not) of good faith or due care or both, if protection is to be accorded:* The courts sometimes read such requirements (especially that of good faith) into an apparently broader protective provision. The interpretative direction in s 6 of the Bill of Rights Act is sometimes available to assist that process. Such a process will sometimes lead to essentially the same practical result as the *Baigent* remedy, as the judgment of Gault J (who dissented on the availability of a Bill of Rights Act remedy) in that case shows.

112 The cumulative requirements of some of the provisions suggest that they accord little real protection. If (4) and (5) are combined, as they often are, the person seeking protection must be acting in accordance with the legislation, in good faith, and with reasonable care. It would be unusual for such a person to be liable in the absence of such a "protective" provision.²³

²³ For recent discussion, see *Percy v Hall* [1996] 4 All ER 523, which held police not liable for wrongful arrest and false imprisonment when acting in reasonable belief that the plaintiffs were committing an offence under bylaws, even though those bylaws were subsequently held to be invalid.

- 113 To the extent that a protective provision is truly protective and prevents the plaintiff proceeding, even though a tort or other breach of rights is alleged to have occurred, the question arises whether that effect can be justified.
- 114 As indicated in para 111, we have found it convenient, when considering the mass of protective provisions, to classify them in various ways. Another way is by reference to the subject-matter of the powers or functions they protect:
- (1) *Powers of law enforcement*, including investigation, inspection, search, arrest, detention, and imprisonment: these were the powers in issue in *Baigent*.
 - (2) *Judicial and related functions*, where the protections relate not just to the judicial and other official participants, but also to witnesses, parties, and counsel, as in *Harvey v Derrick*.
 - (3) *Powers (sometimes duties) of reporting*, for example, of possible public or private dangers (such as the health or well-being of a child) or in the general course of a public responsibility.
 - (4) *Transfer of property* in the context of the restructuring of public and other bodies, as in a number of recent statutes.
 - (5) *General functions*: any act of any person or specified persons in exercise of the functions set out in the Act.

An example – the Law Commission Act 1985

- 115 The protective provision in the Law Commission Act 1985 (First Schedule, cl 14) helps illustrate aspects of (3) and (5) in para 114. In addition, it helps raise some of the relevant issues of principle. The provision follows a fairly standard form:
- 14 Proceedings privileged**
- (1) No proceedings, civil or criminal, shall lie against the Commission for anything it may do or fail to do in the course of the exercise or intended exercise of its functions, unless it is shown that it acted in bad faith.
 - (2) No proceedings, civil or criminal, shall lie against any member of the Commission for anything the member may do or say or fail to do or say in the course of the operation of the Commission, unless it is shown that the member acted in bad faith.
 - (3) No member of the Commission, or officer or employee thereof, or person appointed or engaged under clause 3 of this Schedule, shall be required to give evidence in any Court, or in any proceedings of a judicial nature, in respect of anything coming to the knowledge of the member, officer, employee, or person in the course of the operations of the Commission.

- (4) Anything said or any information supplied or any document produced by any person in the course of any proceedings before the Commission shall be privileged in the same manner as if the proceedings were proceedings in a Court.
 - (5) For the purposes of clause 3 of Part II of the First Schedule to the Defamation Act 1992, any report made by the Commission in the course of the exercise or intended exercise of its functions shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.
- 116 The effect of subcl (5) is to accord qualified privilege in defamation to reports of the Commission. Subclauses (1) and (2) have that effect, as well, for the Commission and its members (but not its staff or consultants). Subclause (4) also appears to reflect that idea, although the concept of “proceedings before the Commission” is more apt for a court, a tribunal, or a body investigating a complaint than it is for the Law Commission.

The breadth of the protection

- 117 But the broad provisions of subcls (1) and (2) could apply well beyond actions relating to speech (including, for example, breach of copyright or confidence as well as defamation). On a literal interpretation they could even apply to administrative actions under the Law Commission Act, relating, for example, to contracts for the supply of goods or services and contracts of employment – although a court would be reluctant to reach such a conclusion. A large number of bodies have that protection in respect of their management functions. There does not appear to be good reason for those bodies (as distinct from their officers and staff) being protected from the ordinary course of law in respect of regular administrative transactions. The principle of equality before the law would strongly argue otherwise. Moreover, it will be a valid question, to be considered in the context of each specific provision, whether statutory powers are in fact needed to perform certain administrative and management functions. Accordingly, the Commission proposes that broad protective provisions such as these should be narrowed.

Protection of officers acting in good faith

- 118 In our later discussion of judicial immunity (see chapter 6) we recommend a personal immunity for officers involved in the administration of justice, if they act in good faith, but liability of the Crown if there has been a breach of a plaintiff’s rights under the Act. Such a potential distinction is made in *Percy v Hall* [1996]

4 All ER 523, 542 and 545. It may in some cases be desirable to extend this approach to other spheres.

- 119 Section 86 of the State Sector Act 1988 grants very broad protection to employees in the state sector and, when read with section 6(4) of the Crown Proceedings Act, may defeat any general vicarious liability of the Crown in tort. The narrower type of provision which we favour would continue to protect individual wrongdoers from civil proceedings when acting in good faith. It would, however, leave the person injured with a remedy against the person or body (usually the employer) who is responsible for those individuals and their actions in respect of:
- conduct other than the due performance of their public functions; and
 - their regular administrative transactions (such as the leasing of premises and employing staff).
- 120 The result would be a primary liability on the employer for the conduct of its operations beyond the protected sphere of due performance. Its liability would be in respect of the acts and omissions of its officers, staff, and (within the limits of the common law) independent contractors. Whether the conduct is of the employer, or outside its sphere, will entail a value judgment.²⁴ Such judgment would be made by the court unless it is considered, when a particular empowering provision is revised, that the liability can be codified.
- 121 For example, members of the board of trustees of a school might be protected so long as they act in good faith, with the board remaining liable. An express legislative statement of that protection might be important in encouraging possible candidates for such public service. It may also prevent risk-averse actions (or omissions) by those who are in office and who have responsibilities to promote the public interest. The use of such provisions is supported by Professor Peter Hogg in *Liability of the Crown* (2nd ed, Carswell, Ontario, 1989), and in his report for the Ontario Law Reform Commission on *Liability of the Crown* (OLRC, Toronto, 1989).
- 122 As noted above, some of the protective provisions do not have complete preventative effect. Rather, they protect the individual who has taken the action, while leaving the person injured with a remedy against someone else (see para 111(3)). This depends on, first, the identity of the person who is protected (the wider the

²⁴ See *Petterson v Royal Oak Hotel* [1948] NZLR 136; *Launchbury v Morgans* [1973] AC 127; *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7.

description, the wider the protection); second, on whether vicarious liability is unaffected by the protective provision; and third, on whether, in any event, the principal is directly liable.

- 123 Protecting the individual wrongdoer, while permitting an action against someone else, might also be achieved in practice without protective legislation, by the principal agreeing to indemnify the wrongdoer. There will, however, sometimes be good reason for Parliament to provide express statutory protection rather than an indemnity. For instance, it may not be practicable to provide the indemnity by agreement when people volunteer or are required to help in an emergency. More generally, as already stated, the protection may be important in encouraging citizens to undertake public responsibilities and to pursue them positively. In addition, s 59(5) of the Public Finance Act 1989 inhibits the use of indemnity agreements in major areas of public activity.
- 124 To return to the protective provision of the Law Commission Act, subcl (3) provides in broad terms an immunity in respect of giving evidence, apparently on the model of judicial immunity. At least eight other officials and bodies (the Ombudsmen, Human Rights Commission, Privacy Commissioner, Commissioner for Children, Health and Disability Commissioner, Police Complaints Authority, Securities Commission, and the Intelligence and Security Committee) have similar broad protection (although with exceptions in respect of certain crimes such as corruption). Unlike the Law Commission, they also have the responsibility to investigate particular complaints, and have related coercive powers and sometimes a mediation function. An application of the necessity test is appropriate when each case is considered. A judgment is required as to whether the body needs to be able to assure potential informants that their confidence will be respected so that the information flow does not cease. An alternative is to rely on s 35 of the Evidence Amendment Act (No 2) 1980 and the safeguards of the Official Information Act 1982 and the Privacy Act 1993: see *Evidence Law: Privilege* (NZLC PP23, 1994). We are at present considering the issues in the context of our evidence and Official Information Act references and defer further comment at this stage.

The defence of statutory authority

- 125 The need for adequate breadth is apparent from such authorities as *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. The recent decision of the House of Lords in *X v Bedfordshire County Council* [1995] 2 AC 633 illustrates the competing interests which

the law seeks to balance. Statutory authorisation to undertake an act, or a class of acts, provides a general defence to an action for nuisance, and may or may not go further. As Lord Browne-Wilkinson stated in *X v Bedfordshire County Council*, however, statutory authority provides a defence only “where the loss suffered by the plaintiff is the inevitable consequence of the proper exercise of the statutory power or duty” (733). The defence requires that the operation be conducted with all reasonable regard and care for the interests of other persons. As the limits of the defence developed in the nineteenth century, Parliament, faced with the spectre of residuary liability, decided that greater protection for the statutory body was required in some cases. Accordingly, it deliberately cut across the common law by stating that there would be no liability in given situations, provided there was absence of bad faith. Other operations were evaluated differently: sometimes the statutory immunity existed only if the operations were conducted with reasonable care. The immunity served the dual purpose of freeing the operator of inhibition in performing its activities and eliminating the uncertainty, which existed at common law, as to whether the defence of statutory authorisation extended beyond the tort of nuisance.

- 126 Several submissions on our draft report rightly recognised that an immunity can provide an extra layer of protection (in respect of negligent conduct) which stand-alone powers cannot, because of the limits of the defence of statutory authority noted in para 125. But it is in our view desirable to focus in particular cases on whether officials should be protected even where they have failed to exercise reasonable care. The issue requires consideration in the course of the overall review of statutory powers and immunities which we recommend.

Powers of law enforcement

- 127 We turn now to the first group of powers listed in para 114: powers of law enforcement, including investigation, inspection, search, arrest, detention, and imprisonment. They are the subject of extensive discussion in appendix C. The powers and protective provisions in *Baigent's* case and the associated case fall into this group.
- 128 In most situations, the starting point is the statutory power. This may directly confer coercive power, eg, on police officers to arrest a person whom they suspect, on reasonable grounds, has committed certain (usually imprisonable) offences. Or it may authorise such powers to be conferred, as when a judicial officer issues a search

warrant on being satisfied that there are reasonable grounds for believing that evidence of certain offences exists at a particular address. Some, but not all, of these powers – conferred widely across the statute book – are paralleled by protective provisions. There is no generally applicable reason why protections or immunity provisions are needed along with those powers if the powers are sufficiently broad. We are satisfied that the need for a special protection on policy grounds must be considered case by case.

- 129 If the protective provision matches the power exactly (as some do), it has no legal effect. If it extends beyond the power, the questions must be asked, first, whether the power was conferred in sufficiently ample terms in the first place; and second, whether it should be extended to include the extra areas of protection. If the power is not extended, there is the prospect that the illegal character of the action in the protected area will have a consequence despite the protection. If the protection is from proceedings, and not from liability, the employer might still be vicariously liable (see para 111(3)), and the illegality, for instance of the taking of evidence, might affect the admissibility of that evidence. Those possible effects are relevant to any possible argument about incentives.
- 130 The conclusion which the Commission has reached is that, in general, law enforcement powers – like general powers of administration when required (see para 117) – should stand alone. Power should be conferred in appropriate terms in the first place. The Submarine Cables and Pipelines Protection Act 1996 offers a useful model of empowering provisions sufficiently wide not to require separate immunity provisions. Section 17(1) provides:
If a protection officer believes on reasonable grounds that a ship or equipment belonging to a ship is being used in a protected area in the commission of an offence against section 13 of this Act, the protection officer may, by any means of communication, order the master of the ship to remove the ship from that area. [Emphasis added]
- 131 An officer who acts reasonably and honestly is protected from civil liability because he or she has acted within the scope of the statutory power. There is no need for an immunity provision in the same terms, and the 1996 Act does not provide one.

CONCLUSIONS

- 132 Accordingly, the Law Commission recommends that current powers, protective provisions, and immunities be systematically reviewed, initially by ministries and departments, and that all such future provisions be considered in the light of the following principles:

- (1) Broad protective provisions should be narrowed so as to conform to the necessity principle. In particular, powers or provisions should not protect a public body in the exercise of management or administrative functions (para 117).
 - (2) If a protective provision is justified in order to encourage provision of a public service, it should not prevent proceedings against another appropriate defendant (such as the employer) by the person whose rights have been breached (paras 118–121).
 - (3) The power conferred should be adequate to the purpose; a protective provision should not, in general, be included as well (paras 127–131).
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The position of judges and
other participants in the
justice system

133 We turn finally to the important question of whether, and if so, how, rights under the Bill of Rights Act should be enforceable against, or in respect of conduct by, judges and other participants in the justice system. This in turn raises questions as to the immunity of judges, justices, and others who exercise judicial functions.

JUDICIAL AND RELATED IMMUNITIES

134 The present law is that superior court (Court of Appeal and High Court) judges, like legislators, effectively have total immunity from suit, so long as they are purportedly acting in their judicial capacity. The status and immunity of judges of the Employment Court is not defined by statute.

135 District Court judges and justices of the peace have protection so long as they are acting within jurisdiction. There is certain immunity for quasi-judicial adjudicators and registrars exercising judicial functions, but no protection where the function is not characterised as judicial. Protection of registrars, sheriffs and bailiffs is limited and uneven in its coverage.

136 Our draft report recommended that the immunities at present possessed by superior court judges should be extended to District Court judges and justices of the peace. No respondent to the draft report argued for removal of the immunity of superior court judges. Some respondents were, however, of the view that there should be a remedy against the Crown as exists in Trinidad and Tobago: see *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979]

AC 385 which was relied on by the Court of Appeal in *Baigent's* case. We discuss in paras 154–159 the desirability of such a remedy in New Zealand.

- 137 Although the detail of judicial immunity varies from court to court and country to country and over time, the central importance of the principle is well established. For instance, in 1988 the United Nations General Assembly endorsed the following propositions included in the declaration of Basic Principles on the Independence of the Judiciary (GA Resns 40/32 and 40/146):

Professional secrecy and immunity

- 15 The judiciary shall be bound by professional secrecy with regard to their deliberations and the confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
- 16 Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

In *Warren v Warren* [1996] 3 WLR 1129 it was held that a judge – whether of the High Court or of any other court – is not a compellable witness in relation to the exercise of that judge's judicial functions, although the judge is competent to give evidence.

Reasons for judicial immunity

- 138 The reasons for the protection accorded by judicial immunity include:
- promoting the fearless pursuit of the truth;
 - ensuring that the judicial function is fairly and efficiently exercised without improper interference;
 - safeguarding a fair hearing in accordance with natural justice, which should reduce the prospect of error;
 - promoting judicial independence;
 - achieving finality in the litigation in accordance with the essential principle of *res judicata*, except insofar as the law provides for appeal or permits review (collateral challenge should not be able to avoid that principle or widen the opportunities for appeal and review); and
 - there exist adequate rights of appeal against, and rehearing and review of, the decision itself (as opposed to proceedings against the person taking the decision), with related powers to delay the effect of any judgment or penalty while the processes are pending.

139 Different weight can be and is given to these reasons. The more general rationale for immunity is that, in exposing judges of the superior courts to liability to suit, the costs of prevention would be greater than the value of the cure. In *Nahkla v McCarthy* [1978] 1 NZLR 291 a disgruntled litigant sued the President of the Court of Appeal. The President's successor had sat on the case complained of and elected not to sit on the appeal. The principles were stated by Woodhouse J:

An action complaining of the judicial work of a superior court judge is probably unique in New Zealand. In the United Kingdom the number of recorded attempts to bring a similar action during the past 150 years or more can be counted on the fingers of one hand. None has succeeded.

It is not necessary to search for the reason. It lies in the right of men and women to feel that when discharging his judicial responsibilities a judge will have no more reason to be affected by fear than he will allow himself to be subjected to influences of favour. Thus he is surrounded with an absolute immunity from civil proceedings for acts done or words spoken in the exercise of his judicial office. But that immunity is in no sense a private right which might be regarded as having been conferred upon him and which he then might be said to enjoy. He is merely the repository of a public right which is designed to ensure that the administration of justice will be untrammelled by the collateral attacks of disappointed or disaffected litigants. That simple concept is gladly accepted, we believe, by the citizen and lawyer alike. And its strength extends to preventing civil proceedings against the judge in respect of his exercise of jurisdiction even though he may act with gross carelessness or be moved by reasons of actual malice or even hatred . . .

A judge can, of course, be made to answer, and in a proper case pay dearly, for any criminal misconduct. Like any other citizen criminal proceedings may be brought against him. If the need arose steps could be taken in the Parliament to have him dismissed from office. If in the course of his work he should fall into error the matter can become the subject of appeal. If he should wrongly deprive a man of his freedom then altogether apart from appeal, there is the remedy of habeas corpus. But in relation to the performance of his judicial office the judge is immune from attack in civil proceedings. (293–294)

The limits of judicial immunity

- 140 Judicial immunity must be seen in context. There is a range of remedies available to those aggrieved, which reinforces the responsibility and accountability of judges. They include:
- rejection of evidence (eg, evidence obtained under an unlawful warrant) or stay of proceedings (eg, for delay);
 - appeal against, review of, or rehearing of, decisions;

- civil proceedings in respect of actions of judicial officers not taken in the exercise of their judicial functions;
 - criminal prosecution in respect of the corrupt exercise of judicial functions; and
 - removal processes for serious judicial misbehaviour or incapacity.
- 141 That list indicates that references to “absolute judicial immunity” are misleading. Other participants who benefit from judicial immunity are also subject to sanction, eg, witnesses, counsel, and litigants may be the subject of perjury and contempt proceedings.

Elements of the immunity

- 142 We now turn to the more confined area of immunity from civil liability or civil process. We have to consider a number of variables in respect of:
- *the range of bodies and persons who benefit*: courts of superior (“unlimited”) and limited jurisdiction, and different officers within them; tribunals; and commissions of inquiry;
 - *the subject-matter of the immunity*: giving evidence about the judicial process, and liability or suit in respect of actions done (judgments given, warrants issued, etc) and of words spoken;
 - *the area of jurisdiction*: absolute or limited and, in the latter case, how the limit is to be assessed and the relevance (if any) to that assessment of the care which the judge has exercised;
 - *the state of mind*: the significance, if any, of good or bad faith, malice, or knowledge; and
 - *a Crown indemnity* to the judicial officer, either automatically or as a matter of discretion, if an award of damages is made.

The range of persons or bodies who benefit

- 143 Judicial officers are but one kind of actor in the chain of actors involved in making and giving effect to judicial decisions. Where, as a matter of policy, judicial powers (especially lesser judicial powers) are exercised not by judges but by court staff, these staff also require protection as persons exercising judicial functions. In *Crispin v Registrar of the District Court* [1986] 2 NZLR 246, McGechan J regarded a District Court deputy registrar exercising a power to enter judgment by default, and performing the consequent duty to record an entry made in the civil record book, as performing a function which was judicial in nature. McGechan J stated that “if the law gives a registrar a judicial function, all policy considerations which dictate immunity for a judge or quasi-judicial adjudicator apply with equal force to protect that registrar”.

- 144 There must be a common law immunity in respect of a judicial function. If, on the other hand, the function is not characterised as judicial, the officer might be held liable. So, in *Seatrans (Fiji) Ltd v Attorney-General* [1986] 2 NZLR 240, Hillyer J held that the failure of a court registrar to give effect to a court order to pay money into an interest-bearing account could be the subject of proceedings. In particular, it was not protected by s 6(5) of the Crown Proceedings Act 1950 (see para 10). No judicial element or indeed execution, was involved.
- 145 In *Baigent's* case the Court held – in the context of proceedings against the Crown alone – that the execution by police officers of a search warrant issued by a judicial officer came within the scope of “judicial process” in s 6(5) of the Crown Proceedings Act.

The subject matter of the immunity

- 146 The subject matter of the immunity calls for only two brief comments at this stage, as the privilege relating to the giving of evidence is relevant to the Commission’s work on evidence law. Whether the immunity is from liability, or only from suit, could be significant if there is a body or person who has vicarious liability. This is probably, however, highly unlikely in the case of independent judicial bodies: see also the Crown Proceedings Act 1950 s 6(5). Such liability might remain and not be affected by the immunity from suit of the judicial officer.

The area of jurisdiction

- 147 The area of jurisdiction has caused the greatest controversy under the existing law. For members of courts of superior jurisdiction the protection is said to be absolute. This results, it is argued, from their unquestioned power to determine the limits of their own jurisdiction. Thus, the erroneous exercise of that power cannot lead to their losing jurisdiction. This error is to be corrected by further proceedings relating to the decision, and not by proceedings against the judicial officer. By contrast, and indeed by definition, a court of limited jurisdiction can move outside that jurisdiction with the result that actions can be brought against the judicial officer in respect of any decision so taken. That common law rule is reflected in s 193(1) of the Summary Proceedings Act 1957:
- No action shall be brought against any District Court Judge or Justice for any act done by him, unless he has exceeded his jurisdiction or acted without jurisdiction.
- 148 That provision also applies to civil proceedings in the District Courts and to other judicial officers: see the District Courts Act

1947 s 119; the Coroners Act 1988 s 35; the Disputes Tribunals Act 1988 s 58; the Employment Contracts Act 1991 s 92 (in relation to the Employment Tribunal); and the Residential Tenancies Act 1986 s 70.

- 149 The Court of Appeal in *Harvey v Derrick* read the reference to “jurisdiction” in s 193(1) of the Summary Proceedings Act in a way which gives greater protection to the judge against civil suit than the protection accorded to the decisions themselves by privative clauses. Richardson J in particular highlighted the different meanings of “jurisdiction” depending on its statutory context (323–324). The court held that under s 193(1), judges would be protected from suit so long as they had acted in good faith and without gross negligence, even though they had acted outside jurisdiction in an administrative law sense.

The state of mind – the significance of good or bad faith, malice or knowledge

- 150 The fourth matter noted in para 142 – good or bad faith, malice or knowledge – has sometimes been said to be irrelevant to the civil liability of superior court judges.²⁵ According to one passage in a recent comprehensive study, the immunity applies “even if the judges are alleged to have been corrupt, malicious or negligent”.²⁶ Woodhouse J in *Nahkla* also saw malice as not affecting the immunity of superior court judges (see para 139). That rule is said to have the advantage of preventing litigation, or stopping it at a very early stage (although it did not in *Nahkla* itself). By contrast, Lord Bridge in *Re McC* [1985] AC 540 considered it “clear that the holder of any judicial office who acts in bad faith, doing what he has no power to do, is liable in damages”. This statement was doubted by Cooke P in *Harvey v Derrick* (317).

²⁵ The Court of Appeal in *Harvey v Derrick* concluded that a District Court judge who acted in bad faith could properly be characterised as acting without jurisdiction, and would accordingly fall outside the immunity afforded by the Summary Proceedings Act s 193. As this report went to press, the Court of Appeal handed down its decision in *Rawlinson v Rice* (unreported, Court of Appeal, 19 March 1997, CA 246/96), an appeal from a decision of the High Court striking out a claim for misfeasance in public office against a retired District Court judge. The Court of Appeal reversed the High Court judge’s conclusion that a finding of malice or reckless indifference was open to a jury, but referred to a court of five judges the question whether the tort of misfeasance in public office can apply to a judicial officer.

²⁶ Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Clarendon Press, Oxford, 1993), 33

151 Good faith is an explicit statutory requirement for immunity in the case of commissions of inquiry and the many bodies which are subject to the Commissions of Inquiry Act 1908. Section 3 deals with the members:

So long as any member of any such Commission acts *bona fide* in the discharge of his duties, no action shall lie against him for anything he may report or say in the course of the inquiry. [Emphasis added]

152 In addition to the good faith limit, the phrases “in the discharge of his duties” and “in the course of the inquiry” also place some limit on the protection similar to the jurisdictional limit which exists for courts of limited jurisdiction. The good faith, qualified privilege limit reflects the common law as stated by a majority of the Supreme Court the year before the quoted provision was enacted: *Jellicoe v Haselden* (1902) 22 NZLR 343.²⁷ If a sitting or former High Court judge is a member of the commission, the judge and the commission have, for the purposes of the inquiry, the same privileges and immunities as High Court judges in the exercise of their civil jurisdiction: Commissions of Inquiry Act 1908 s 13. So far as defamation is concerned, those specific provisions would appear to override the more generous absolute privilege conferred in respect of the proceedings of statutory tribunals and authorities with the power to summon witnesses or a duty to act judicially: Defamation Act 1992 s 14(5).

Indemnity provisions

153 Indemnity provisions are relevant to the incentives which are often said to be at work in this area of law. To adapt Lord Denning’s colourful phrase, the judge who knows the indemnity is there should not be turning the pages of the books with trembling fingers, fearing personal liability in damages if a wrong step is taken: *Sirros v Moore* [1975] QB 118, 136 (CA). The indemnity provisions also manifest the acceptance *by the state* that errors will occur in the administration of the law and that the community as a whole should bear the cost. For other Crown indemnities, see, for example, the Proceeds of Crime Act 1991 s 62; the Reserve Bank of New Zealand Act 1989 s 146; the Corporations (Investigation and Management) Act 1989 s 63; and the Serious Fraud Office Act 1990 s 35. In those cases it is not, in the end, the individual judicial officer who is liable, even if the form of the legal proceedings might suggest that.

²⁷ That element was present at that time for inferior court judges by virtue of s 284 of the Justices of the Peace Act 1882, a provision which can be traced back in New Zealand at least to the Justices Protection Act 1866 and s 2 of the Justices Protection Act 1848 (UK): see *Harvey v Derrick*, 321.

A *Maharaj* remedy in New Zealand?

- 154 Section 3(a) of the Bill of Rights Act states that it applies to acts done by the three branches of government – including the judiciary. We noted in chapter 2 the importance, as a matter of principle, of providing remedies for breaches of the Act. In respect of the judiciary, however, this principle is in conflict with the policy considerations which justify the doctrine of judicial immunity (see para 138). These considerations lead us to conclude that a remedy for breach of the Bill of Rights Act should not be available in respect of the conduct of superior court, Employment Court, District Court (including Environment Court), and Māori Land Court judges.
- 155 As key considerations underlying our conclusion, we emphasise in particular the availability of adequate rights of appeal, and the need to achieve finality in litigation. We also see it as undesirable for judges to have to appear as witnesses in cases concerning their own conduct,²⁸ with their evidence subject to findings of credibility, as would inevitably happen in actions against the Crown for breaches of the Act by judges. The credibility of judges should not in our view be put in issue merely on the assertion of a disgruntled litigant, whose remedy should generally be that of appeal. If the credibility of a judge is indeed in issue, this can be addressed in other ways (see para 140).
- 156 We appreciate that our conclusion entails rejection in New Zealand of *Maharaj* which was the main authority relied on by the Court of Appeal in *Baigent* for the availability of a remedy against the Crown for breach of the Bill of Rights Act. In *Maharaj*, a High Court judge had committed the plaintiff to prison for 7 days for contempt but had failed to observe a fundamental rule of natural justice – that persons accused of an offence should be told what they are said to have done plainly enough to give them an opportunity to put forward any explanation or excuse that they may wish to advance. The Judicial Committee held that the plaintiff was entitled to compensation from the Crown. It was submitted by several respondents to the draft report that the quid pro quo of judicial immunity should be Crown liability for breaches of the Act by judges, as was held in *Maharaj*. We also acknowledge that *Maharaj* was effectively applied by the High Court in *Upton v Green* (see para 68), although it was not referred to in the judgment of

²⁸ For a recent case in which this situation was considered, see *Warren v Warren* [1996] 4 All ER 664.

Tompkins J.²⁹ But we are satisfied that the interests of finality of litigation, except by way of appeal, should predominate.

- 157 The Privy Council in *Maharaj* clearly stated that as the remedy was against the State, the principle of judicial immunity was not affected. Consequently, in New Zealand, the absolute immunity of superior court judges would prevent an action against such judges personally for breach of the Act. Under our proposal for increased immunity (summarised in para 186), District Court and Māori Land Court judges would also be protected. Legislation is, however, required to prevent an action against *the Crown* in respect of the conduct of judges.
- 158 Accordingly, we propose that legislation be introduced providing that a remedy for breach of the Bill of Rights Act is not available in respect of the conduct of superior court, Employment Court, District Court and Māori Land Court judges. Compensation for miscarriage of justice resulting in conviction for a criminal offence would be dealt with in the manner proposed in paras 177–185. We recognise that there will be some cases where the obligation to ensure provision of an “effective remedy” stipulated by article 2(3) of the International Covenant on Civil and Political Rights is not satisfied by either the right of appeal, or our proposed legislation providing for compensation for miscarriage of justice which is limited to the results of wrongful conviction (see para 181). That legislation would not, for example, cover the facts which arose in *Upton v Green* or for that matter *Harvey v Derrick*. Article 2(3) must, however, be balanced against the need for finality in litigation, and the other considerations noted in para 155.
- 159 We would, however, propose that such immunity of the Crown be limited to cases involving judges mentioned in the previous paragraph. There is, as was apparent from submissions received on the draft report, less reason for confidence that the skills and experience of justices of the peace and other judicial officers warrant their complete immunity from suit. The following discussion contains reasons for not extending the immunities of justices and other judicial officers. Those reasons also lead us to consider that a *Baigent*

²⁹ In *Rawlinson v Rice* (unreported, Court of Appeal, 19 March 1997, CA 246/96), the Crown accepted liability for damages for breach by a District Court judge of the right to observance of principles of natural justice in s 27 of the Bill of Rights Act, notwithstanding that the plaintiff had abandoned this cause of action by the time the case reached the Court of Appeal. The members of the court accepted but did not discuss in any detail the availability of damages under the Bill of Rights Act in respect of the judge's conduct.

remedy against the Crown should be preserved in respect of breaches committed by justices and certain other judicial officers.

Proposals for reform of judicial immunity

- 160 Having considered the possible liability of the Crown under the principle in *Baigent's* case, we now turn to the question, raised by the proposed legislative response to *Harvey v Derrick*, of how, if at all, the present law of judicial immunity should be reformed. Our principal question concerns the differences between the protections. The differences relate especially to the jurisdictional constraint which limits the protection given to courts and tribunals of limited jurisdiction, and to the requirement of good faith which is sometimes made expressly applicable to those courts and tribunals. Courts of unlimited or inherent jurisdiction – the High Court and Court of Appeal – are often said not to be subject to those limits. We have already pointed out the qualifications to the proposition that the immunity of the judges of those courts is absolute (see paras 140–141).

Superior court judges

- 161 Under the present law it is open to the Solicitor-General to apply before trial to strike out a proceeding against a superior court judge as an abuse of the processes of the court. We consider that the public interest in avoiding collateral attacks on the work of superior court judges and judges of the Employment Court justifies the continuation of the immunity from suit. Such attacks, in general, evade the process of appeal; the other factors in paras 138 and 139 also justify continuation of the immunity. Moreover, as mentioned previously, their actions should not be the subject of any remedy against the Crown under the Bill of Rights Act.

District Court judges

- 162 When the Law Commission considered the position of District Court judges in 1989, it indicated that their protection should be the same, or almost the same, as that of High Court judges:
- Some of these matters are probably best considered in a broader examination of the legal liability of the Crown and of officers of the Crown. (One wider issue for instance is the right of a person who has been found in appropriate proceedings, including the exercise of the prerogative of mercy, to have been wrongly imprisoned under a court order, not just to be released but also to have compensation.) For the moment, however, we propose that the distinction in respect of

immunity between the judges of the superior courts and the District Court should be removed or at least narrowed, see for instance *Sirroos v Moore* [1975] QB 118 (CA). In large parts of their business they are dealing with matters which can come before the High Court, that will be the more so if our proposals are adopted and, as already indicated, there are remedies available to those aggrieved (including in extreme cases remedies against the judge). The legislation relating to retired High Court judges acting as temporary judges and to the Masters provides models. (*The Structure of the Courts* (NZLC R7, 1989), para 588)

- 163 Given the changes which have since been made to confer more extensive jurisdiction on the District Courts – a jurisdiction which often overlaps with that of the High Court – we confirm the opinion we expressed in 1989. The increased jurisdiction and status of the District Court has also improved the quality of representation and argument in that court, and hence the whole decision-making process. Accordingly, we recommend that the District Court judges should be in the same position as superior court judges so far as civil immunity is concerned.³⁰
- 164 We would not propose that the extent of the immunity of District Court judges should be the subject of explicit provision (as, for instance, in the Summary Proceedings Amendment Bill (No 2) 1995). Rather, the legislation should simply refer to the protections, privileges, and immunities of High Court judges (see, for example, the Judicature Act 1908 ss 11A(4) and 26Q, the details of which differ, possibly significantly). There would still be the question of the outer limits which do, of course, vary from one judicial officer to another. It is not feasible to attempt to chart the boundary of such limits: the possible eventualities entail questions of degree which are best left to the common law to appraise in the rare cases where they arise. The references to District Court judges in ss 193–196 of the Summary Proceedings Act will need to be deleted, and section 196A repealed. We return to ss 193–196 below when discussing justices of the peace.
- 165 As discussed earlier, we also recommend the enactment of a statutory provision to prevent actions against the Crown for alleged breaches of the Bill of Rights Act by District Court judges.
- 166 We note finally that the power of imprisonment which was exercised in *Harvey v Derrick* can now be exercised only if the

³⁰ Environment Court judges are judges of the District Court under s 249 of the Resource Management Act 1991: accordingly they would under our proposals also enjoy increased immunity.

defendant is actually present in court and is, or has had the opportunity to be, legally represented. Those requirements greatly reduce the possibility of the repetition of the error which occurred in that case, and they facilitate speedy correction should an error occur: Summary Proceedings Act 1957 s 106E(2); Criminal Justice Act 1985 s 10.

Justices of the peace

- 167 In terms of the people protected from liability or suit in judicial matters, there remain the cases of justices of the peace and of other judicial officers (see para 171). Justices at present share the protection afforded to District Court judges. Under s 193 of the Summary Proceedings Act, no action shall be brought against a District Court judge or a justice unless he or she has exceeded or acted outside jurisdiction. Under s 197, a justice against whom a judgment to pay damages has been entered, is indemnified by the Crown on production of a certificate from a High Court judge stating that the justice acted in good faith under the belief that he or she had jurisdiction, and that in the judge's opinion the justice ought fairly and reasonably to be excused.
- 168 In our draft report we concluded that justices of the peace should acquire alongside District Court judges the same immunity as High Court judges. This met with some concern from respondents as to whether justices' work is of sufficient quality, and whether they have sufficient training and experience, to effectively be given blanket immunity from suit. The submissions also pointed out that the main argument for equating the protections afforded to High Court and District Court judges (overlapping jurisdiction), did not apply to justices, whose jurisdiction remains limited. Nor do the arguments about the overall improvement in the decision-making process, which we make in respect of the District Court in para 163, apply to justices.
- 169 In light of the concerns expressed in these submissions, we have revised our earlier recommendation that justices be granted the same immunity as High Court judges.³¹ Instead, we propose no change to the general law concerning the immunity and entitlement to indemnity of justices. Accordingly, ss 193–196 and s 197

³¹ We would however make an exception in the case of judges of the Māori Land Court who are, by virtue of s 7(3) of Te Ture Whenua Māori–Māori Land Act 1993, deemed to be justices of the peace. In light of their judicial functions and the status and jurisdiction of the Māori Land Court, we consider it appropriate that their immunity be equivalent to that of District Court judges.

of the Summary Proceedings Act should still remain on the statute book to provide for the civil immunity of justices and for the circumstances in which they are entitled to an indemnity. However, because we propose new provisions concerning the immunity of District Court judges, the references to District Court judges in ss 193–196 will need to be deleted. The wider issue, whether justices should be relieved of personal liability for other causes of action if acting in good faith, warrants consideration when the general legislation concerning the courts is reviewed.

- 170 Legislation is, however, required to provide:
- that the Crown should be liable for breaches of the Bill of Rights Act by justices of the peace; and
 - that justices would not be personally liable for such breaches if acting in good faith.

Other judicial officers

- 171 Other judicial officers, such as tribunal members who are not District Court judges, disputes tribunal referees, and coroners, should receive the same protection as justices of the peace from personal liability for breach of the Act if they act in good faith, although a remedy against the Crown should be preserved. We propose no other changes to the existing immunities of these officers.³²

Registrars and other officers

- 172 We propose that other participants in the process of administration of justice, such as registrars and bailiffs, should be treated similarly in respect of Bill of Rights Act liability. Again there should remain a remedy against the Crown in respect of breach of the Act by these officers.
- 173 Some provisions protect registrars, sheriffs and bailiffs: for example, the Judicature Act 1908 s 32; the District Courts Act 1947 ss 105–108 (see also s 17(2) relating only to bailiffs); and the Summary Proceedings Act 1957 s 102 (relating to wheel clamping). In general, Parliament appears to have considered that the warrant, or other court order, itself provides a sufficient authority, but that if the action exceeds that authority then liability will arise. In practice, an official might be indemnified and expect to be.

³² Section 35 of the Coroners Act 1988 defines coroners' immunity by reference to that enjoyed by a District Court judge exercising jurisdiction under the Summary Proceedings Act 1957. This section will need to be amended to equate the immunity of coroners instead to that enjoyed by justices.

- 174 Further issues arise where the order under which the officer is acting is itself unlawful, and the officer, acting in accordance with the order, has no reason to know of that unlawfulness. The person subject to the order should, of course, be able to challenge the order and have it set aside. But should the officer be liable or subject to suit?³³ Parliament has sometimes answered that question in the negative. The protective legislation contains, as well, an express limitation to the effect that if the official knew or ought to have known that the court issuing the order had no authority, the protection does not apply: Crimes Act 1961 ss 26–29; Police Act 1958 s 39. This is an application of the general principle that a patently unlawful order is no defence: see, for example, the Crimes Act ss 45 and 47.
- 175 The position of officials executing court process does appear to call for systematic attention, even if it appears to have caused only limited difficulties to date. That could be undertaken as part of the preparation of new courts legislation.
- 176 The result of one aspect of such a review can be anticipated. The Public and Administrative Law Reform Committee, in paras 37 and 41 of its 1980 report *Damages in Administrative Law*, recommended that the final phrase of s 6(5) of the Crown Proceedings Act be deleted. That phrase, it will be recalled, protects the Crown (but not the officer) in respect of the carrying out of “any responsibilities which [the officer] has in connection with the execution of judicial process”. We agree with that recommendation, generally for the reasons which the Committee gave and especially the need to examine specific situations which might be covered by such a broad protection; particular provisions, possibly limited to protecting the individual, might be appropriate. We note that a similar protection is not available in respect of an official exercising direct statutory powers, eg, of search. We also note that, notwithstanding occasional judicial statements to the contrary, the protection in s 6(5) appears to leave open an action against the officers themselves.

COMPENSATION FOR MISCARRIAGE OF JUSTICE

- 177 Appeal and review processes are generally capable of averting detrimental consequences of impugned decisions. Allegedly defamatory statements can also be corrected – if not forestalled – by appeal and review.

³³ See *Percy v Hall* [1996] 4 All ER 523.

- 178 There may, however, be cases in which a miscarriage of justice is recognised to have occurred, resulting in the deprivation of a person's liberty, where the quashing of the conviction will not, in itself, provide a remedy. Judicial immunity of superior court judges will prevent an action against the judge; and under our proposed reforms District Court and Māori Land Court judges would also be protected. As discussed in para 161, we are of the view that the public interest in the finality of litigation makes it inappropriate that the conduct of business by a senior judicial officer should be subject to challenge in the courts other than on appeal.
- 179 The international community has addressed this matter in the International Covenant on Civil and Political Rights. Article 14(6) provides:
When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
- 180 New Zealand made a reservation to that provision when it ratified the Covenant in 1978. It is therefore not under an obligation at international law to enact legislation giving effect to article 14(6). Nevertheless, in light of the detriment to those who have suffered a miscarriage of justice, and the absence (for good reason) of other redress owing to the doctrine of judicial immunity being applied, there would appear to be a gap in our current law.
- 181 Consideration ought to be given to reviewing the decision to reserve, and to enacting legislation giving effect to article 14(6). The United Kingdom took that step in 1988 enacting the Criminal Justice Act 1988 s 133 which states:
(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

- (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
 - (4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.
 - (5) In this section "reversed" shall be construed as referring to a conviction having been quashed
 - (a) on an appeal out of time, or
 - (b) on a reference
 - (i) under section 17 of the *Criminal Appeal Act 1968*,
 - (ii) [applies to Scotland only], or
 - (iii) under section 14 of the *Criminal Appeal (Northern Ireland) Act 1980*.
 - (6) For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.
 - (7) Schedule 12 shall have effect.
- 182 The English provision provides only for compensation by the Secretary of State, representing the executive branch of government, after determination
- by the judiciary that a conviction be overturned, or
 - by the executive that there has been a miscarriage of justice.
- 183 According to subs (3) the question of whether there is a right to compensation under the section is determined by the Secretary of State: under subs (4) and assessor sets the level of compensation. Such decisions are however susceptible to judicial review if they are unreasonable or otherwise contrary to administrative law principles. In *R v Home Secretary, ex p Howse* and *R v Home Secretary, ex p Bateman* [1994] TLR 1 July 1994, the Court of Appeal upheld the refusal of applications for judicial review of the Home Secretary's decision not to pay compensation after the applicants' convictions had been reversed. The Court held that where a conviction had been reversed on the ground that particular evidence was inadmissible or that certain regulations were ultra vires, the reversal was a legal ruling on a point of law, rather than a newly discovered fact in terms of s 133. In each case the facts had been known all along. These cases clearly show how the requirement of a "new or newly discovered fact" prevents compensation from being payable simply because a conviction has been reversed.
- 184 It is fundamental to the rule of law that determinations of rights are made by the judiciary rather than the executive. This section is provided by way of exception, so as to avoid leaving the citizen

without compensation, for a miscarriage of justice, and to prevent in effect a further trial of the determination of a superior (or District) court judge.

- 185 If an equivalent provision were adopted in New Zealand, the entitlement – a recognition by the state of its general responsibility – would stand quite separately from the immunity of the judicial officer. That immunity would remain unaffected. Lord Templeman proposed such a dual approach in *Re McC* [1985] AC 528, 559.

CONCLUSIONS

- 186 The Law Commission's conclusions and recommendations are:
- (1) To avoid the reopening of decided cases, which should as a rule occur only on appeal, legislation should state that a remedy is not available against the Crown for breaches of the Bill of Rights Act by Court of Appeal, High Court, Employment Court and District Court (which includes Environment Court) judges, and judges of the Māori Land Court. (Judges themselves would be protected from suit by their immunity, as defined in subpara (2) below.) Legislation should also specify that a remedy is available against the Crown for breaches of the Act by justices of the peace and other judicial officers but that they are not personally liable if acting in good faith.
 - (2) The civil immunity of District Court and Māori Land Court judges should be stated by reference to that of superior court judges. Although there would remain the issue in particular cases of where the outer limits of the protection lie, there should be no attempt to define that immunity. Sections 193–196 of the Summary Proceedings Act 1957 require consequential amendment and s 196A should be repealed.
 - (3) Sections 193–196 and 197 of the Summary Proceedings Act should remain to deal with the immunity and entitlement to indemnity of justices.
 - (4) The civil immunity of other participants in judicial processes – tribunal members, parties, counsel, witnesses, registrars, and other court officials – does not, in practice, appear to be causing any difficulty. However, when new courts legislation is prepared some of the current gaps, uncertainties, and inconsistencies should be addressed. That opportunity will also arise when legislation in respect of tribunals and commissions of inquiry is prepared.

- (5) Consideration should be given to providing a remedy for those who have suffered punishment as a result of a miscarriage of justice, as provided for in article 14(6) of the International Covenant on Civil and Political Rights. That would balance, in the more serious cases, the absence of a *Baigent* remedy in respect of judicial conduct.
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APPENDIX A

Likely Consequences of *Baigent's Case in Fact:* The New Zealand position

- A1 **T**he Commission has considered the number of proceedings pending or threatened in which a breach of the Bill of Rights Act is alleged, as well as the quantum of damages claimed.

Number of proceedings

- A2 Material collected by the Ministry of Justice indicated approximately 40 sets of proceedings as at August 1995.
- A3 Table 1 lists departments and organisations which indicated that proceedings had been issued against them, and the number of proceedings identified by each.

table 1: Departments and organisations served with proceedings involving alleged breach of the Bill of Rights Act.

<i>Organisation</i>	<i>No of proceedings</i>
Housing NZ	1
NZ Police	29
NZ Customs Service	3 (at least one of which is also identified by the police)
Ministry of Education	2
Department of Labour	1
Department of Conservation	1 (which is included in the proceedings identified by the police)

- A4 The Department for Courts and the Department of Corrections also indicated threatened proceedings (1 and 3 respectively).

Contingent liability

- A5 As is evident from the number of proceedings, the nature of police activities makes their actions the most likely source of claims based on breach of the Act.
- A6 The police report a rise in contingent liability, a significant proportion of which is attributable to Bill of Rights Act liability. These figures are shown in tables 2 and 3.

table 2: Total contingent liability figures for the police as at 30 June for the years 1993–1996.

1993	1994	1995	1996
\$15 513 000	\$12 980 472	\$37 358 229	\$42 613 870

table 3: The Bill of Rights Act component of total police contingent liability as at 30 June for the years 1993–1996.

1993	1994	1995	1996
Nil	\$200 000	\$8 500 000	\$27 648 714

- A7 The contingent liability figures relate essentially to tort actions. The Bill of Rights Act component is calculated by totalling the amounts claimed for breach of the Act, even where other causes of action are pleaded in respect of the same facts. This means that there may be some double counting.
- A8 Three of the proceedings listed in table 1 seek declarations and other orders and do not claim damages. Where damages are claimed they range from \$40 000 (for an alleged unlawful strip-search of school students) to \$250 000 (sought in respect of the alleged false imprisonment of two women mistaken for their sisters who were subject to removal orders under the Immigration Act 1987).
- A9 It is difficult to make an assessment of the extent of the contingent liability that will be realised, given that:
- the amounts claimed in individual proceedings are not indicative of the strength of the claim that there has been a breach of the Bill of Rights Act; and
 - the amounts claimed, especially for exemplary or punitive damages, do not indicate any scale reflecting the harm caused by the breach or the relative severity of the breach.

It is also difficult to assess what liability is actually created by the new cause of action. That is, what claims can be brought or will succeed which would not have been brought or would not have succeeded in tort (see para A15).

Scope of the new public law action

- A10 Most of the proceedings involve alleged breaches of ss 21–24 of the Act. The rights contained in these sections are the right to be secure against unreasonable search or seizure (s 21); the right not to be arbitrarily arrested or detained (s 22); rights of persons who have been arrested or detained (s 23), such as the right of silence and a requirement that the person be treated with respect; and rights of persons charged (s 24), including right to time and facilities to prepare a defence, and the right to consult and instruct a lawyer. The statements of claim also plead related torts of assault, false imprisonment, and trespass – these pleadings in tort could, of course, have been made in the absence of the Bill of Rights Act. The proceedings against the police can be grouped as challenges to:
- the grounds for issuing a search warrant;
 - the grounds for conducting a search without a warrant;
 - the manner in which a search was conducted;
 - the grounds for arrest (this challenge is brought in cases where the person charged is acquitted, discharged, or where charges are withdrawn); and
 - decisions about police bail.
- A11 There are other proceedings alleging conspiracy and misfeasance in public office, challenging the conduct of police officers involved in the transporting of a mentally ill person, and seeking damages for the diminution in value of goods seized by the police for the purposes of prosecution.
- A12 The case identified by the Department of Labour involves the detention of two women subject to removal orders (see para A8). One of the cases identified by the Ministry of Education involves an alleged unlawful search of a school student. Two of the three cases identified by the New Zealand Customs Service involve challenges to powers of search.
- A13 The proceedings that do not involve the exercise of powers of search or detention concern:
- an action against Housing New Zealand challenging changes to state housing rentals in which breaches of ss 8 (right to life) and 18 (freedom of movement) were alleged; the action was

- unsuccessful: see *Lawson v Housing New Zealand & Ors* (unreported, High Court, Auckland, 29 October 1996, M538/94);
- an application for judicial review of a decision to suspend a student in which breach of s 27 (right to natural justice) is alleged; and
 - an application for an interim order excusing the applicant from complying with requisitions to produce documents under s 218 of the Customs Act 1966 on the basis that they are in breach of ss 22 and 27 of the Act.
- A14 The proceedings appear to be largely co-extensive with traditional tort actions or applications for judicial review. We have held discussions with the Crown Law Office and lawyers who might act for potential plaintiffs, and they share this sense of the scope of the *Baigent* action. Among lawyers acting for plaintiffs there is caution about the fact that the remedy for breach of the Bill of Rights Act is discretionary: they see the value of invoking the traditional remedies with their well-established rules relating, for instance, to the measurement of damages.
- A15 Examples of claims that might be made under the Act that could not readily be brought in tort are:
- a claim by a prisoner that treatment breached the right to be treated with humanity and respect where the treatment complained of does not involve an assault (eg, neglect); and
 - claims based on the rights of persons arrested, detained, or charged.
- A16 The latter of these claims will often be met by non-monetary awards but could potentially involve damages. There is a case pending against the police in which damages for breach of the right to legal advice have been sought. It is alleged the failure led to name suppression not being sought which affected the charged person's employment as a teacher.
- A17 The Human Rights Act 1993 prohibition on discrimination contains detailed exceptions and also a limit on the application of the Act to the Crown in s 151. In contrast, the Bill of Rights Act s 19 states the right to freedom from discrimination more starkly. This may lead to claims being brought in the courts for breach of s 19 in preference to making a claim under the Human Rights Act.
- A18 In many cases the same facts would support either an action in tort or a claim for breach of the Bill of Rights Act. There are, however, some important differences between the two actions. These differences may mean that the action based on the Act is more likely to succeed or to result in greater damages being awarded than an action in tort.

A19 The key difference between the two actions is that statutory powers or immunities conferred on individual employees, officers or bodies do not seem to be available to the Crown as a defence to a Bill of Rights Act claim. This is because *Baigent's* case held that liability for breach of the Act is direct.

A20 The principles that apply to awards of damages for breach of the Act were not fully discussed in *Baigent's* case, but the following observations were made:

- compensation for intangible harm is available;
- the need to “emphasise the importance of the affirmed rights and to deter breaches” are proper considerations; and
- emphasis should be given to compensating, so as to affirm the right breached, rather than to punishing the transgressor.

([1994] 3 NZLR 667, 678, 692, 703, 718)

Inferences from these comments are that an award that does more than compensate might be justified to emphasise the rights, and punitive damages may be available at least in some cases. The following comment made by Cooke P can be interpreted as a sign that damages for breaches of the Act could be substantial:

[F]or a brief but serious invasion of the plaintiff's rights such as may have occurred [in *Baigent's* case], where no physical harm or lasting consequences appear to have ensued, an award of somewhat less than \$70 000 [the amount claimed] would be sufficient vindication on all or any causes of action. (678)

In contrast, in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385, it was suggested the compensation might be less than that recoverable in tort (400).

A21 A third aspect of a claim based on the Act is the speculation that its characterisation as “compensation” rather than damages might mean the statutory bar on proceedings for damages in the ACC legislation and the limits on damages in the Law Reform Act 1936 are avoided. These issues did not arise for consideration in *Baigent's* case and can only be considered uncertain possibilities at this stage.

A22 The potential liability credited by the direct action (avoiding statutory immunities) and the uncertainty about other aspects of the action is likely to lead to an increase in the number of claims made. Even if these claims are not substantiated, there are costs in managing them, particularly while the scope of the action, and the likely range of awards, are uncertain.

A23 Although proceedings to date relate in the main to breaches of ss 21–24 of the Act, the police consider that claims will “dramatically increase” and suggest claims may arise under the other

sections in the following circumstances:

- section 8: arbitrary deprivation of life – whenever there is a fatal car accident involving a police vehicle, or where police shoot an offender;
- section 9: torture and cruel treatment – whenever police use unreasonable force to arrest;
- section 11: refusal to undergo medical treatment – where police give medical treatment to a person who has attempted suicide in police custody;
- section 14: freedom of expression – all arrests for inciting criminal behaviour or offensive language;
- sections 16–18: freedom of peaceful assembly, association, and movement – all police action at scenes of protest;
- sections 19–20: freedom from discrimination, and minorities' rights – coercive police action;
- sections 21–24: search, personal liberty, and rights of criminal suspects – these sections are used where the accused is not convicted, or if a person claims that he or she was not granted the proper bail;
- section 25: minimum standards of criminal procedure – action for damages for time on remand.

A24 This prediction of a “dramatic increase” must be taken seriously. But what is the strength of the prediction? Three comments must be made in response. The first is one of fact: the proceedings actually filed against the police are essentially limited to those in the traditional law enforcement areas covered by ss 21–24. If the facts alleged in those proceedings are made out there would be, in almost all conceivable cases, a remedy in damages under the established law – for assault, or wrongful arrest, or false imprisonment, or trespass. The second is that the rights and freedoms in question are not absolute. Particular freedoms have limits written into them: freedom of *peaceful* assembly (s 16), and the right not to be *arbitrarily* arrested or detained (s 22). There is also a general recognition in s 5 that the rights and freedoms might be subject to reasonable limits which can be demonstrably justified in a free and democratic society. The third related comment is that, with only limited exceptions (and then mainly by way of greater precision rather than through the establishment of new rights), the rights and freedoms affirmed, protected, and promoted by the Bill of Rights Act existed before 1990. Over the centuries, Parliament and the courts have established the rights and freedoms, and have provided remedies in respect of them. That appears very clearly from the dissenting judgment in *Baigent's* case. The limited, residual character of the compensation remedy is supported by the fact that similar, additional remedies in comparable countries have not produced a major increase in state liability.

- A25 The Commission sought views from departments and Crown entities about whether they considered that the action for breach of the Bill of Rights Act extended the liability they would otherwise face.
- A26 The Police Complaints Authority, the Securities Commission, the New Zealand Police, the New Zealand Fire Service, the Ministry of Education, the Ministry of Fisheries, the Department for Courts, the State Services Commission, and the Department of Conservation considered that the liability of the Crown has been extended. The extension of liability arises because of:
- the creation of direct liability of the Crown;
 - the attraction that a potential damages award might have to those who would otherwise have only administrative law remedies (eg, students who are suspended);
 - the fact that there is an additional cause of action even if the facts support a tort action (this could be important if there are economic incentives to challenge actions of fisheries officers for instance); and
 - the possibility that actions (such as a search) might be held lawful yet unreasonable.
- A27 The Ministry of Health, the Inland Revenue Department, the Department of Internal Affairs, the Maritime Safety Authority, Healthlink South, South Auckland Health, and Trans Power New Zealand Limited also considered an increase in liability was possible but did not comment specifically on whether that liability would attach to the Crown, or entities, or individuals.
- A28 Other respondents (Department of Statistics, Ministry of Defence, Broadcasting Standards Authority, Parliamentary Commissioner for the Environment, The Treasury, Department of Survey and Land Information, Ministry of Cultural Affairs, Office of Controller and Auditor-General, New Zealand Tourism Board, Education Review Office, Blood Transfusion Trust, Crown Company Monitoring Advisory Unit, Department of Labour, Ministry of Commerce, and Ministry of Foreign Affairs and Trade) did not envisage an increase in the number of claims against them.
- A29 To our knowledge there have been, at the time of writing, only two cases in which damages have been awarded for breach of the Act on the authority of *Baigent's* case. These are discussed in paras 68–71.

APPENDIX B

Likely Consequences of *Baigent's Case* in Fact: The position elsewhere

- B1 **A**t the Commission's request, Paul Rishworth and Grant Huscroft of the University of Auckland carried out a survey, "Damages for breach of individual rights in the United States of America, Canada, Ireland, the Caribbean, India, Sri Lanka, the European Union and under the European Convention on Human Rights". This survey tends to indicate that:
- the number of cases in which damages are awarded is not high, and
 - the courts draw on tort principles when considering whether there has been a breach of the right and when calculating damages.
- B2 In the United States claims may be brought against state officials under the Civil Rights Act 1871, 42 USC s 1983, and federal officials – so called "*Bivens* actions" – for breach of the Constitution. The immunities available to state and federal officials are relevant to whether an action succeeds, and tort principles apply so that awards are usually compensation for actual damage only. Federal and state immunity (including immunity of federal agencies) remains except to the extent that vicarious liability claims may be brought against the Federal Government under the Federal Tort Claims Act 1946, 28 USC s 1346(b). Following *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics* 403 US 388, 29 L Ed 2d 619 (1971), which awarded damages against federal agents for an unlawful search, the Federal Tort Claims Act was amended to include claims arising out of assault, false imprisonment, false arrest, abuse of process, or malicious prosecution.

- B3 The survey concludes:
- For the most part, this tension (between vindicating constitutional rights and protecting state officials from undue liability and harassment) has been resolved by the courts in favour of protecting state officials (s 1983 cases).
 - The *Bivens* action is so rarely available that it cannot be considered constitutionally significant. According to one survey, of 12 000 *Bivens* actions reported to have been filed as at 1985, only 30 resulted in judgments for the plaintiffs. Most of these were reversed on appeal, and only four judgments were actually paid by the federal defendants.
- B4 In Canada s 24(1) of the Charter of Rights and Freedoms provides that:
- Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- In the 13 years following the passage of the Charter, the damages remedy has not been significant, and there is no clear appellate authority about the approach to the remedy. There is uncertainty about whether liability is direct or vicarious, the relevance of statutory immunities, the extent of misconduct or intent necessary before damages will be awarded, and the relevance of tort principles. Where damages are awarded, the cases surveyed indicate that the amounts are usually under \$10 000 and often much less.
- B5 Damages are available for breach of constitutional rights in Ireland. It seems to have been more significant there but the situation differs from New Zealand's in two important respects:
- fundamental rights can be enforced against private individuals (against whom many of the non-monetary penalties regularly issued against public bodies are not likely to be available or appropriate); and
 - the range of rights protected by the Constitution is broader, and includes rights for the breach of which monetary relief is more appropriate: the right to privacy, the right not to be interfered with in earning a living, and the right to an education.
- Despite these differences it is interesting to note, first, that some cases have read in immunities even though the constitutional rights are entrenched, and second, that tort principles are applied in the calculation of damages.
- B6 The case law in the Caribbean indicates that actions for damages for breach of constitutional rights are not significant and that the majority of cases seem accommodated within the boundaries of tort law.

- B7 In India the Supreme Court has held damages to be available for breach of the Constitution. The action is one in public law against the state, whose liability would appear to be absolute. An award of compensation will only be made, however, when it is the only practicable means of enforcing the fundamental right.
- B8 In Sri Lanka, damages for breach of rights under the Constitution are also available.
- B9 Paragraph 37 and footnote 10 of the main text touch briefly upon remedies developed by the European Court of Justice for breaches at domestic law level of rights conferred directly on individuals under Community law. These remedies include, in limited circumstances, awards of damages: see *Brasserie du Pêcheur SA v Federal Republic of Germany*; *Reg v Secretary of State for Transport, ex p Factortame Ltd & Ors (No 4)* [1996] QB 404. The European Court of Human Rights has also awarded damages for breaches of the European Convention of Human Rights.
- B10 This international experience suggests that damages for breach of constitutional rights is not a remedy central to judicial enforcement of individual rights. The existing law of tort would seem to have continued to meet the need to compensate persons adversely affected by the wrongful actions of others including those exercising public powers. That result is not at all surprising. That law has been developed carefully and incrementally over several centuries to give remedies to those whose basic rights – now recognised and affirmed in New Zealand in the Bill of Rights Act – have been infringed. It would be surprising if those developments had left large gaps in the remedies available. But, as the occasional case shows, instances do occur when a supplementary remedy is considered appropriate.
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APPENDIX C

Provisions protecting public
bodies, officials and others
acting under statute

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INTRODUCTION

C1 **A**bout 200 statutes contain one or more provisions which specifically protect the persons who act under them from legal proceedings or legal liability. Relevant provisions are included in a schedule to this appendix. In addition, the general law similarly protects those exercising certain powers, especially in the judicial field: see the common law of judicial immunity and of absolute privilege in defamation, and related provisions of the Summary

Proceedings Act 1957 Part VII, the District Courts Act 1947 s 119, the Coroners Act 1988 s 35, the Disputes Tribunals Act 1988 s 58, the Employment Contracts Act 1991 s 92, the Residential Tenancies Act 1986 s 70, the Commissions of Inquiry Act 1908 ss 3 and 13 (which apply to more than 100 other bodies and persons), and the Defamation Act 1992 ss 14–19. The final set of provisions, as well as those in the Commissions of Inquiry Act, also remind us of the rules protecting legislative processes as stated in the Bill of Rights 1688 (UK) and reflected in the Legislature Act 1908.

- C2 These provisions are to be related to, and contrasted with, provisions which do not protect *the person* from legal proceedings but rather protect *the thing* – the decisions and actions taken by the person:
- provisions stating that the fact that a deputy, officer or member is acting is conclusive evidence that the occasion for their appointment arose;
 - conclusive evidence provisions (eg, giving notice in the *Gazette* of a code is conclusive evidence that the required procedures have been followed);
 - regular privative or ouster clauses (eg, “a decision is not to be challenged . . .”);
 - finality provisions (eg, “a decision is final . . .”);
 - legislation preventing pending or prospective legal proceedings which challenge administrative action or even override judgments already given which have upset the action;
 - provisions requiring use of the statutory appellate or review process rather than or ahead of judicial review; and
 - provisions requiring any review proceeding to be brought within a fixed period.
- C3 These provisions relate to first, the legality of the appointment of the person acting, second, the process they have followed, and third the substance of the decision; stated another way, to the three questions of who? how? and what? The provisions can be related in their substance or in effect to similar common law doctrines and practices, such as the de facto officer doctrine, the presumption of the regularity of official acts, waiver, and discretions to defer to specific statutory remedies or to refuse relief in the case of delay.
- C4 All the provisions and doctrines mentioned so far are designed to prevent attacks against, and to protect, decisions and processes which may appear to be unlawful or irregular in some respect. They assume the existence of a power or function of some kind, the exercise of which is in question.

- C5 Many of the provisions and doctrines also assume that the person affected by the action in question has a civil cause of action (generally in damages), or that the person taking the action might be committing a criminal offence, or both. So a police officer arresting a person might be committing the tort and crime of assault. Alternatively, an official issuing a statement about a public health risk might be defaming a person or breaching a confidence owed at law (and also be subject to professional discipline). Those two situations help identify the three relevant parts of the law:
- the apparently unlawful act – especially a civil wrong, criminal offence, or disciplinary offence;
 - the statutory power or duty which might authorise and make lawful the apparently unlawful act; and
 - legislation and common law rules which protect the actor.
- Generally there will be a protective provision as well as an empowering provision, but in some cases the protective provision will stand alone.
- C6 Although this appendix is principally concerned with protections, in particular those provided by legislation, we should not neglect the other two matters noted in para C5. Indeed, a basic proposition expressed here and in this report is that a major effort in preparing, applying, and interpreting legislation should go into the positive statement of the power which is to be exercised. The statement of the positive power should be appropriate to the relevant public interest and purpose. Once that is done, there is no apparent justification for an immediate rush to provide statutory protection against arguments that the statutory power has been exceeded.
- C7 Another issue which should be regularly considered, along with the proposal to confer power, is whether the legislation should itself explicitly provide for compensatory and other remedies to those who are affected by the exercise of that power, by actions affecting its operation, or by breaches of the law. Statutory remedial provisions exist in a variety of circumstances:
- (1) Powers to impose criminal penalties are sometimes accompanied by powers to order the payment of compensation to those affected by the breach: eg, the Criminal Justice Act 1985, the Land Transfer Act 1952, the Marine Farming Act 1971, the Animals Protection Act 1960, the Armed Forces Discipline Act 1971, the Student Loans Act 1992, the Child Support Act 1991, and the Health and Safety in Employment Act 1992.
 - (2) Rights and obligations relating to commercial transactions may be supported by explicit remedies for those whose rights

are infringed by breach: eg, the Takeovers Act 1992, the Consumer Guarantees Act 1993, and the Securities Act 1988.

- (3) Human rights legislation generally includes specific remedial provisions as part of the overall scheme: eg, the Human Rights Act 1993, the Privacy Act 1993, and the Health and Disability Commissioner Act 1994.
 - (4) Compulsory registration of title legislation provides for compensation for losses caused by errors in the administration of the registry: eg, the Land Transfer Act 1952, the Motor Vehicles Securities Act 1989, and the Radiocommunications Act 1989; see also the liability of private individuals for loss caused by the abusive use of the caveat provisions of the Land Transfer Act 1952 and the Ship Registration Act 1992.
 - (5) Powers to take action relating to land (and sometimes other property) are subject to an obligation to pay compensation for the taking or injurious affection: eg, the Public Works Act 1981, the Local Government Act 1974, the Soil Conservation and Rivers Control Act 1941, the Telecommunications Act 1987, the Crown Minerals Act 1991, the Railway Safety and Corridor Management Act 1992, the Gas Act 1992, and the Electricity Act 1992.
 - (6) Legislation requiring or authorising rescue and salvage actions may provide that the rescuer is entitled to compensation: eg, the Maritime Transport Act 1994, the Civil Defence Act 1983, and the Biosecurity Act 1993.
 - (7) Legislation conferring emergency powers may also provide for compensation to those whose property has been requisitioned or damaged in the course of the response to the emergency, as in the statutes noted under (6) and the Health Act 1956, the Defence Act 1990 and the International Terrorism (Emergency Powers) Act 1987; see also the Toxic Substances Act 1979, and the Pesticides Act 1979.
 - (8) Among other relevant entitlements are those of individuals whose property is damaged by escaping prisoners: the Penal Institutions Act 1954; and of a land owner who has assisted in identifying straying cattle: the Animal Identification Act 1993.
- C8 In addition to providing an explicit remedy, these provisions have at least three important characteristics:
- Some are based on fault or error ((1)–(4)), others on reward ((6)), while those in the third category are based on community

responsibility or cost sharing ((5), (7) and (8)). In respect of the latter group of provisions, Parliament has made the judgment that it would not be just for the injured party to carry the cost. In such cases the act is in the general interest (eg, the killing of stock to prevent the spread of an animal disease, or the taking of land for a motorway); only one person or a limited number of persons has suffered the damage; and the damage is substantial and a result of the government's act (see Bell and Bradley, *Governmental Liability: A Comparative Study* (UKNCCL, London, 1991), 9, citing a 1984 recommendation of the Committee of Ministers of the Council of Europe). The remedy in these cases is not, of course, dependent on a showing of unlawful action by the state; on the contrary, it will usually be acting lawfully.

- The legislative schemes may put the obligations on private bodies or persons as well as on public bodies. Sometimes, as with the land transfer system, the state may be able to recover from the private wrongdoers the payment it has made to the innocent victim.
- This specific legislative technique allows a judgment to be made in the particular case of the entitlement to compensation and its scope. The resulting statutory system might involve rules which can be applied relatively automatically – as with aspects of war pensions. Alternatively, the system might involve rules which require judgment of competing considerations or disputed facts – as in some salvage situations, or in decisions about compensation for miscarriages of justice: see Criminal Justice Act 1988 (UK) s 133 (quoted in para 181).

C9 But many statutes do not expressly draw civil remedial consequences from the statements of duties which they impose. The matter is left unaddressed. Compare the recommendations of the United Kingdom Law Commissions, *The Interpretation of Statutes* (LAW COM No 21, SCOT LAW COM No 11, HMSO, London, 1969), paras 38, 78 and 81(c) and cl 4 of the draft provisions (p 51), and the recommendations of the Public and Administrative Law Reform Committee in its 1980 report, *Damages in Administrative Law* (Report No 14, Wellington, 1980). When remedies are provided, it is sometimes implicit that the provision containing the remedy is exhaustive. In other cases that is made explicit, eg, the Resource Management Act 1991 s 23(2); in still other cases the matter is not clear, as with the Securities Act 1988 (see para C14).

C10 One long-standing provision denying civil liability can be conveniently mentioned here. The Postal Services Act 1987 s 6

provides that:

No person shall have any right to compensation and no liability shall be imposed upon New Zealand Post Ltd by reason of any loss, default, delay, or omission in relation to any letter except in relation to a letter to which section 3(2) of this Act applies.

(For an earlier version, see Post Office Act 1881 s 77.)

Section 3(2) sets out the exceptions to the New Zealand Post monopoly which is being phased out, and with it the protection from liability. In that area of competition the general law, especially of negligence or contract, would apply. This statutory denial of liability presumably reflects the legislative judgment that an efficient public mail system could be impeded by imposing standards of care with an associated very extensive potential liability for economic loss: compare *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 CA. (Neglect by those with responsibility to deliver the post has, however, sometimes resulted in criminal liability.)

- C11 Whether a protective provision can be justified in addition to the positive statement of power has to be related to the extent and nature of that power, to principle, to statutory practice, and to particular matters considered here and in the report. The many protective provisions and the related common law rules strongly suggest that it is too simple to say that such provisions should never be enacted. The report considers when they can be justified and proposes answers. This appendix provides a basis for that consideration by analysing the terms of the protective provisions.

The apparently unlawful act

- C12 Before turning to the protective provisions, we return briefly to the initial element listed in para C5 – the original act which is alleged to be unlawful and is the subject both of the civil or criminal proceedings and the protective provisions. The main cases can be identified readily enough. They include the torts (and sometimes the associated crimes) of assault, trespass, defamation, negligence, and breach of statutory duty. They also include breach of confidence and of copyright, and breach of contract.
- C13 The torts of negligence and breach of statutory duty present larger difficulties than do the others. Although these difficulties are not the main concerns of the appendix, it is helpful to mention them since they may be central to both the drafting and the effect of protection provisions. The difficulties reinforce the point made

in para C9 about the value of explicit provisions for compensation for damage caused by the exercise or breach of statutory powers. The straightforward legislative entitlement to compensation provided for in the Penal Institutions Act (para C7(8)) can be contrasted with the complex arguments (lasting at least 9 days) and lengthy judgments in *Dorset Yacht Co v Home Office* [1970] AC 1004. (Compare also the compensation provisions in the compulsory title provisions (para C7(4)) with *Ministry of Housing v Sharp* [1970] 2 QB 223 (QBD and CA).) The issues which arise in the absence of legislation can also be highlighted by recent decisions of the Court of Appeal and the House of Lords.

- C14 In *Fleming v Securities Commission* [1995] 2 NZLR 514, some members of the Court of Appeal rejected claims by disappointed investors that the Securities Commission owed them a duty of care in respect of the supervision of irregular newspaper advertisements offering high interest securities. (Some members of the court also held that the plaintiffs had not established that the breaches of the alleged duty caused their losses.) The assessment of whether a duty of care existed had regard to the legislative provisions and the responsibilities of the Securities Commission. For one judge, the protective provision with its express reasonable care limit “shows that Parliament contemplated the possibility of negligence liability” (519). Another judge did not specifically identify negligence as a cause of action contemplated by the provision. Rather, “the statute recognises that in some circumstances civil proceedings may lie against the Commission when it has not acted with reasonable care” (529). It is interesting that a provision which is designed to protect the public body from legal action is seen as implying the opposite; that is, that an action might be brought.
- C15 Recent House of Lords decisions have concerned proceedings brought against local authorities by child abuse victims, by a child who had been put in care and her mother, and by children complaining about schooling – in all cases for negligence and all but one for breach of statutory duty: *X & Ors (minors) v Bedfordshire CC* [1995] 2 AC 633. For the most part, the proceedings were struck out. Lord Browne-Wilkinson, in the leading speech, distinguished between four categories of private law claims for damages where statutory duties are imposed on public authorities:
- (A) Actions for breach of statutory duty simpliciter (ie, irrespective of carelessness);
 - (B) Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;
 - (C) Actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it;

(D) Misfeasance in public office; ie, the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful. (730–731)

C16 So far as (A) was concerned, he noted that it was significant that the court was

not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general . . .

The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions. (731–732)

C17 He then turned to (B) and considered

cases in which the plaintiff alleges (A) the statutory duty and (B) the “negligent” breach of that duty but does not allege that the defendant was under a common law duty of care to the plaintiff. It is the use of the word “negligent” in this context which gives rise to confusion: it is sometimes used to connote mere carelessness (there being no common law duty of care) and sometimes to import the concept of a common law duty of care. In my judgment it is important in considering the authorities to distinguish between the two concepts: as will appear, in my view the careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a statutory right of action (category (A) above) or a common law duty of care (category (C) below). (732)

He quoted from the judgment of Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1011:

It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away: *Hammersmith and City Railway Co v Brand* (1869) LR4 HL 171, 215, Lord Cairns. To this there is made the qualification, or condition, that the statutory powers are exercised without “negligence” – that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons . . . (733)

Lord Browne-Wilkinson concluded his decision on this point in this way:

In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient. (734–735)

C18 It followed, misfeasance – (D) – not being pleaded, that the House of Lords considered only (A) actions for breach of statutory duty and (C) actions based on a common law duty of care.

The protective provisions

C19 The protective provisions can be roughly grouped according to the range of subject matter:

- *general functions*: any act of any person or specified persons in exercise of the functions set out in the Act;
- *powers of law enforcement*: these powers include investigation, inspection, search, and arrest;
- *judicial and related functions*: in this context these protections relate not just to the judicial and other official participants, but also to witnesses, parties, and counsel;
- *powers (sometimes duties) of reporting*: for example, of possible public dangers; and
- *transfer of property*: for example, in the context of the reorganisation of public and other bodies.

C20 That rough grouping and the lists of statutes which have been prepared are problematic in that they do not record the omissions. For example, exercises of the powers of labour inspectors are not protected (and appear never to have been, eg, Factories Act 1892), while those in the transport area are. Arbitrators under the Crown Minerals Act 1991 get express protection while those under the Resource Management Act 1991 do not. Protections under the (now repealed) Customs Act 1966 were extended in 1971 to include liability in respect of loss of or damage to goods: it must have been thought that the earlier protection was inadequate.

C21 This appendix concerns the provisions included in the schedule of statutory protection provisions. Table 4 (pages 98–164) summarises protective and immunity provisions which in general protect persons acting under legislation from liability or proceedings. Those provisions have a long history while those in tables 5 and 6 (pages 171 and 172) are much more recent. The newer provisions state, among other things, that those carrying out certain actions under restructuring legislation are not committing a “civil wrong”.

- C22 The elements of many of the provisions can be divided into four. To take a provision in a recent statute, the Biosecurity Act 1993 s 163:
- inspectors appointed under the Act
 - are protected from liability
 - in respect of actions under the Act
 - so long as the actions were taken in good faith and with reasonable care.
- C23 We shall see that there are several possibilities in respect of each element. We have already noted the possibility that no protective provision might be included at all, perhaps because the powers in question have been conferred in sufficient amplitude or the general protective law mentioned in para C1 is thought to be adequate.

The person protected . . .

- C24 Statutory protections are conferred on one or more of the following:
- any person (usually qualified by referring to those acting under the legislation);
 - the relevant statutory body;
 - the Crown;
 - an identified official;
 - members of the relevant body, its advisers, officers, and employees;
 - categories of persons (such as members of the police, inspectors, and aircraft commanders); and
 - participants in legal proceedings (witnesses, counsel, and tribunal members).
- C25 A preliminary comparison of the provisions raises a number of questions. For instance, sometimes statutory bodies and their members (and others) are protected, while in other cases the body is not included. This could be a very significant difference. In the latter case, the injured plaintiff may still have a remedy against the body itself with the members alone being protected. Such provisions might be seen as rightly protecting the individual wrongdoer from financial cost while leaving the injured person with their remedy against another body or person such as the statutory body or the Crown by way of the Attorney-General. In that category of case, whether the remedy is available may turn on whether the body itself committed the wrong or on whether it can be held responsible for the action of the protected wrongdoer. By contrast, those protective provisions extending to "any person" might be seen as including and therefore protecting the statutory body as well as the

individual, given the comprehensive definition of “person” in s 4 of the Acts Interpretation Act 1924; the plaintiff might be completely defeated. Some provisions extend to staff, while others are limited to the members of the body. The latter provisions might leave the plaintiff with a remedy, in this case against that staff member, if the unlawful act is that of a staff member.

. . . *from liability or proceedings* . . .

- C26 Statutory protective provisions use four main formulas:
- the person has no liability;
 - no action or proceeding may be brought;
 - the person is to be indemnified; and
 - the person is not to be regarded as being in breach of contract or confidence, or guilty of a civil wrong.
- C27 A further formula may have features of both the first and second formula: the person is not liable to civil *proceedings* (as opposed to not having a civil *liability*) nor guilty of an *offence*.
- C28 A handful of provisions also require court leave before proceedings are brought, and have special limitation periods. They include provisions relating to health, local government, and securities. The Commission has already recommended that these provisions be repealed: *Limitation Defences in Civil Proceedings* (NZLC R6, 1988), draft Limitation Defences Act ss 37–38 and 46.
- C29 The first formula in para C26 takes at least six different forms:
- no liability;
 - no civil liability;
 - no personal liability;
 - not liable for damages;
 - no criminal liability;
 - no civil or criminal liability.
- C30 The second formula varies somewhat similarly:
- no proceedings;
 - no action or proceedings;
 - no action or proceedings to recover damages;
 - no civil proceedings;
 - no civil or professional proceedings;
 - no civil or criminal proceedings;
 - no civil, criminal, or disciplinary proceedings.
- C31 There is a significant difference between the “no liability” provisions and the “no proceedings” provisions. The first formula means that the person is not committing a legal wrong: the person

is not bound by the relevant law (generally of tort) and is not subject to the relevant substantive obligation. By contrast, the second set of provisions does not deny the liability of the person or the wrongfulness of the action; nor does it deny that the person is subject to an obligation. Rather, it states that no proceedings may be brought against that person for that (wrong) action or breach of obligation. That is to say, the first set of provisions is concerned with a lack of duty, the second only with an immunity from jurisdiction. The distinction parallels that recognised in the law of diplomatic immunity where it is established that diplomatic immunity “does not import immunity from legal liability, but only exemption from local jurisdiction”: *Dickinson v Del Solar* [1930] 1 KB 376, 380, Lord Hewart CJ (see also articles 31–32 and 41 of the Vienna Convention on Diplomatic Relations and *Empson v Smith* [1966] 1 QB 426, 434–435, 438–439).

- C32 Similarly, the English Court of Appeal held that legislation which provided that a wife or husband was not “entitled to sue the other for a tort” did not stand in the way of an action by the wife against their employer for the husband’s negligence which caused her injury. That act was still unlawful and was a tort by the husband for which the employer was liable. “Others may not hide behind the skirts [!] of his [the husband’s] immunity”: *Broom v Morgan* [1953] 1 QB 597, 606. The New Zealand Court of Appeal has made the same point about accident compensation legislation. The statement that “no proceedings for damages” are to be brought in respect of personal injury prohibits suits for damages but it does not abolish a cause of action: *Donselaar v Donselaar* [1982] 1 NZLR 97, 109, 116.
- C33 But, if by contrast the legislation goes further and provides that the employee is “not liable”, the Crown or other employer cannot be vicariously liable for the employee’s action: that original action is not tortious. The Crown Proceedings Act 1950 makes the point very clearly. The Crown is made responsible for “*torts* committed by its servants and agents” (s 6(1)(a)) and, as well (and apparently redundantly), it can benefit from enactments which negative the liability of any officer in respect of any tort (s 6(4) – see para C68); see also the proviso to s 6(1)(a) set out in para C67. Note, however, the important limit placed on the vicarious element by s 6(3).
- C34 Section 86 of the State Sector Act 1988 appears to be a major instance of such a non-liability provision. That provision’s broad denial of the liability of state employees appears (when read in conjunction with the Crown Proceedings Act s 6(4)) to place very extensive limits on the vicarious tort liability of the state. We understand that it has not, in practice, been applied in that fashion.

- C35 We say in para C27 that a further formula *may* have features of the two formulas which have just been considered: the person is not liable to civil *proceedings* or guilty of an *offence*. The first half of the formula may leave the civil *liability* in effect (and grant an immunity only from *proceedings*) while the second half fully denies criminal liability. On that basis, the vicarious civil liability of the Crown (or other employer) would still exist. But it may be that that view depends too much on accidental variations in language over the last century, in different countries and in different statutory contexts. The uncertainty may be important since the formula is used in several provisions of the Crimes Act 1961 relating to general law enforcement activities (see further para C66).
- C36 Both the “no liability” provisions and the “no proceedings” provisions present the same questions about their scope of application to different types of liability or proceedings. Some make it explicit that the provisions extend beyond civil matters to criminal. The references to discipline are a recent addition: it is not clear whether a general reference to *proceedings* or *liability* or to *civil proceedings* or *liability* would cover professional discipline. (For a discussion of the issue in a common law context, see *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, 723–724.) Other provisions are limited to either civil or criminal matters. Those which refer only to “liability” (or personal liability) or to “proceedings” or “action or proceedings” might or might not extend to civil or criminal matters or both. (“Action” is probably a clear indication that civil process is intended.) There may also be a question whether the provision, if not expressly referring to damages, applies to prevent attacks on the *decision* in issue; ie, whether it is also a privative clause in the standard sense (see para C2). That wider view was taken in *Hutchins v Broadcasting Corporation* [1981] 2 NZLR 593, 597–598. It is to be noted, however, that the court – plainly mistakenly – thought that the expression “shall be under no civil liability” was an unusual one. Furthermore, there is a distinct standard set of formulas for privative clauses; there is no need for the drafter to draw on another set.
- C37 The third formula noted in para C26 confers an indemnity. This is conferred on the basis that the individual can be held liable and the injured party compensated either by the wrongdoer or the indemnifier. Such provisions recognise, as well, that the appropriate way of reflecting the competing interests is not to deny the rights of the injured person, but to move the cost from the wrongdoer to the indemnifier – often the taxpayer. It should be noted, however, that the word “indemnity” is sometimes wrongly used in provisions which confer immunity. Note also the surprising provisions of s 59(5) of

the Public Finance Act 1989 in respect of “indemnities” given under that section: the person who apparently is indemnified must repay the Crown. The word “indemnity” has lost its meaning in that case. Consider its application to the passages in the *Cabinet Office Manual* (Cabinet Office, Department of Prime Minister and Cabinet, Wellington, August 1996), chapter 5, paras 5.112–5.113, relating to litigation involving Ministers:

[I]t is a convention of government that Ministers should be indemnified by the Crown for any actions taken against them for things done or decisions made in the course of their Ministerial duties. . . . The Crown normally gives such an indemnity to all its servants; and Ministers are servants of the Crown.

- C38 The fourth formula noted in para C26 appears to be a new one introduced from 1986 in restructuring legislation. The persons in question are not to be regarded as being in breach of the relevant obligation. Since the restructuring legislation has either effected the change in the legal obligation and the legal position generally, or authorises the change, the protective provisions appear to be unnecessary.

. . . *in respect of certain acts* . . .

- C39 There are six main variants. The protection is in respect of:
- any act under the statute (or other source of authority);
 - acts effected or authorised by the legislation (especially under the restructuring legislation);
 - any act in the course of the operations of the body;
 - any act under the statute or *intended to be* under the statute;
 - any act done *for the purpose* of carrying out the provisions of the statute; and
 - the giving of evidence or the provision of information under the statute.
- C40 In some statutes, defaults (or omissions) are included along with acts (or actions) or stand alone. In at least one case, the reference to omissions was added by a later amendment, suggesting doubt in that case and possibly in others whether “acts” or “actions” alone would include omissions. The acts might also be stated more precisely in terms of the particular statutory context, eg, disclosure of information, furnishing of reports, or words spoken or written in a proceeding.
- C41 The statutes are sometimes explicit that the protection is from proceedings or liability “on any ground” or, more fully, “on any ground including want of jurisdiction or mistake of law or fact”. It is not clear that those words add to the protection. It may be

that the explicit reference to want of jurisdiction would lead to wider protection.

- C42 Some of the protections expressly exclude criminal proceedings for corruption and unlawful release of information under the Crimes Act 1961 ss 78–78A, and 105–105A.
- C43 The principal question raised by the variations is whether under some of them, given their strict wording, the protection is available only if the act in question conforms with the statute. If so, what is the point of the provision? If the act is lawful – authorised by the statute – can it be the subject of legal proceedings? (See, however, para C50.) Much of the wording does appear to require conformity with the statute – the action must be “under the Act” or “in the exercise of the powers” conferred. The new restructuring provisions appear to have no effect for the same reason: nothing effected or authorised by the Act is regarded as placing any person in breach of contract or confidence, or guilty of a civil wrong.
- C44 That narrow literal reading appears to be supported by the apparently deliberate double structure of many other provisions: acts done in execution or *intended* execution of the Act or in pursuance or *intended* pursuance of the Act; and by provisions which protect acts done *for the purpose* of carrying out the Act. The literal meaning would have the consequence that no protection is given by that large group of provisions: if the action complies with the Act and is accordingly lawful, can action be brought in any event? The English Court of Appeal has, however, read apparently strict empowering language (someone “committing an offence” could be arrested) as providing greater power and accordingly wider protection against a tort action (someone “*apparently* committing an offence” could be arrested): *Wiltshire v Barrett* [1966] 1 QB 312, approved in *Walker v Lovell* [1975] 1 WLR 1131 (HL). There is a question whether protective provisions, as opposed to empowering provisions, would be construed in this less than literal way, especially if careful distinctions are shown between them, as in the Crimes Act 1961 ss 27–38 (see paras C55–C64 and also para C51).
- C45 The wording protecting court and related processes does not, of course, require conformity with the relevant legislation (except in one sense). Indeed, it cannot require such conformity: witnesses, parties and counsel are to give their evidence and argue their cases as they understand the situation, and the court or tribunal is to reach its own judgment or decision according to its view of the law and the facts. The exception is the outer limit of the jurisdiction in issue: action outside jurisdiction is generally not protected. “Jurisdiction” is read broadly in this context, as

providing greater protection than when it appears in a privative clause designed to prevent an attack on the decision rather than an action for damages against the judicial officer: see *Harvey v Derrick* [1995] 1 NZLR 314 (CA).

. . . *so long as the actions were taken in good faith* . . .

- C46 Almost all the provisions require that the person be acting in good faith or sometimes that bad faith not be shown. The good faith requirement is replaced by an absence of malice in provisions which parallel qualified privilege in defamation.
- C47 In addition, many of the provisions require reasonable care (or, in a few cases, reasonable cause).
- C48 If the action is in bad faith, it may be that the preceding element will also not have been satisfied: the action was not in pursuance or intended pursuance of the statute in question. But that is not necessarily so, since the actor might have dual motives or motives may not be relevant once the threshold test for the exercise of the power is satisfied. As well, some of those protected by the provisions may not be acting "in pursuance" of statutory powers since they are, for instance, giving evidence to a court or tribunal. For them the good faith element may be a significant extra element to be established.
- C49 It is relatively unusual for a good faith element not to be expressly stated, although it was removed from the legislation relating to justices of the peace in 1957. In the defamation context, it also does not appear for courts and tribunals in the Defamation Act 1992. That contrasts with the Commissions of Inquiry Act 1908. After some controversy the good faith requirement was included in the Commissioners Act 1903 and carried over into the 1908 Act; accordingly, it is now applicable to many tribunal and related powers. (See also para C63 for the variations in the Crimes Act.) That extensive legislative practice of including explicit provisions has not, however, prevented the courts reading the requirement into an Act which is silent. In *Baigent's* case, the limit was read into silent Crimes Act provisions (ss 26(3) and 27), so that a police officer who exceeds the scope of the search warrant and knows that the search is beyond the purpose for which it was issued, is not protected: [1994] 3 NZLR 667, 673, 688, 716.
- C50 The reasonable care element does appear to be more significant: if the potential defendant has acted with reasonable care and has also complied with the statute, it is not at all clear what protection

– if any – the protective provision provides. Indeed, to return to the question in para C43, is not compliance with the statute itself a defence to any proceedings? To establish a defence, should it be necessary to show as well that reasonable care has been exercised? *Clerk and Lindsell on Torts* (17th ed, Sweet and Maxwell, London, 1995), 3–65, states that “in order that statutory authority shall succeed as a defence, the defendant must have acted without negligence, for it is not within the realm of reality that a statute would ever authorise negligence”, citing *Geddis v Proprietors of the Bann Reservoir* (1878) 3 App Cas 430. The House of Lords relied on *Geddis* in *X & Ors (minors) v Bedfordshire CC* (see paras C15–C18). *Geddis* makes it clear that an argument based on negligence requires that there be a duty of care: a lack of care in the exercise of the power without the duty is not enough (see para C17).

C51 While in *Baigent’s* case the Court of Appeal did not make a clear decision on whether reasonable care was to be read into the protection provisions in issue, there are strong indications in support of that position. The frequent express inclusion of a reasonable care limit does, however, raise doubts about whether it should be implied into a silent text. But the cases do show that apparently wide provisions – either conferring power or granting protection – might be read more narrowly than a first reading suggests. And in some areas covered by the Bill of Rights Act, especially powers of arrest, and search and seizure, the interpretative direction in s 6 of the Act might well lead to that result.

Comment

A more consistent, principled approach?

C52 At first, the great variety and huge mass of the statutory provisions make any general conclusion difficult to draw. But three points can usefully be made at this stage:

- The apparent confusion over whether provisions are to be included or not and, if they are, how they are worded, should be removed so far as possible by a more consistent approach – consistent in both principle and drafting.
- The need for that approach is supported by the limited or, apparently, even complete lack of effect of some of the provisions. In addition to the doubts about their effect raised in previous paragraphs, the law reports suggest that the provisions are not often invoked.
- That more consistent approach should have regard both to the scope and nature of the power, duty or functions conferred

and to the rights or interests of individuals which might be affected by the exercise of the power.

- C53 To return to the point made at the outset in para C6, in many areas of administration and of law enforcement it would appear sufficient to address this matter directly and positively through the statement of the power or function in issue, and that alone.
- C54 There does not appear to be any reason to confer a power, for instance of search, and then to confer as well a protection on the person allegedly exercising the power. If the latter is to serve the purpose of preventing legal proceedings, it will have to be wider than the former; and, if it is, the question must arise why the original power was not conferred in more ample terms. If the answer is that an action outside the power but inside the protection remains unlawful so that the person injured can still sue (for instance, the Crown or other employer), the two preferable techniques would be to either leave the initial liability unaffected and protect the individual wrongdoer, or provide for an indemnity under contract or statute. (So far as a contractual indemnity by the Crown is concerned, the difficulties apparently caused by the Public Finance Act 1989 s 59(5) should be recalled (see para C37).)

The Crimes Act as a test: "protections without powers"

- C55 Provisions in the Crimes Act 1961 help illuminate some of the issues and add one further statutory variation to those already considered. The variation is the conferral of a protection when no power exists. Section 315 makes it clear that powers of arrest exist only under statute; there are no common law powers of arrest. This section confers powers of arrest on constables, notably when they have good cause to suspect that the person arrested has committed an imprisonable offence (s 315(2)(b)). Section 31 can be read with that power. It provides that constables are justified in arresting a person in accordance with the provisions of s 315 or in accordance with any other enactment conferring an arrest power. ("Justified" is defined as meaning not guilty of an offence and not liable to a civil proceeding: s 2.) Section 31 appears to have no protective effect at all: constables have had the power conferred on them by the separate provision of s 315.
- C56 In contrast to constables, members of the public are not given powers of arrest by the Crimes Act. Rather, they continue to have the benefit of the 1893 protection provisions which remain in the part of the Act concerned with matters of justification and excuse. Those provisions do provide real protection.

Members of the public are justified in arresting a person they find either committing an offence against the Crimes Act which is punishable by 3 years of imprisonment or more, or committing an offence against the Act at night: s 35. The protection in the latter case is reduced to denying criminal responsibility if the circumstances afford reasonable and probable grounds for belief that the Crimes Act is being breached (presumably when the person arrested has not, in fact, committed the offence: s 36).

- C57 To return to constables, s 32, in contrast to s 31, does serve a purpose: a constable who has authority under an enactment to arrest a person *who has committed an offence* is justified in arresting a person whom the constable believes *on reasonable and probable grounds* to have committed that offence, whether the offence has been committed or not, and whether the person committed it or not. The effect of this provision is to limit the absolute nature of the empowering provision (s 315) and to achieve part of what was achieved by a judicial gloss in the *Wiltshire* case (para C44). This is achieved only in part, first, because the statutory ground (belief on reasonable and probable grounds) appears to be more difficult to satisfy than the gloss (apparently committing an offence); and second, because the provision does not confer a power, but only a protection.
- C58 One consequence of the second characteristic appears to be that the protection provision cannot be used in support of a provision which requires the existence of a power (or duty). Consider, for instance, whether an action falling within the protection provision is an action in the course of the constable's *duty* for the purpose of the offence of obstructing constables in the course of their duty. There may also be a question whether the Crown continues to be liable nonetheless: the protection may do no more than prevent proceedings against the constables while leaving intact their liability and the related liability of the Crown under s 6(3) of the Crown Proceedings Act 1950.
- C59 The approach of giving protection rather than conferring a power appears in several other of the provisions of the Crimes Act; for instance:
- Persons executing an erroneous sentence, process or warrant issued by a court
 - having authority to impose such a sentence, etc, but which lacked authority in the particular case, or
 - not having authority to impose such a sentence, etc,are protected from criminal liability in both cases but from civil proceedings only in the first case (ss 27–28).

- Where the warrant or process is bad on its face, a person who believes, in good faith and without culpable ignorance or negligence, that the warrant or process is good in law, is protected from criminal liability (s 29).
- Anyone arresting the wrong person under a warrant, believing in good faith on reasonable and probable grounds that the person is the person named in the warrant, is protected from criminal liability (s 30).
- Anyone assisting a constable or officer to arrest a suspect is protected from both criminal liability and civil proceedings unless the person knows there is no reasonable ground for the belief or suspicion (s 34).

By contrast, the more recent s 39 of the Summary Offences Act 1981 simply and directly empowers constables to arrest persons they have good cause to suspect of having committed an offence against specified provisions of the Act.

C60 The above arrest provisions, taken from just two major criminal statutes, take four forms:

- the power of arrest is conferred (Summary Offences Act s 39);
- that power is exactly matched by a protection provision (Crimes Act s 31, matching s 315);
- that power is paralleled by a protection provision which also gives greater protection than the power conferred (Crimes Act ss 32 and 317(1)(a) – the person arrested is “committing” an imprisonable offence);
- only a protection provision is included (Crimes Act ss 27–28).

C61 In the case of arrest for an apparent offence, there is no manifest difficulty in proceeding simply as in s 39 of the Summary Offences Act. Note, however, that even the exactly matching general protection provision of s 31 of the Crimes Act would also apply as this section is not confined to powers conferred by the Crimes Act.

C62 In respect of these arrest provisions, we consider:

- an exactly matching protection provision serves no purpose at all;
- the substance of a wider protection provision which can be justified should be incorporated into the power itself; and
- the power should be conferred directly.

C63 The variations appear as well in the grounds for arrest or protection, or both:

- the offence must have been committed and the arrested person must be the offender;
- the offence must have been committed and there must be belief that the arrested person is the offender;

- there must be belief both that the offence was committed and that the arrested person is the offender;
- the mental element (if included) varies,
 - belief or suspicion,
 - good (or reasonable) grounds (or cause) for the belief or suspicion, or reasonable and probable grounds, or
 - good faith is explicit in some provisions but not in others.

Some of those differences may well be deliberate. For instance, the good faith element is included in eight of the empowering or protective provisions in the Crimes Act which include mental elements, but not in at least another ten such provisions: eg, ss 32, 34, 36, 37, 38, 312B, 315, 317, 317A, 317B. While it might be thought that that difference is significant, *Baigent's* case indicates that may not be so (see para C49). Consider also the line drawn between *belief* and *suspicion*: the former is frequently further constrained by the requirement that the grounds or cause must be *probable* as well as *reasonable*.

- C64 The differences might also be partly explained by history with, for instance, the protection provisions dating back to the times of common law powers of arrest: see Stephen, *A History of the Criminal Law of England* (MacMillan, London, 1883), vol 1, 193–194, who, in preparing the criminal code, took them for granted. The belief–suspicion distinction appears to be historical as well, with the former being used in 1893 and the (easier) suspicion ground being added in 1961 and later.
- C65 The legislative practice certainly does not support with any consistency the proposition that there must, in general, be protective provisions extending beyond the enforcement powers conferred.

Baigent's case

- C66 The analysis and arguments can be further tested by reference to the four protective provisions at issue in *Baigent's* case. The discussion also highlights the limited or nil effect of the protective provisions when they are tested. The following three provisions – which on their face protect the police officers – were invoked as also protecting the Crown:
- Section 26(3) of the Crimes Act 1961 states that
 Everyone duly authorised to execute a lawful warrant issued by any . . . person having jurisdiction to issue the warrant . . . is justified in executing the warrant . . .
- (“Justified” means not guilty of an offence and not liable to a civil proceeding.)

- Section 27 further states that
 - if a warrant is issued by a . . . person having jurisdiction under any circumstances to issue such a warrant, the . . . warrant issued shall be sufficient to justify the execution of it by every officer . . . or other person authorised to execute it, notwithstanding that
 - . . .
 - (b) . . . [the] person issuing the warrant had no jurisdiction to issue it, or exceeded . . . his jurisdiction in issuing it, in the particular case.
- Section 39(1) of the Police Act 1958 states
 - Where any process has been issued out of any court . . . no member of the police doing anything in obedience to any such process shall be responsible for any irregularity in the issuing of the process, or for any want of jurisdiction in the issuing of the same.

C67 A fourth provision (s 6(5) of the Crown Proceedings Act 1950) does not, on its face, protect the officer. Rather it denies the *Crown's* vicarious liability for certain torts committed by the officer. Section 6(1) makes the Crown subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject

(a) In respect of torts committed by its servants or agents; . . .

A proviso to that s 6(1) emphasises that no proceedings shall lie against the Crown by virtue of paragraph (a) . . . in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his estate.

C68 Section 6(4) gives further emphasis to the proposition that the Crown can stand in the protective shoes of an official:

Any enactment which negatives or limits the amount of the liability of any Government Department or officer of the Crown in respect of any tort committed by that Department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that Department or officer, apply in relation to the Crown as it would have applied in relation to that Department or officer if the proceedings against the Crown had been proceedings against that Department or officer.

C69 In that context, we turn now to s 6(5) which was the protective provision centrally in issue in *Baigent's* case:

No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibility which he has in connection with the execution of judicial process.

- C70 If we begin with the hypothesis – accepted for the purposes of the striking-out action – that the police officers in *Baigent's* case were committing torts of trespass because they were acting outside the scope of their positive authority under the warrant, what *is*, or what *ought* to be, the role of the four protective provisions set out? Both the *is* question and the *ought* question can be answered briefly because the Court of Appeal has ruled on most aspects of them. The four provisions are considered in turn in the following paragraphs.
- C71 Section 26(3) of the Crimes Act appears to provide no protection if, on the plaintiff's hypothesis, the officer was not "executing the warrant". The provision appears to be redundant in any event. If it does not deny the liability of the police officers but only prevents proceedings against them, the Crown's liability might continue unaffected (see para C35).
- C72 Section 27 of the Crimes Act also appears to be of no help to the Crown since there is no allegation that the warrant was issued without authority. In the situation to which it is directed, the provision does appear to have a perfectly proper role: a person directed or authorised to execute a warrant should not be at risk due to the issuer of the warrant, although having general authority to issue such a warrant, acting without authority in the particular case – unless, of course, the person executing the warrant knows of the particular lack of authority.
- C73 That last comment is to be related to the willingness of the judges in *Baigent's* case either to read into such provisions limits of reasonableness and good faith (notwithstanding the "pointed" omissions of such limits from some particular provisions in contrast to others), or to use the knowledge of the officers to conclude that they were not "executing" the warrant and, accordingly, had stepped outside the protection.
- C74 The points relate as well to s 39(1) of the Police Act. On the assumed facts in para C70, the police were not "doing anything in obedience to . . . [the] process"; they were doing things outside it. Also, the limits of good faith and reasonableness are again seen as constraining the exercise of the power or the scope of the protective provision. Like s 27 of the Crimes Act, s 39(1) appears to have what may be considered an entirely proper purpose of protecting those executing court process from earlier errors in the issuing of the process – again, so long as the officers did not know of the errors.

- C75 The possible area of application of the final provision – s 6(5) of the Crown Proceedings Act – is narrowed by the following considerations:
- that judicial immunity already provides wide protection to those exercising judicial functions;
 - that most of those exercising “responsibilities of a judicial nature” are not “servants” or “agents” of the Crown within the definitions in s 2 of the Crown Proceedings Act – accordingly s 6(1)(a) does not apply; and
 - that the provision does not, expressly at any rate, prevent action directly against the person who discharges the responsibility in question: for instance, in *Baigent’s* case it does not protect the police officer.
- C76 To move to the *ought* question, to the extent that the provision protects the Crown in respect of the action of the police, why should the existence of that protection depend on whether the police officers are claiming to act directly under a statutory power of search (eg, the powers to stop and search cars in the Crimes Act s 317A), or – as in *Baigent’s* case – under a search warrant issued under statutory power? We recall the 1980 recommendation of the Public and Administrative Law Reform Committee that the final phrase of s 6(5) of the Crown Proceedings Act (“or any responsibilities which he has in connection with the execution of judicial process”) should be deleted. As the report indicates, we support that recommendation (see para 176).
- C77 The foregoing discussion might first suggest a category of protective provisions – provisions protecting an officer who is acting under the authority of another or to give effect to the directions of another – where that authority has been unlawfully exercised by that other. The argument would be that in the absence of knowledge or imputed knowledge, the subordinate should not be personally liable. Such a protection would be in conformity with the principle that a manifestly unlawful order is no defence to criminal proceedings, with the consequence that an apparently lawful order *is* a defence, even if a court later holds it to have been unlawful: eg, Crimes Act ss 45 and 47; compare the Armed Forces Discipline Act 1971 ss 37–40 (“unlawful” order). Protecting the innocent subordinate or officer would not affect the ability to sue the person who ordered the issue of the process (although judicial immunity would generally defeat that) or the Crown if no other appropriate remedy (eg, an appeal or review) was available.
- C78 The second suggestion arising from this discussion might be that many protective provisions should be repealed or modified. Many

are not effective; they might even be counter-productive. To the extent that they are effective, they are difficult to reconcile with principle. The reason is that they completely prevent a person who has been unlawfully deprived of liberty, assaulted, or has been the subject of unlawful trespass, from obtaining the judgment in damages to which that person would otherwise be entitled. However, a provision of the kind suggested in para C77, which protects an innocent officer, but leaves the main cause of action available against another defendant (the person or body principally responsible, or the Crown), can be seen differently. That matter, too, is further considered in the report (see paras 118–120).

- C79 To conclude the discussion in this appendix, it is convenient to mention an important argument of principle for the repeal or narrowing of many of the protective provisions. It is discussed in chapter 2 of the report. The principle is equality before the law: the state should not, in terms of remedies, have a preferred position. The Bill of Rights Act s 27(3), the International Covenant on Civil and Political Rights, the Crown Proceedings Act 1950, the criteria stated by the Cabinet Strategy Committee, and the Ministerial terms of reference on the Crown project, all support the equation of the state with individuals in this respect. That matter is considered by the Commission in its *Final Report on Emergencies* (NZLC R22, 1991), paras 5.162–5.164. The principle that the state be subject to the law in the same manner as an individual is also part of Dicey's concept of the rule of law: It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals . . . (Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan, London, 1959), 202–203)
- C80 This equality is emphatically not a reference to equality of powers. As the preface to this report recognises, the state has numerous powers which the individual does not. Rather, the principle of equality in this case means that when those powers are exercised the state should be liable for wrongdoing in the same way as an individual.

PROTECTION AND IMMUNITY PROVISIONS

table 4: Schedule of protection and immunity provisions.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Access Training Scheme 1988	18	Members of council and of council committee	No personal liability	Any act in pursuance or intended pursuance of the Act	Good faith	Education and Training Support Agency
Accident Rehabilitation and Compensation Insurance 1992	Sch 2, cl 26	Members and employees of corporation	No personal liability	Any act in pursuance or intended pursuance of the Act	Good faith	ARCI Corporation
Alcoholic Liquor Advisory Council 1976	15A	Members of council and of council committees, co-opted advisers, officers and employees	No civil or criminal liability on any ground	Any act or omission in pursuance or intended pursuance of the Act	Good faith and reasonable care	Ministry of Health
Alcoholism and Drug Addiction 1966	37A	Constables	Not guilty of any criminal offence and not liable to any civil proceeding	Detention of an intoxicated person for not more than 12 hours	Reasonable and probable grounds for finding intoxication	Ministry of Health
	38	Any person	No civil or criminal liability whether on the ground of want of jurisdiction, mistake of law or fact, or any other ground	Any act in pursuance or intended pursuance of the Act	Bad faith and lack of reasonable care not shown	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Animal Remedies 1967	13	Board members, members of advisory and technical committees, officers of the Department of Health or of the Ministry of Agriculture and Fisheries	No civil or criminal liability on any ground, including want of jurisdiction and mistake of law or fact	Any act in pursuance or intended pursuance of the Act or omission of any act required by the Act	Good faith and reasonable care	Ministry of Agriculture
Animals Protection 1960	14	Any person	No civil or criminal liability on any ground, including want of jurisdiction and mistake of law or fact	Any act in pursuance or intended pursuance of the Act	Good faith and reasonable care	Ministry of Agriculture
Antarctic Marine Living Resources 1981	10	Crown, inspectors and any person acting under an inspector	No action or proceedings shall be brought	Anything done or undertaken for the purpose of carrying out the provisions of the Act or of regulations made under it	Good faith and reasonable care	Ministry of Foreign Affairs and Trade
Antarctica (Environmental Protection) 1994	49	Crown, inspector, observer, any person acting under instructions of inspector	No action or proceedings shall be brought	Any act or omission of inspector or observer while carrying out function under Act	Good faith and reasonable care	Ministry of Foreign Affairs and Trade

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Armed Forces Discipline 1971	141(1)	Members of court-martials and judge advocates	No civil or criminal liability	Any act, omission or written or spoken words at or for the purposes of any proceedings	—	NZ Defence Force
	141(2)	Witnesses, counsel and interpreters appearing before court-martials	Same privileges and immunities as in High Court	—	—	
	184	Prison officers, constables, provost officers and others exercising authority over those detained under the Act	Not liable for damages	Any act which would be lawful but for defective warrants	—	
	200(5)	Members of Court of Inquiry	No civil or criminal liability	Actions or words at, or for the purpose of, any proceedings	Good faith	
	200(6)	Witnesses, and interpreters at a court inquiry	Same privileges and immunities as in High Court	—	—	
Arms 1983	71	The Crown, Ministers and other persons	No action, claim or demand shall lie or be made or allowed except for expressly provided compensation	Any act in execution or intended execution of the Act	Good faith	NZ Police

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Arts Council of New Zealand Toi Aotearoa 1994	Sch 1, cl 24	Any person	No civil or criminal liability on any ground, including want of jurisdiction and mistake of law or fact	Any act in pursuance or intended pursuance of functions conferred by or under the Act	Good faith and reasonable care	Minister of Cultural Affairs
Aviation Crimes 1972	15	Aircraft commanders and any person authorised by an aircraft commander	Not guilty of an offence or liable to any civil proceeding	Imposition of reasonable measures including restraint on any person for the maintenance of order or safety on board aircraft	Good faith	Ministry of Justice
Biosecurity 1993	163	Inspectors, authorised persons, accredited persons, and others	No civil or criminal liability	Any act or omission in pursuance of functions, powers or duties conferred on that person by the Act	Good faith and reasonable care	Minister of Agriculture
	164	Crown	No civil liability for loss or damage to goods	Loss or damage to goods while goods in custody of Crown, or resulting from or in course of treatment, handling or quarantine under authority of the Act	Good faith and reasonable care	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Broadcasting 1989	Sch 1, cl 16	Members of Broadcasting Standards Authority or of Broadcasting Commission	No personal liability	Acts or defaults of the authority, commission, or their members in the course of operations	Good faith	Ministry of Commerce
Building 1991	36	Territorial authorities and authority members, employees and agents	No civil liability	Issue of building consents	—	Department of Internal Affairs
	50(3)	Territorial authority or building certifier	No civil proceedings	Any act done in reliance upon a document of compliance	Good faith	
	70(4)	Territorial authority	No liability	Issue of warrant rectifying insanitary conditions	Good faith	
	89	Members and employees of authority, territorial authorities, members of authority and territorial authority committees, building referee	No personal liability	Any act under the Act	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Business Development Boards 1991	Sch 1, cl 23	Board members	No personal liability	Any act or default by a Board or Board member in the course of operations	Good faith	Ministry of Commerce
Cancer Registry 1993	7	Any person	No proceedings, civil or criminal, shall lie	Person making available information for purposes of complying with ss 5 or 6(2) of the Act	—	Ministry of Health
Carter Observatory 1938	22A	Board members	No personal liability	Any act or default by the Board or a Board member in the course of operations	Good faith	Ministry of Research, Science and Technology
Chateau Companies 1977	15	Trustee	No liability, no action or proceeding may commence without leave of the Court; indemnity for liabilities properly incurred	Any act in the exercise of functions	Good faith	Ministry of Justice
Children's Health Camps 1972	38	Members of the board, camp committees, district committees, subcommittees, and other committees appointed under the Act	No personal liability	Act or default in the	Good faith course of operations	Ministry of Health

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Children, Young Persons, and Their Families 1989	16	Any person	No civil, criminal, or disciplinary proceedings	Disclosure of information under s 15 of the Act	Good faith	Department of Social Welfare
	188	Any person	No civil or criminal liability	Furnishing of reports under ss 178, 181, 186, 187	Good faith and reasonable care	
	420(1)	Commissioner for Children	No civil or criminal proceedings ³⁴	Acts or omissions in the exercise or intended exercise of functions under the Act	Good faith	
	444	Any person	No civil or criminal liability	Furnishing of reports to any court for the purposes of proceedings under the Act	Good faith	
Citizenship (Western Samoa) 1982	8(3)	Any person	No civil liability or criminal guilt	Action against persons whose convictions are quashed under s 8(1)	Good faith	Department of Internal Affairs
Civil Aviation 1990	Sch 3, cl 27	Members and employees of the Authority	No personal liability	Any act or omission of the Authority, the Director, its members or employees in pursuance or intended pursuance of functions	Good faith	Ministry of Transport

³⁴ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Civil Defence 1983	6B	Crown, territorial authorities, their members and employees, and any other person	No proceedings may be brought	Any act or omission in pursuance or intended pursuance of functions or powers, other than under ss 65 and 75 of the Act	Good faith	Department of Internal Affairs
Commerce 1986	106	Commerce Commission, Commission members, associate members, and officers	No proceedings may be brought ³⁵	Any act or omission in exercise or intended exercise of its functions ("operations" in regard to members, associate members or officers)	Bad faith or lack of reasonable care not shown	Ministry of Commerce
Commissions of Inquiry 1908	3	Any member	No action shall lie	Anything he may report or say in course of inquiry		Ministry of Justice
Conservation 1987	26D	NZ Fish and Game Council members	No personal liability	Any act of the council in the course of operations	Good faith	Department of Conservation
	26ZB	NZ Fish and Game Council members	No personal liability	Any act of the council in the course of operations	Good faith	
	42	Any person	No civil or criminal liability	Any act in pursuance or intended pursuance of any function conferred under the Act	Good faith and reasonable care	

³⁵ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Contraception, Sterilisation, and Abortion 1987	40	Supervisory committee members and certifying consultants	No personal liability	Any act or omission in pursuance of powers conferred by the Act	Good faith	Ministry of Justice
Corporations (Investigation and Management) 1989	15	Trustees, statutory supervisors, and auditors	No civil, criminal, or disciplinary proceedings shall lie; no order may be made by any professional body; disclosed information inadmissible as evidence	Disclosure of information under ss 11 and 13 of the Act	Good faith	Ministry of Justice
	63	Securities Commission, registrar, statutory managers, advisory committee, members and appointees under ss 17 and 19	Crown indemnity for liability	Exercise, purported exercise, or omitted exercise of any power conferred by the Act	Bad faith not shown	
Crimes 1961 ³⁶	26(1)	Ministerial officer of any court authorised to execute sentence, superintendent of penal institution, and every person lawfully assisting	"Justified" (not guilty of an offence and not liable to any civil proceeding)	Executing sentence	—	Ministry of Justice

³⁶ Sections 48 and 52–60 are not listed here: ss 48 and 52–58 provide justifications or immunities for acts in defence of person or property; ss 59–60 authorise certain private persons to administer discipline.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	26(2)	Ministerial officer of any court, persons lawfully assisting, superintendent	"Justified"	Executing lawful process of the court, (superintendent) receiving and detaining person	— —	Ministry of Justice
	26(3)	Every one duly authorised to execute lawful warrant and every person lawful, assisting, superintendent	"Justified"	Executing warrant, (superintendent) receiving and detaining person	—	
	27	Every officer, superintendent, other person authorised to execute sentence, process or warrant and person lawfully assisting	"Justified"	Execution of sentence, process or warrant where court passing or issuing it had no jurisdiction or authority in particular case	—	
	28	Every officer, superintendent, person executing sentence, process or warrant and person lawfully assisting	No criminal liability	Execution of sentence, process or warrant	Good faith and under belief that court had jurisdiction, or that warrant issued by court, justice or other person who has authority to do so <i>and</i> proof that person passing sentence etc acted under colour of having authority to do so	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Crimes 1961 (cont)</i>	29	Every one acting under warrant or process that is bad in law	No criminal liability	Act that would be authorised if warrant or process were good in law	Good faith and without culpable ignorance or negligence believed warrant or process good	Ministry of Justice
	30(1)	Every one duly authorised to execute warrant of arrest	No criminal liability	Arrest of wrong person	Belief in good faith and on reasonable grounds arrested person is person named	
	30(2)	Every one assisting person making arrest, superintendent	No criminal liability	Arrest of wrong person	Belief that arrested person is person named	
	31	Every constable	"Justified"	Arrest without warrant or per s 315 or any other power to arrest	—	
	32	Any constable	"Justified"	Arrest without warrant	Belief on reasonable and probable grounds that arrested person committed offence <ul style="list-style-type: none"> • whether offence committed • whether arrested person committed it 	
	33	Every officer or other person not a constable authorised to arrest	"Justified"	Arresting in accordance with provisions of enactment	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	34(1)	Every one called by constable to assist in arrest	"Justified"	Assisting in arrest	No knowledge that there is no reasonable ground for belief or suspicion that person committed offence	Ministry of Justice
	34(2)	Person assisting officer or person not a constable	"Justified"	Assisting in arrest without warrant of one who has committed or is committing offence	No knowledge that there is no reasonable ground for believing that arrested person has committed offence	
	35	Everyone	"Justified"	Arresting without warrant person committing <ul style="list-style-type: none"> • offence punishable by sentence of imprisonment for not less than 3 years, or • offence under Crimes Act committed at night 	—	
	36	Everyone	No criminal liability	Arrest without warrant of person found by night	Circumstances affording reasonable and probable grounds for believing offence against Crimes Act committed	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Crimes 1961 (cont)</i>	37	Everyone	No criminal liability	Arrest of person without warrant	Belief on reasonable and probable grounds that offence against Crimes Act committed	Ministry of Justice
	38	Everyone	No criminal liability	Arrest of person escaping and freshly pursued	Belief on reasonable and probable grounds that person committed offence against Crimes Act <i>and</i> belief on reasonable and probable grounds that person pursuing has authority to arrest	
	39	Any person justified or protected from criminal responsibility in executing sentence process or warrant or making any arrest	Justification or protection extends to use of necessary force	Used necessary force (unless a less violent manner would suffice); except in case of constable or person assisting constable, section does not apply if force used is intended or likely to cause death or grievous bodily harm	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	40(1)	Any person authorised to arrest or assist in arrest	Authority, justification or protection extended to necessary force to avoid escape or rescue of person that is or is about to be arrested	Use of necessary force to prevent escape or rescue from arrest (unless a less violent manner would suffice); except in case of constable or person assisting constable, section does not apply if force used is intended or likely to cause death or grievous bodily harm	—	Ministry of Justice
	40(2)	Every constable and any person assisting constable	"Justified"	Use of necessary force to prevent escape or flight of inmate (unless a less violent manner would suffice)	—	
	41	Everyone	"Justified"	Use of force reasonably necessary to prevent suicide or offence likely to cause immediate and serious injury to person or property	Belief on reasonable grounds that suicide or offence of serious injury to person or property about to be committed	
	42(1)	Everyone	"Justified"	Interfering to prevent or stop breach of peace	Force used is no more than is reasonably necessary, or than is reasonably proportionate to the danger	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Crimes 1961 (cont)</i>	42(2)	Every constable and every person assisting	"Justified"	Arresting person who is committing breach of peace	—	Ministry of Justice
	42(3)	Every constable	"Justified"	Receiving into custody person from one who witnessed breach of peace or where belief on reasonable and probable grounds that person witnessed it	—	
	43	Everyone	"Justified"	Use of force to suppress riot	Force used not disproportionate to danger	
	44	Senior member of police	"Justified"	Ordering or using necessary force to suppress riot	Belief in good faith on reasonable and probable grounds that force necessary and force not disproportionate to danger believed to exist on reasonable and probable grounds	
		Every constable	"Justified"	Using necessary force to suppress riot	(as above)	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	45	Any person	No criminal liability	Action in obedience to orders given by the senior member of the police, including the use of force, for the suppression of a riot	Good faith; orders must not be manifestly unlawful; force must be as believed necessary on reasonable and probable grounds	Ministry of Justice
	46	Everyone	"Justified"	Use of force believed necessary not being disproportionate to danger	Belief in good faith on reasonable and probable grounds that serious mischief will arise from riot before police can intervene; belief that force necessary on reasonable and probable grounds	
	47	Everyone bound as member of NZ armed forces to obey command of supervisor	"Justified"	Action in obedience to command for suppression of a riot	Orders must not be manifestly unlawful	
Crown Minerals 1991	75	Arbitrators	No proceedings shall lie except under s 76(4)	Any determination, publication or any act, matter or thing done for the purposes of a hearing	Good faith	Ministry of Commerce

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Crown Proceedings 1950	6(5)	Crown	No proceedings	Acts done or omitted by any person while discharging or purporting to discharge responsibilities of judicial nature or responsibilities in connection with judicial process	—	Ministry of Justice
	9	Crown, or any officer of the Crown	No proceedings for compensation or damages	In respect of death or disablement of any member of NZ armed forces if <ul style="list-style-type: none"> • pension paid, or • death or disablement attributable or aggravated by service in forces 	Actions of officer not exempt if act or omission not connected with execution of duties	
Customs and Excise 1996	175	The Crown, customs officer, members of the police, a member of the armed forces, an authorised person, a person lawfully assisting any such person	No liability for loss of or damage to goods	Anything done or omitted to be done or purporting to have been done in the exercise of any power conferred by the Act	Good faith and reasonable care	NZ Customs Service

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Dangerous Goods 1974	25	Crown, local licensing authorities, inspectors and any person under an inspector	No action or proceedings shall be brought	Any action for the purpose of carrying out the provisions of the Act or any regulations made under it	Good faith and reasonable care	Department of Labour
Defence 1990	9(6)	Every member or part of armed forces	For purposes of civil and criminal liability have the protections of a member of police	Assisting police in dealing with emergency	—	Ministry of Defence
	58(12)	Crown	No liability	Any loss sustained by any fund established under s 58 (for benefit of members and dependants of members of services etc)	—	
	96(3)	Public Trustee	No liability	Acts on direction of Chief of Defence Force in regard to Nelson Rifle Prize Fund	—	
	96(5)	Public Trustee	No liability in law or equity	Failure to ensure that money is spent on intended purpose	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Dental 1988	76	Council, board, tribunals, assessment committee, and their members	No civil or criminal liability	Anything done or omitted and any words spoken or written for the purposes of any inquiry or proceedings	Bad faith not proven to the satisfaction of the court	Ministry of Health
Development Finance Corporation of NZ 1986	16	Former directors of the corporation	No personal liability	Any act or default by the board or by a director in the course of operations of the board	Good faith	Ministry of Commerce
Dietitians 1950	25C(8)	Dietitians Board members, witnesses and counsel	Same privileges and immunities as if proceedings in court of law	Proceedings before board	—	Ministry of Health
Distress and Replevin 1908	17	Justices	No liability in any action	Taking of insufficient security	Good faith, reasonable care and caution	Ministry of Justice
District Courts 1947	107	Bailiffs	No proceedings	Anything done pursuant to warrant issued under Act	Exception where bailiff fails to comply with request to inspect warrant	Department for Courts
	119	Judges and justices	Provisions of the Summary Proceedings Act 1957 Part VII relating to the protection of judges and justices apply	Actions of judges in civil jurisdiction	—	Department for Courts

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Driftnet Prohibition 1991	23(1)	Enforcement officers and any person assisting an officer	No civil or criminal liability on any ground	Any act or omission in pursuance or intended pursuance of the Act including want of jurisdiction and mistake of law or fact	Bad faith or lack of reasonable cause not shown	Ministry of Fisheries
	23(2)	Crown	No direct or indirect liability	actions of enforcement officers or of any person assisting an enforcement officer	Enforcement officer or person assisting would not incur liability him/herself	
Education 1989	19	Principals and Board of Trustees	No liability	Any act done or omitted in pursuance or intended pursuance of a power or duty given or imposed by the section (which relates to expulsion of students with communicable diseases)	Good faith and reasonable care	Ministry of Education
	183	Members of institution councils	No personal liability	Any act done or omitted by the member in pursuance or intended pursuance of functions of the institution or of the council	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Education 1989 (cont)</i>	Sch 1, cl 12	Special Education Service Board members and employees	No personal liability	Any act done or omitted by the member or employee in pursuance or intended pursuance of the committee's functions	Good faith	Ministry of Education
	Sch 14, cl 4	Vice-Chancellors committee members and staff	No personal liability	Any act done or omitted by the member, the staff or the committee in pursuance or intended pursuance of the committee's functions	Good faith	
	Sch 16, cl 11	Education and Training Support Agency members and employees	—	No personal liability; any act done or omitted by the member or employee or by the board in pursuance or intended pursuance of the agency's function	Good faith	
	Sch 18, cl 8	Tertiary Research board members and staff	No personal liability	Any act done or omitted by the member or staff member or by the board in pursuance or intended pursuance of the board's functions	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Electricity 1992	Sch 2, cl 17	Electrical Workers Registration board and Complaints Assessment committee members	No personal liability	Any act or default done by the board or committee or by any member in the course of operations of the body	Good faith	Ministry of Commerce
Enemy Property 1951	9	Custodian	No civil proceeding shall be brought	Any act, default or error in the exercise of functions, powers or duties conferred or imposed by the Act or by regulation or order made under the Act	Good faith	Public Trust Office
Environment 1986	16(3)	Commissioner	Shall have same immunities as District Court judge in civil jurisdiction	Inquiry and report at request of House or Select Committee	—	Ministry for the Environment
	22A(2)	Commissioner and persons engaged or employed in connection with commissioner's work	No civil or criminal proceedings (offences listed in s 22A(3) excluded)	Anything done, reported or said in the exercise/intended exercise of duties under the Act	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Fair Trading 1986	48(1)	Commerce Commission	No proceedings shall lie ³⁷	Anything done or omitted in the exercise or intended exercise of functions under the Act	Bad faith or lack of reasonable care not shown	Ministry of Commerce
	48(2)	Commission members, associated members, and officers	No proceedings shall lie ³⁸	Anything said or done or not said or done in the course of operations	Bad faith not shown	
Films, Videos, and Publications Classification 1993	119	Any person	No action shall lie	Any act done or any warrant or order issued in pursuance or intended pursuance of this part of the Act	Good faith	Minister of Internal Affairs
	137	Any person	No action shall lie	Any act done or order made in pursuance or intended pursuance of s 136	Good faith	
Financial Reporting 1993	Sch 1, cl 8	Accounting Standards Review Board members	No personal liability	Any act or default of the Board or any member in the course of operations	Good faith	Ministry of Justice

³⁷ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

³⁸ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Fire Service 1975	43(1)	The Crown, Fire Service Commission, fire brigades, their members and any other person	No action or proceeding shall be brought to recover damages	Any damage occasioned by the Chief Fire Officer or any member of a fire brigade in the performance of functions or duties or the exercise of powers under any Act except where related to the use of motor vehicles for transport	Good faith ³⁹	Department of Internal Affairs
	43(2)	Fire Service Commission, fire brigades, their members and employees	Defence in any action for failure or neglect to make or negligence in making adequate provision for prevention, suppression or extinction of fires	Acts or omissions connected with prevention, suppression, or extinction of fires	Provisions made followed standards approved by commission or operational instructions of national commander, and that employees or members complied with requirements of commission	
	43(3)	Fire Service Commission members	No personal liability	Any act done or omitted by the Commission or any member in pursuance or intended pursuance of the Commission's powers and authority	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Fisheries 1983	80(10)	Fishery Officers	No civil or criminal liability	Return of fish or aquatic life to water following seizure	—	Ministry of Fisheries
	80(8)	Crown	No liability	Any spoilage or deterioration in quality of seized fish, aquatic life or seaweed		
	83(1)	Fishery officers	No civil or criminal liability on any ground, including want of jurisdiction and mistake of law or fact	Examining or rendering ineffective equipment; any act in pursuance, or omission of any act required by, the Act or regulations under the Act	Bad faith or lack of reasonable cause not shown	
	83(2)	Crown or any Fish and Game Council	No direct or indirect liability	Any act or omission of any fishery officer	Fishery officer would not incur liability for the act or omission	
Fishing Industry Board 1963	32	Members of board and of appointed committees	No personal liability	Any act or default of the board, the committee or their members in the course of operations	Good faith	Ministry of Fisheries

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Food 1981	39	Any person	No civil or criminal liability on any ground, including want of jurisdiction or mistake of law or fact	Any act in pursuance or intended pursuance of any function conferred under the Act	Bad faith or lack of reasonable care not shown	Ministry of Health
Forest and Rural Fires 1977	56	The Crown, National Rural Fire Authority, fire authorities, fire brigades, and their officers, members, servants, employees or any other person	No action or proceedings shall be brought to recover damages ³⁹	Damage occasioned by the performance of functions or duties or the exercise of conferred powers except where related to the use of motor vehicles for transport	Good faith	Department of Internal Affairs
	57(1)	The Crown, National Rural Fire Authority, fire authorities, and their officers, members, servants, employees or any other person	No action or proceedings shall be brought to recover damages	Failure or neglect to make adequate provision for fire control	Good faith	

³⁹ Note also the defence under s 56(2) of compliance with approved plans, operational instructions, codes of practice and with relevant requirements and instructions should any action be brought.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Forest and Rural Fires 1977 (cont)</i>	57(2)	Fire authority members	No personal liability	Any act done or omitted by the Authority or by any member in pursuance or intended pursuance of its power and authority	Good faith	Department of Internal Affairs
Forests 1949	13	Forestry Officers, ministry employees and appointees under s 15(2)(b) or 71A	No personal liability	Anything done in the exercise of powers or performance of duties under the Act	Good faith	Ministry of Forestry
Foundation for Research, Science, and Technology 1990	Sch 1, cl 24	Foundation members	No personal liability	Any act or default of the foundation in the course of operations	Good faith	Ministry of Research Science and Technology
Friendly Societies and Credit Unions 1982	58	Public trustee or trustee company to whom funds, stocks, shares or securities of society registered under Act are transferred	No liability	Investment, transfer realisation of stocks etc or society	Acts in accordance with section which requires investment in accordance with rules of society and transfers etc in accord with instruction of trustees of society	Treasury
Gaming and Lotteries 1977	82	Commission and committee members	No personal liability	Any act or default of the commission in the course of operations	Good faith	Department of Internal Affairs

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	116ZC	Board, distribution committees and subcommittee members	No personal liability	Any act or default of the board, the distribution committee or subcommittee in the course of operations	Good faith	Department of Internal Affairs
Health 1956	92L	Trustees of blood transfusion unit	(as per s 129)	Any act, or failure, or refusal to act, in pursuance or intended pursuance of the Act	(as per s 129)	Ministry of Health
	129	Any person	No civil or criminal liability on the ground of want of jurisdiction or mistake of law or fact or any other ground ⁴⁰	(as above)	Bad faith and lack of reasonable care not shown to the satisfaction of a High Court judge	
Health and Disability Commissioner 1994	65	Commissioner, every advocate, and every person engaged or employed with work of Commissioner	No civil or criminal proceedings shall lie except under ss 78, 78A(1), 105, 105A, and 105B of the Crimes Act 1961	Anything done, said or reported in exercise of intended exercise of duties	Bad faith not shown	Ministry of Health

⁴⁰ Under ss 129(2) and 129(4), proceedings may only be brought within 6 months of the act or damage complained of with the leave of a judge of the High Court, who must be satisfied that there is substantial ground for the contention of bad faith or lack of reasonable care. Under s 129(3) the intended defendant must be given notice of any application and is entitled to be heard against it. Section 129(5) provides that leave may be granted subject to a time limit.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Health and Disability Services 1993	Sch 2, cl 16(1)	Directors and employees of Government purchasers	No personal liability	Any liability of or any act done or omitted by the purchaser or its directors or employees in pursuance or intended pursuance of the purchaser's functions, duties or powers	Good faith	Ministry of Health
Health Research Council 1990	42	Any person	No civil or criminal liability on any ground, including want of jurisdiction or mistake of law or fact	Any act in pursuance or intended pursuance of functions conferred by or under the Act	Bad faith or lack of reasonable care not shown	Ministry of Health
Higher Salaries Commission 1977	29	Commission members	No personal liability	Any act or default of the commission in pursuance or intended pursuance of its powers and authorities	Good faith	Department of Labour
Historic Places 1993	53	Board and committee members	No personal liability	Any default of the board or any committee in the course of operations	Good faith	Department of Conservation

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	68	Trust Chief Executive Officer and employees	No personal liability	Any liability of the trust, or any act or default of the trust or its employees in pursuance or intended pursuance of their functions or powers	Good faith	Department of Conservation
	96	Māori Heritage Council and council committee members	No personal liability	Any default of the council or any committee in the course of operations	Good faith	
Hospitals 1957	13F	Any person	No civil or criminal liability on the ground of want of jurisdiction or mistake of law or fact or any other ground ⁴¹	Any act for purposes connected with the functions of the assessment committee	Bad faith and lack of reasonable care not shown to the satisfaction of a High Court judge	Ministry of Health
	139A	Medical practitioners and licensees of private hospitals	No civil or criminal liability	Provision of medical information for statistical purposes		

⁴¹ Under s 13F(2) and 13F(4), proceedings may only be brought within 6 months of the act or damage complained of with the leave of a judge of the High Court, who must be satisfied that there is substantial ground for the contention of bad faith or lack of reasonable care. Under s 13F(3) the intended defendant must be given notice of any application and, if entitled, be allowed to be heard against it. Section 13F(5) provides that leave may be granted subject to a time limit.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Hotel Association of New Zealand 1969	19	Association and its members, officers and servants	No civil or criminal liability	Any act or omission or any words spoken or written for the purposes of any inquiry or proceedings under the Act	Bad faith not proven to the satisfaction of the court	Ministry of Justice
Housing Corporation 1974	43A	Corporation solicitors	No personal liability	Any act or default of the solicitor while acting for the Corporation in the exercise or purported exercise of powers under s 19(4)(c) of the Act	Good faith	Housing New Zealand
	47	Corporation and corporation committee members	No personal liability	Any act or default of the Corporation or any committee in the course of operations	Good faith	
Human Rights 1993	118	Complaints Review Tribunal members	No personal liability	Any act done or omitted by the tribunal or any member in pursuance or intended pursuance of tribunal functions, powers or duties	Good faith	Ministry of Justice

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	130(2)(a)	Commissioners and every person engaged or employed in connection with the work of the commission	No civil or criminal proceeding shall lie ⁴²	Anything done, reported or said in the course of exercise or intended exercise of duties under the Act	Bad faith not shown	Ministry of Justice
	130(2)(b)	Commissioners and every person engaged or employed in connection with the work of the commission	Not required to give evidence in any court or judicial proceedings in respect of anything coming to his or her knowledge in the exercise of his or her function	—	—	
	130(4)	—	Same privilege as if inquiry, etc, were before a court	Anything said, any information supplied, any document or thing produced by any person in the course of any inquiry, investigation or proceedings	—	

⁴² Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Human Rights 1993 (cont)</i>	130(5)	—	Report deemed to be an official report of a parliamentary inquiry for the purposes of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Any report by the commission or by a commissioner	—	Ministry of Justice
Immigration 1987	45	Any person	No civil or criminal liability	Any act in compliance with a request for information under s 45(3) of the Act	—	Department of Labour
	125	Any person	Not guilty of an offence and not liable to civil proceedings	Imposition of reasonable measures, including restraint, on another person to prevent unlawful disembarkation	Good faith	
	134	Police members	Not guilty of an offence and not liable to civil proceedings	Arrest under part II of the Act	Reasonable and probable grounds for arrest	
	Sch 2, cl 9	Deportation Review Tribunal members	No personal liability	Any act done or omitted by the Tribunal or any member in pursuance or intended pursuance of tribunal powers and authorities	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	Sch 3A, cl 5	Residence Appeal Authority members	No personal liability	Any act done or omitted by the Authority or any member in pursuance or intended pursuance of Authority powers and functions	Good faith	Department of Labour
	Sch 3B, cl 5	Removal Review Authority members	No personal liability	Any act done or omitted by the Authority or any member in pursuance or intended pursuance of Authority powers and functions	Good faith	
Insolvency 1967	118	The Crown and the Secretary for Justice	No action shall lie	Publication of list of undischarged bankrupts	Good faith and reasonable care	Ministry of Justice
Inspector-General of Intelligence and Security 1996	23(5)	Every person who appears as a witness before the Inspector-General	Same privileges and immunities as witnesses in court of law	Giving information, answering questions, and producing documents and papers	—	NZ Security Intelligence Service
	24(1)(a)	Inspector-General or any employee of the Inspector-General	No civil or criminal proceedings	Anything done, reported or said in exercise or intended exercise of functions under the Act	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Inspector-General of Intelligence and Security 1996 (cont)</i>	24(1)(b)	Inspector-General or any employee of the Inspector-General, or past Inspector-General or employee	Not required to give evidence in respect of information gained in exercise of functions under the Act	—	—	NZ Security Intelligence Service
	24(3)	—	Shall be privileged as though proceedings were court proceedings	Anything said, any information given, or document or thing produced in the course of an inquiry or proceeding before the Inspector-General	—	
<i>Institute of Chartered Accountants of New Zealand 1996</i>	12(1)	Any member of the Professional Conduct Committee or a disciplinary body	No action shall lie	Exercise of any power or function under the Act or the rules	Good faith	Treasury
	12(2)	Any person who provides documents, things or information to the Professional Conduct Committee or produces evidence or answers questions before a disciplinary body	Same privileges as a witness in court	—	—	
	12(3)	Every counsel appearing before a disciplinary body	Same privileges and immunities as counsel in a court	—	—	

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Intelligence and Security Committee 1996	15(1)	Any member of the committee or person assisting the committee	No civil or criminal proceedings	Anything done, reported, or said in the course of exercise or intended exercise of committee's functions under the Act	Good faith	Department of the Prime Minister and Cabinet
	15(2)	Any member of the committee or person assisting the committee	Not called to give evidence in any proceedings of a judicial nature, in respect of information gained in exercise of committee's functions	—	—	
	16(2)	—	Privileged as if inquiry or proceedings were parliamentary proceedings	Anything said, any information supplied or thing produced in an inquiry or proceeding before the committee	—	
International Terrorism (Emergency Powers) 1987	16	The Crown and members of the police and armed forces	No action or proceeding shall be brought to recover damages	Loss, damage or injury due to an emergency in which authority to exercise emergency powers has been granted, whether caused by acting or failing to act in the exercise or performance of functions, duties, or powers under the Act	Good faith	Department of the Prime Minister and Cabinet

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Judicature 1908	26Q	Masters	All protections, privileges and immunities of High Court judge	Acting or purporting to act as a Master	Good faith	Ministry of Justice
Land Transport 1993	Sch 1, cl 34	Land Transport Safety Authority members and employees	No personal liability	Any liability of the Authority or any act done or omitted by the authority or its director or any other employee in pursuance of functions or powers	Good faith	Minister of Transport
Law Commission 1985	Sch 1, cl 14(1)	Commission	No proceedings may be brought	Any act in exercise or intended exercise of functions	Bad faith not shown	Ministry of Justice
	cl 14(2)	Commission members	No proceedings may be brought	Anything said or done in the course of operations	Good faith	
	cl 14(3)	Commission members, officers, appointees and employees	Not be required to give evidence relating to any information in the course of operations	—	—	
	cl 14(4)	—	Same privilege as if proceedings were before a court	Proceedings before the commission	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	cl 14(5)	—	Deemed to be reports of a parliamentary inquiry for the purpose of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Reports made by the commission in the exercise or intended exercise of its functions	—	Ministry of Justice
Law Practitioners 1982	31B	Council of Legal Education Members	No personal liability	Any act of the council or council members in pursuance or intended pursuance of functions	Good faith	Ministry of Justice
	137	New Zealand Law Society, district law societies, tribunals, and their members, officers and employees	No civil or criminal liability	Any act or words in the course of any inquiry proceedings, investigation or related publication	Bad faith not proven to the satisfaction of the court	
Life Insurance 1908	30D	Judicial manager	No criminal or civil liability whether on the ground of mistake of law or of fact or any other ground	Any act or omission in pursuance or intended pursuance of functions or powers under the Act	Good faith	Ministry of Justice
Local Government 1974	692G	Commissioner and Deputy Commissioner for Disaster Recovery	No personal liability	Any action in pursuance or intended pursuance of powers, functions and duties under any Act	Good faith	Department of Internal Affairs

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Local Government Amendment 1989	30(1)	Any person	No civil or criminal liability whether on the ground of want of jurisdiction, mistake of law or fact, or any other ground	Any act or omission in pursuance or intended pursuance of the Act; any direction or proposal, or any indicative scheme issued by the Local Government Commission	Good faith and reasonable care ⁴³	
Local Government Official Information and Meetings 1987	41(1)	Local Authority or any person	No civil or criminal proceedings may lie	Provision of information under parts II, III, of IV of the Act	Good faith	Department of Internal Affairs
Māori Community Development 1962	41	Māori Association member	No personal liability	Any act or omission by the association or its members in pursuance or intended pursuance of powers and authority	Good faith	Te Puni Kokiri

⁴³ Under ss 30(2) and 30(4), proceedings may only be brought within 12 months of the act or damage complained of with the leave of a judge of the High Court, who must be satisfied that there is substantial ground for the contention of bad faith or lack of reasonable care. Under s 30(3) the intended defendant must be given notice of any application and is entitled to be heard against it. Section 30(5) provides that leave may be granted subject to a time limit.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Māori Fisheries 1989	Sch 1, cl 16	Commission members, committee members, officers, employees, and appointees under cl 4	No personal liability	Any liability or any act or omission of the Commission, or its committees, members, officers, employees or appointees in pursuance or intended pursuance of functions or powers	Good faith	Ministry of Fisheries
Māori Land/Te Ture Whenua Māori 1993	183(7)	Court-appointed landowners' agents	Not personally liable	Anything done in pursuance of the agent's powers, functions, and duties under the section	Good faith	Te Puni Kokiri
Māori Trust Boards 1955	37	Board members	Not personally liable	Any act or default by the Board or any members in the course of its operations	Good faith	Te Puni Kokiri
Māori Trustee 1953	9(4)	Delegates of powers or functions of the Trustee	Not personally liable	Any act or thing done or omitted in pursuance and exercise or intended pursuance or exercise of any delegated functions or powers	Good faith	Te Puni Kokiri

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Marine Mammals Protection 1978	15	The Crown, officers, or any person acting under the instruction of an officer	No action or proceedings may be brought	Anything done or undertaken for the purpose of carrying out the provisions of the Act or any regulations made under it	Good faith and reasonable care	Department of Conservation
Marine Pollution 1974	29(a)	Minister and any authorised person	No civil liability	Any measures taken under ss 25(2)(b) or 26(2)(b)	—	Ministry of Transport
	29(b)	Any person	No civil liability	Action or inaction pursuant to instructions issued under ss 25(2)(a), 25(4) or 26(2)(a)	—	
Maritime Transport 1994	197(3)	Crown, Director, collector of customs, and persons acting under their authority	No liability	Detention or sale of ships where safety charges not paid	Bad faith not proved to the satisfaction of the court	Ministry of Transport/Maritime Safety Authority
	251, 256	Director and persons complying with instructions from director in regard to hazardous ships and structures	No criminal or civil liability but subject to compensation provisions in s 251	Issuing or complying with instructions in relation to hazardous ships, structures and operations	Acting in compliance with ss 248 and 249	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	327	Crown, any organisation, the authority, and regional council, or any officer or employee of any of them or any member of a regional council, any on-scene commander, or any other person	No action or proceedings may be brought to recover damages	Loss or damages to property resulting from marine oil spill response actions carried out in accordance with part XXIII of the Act	Good faith and action or inaction in accordance with functions, duties and powers under part XXIII	Ministry of Transport/Maritime Safety Authority
	Sch 1, cl 34	Member or employee of the Maritime Safety Authority	Not personally liable	Any liability of the authority, or any act done or omitted by the authority, the director or any other employee in pursuance or intended pursuance of the functions or powers of the authority or the director	Good faith	
Maternal Mortality Research 1968	16	Any person	Under no civil or criminal liability, whether on the ground of want of jurisdiction, or mistake of law or fact, or any other ground	Any act for purposes connected with the administration of the Act or the carrying out of its provisions	Good faith and reasonable care ⁴⁴	Ministry of Health

⁴⁴ Under ss 16(2) and 16(4), proceedings may only be brought within 6 months of the act or damage complained of with the leave of a judge of the High Court, who must be satisfied that there is substantial ground for the contention of bad faith or lack of reasonable care. Under s 16(3), the intended defendant must be given notice of any application and is entitled to be heard against it. A time limit of leave may be imposed under s 16(5).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Meat Export Control 1992	18(2)	Members of the Meat Export Control Board	Not personally liable	Any act or default of the Board done in the course of its operations	Good faith	Ministry of Agriculture
Medical Auxiliaries 1966	3B	Members, agents or servants of a medical auxiliary board, or investigators	No criminal or civil liability	Anything done or omitted or any words spoken or written at or for the purposes of any inquiry or other proceeding	Bad faith proven to the satisfaction of the court	Ministry of Health
Medical Practitioners 1968	66	Medical Council, Preliminary Proceedings Committee, Divisional Disciplinary Committee, their members or servants	No civil or criminal liability	Anything done or omitted or any words spoken or written at or for the purposes of any inquiry or other proceedings	Bad faith proven to the satisfaction of the court	Ministry of Health
Medicines 1981	102	Any person	No civil or criminal liability, whether on the ground of want of jurisdiction, or mistake of law or fact, or any other ground	Any act in pursuance or intended pursuance of any of the functions conferred by or under the Act	Bad faith or lack of reasonable care	Ministry of Health

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Milk 1988	4(4)	Members or deputy members of the NZ Milk Authority	Not personally liable	Any act done or omitted by the authority or by any member or deputy member in pursuance or intended pursuance of the functions and powers conferred on it by the Act	Good faith	Ministry of Commerce
Misuse of Drugs 1975	34	Person authorised under the Act	No civil or criminal liability, whether on the ground of want of jurisdiction, or mistake of law or fact, or any other ground	Any act in pursuance or intended pursuance of any functions conferred under the Act	Bad faith or without reasonable care	Ministry of Health
Misuse of Drugs Amendment 1978	12	Customs officer and officers and employees of NZ Post Ltd	No criminal or civil liability	Any act in respect of delivery or return of postal packets in the course of duties	—	Ministry of Justice
Motor Vehicle Dealers 1975	125(2)	The Motor Vehicle Dealers Institute, its members, members of the board, the authority, or the disciplinary committee	No civil or criminal liability	Anything done or omitted at or for the purposes of the hearing of any complaint	Bad faith not proven to the satisfaction of the court	Ministry of Justice

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Motor Vehicle Securities Act 1989	23	The Crown, registrar, or any other person engaged in the administration of the Act	No proceeding shall lie, other than review under Part I of the Judicature Amendment Act 1972	Anything done or omitted under this part of the Act	Bad faith not shown	Ministry of Justice
Museum of New Zealand Te Papa Tongarewa 1992	21	Any person authorised under the Act	No civil or criminal liability, whether on the ground of want of jurisdiction, or mistake of law or fact, or any other ground	Any act in pursuance or intended pursuance of functions conferred by or under the Act	Bad faith or without reasonable care	Ministry of Cultural Affairs
National Library 1965	27	Trustees appointed under s 9 of the Act	No personal liability	Any act or default by the trustees or by any trustee in the course of the operations of the trustees	Good faith	National Library of NZ
New Zealand Film Commission 1978	12	Members of the commission and of its committee	No personal liability	Any act or omission by the member in the course of the operations of the commission or of the committee	Good faith	Ministry of Cultural Affairs

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
New Zealand Horticulture Export Authority 1987	21	Members of the authority and of its committees, its officers and employees, and appointees under s 18 of the Act	No personal liability	Any liability of the authority, or any act or omission of the authority, its members, committees, officers, employees or appointees in pursuance or intended pursuance of the functions and powers of the authority	Good faith	Ministry of Agriculture
New Zealand Māori Arts and Crafts Institute 1963	27	Members of the institute	No personal liability	Any act or omission by the board or its members in the exercise or purported exercise of any powers conferred on the board or its members by or under the Act	Good faith	Ministry of Commerce
New Zealand Society of Accountants Amendment 1963	15	Society and its members and servants	No action for damages shall lie	Notification warning against employment of a particular accountant	Good faith and absence of malice	Treasury

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
New Zealand Sports Drug Agency 1994	Sch 1, cl 14	Members of the board and of board committees and agency employees	No personal liability for damages	Any act done or omitted in the performance of any function, or the exercise or purported exercise of any power, of the board or agency	Good faith	Department of Internal Affairs
New Zealand Tourism Board 1991	Sch 1, cl 12	Members and employees of the board	No personal liability	Any act done or omitted by the member or employee or by the board in pursuance or intended pursuance of the board's object	Good faith	Ministry of Commerce
New Zealand Trade Development Board 1988	Sch 1, cl 9	Members, officers and employees of the Board	No personal liability	Any liability of the board and any act done or omitted by the board or its members, officers or employees in pursuance of the function or powers of the board	Good faith	Ministry of Foreign Affairs and Trade
Ngarimu VC and 28th (Māori) Battalion Memorial Scholarship Fund 1945	13	Members of the board	No personal liability	Any act or default of the board or any member in the course of operations	Good faith	Ministry of Education

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Nurses 1977	55	Council and council committee and their members and employees	No civil or criminal liability	Any act or omission or spoken or written words at or for the purposes of any inquiry, investigation, appeal or other proceedings, or contained in any notice under s 48A of the Act	Bad faith not proven to the satisfaction of the court	Ministry of Health
Official Information 1982	48	The Crown or any other person	No civil or criminal proceedings shall lie	Provision or publication of information under the Act	Good faith	Ministry of Justice
Ombudsmen 1975	26(1)(a)	Chief Ombudsman, officers and appointees	No civil or criminal proceedings shall lie except under ss 78, 78A(1), 105, 105A or 105B of the Crimes Act 1961 ⁴⁵	Anything done, said or reported in the exercise or intended exercise of functions under the Act or the Local Government Official Information and Meeting Act 1987	Bad faith not shown	Ministry of Justice

⁴⁵ Exception under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Ombudsmen 1975 (cont)</i>	26(1)(b)	Ombudsman, officer or appointee	Shall not be called to give evidence in any court or in judicial proceedings relating to information acquired in the course of functions under the Act or the Local Government Official Information and Meetings Act 1987	—	—	Ministry of Justice
	26(3)	—	Same privilege as if inquiry or proceedings were court proceedings	Anything said, any information supplied and any document produced in the course of any inquiry by or proceedings before an Ombudsman	—	
	26(4)	—	Deemed to be parliamentary inquiry reports for the purposes of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Reports by the ombudsman under this Act, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1982	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Optometrists and Dispensing Opticians 1976	51	Board, board committees, board and committee members	Not liable in any way	Anything done or omitted in the discharge of board or committee functions or any words spoken or written at or for any proceedings under the Act	Good faith	Ministry of Health
Overseas Investment 1973	11	Members of the Overseas Investment Commission	No personal liability	Any act or default by the commission or any member in the course of operations	Good faith	Reserve Bank of NZ
Ozone Layer Protection 1996	51	Persons authorised by or under the Act	No civil or criminal liability	Any act in pursuance or intended pursuance of functions conferred	Good faith and reasonable cause	Ministry for the Environment
Pacific Islands Polynesian Education Foundation 1972	33	Board members	No personal liability	Any act or default by the board or by any member in the course of operations	Good faith	Ministry of Education
Penal Institutions 1954	8	Officer of institution	Protection and privileges of a constable	Acting as an officer of an institution		Department of Corrections
	8A	Member of NZ armed forces	Protection and privileges of an officer	Public service in connection with any institution in accordance with s 9 Defence Act 1990		

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Penal Institutions 1954 (cont)</i>	36L	Security officer	Protection and privileges of a constable	Escort duties or court-room custodial duties	—	Department of Corrections
Plumbers, Gasfitters and Drainlayers 1976	62	Registration board, board committees, board and committee members, persons authorised by or under the Act	Not liable in any way	Anything done or omitted in pursuance of functions under the Act or any words spoken or written at or for any determination or proceedings	Bad faith not shown to the satisfaction of the court	Ministry of Health
Police 1958	39	Member of police	No responsibility for irregularity or want of jurisdiction in issuing process	Acting in obedience to process issues by court, judge, District Court judge or justice	—	NZ Police
Police Complaints Authority 1988	33(1)(a)	Authority, officers and appointees	No civil or criminal proceedings shall lie except under ss 78, 78A(1), 105, 105A or 105B of the Crimes Act 1961 ⁴⁶	Anything done, said or reported in the exercise or intended exercise of functions under the Act	Bad faith not shown	Ministry of Justice

⁴⁶ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	33(1)(b)	Authority, officer or appointee	Shall not be called to give evidence in any court or in judicial proceedings relating to information acquired in the course of functions under the Act	—	—	Ministry of Justice
	33(3)	—	Same privilege as if investigation or proceedings were court proceedings	Anything said, any information supplied, and any document produced in the course of any investigation by or proceedings before the authority	—	
	33(4)	—	Deemed to be government inquiry reports for the purposes of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Reports, opinions, and recommendations of the authority and reports published by the authority or the commissioner	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Pork Industry Board 1982	36	Board members, officers and employees, and members of board committees	No personal liability	Any liability of the board and any act done or omitted by the board, its committees, board members, officers or employees in pursuance or intended pursuance of the functions or powers of the board	Good faith	Ministry of Agriculture
Privacy 1993	96(2)(a)	Privacy commissioner and persons engaged or employed in connection with the work of the commissioner	No civil or criminal proceedings shall lie except under ss 78, 78A(1), 105, 105A or 105B of the Crimes Act 1961 ⁴⁷	Anything done, said or reported in the exercise or intended exercise of functions under the Act	Bad faith not shown	Ministry of Justice
	96(2)(b)	Commissioner, employee or appointee	Shall not be called to give evidence in any court or in judicial proceedings relating to information acquired in the course of functions	—	—	

⁴⁷ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	96(4)	—	Same privilege as if inquiry or proceedings were court proceedings	Anything said, any information supplied and any document produced in the course of any inquiry by or proceedings before the commissioner	—	Ministry of Justice
	96(5)	—	Deemed parliamentary inquiry reports for the purposes of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Reports by the commissioner	—	
	115	The Crown or any other person	No civil or criminal proceedings shall lie	Making available of personal information under principle 6 of the Act and publication involved in or resulting from the making available	Good faith	
Private Investigators and Security Guards 1974	11	Registrar	Not personally liable	Action or omission in pursuance or intended pursuance of functions, powers and duties under the Act	Good faith	Ministry of Justice

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Proceeds of Crime 1991	62	Official Assignee and delegates	Crown indemnity	Any liability relating to the performance, purported exercise or performance, or omitted exercise or performance of any function, power or duty conferred or imposed under the Act	Bad faith not shown	Ministry of Justice
Property Law 1952	87(9)	Public Trustee	No liability	Discharge of mortgage	Bad faith or unreasonableness not shown	Ministry of Justice
	154	Solicitors, trustees, executors, and other fiduciaries	No liability or finding of neglect or breach of duty	Failure to negative provisions deemed included in any instrument by the Act	Good faith	
Protection of Personal and Property Rights 1988	20	Welfare guardian	No action shall lie	Anything done or omitted in the exercise of powers conferred by or under the Act ⁴⁸	Bad faith or lack of reasonable care not shown	Ministry of Justice
	43	Manager acting under a property order	No liability	Acts or omissions pursuant to advice, or failure to follow advice	Good faith and reasonable care	

⁴⁸ Provided that where a contract or arrangement is concerned, the welfare guardian disclosed at that time that he or she was acting in that capacity (s 20(2)).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	49	Manager acting under a property order	No action shall lie	Anything done or omitted in the exercise of powers conferred by or under the Act ⁴⁹	Bad faith or lack of reasonable care not shown	
Public Finance 1989	68	Crown and any agent of the Crown	No person shall have any right of action	Investment or non-investment of any trust money held by the Crown		Treasury
Public Service Investment Society Management (No 2) 1979	17	Managers of corporate bodies	No liability; indemnity out of body corporate property in respect of all liabilities incurred in good faith; actions may only be brought by leave of the court and on such terms as the court may impose	Any act done or liability incurred in the exercise of powers and functions as manager	Good faith	Ministry of Justice
Public Trust Office 1957	38	Public trustee	No liability	Payment made from infant's investment under this section	Good faith	Public Trust Office

⁴⁹ Provided that where a contract or arrangement is concerned, the manager disclosed at that time that he or she was acting in that capacity (s 20(2)).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Public Trust Office 1957 (cont)</i>	84	Public trustee	No liability	Anything done or omitted in exercise of discretion to exercise powers under the Act or in exercise of such powers	Good faith	Public Trust Office
	97	Public Trustee	No liability	Accepting as correct and acting upon written statements and statutory declarations	Good faith	
	117	Public Trustee	No liability	Acting under any power of attorney when the person giving the power has died or avoided the power	Good faith and lack of knowledge of death or avoidance	
	135	Public trustee or any officer, employee, agent or representative	No personal liability	Acting or purporting to act under any authority contained in this Act or any other Act	Absence of actual fraud or crime; good faith where purporting to act	
Public Works 1981	234	The Crown, any Minister of the Crown, any local authority, any Crown, Ministerial or local authority officer or servant, or any other person	No action or proceedings may be brought	Any damage arising from exercise or performance of powers, duties or obligations relating to emergency entry on to land under the section	Good faith	Land Information NZ

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Queen Elizabeth the Second National Trust 1977	12	Trust directors, and members of Trust committees	No personal liability	Any act or omission of the trust, the board, trust committees, directors, officers or members in the course of operations	Good faith	Department of Conservation
Radiocommunications 1989	72(1)	Registrar and employees	No criminal proceedings shall lie other than under ss 78, 78A, 105 and 105A of the Crimes Act 1961	Anything done or omitted in the exercise or intended exercise of the functions of the registrar	Bad faith not shown	Ministry of Commerce
	72(3)	Registrar and employees	Crown indemnity in respect of personal liability in civil actions	Anything done or omitted in the exercise or intended exercise of the functions of the registrar	Bad faith not shown	
	127	Persons authorised to enter and search premises under s 120 of the Act	No civil or criminal proceedings shall lie	Anything done or omitted in the exercise or intended exercise of functions under ss 120 and 121 of the Act	Bad faith not shown	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Real Estate Agents 1976	82(7)	Real Estate Agents Institute, council, institute and council members or employees	No action for damages shall lie	Notification advising against use of a particular agent under s 82(5) of the Act	Good faith and absence of malice	Ministry of Justice
	104(1)	Witnesses and counsel before the board and disciplinary committee	Same privileges and immunities of witnesses and counsel in court proceedings	—	—	
	104(2)	Board, institute, their members, and disciplinary committee members	No civil or criminal liability	Anything done or omitted at or for the purposes of the hearing of a complaint	Bad faith not proven to the satisfaction of the court	
Reserve Bank of New Zealand 1989	98	Auditors	No civil, criminal, or disciplinary proceedings shall lie; no professional sanctions ⁵⁰	Disclosure of information under s 96 of the Act	Good faith	Reserve Bank of NZ
	146	Reserve Bank, statutory managers of registered banks, appointees under ss 99 and 10 of the Act, members of advisory committees	Crown indemnity	Exercise, purported exercise, or omission to exercise any power conferred by this part of the Act	Bad faith not shown	

⁵⁰ Under s 98(3), no information received under s 96 shall be admissible in evidence in any proceedings against the auditor concerned.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	179	Directors and employees of the Reserve Bank	No personal liability	Exercise, purported exercise, or omission to exercise any power conferred by the Act	Good faith	Reserve Bank of NZ
Reserves 1977	34	Board members	No personal liability	Any act done or omitted in the course of operations or any debt or other liability incurred by the board	Acts must be in good faith; debts and liabilities must be lawful	Department of Conservation
	110	Crown, commissioner and any other person	No liability shall attach	Any loss or damage occasioned by sale or destruction of abandoned vehicles		
Residential Tenancies 1986	125	Chief executive and delegates	No personal liability ⁵¹	Any act or omission in the exercise or purported exercise of functions and powers, or discharge or purported discharge of duties, under the Act	Good faith	Ministry of Housing
Resource Management 1991	261	Members of the Environment Court	No action lies	Anything said, done or omitted while acting in performance of duties	Good faith	Ministry for the Environment

⁵¹ Note that the provision is without prejudice to any liability that the Crown may incur for the acts and omissions of Crown agents or employees.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Resource Management 1991 (cont)</i>	Sch 5, cl 7	Members of the Hazards Control Commission	No personal liability	Any act or default by the commission or by any member in the course of operations	Good faith	Ministry for the Environment
Retirement Income 1993	17	Retirement Commissioner, employees and appointees	No liability	Any liability of the commissioner for any act done by the commissioner, or any employee, contractor, delegate or other person assisting the commissioner in performing or exercising, or with the intention of performing or exercising, the functions or powers of the commissioner	Good faith	Treasury
Securities 1978	28(1)	Securities Commission	No civil or criminal proceedings shall lie ⁵²	Anything done or omitted in the exercise or intended exercise of commission functions	Bad faith and absence of reasonable care not shown	Ministry of Justice
	28(2)	Commission members ⁵³	No civil or criminal proceedings shall lie	Anything said, done, or omitted in the course of operations	Bad faith not shown	Ministry of Justice

⁵² Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

⁵³ Including alternate members holding office immediately before 6 November 1986.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	28(3)	Commission members	No civil or criminal proceedings shall lie	Anything said, done, or omitted in the exercise or intended exercise of any function under s 10(c) of the Act in relation to any inquiry	Bad faith and lack of reasonable care not shown	Ministry of Justice
	28(4)	Commission members, officers, employees, appointees or delegates	Shall not be required to give evidence in any court or in judicial proceedings relating to information acquired in the course of functions	—	—	
	28(6)	—	Same privilege as if proceedings were court proceedings	Anything said, any information supplied and any document produced in the course of any proceedings before the commission	—	
	28(7)	—	Deemed parliamentary inquiry reports for the purposes of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Reports and comments by the commission in the exercise or intended exercise of its functions	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Securities 1978 (cont)</i>	44C(5)	Contributory mortgage brokers appointed by the commission	No liability; proceedings may be brought with the leave of the Court and on such terms as the court may impose	Any act or omission in the exercise of powers under the section	Good faith	Ministry of Justice
	44D	Directors and secretaries of nominee companies appointed by the commission	No liability, action or proceedings may be brought except with the leave of the court and on such terms as the court may impose	Any act or omission in the exercise of powers as a director or secretary	Good faith	Ministry of Justice
Serious Fraud Office 1990	35 ⁵⁴	Serious Fraud Office and members	Crown indemnity	Exercise, purported exercise or omission to exercise ⁵⁵ any power conferred by the Act	Bad faith not shown	Ministry of Justice
Ship Registration 1992	64	Registrar and deputy registrar	No personal liability	Act or omission as registrar or deputy registrar	Good faith and reasonable care	Ministry of Transport

⁵⁴ Section 35(5) provides that the section does not affect any provision of the Crown Proceedings Act 1950 or the Crimes Act 1961 relating to the liability of the Crown or to matters of justification or excuse.

⁵⁵ See s 49 of the Serious Fraud Office Act 1990 for liability relating to omission.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
	66(3) ⁵⁶	Registrar and deputy registrar	No personal liability	Act or omission as registrar or deputy registrar	Good faith and reasonable care	Ministry of Transport
Smoke-free Environments 1990	19	Appointees under s14 of the Act	No civil or criminal liability on grounds of want of jurisdiction, mistake of fact or any other ground	Any act in pursuance or intended pursuance of any function, duty, or power conferred by or under the Act	Good faith and reasonable care	Ministry of Health
	61(2)	Health Sponsorship Council members and council committee members	No liability	Any act or omission by the council or committee	Good faith	
Social Welfare (Transitional Provisions) 1990	Sch 3, cl 25	NZ Artificial Limb Board members	No personal liability	Any act or default by the board or any member in the course of operations	Good faith	Department of Social Welfare
Sport, Fitness, and Leisure 1987	13	Hillary Commission for Sport, Fitness, and Leisure members and commission committee members	No personal liability	Any act or default by the commission or any commission committee in the course of operations	Good faith	Department of Internal Affairs

⁵⁶ Section 66 provides for the appointment of a suitable organisation to maintain the register.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Standards 1988	14	Standards Council members, officers, and employees and advisory committee members	No personal liability	Any act or omission by the council, committees, members, officers, and employees in pursuance or intended pursuance of council functions or powers	Good faith	Ministry of Commerce
State Sector 1988	77	Chief executive, other employees	No personal liability	Any liability of any institution in education service; acts done or omitted by the institution or chief executive or employee of institution in pursuance or intended pursuance of functions or powers of the institution or of chief executive	Acts or omissions of the chief executive or employees must have been in good faith	Office of the State Services Commission
	86	Chief executives, senior executive service members, and other employees	No personal liability	Any liability of the department, or any act or omission by the department, the chief executive, senior executive service members, employees, or employees of the chief executive in pursuance or intended pursuance of the functions or powers of the department of the chief executive	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Statistics Act 1975	38	A person who has taken declaration of secrecy under s 21	Not compellable in proceedings to give oral evidence or to produce the report, document or record except as the Act provides	—	—	Statistics NZ
		—	No disclosure or use in evidence in any proceedings	Return or copy of a schedule or return in the possession of the respondent	—	
Summary Proceedings 1957	102	Registrar, bailiffs, constables, or officers	No personal liability	Any act or omission in the performance or purported performance of any power or function under the Act in relation to the seizure or disposal of property	Good faith	Ministry of Justice
	193(1)	District Court judges, Justices of the peace	No action shall be brought	Any act done	Act not done in excess or without jurisdiction	Ministry of Justice

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Summary Proceedings 1957 (cont)</i>	193(2)	District Court judges, Justices of the peace	No action shall be brought	Granting warrant on conviction or order of another judge or justice where defect or want of jurisdiction in conviction or order	Bona fides	
	196A(1)	District Court judges	Crown indemnity for amount of any judgment entered	Any act done in excess of or without jurisdiction	—	
	196A(2)	District Court judges	Crown indemnity for any amount paid in settlement of an action	(as above)	—	
	197(1)	Justices of the peace	Crown indemnity for amount of any judgment entered	Any act done in excess of or without jurisdiction	Good faith and Justice's belief that he or she had jurisdiction; opinion of High Court judge that Justice ought fairly and reasonably to be excused	
	197(2)	Justices of the peace	Crown indemnity for any amount paid in settlement of an action	(as above)	Opinion of a High Court judge that amount paid was fair and reasonable	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Superannuation Schemes 1989	27	Government actuary and employees	No personal liability	Any act or omission in pursuance or intended pursuance of the functions or powers of the actuary under the Act	Good faith	Treasury
	65	Government Actuary and employees	No personal liability	Any act or omission in pursuance or intended pursuance of the functions or powers of the actuary under this part of the Act	Good faith	
Takeovers 1993	11(1)	Takeovers Panel	No civil or criminal proceedings shall lie ⁵⁷	Any act or omission in the exercise or intended exercise of functions	Bad faith and lack of reasonable care not shown	Minister of Justice
	11(2)	Takeovers Panel members, associate members, officers and employees	No civil or criminal proceedings shall lie	Anything done, said or omitted in the course of operations	Bad faith not shown	

⁵⁷ Except under ss 78, 78A, 105 and 105A of the Crimes Act 1961 (offences relating to breach of confidentiality and corruption).

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
<i>Takeovers 1993 (cont)</i>	11(7)	Members, officers, employees, or persons present at meetings of the panel	Shall not be required to divulge any information, document, or evidence relating to the operations of the panel except in proceedings to which the panel is a party or proceedings under s 11(3) or 11(6)	—	—	Minister of Justice
	11(9)	—	Same privilege as if statement, etc, were made in court proceedings	Anything said, any information supplied, any document produced, and any evidence given to the panel	—	
	11(10)	—	Deemed to be parliamentary inquiry reports for the purposes of cl 3 of Part II of the First Schedule to the Defamation Act 1992	Statements, documents, determinations, orders, or decisions made by the panel in the exercise or intended exercise of any functions or powers under this Act	—	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Taratahi Agricultural Training Centre (Wairarapa) 1969	16	Trust board members	No personal liability	Any act or omission by the board or any member in the course of operations	Good faith	Ministry of Agriculture
Taxation Review Authorities 1994	9	Person appointed as authority	No personal liability	Act or omission in pursuance or intended pursuance of person's powers and authorities as authority	Good faith	Inland Revenue Department
Temporary Safeguard Authorities 1987	10(1)	Authorities	No civil or criminal proceedings shall lie	Any act or omission in the exercise or intended exercise of functions	Bad faith and lack of reasonable care not shown	Ministry of Commerce
	10(2)	Authorities and officers	No civil or criminal proceedings shall lie	Anything done, said or omitted in the course of operations	Bad faith not shown	
Testing Laboratory Registration 1972	22	Council members, council committee members	No personal liability ⁵⁸	Any act or default by the council or committee in the course of operations	Good faith	Department of Scientific and Industrial Research

⁵⁸ Under s 22(2), a member may refute allegations of bad faith if it is shown that he or she opposed, or was not aware of, the action complained of.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Toxic Substances 1979	80	Any person authorised by or under the Act	No civil or criminal liability, whether on the ground of jurisdiction, mistake of law or fact, or any other ground	Any act in pursuance or intended pursuance of functions conferred by or under the Act	Good faith and reasonable care	Ministry of Health
Transport Accident Investigation Commission 1990	Sch 1 cl 9	Commission members	No personal liability	Act or default by the commission or any member in the course of operations	Good faith	Ministry of Transport
Transport (Vehicle and Driver Registration and Licensing) 1986	45A	Registered medical practitioners and optometrists	No civil or professional liability	Disclosure of personal medical information	Good faith	Ministry of Transport
	cl 24	Commission employees	No personal liability	Liabilities of the Commission or act or omission by the commission or the chief executive or any other employee in pursuance or intended pursuance of their functions or powers	Good faith	

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
Trustee Companies Management 1975	14	Board and board members	No liability; indemnity out of company property; action may be brought with the leave of the court on such terms as the court may impose	Any act in the exercise of functions or powers	Good faith; liability must be properly incurred	Ministry of Justice
Tuberculosis 1948	24	Any person	No civil or criminal liability, whether on the ground of lack of jurisdiction, mistake of law or fact, or any other ground ⁵⁹	Any act in pursuance or intended pursuance of the provisions of the Act	Bad faith or lack of reasonable care	Ministry of Health
Unit Titles 1972	5A(3)	Territorial authorities, authority principal administrative officers, members, and employees	No civil or criminal liability	Issue of certificates under s 5(1)(g) of the Act	Good faith	Ministry of Justice
Veterinarians 1994	65	Council, Complaints Assessment Committee, any of their members or employees	No civil or criminal liability	Act or omission; words spoken or written at or for inquiry or other proceedings under Act	Bad faith not proven to satisfaction of a court	Ministry of Agriculture

⁵⁹ Proceedings may only be brought with the leave of a High Court judge satisfied that there is substantial ground for allegations of bad faith or lack of reasonable care. The intended defendant must be given notice of any application for leave and may be heard against it. Applications must be made within 6 months of the action or the ceasing of the damage complained of and may be given subject to a time limit.

<i>Act</i>	<i>Section</i>	<i>Persons protected</i>	<i>Form of protection</i>	<i>Protected acts or things</i>	<i>Requisites</i>	<i>Administered by</i>
War Pensions 1954	18R	Members of the advisory board of the War Pensions Medical Research Trust	No personal liability	Any act or default of the advisory board in the course of operations	Good faith	Department of Social Welfare
Waterfront Industry Reform 1989	25	Liquidators	No personal liability; indemnity from property held; actions may only be brought by leave of the High Court and on such terms as the court may impose	Acts in exercise of powers, duties, and functions under the Act	Bad faith and lack of reasonable care not shown	Department of Labour
Wild Animal Control 1977	32	Any person authorised by the Act	No personal liability	Any matter or thing done in the exercise of powers or duties under the Act or under any regulations made under the Act	Good faith	Department of Conservation
Winston Churchill Memorial Trust 1965	28	Trust Board members, officers, and servants	No personal liability	Any act or default by the board or by any member in the course of operations	Good faith	Department of Internal Affairs

“Civil wrong” provisions

- C81 The majority of the provisions that preclude “civil wrongs” relate to the transfer of assets and are usually accompanied by provisions to the effect that no illegal act or discharge of responsibility arises from the transfer. These provisions are listed in table 5.

table 5: Provisions precluding “civil wrongs”.

<i>Act</i>	<i>Section</i>
Animal Control Products Limited Act 1991	9
Auckland Airport Act 1987	7(1)
Building Societies Act 1965	113E(3)(g)
Development Finance Corporation of New Zealand Act 1986	6(g)
Energy Companies Act 1992	50(c)
Energy Companies Act 1992	58
Finance Act 1988	10(i)
Finance (No 2) Act 1989	6(1)
Finance Act 1990	11
Foreshore and Seabed Endowment Revesting Act 1991	11
Harbour Boards Dry Land Endowment Revesting Act 1991	11
Health Reforms (Transitional Provisions) Act 1993	6(1)
Housing Assets Transfer Act 1993	7(1)
Housing Restructuring Act 1992	25(1)
Local Government Act 1974	594ZJ
Local Government Act 1974	707S
National Provident Fund Restructuring Act 1990	23
New Zealand Railways Corporation Restructuring Act 1990	7(1)
Port Companies Act 1988	30
Private Savings Banks (Transfer of Undertakings) Act 1992	6(1)
Rural Banking and Finance Corporation of New Zealand Act 1989	7(1)
State Insurance Act 1990	8
Tourist Hotel Corporation of New Zealand Act 1989	10
Trustee Banks Restructuring Act 1988	7(i)
Wellington Airport Act 1990	8(1)

- C82 Further provisions relate to the imposition of a new statutory or administrative structure. These are listed in table 6.

table 6: Provisions relating to new statutory or administrative structures.

<i>Act</i>	<i>Section</i>
Local Government Act 1974	37ZZZQ
Local Government Amendment Act 1992	105
Māori Purposes Act 1993	8
Union Representatives Education Leave Act Repeal Act 1992	9
Wool Testing Authority Dissolution Act 1988	11

Other provisions

- C83 Sections 280D, 28ZN, 28ZP and 28ZQ of the Fisheries Act 1983 include “no civil wrong” provisions related to the reduction or cancellation of fishing quota allocations. Section 20 of the Waterfront Industry Reform Act 1989 makes similar provision for property leases and licenses.
- C84 Section 8 of the Forests Amendment Act 1993 provides that no civil wrong or cause for compensation arises from the actions of the Minister of Customs in restricting the export of indigenous timber.
- C85 Sections 386, 390, 435, 446(4) and 457 of the Local Government Act provide for no compensation in certain cases of discontinuance of water supply and drainage.

APPENDIX D

Extract from *R v Grayson and Taylor*⁶⁰

REMEDIES FOR BREACH

There being no breach of s 21, the issue of remedy does not arise for determination. We propose however to make some brief comments in that respect.

The development and choice of remedy in the case of breach of the Bill of Rights is often seen as affected by the purposes and nature of the provision in issue.

A rights centred approach, supported by the title, by s 2 and by the formulation of the substantive provisions, might emphasise remedies (such as monetary damages or compensation as well as the exclusion of evidence) favouring the person aggrieved.

Another aspect is that the obligations in the Bill are placed on state authorities (including the Courts) which might emphasise compliance by those authorities with the Bill.

A broader perspective also looks to the general underlying public interest. That involves in particular the tension between the affirmation of the rights of the individual, to be enjoyed by all members of the community, and the recognition to be found in particular provisions, notably in s 5 of the fact that there are limitations on the rights, in particular "reasonable limits prescribed by law [which] can be demonstrably justified in a free and democratic society".

⁶⁰ *R v Grayson and Taylor* (unreported, Court of Appeal, 28 November 1996, CA 255/96; 256/96).

A further important feature of many provisions of the Bill of Rights is their procedural character. In particular if the state is to take action which will deprive members of the community of their liberty for breach of the criminal law, then correct procedures, reflecting centuries of development and principle, are to be followed. It has been wisely said that the history of individual liberty is largely the history of the development of procedural safeguards.

The remedies might, in the first place, relate to the trial itself. For example evidence might be rejected, with the possible consequence of the prosecution failing, the penalty imposed might be reduced or there might be an appropriate order for costs. There is the possibility of police disciplinary proceedings, criminal prosecution, and civil proceedings. Proceedings brought by an aggrieved person might lead to damages or compensation, a declaration, or future-looking relief.

The experience in other jurisdictions, notably Canada and the United States of America, suggests the need for a careful balancing of the identification and scope of the guaranteed rights and appropriate remedies where rights have been breached. The pursuit of a broad approach to right identification with remedies inflexibly allowed could lead to imbalance in individual and community rights. Protection and vindication of individual rights are themselves community values but, as the Act makes clear, limitations are justified (indeed necessary) in a free and democratic society. There are helpful discussions of these issues by the Law Commission in its report *Police Questioning* (NZLC R31, 1994) 23, 33–34, 53, 98–105, and in the articles by Mahoney, "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights", in Rishworth and Huscroft (eds) *Rights and Freedoms* (Brooker's, Wellington, 1995) 447; and Walker, "Wilkes and Liberty: A Critique of the Prima Facie Exclusion Rule" (1996) 17 NZULR 69.

A robust and rights centred approach to individual rights is not necessarily inconsistent with flexibility of remedies where rights are breached. A remedy is no less an effective remedy because it is one appropriate to the circumstances of the breach rather than a remedy inflexibly applied in respect of all breaches.

The formulation of appropriate remedies should be approached broadly. To settle upon a single remedy to be applied in all cases rather than keeping open the full range of possible remedies risks inflexibility and the rejection of possibly more appropriate remedies in particular cases. Similarly the response to any particular breach

arguably should be at the appropriate level. It should be no less an effective remedy because it is fashioned to bear some relationship to the nature and seriousness of the breach. Whether there should be the same response to breaches of rights in the course of activities resulting in the discovery of real evidence as to breaches of rights in the course of obtaining, for example, confessional evidence also requires careful consideration.

Having regard to the above matters, on an appropriate occasion the Court would be prepared to re-examine the prima facie exclusion rule.

APPENDIX E

List of respondents and other contributors

The Law Commission wishes to acknowledge the contribution made, either in the form of a submission on the draft report or otherwise, by the following persons and bodies:

Association of Polytechnics in New Zealand
Crown Company Monitoring Advisory Unit
Crown Law Office
Department of Conservation
Department of Corrections
Department for Courts
Department of Internal Affairs
Department of Labour
Health and Disability Commissioner
Inland Revenue Department
Maritime Safety Authority of New Zealand
Ministry of Agriculture
Ministry of Commerce
Ministry of Foreign Affairs and Trade
Ministry of Forestry
Ministry of Housing
Ministry of Justice
Ministry of Māori Development
Ministry of Research, Science and Technology
Ministry of Transport
Ministry of Women's Affairs
Ministry of Youth Affairs
New Zealand Customs
New Zealand Fire Service
New Zealand Law Society

New Zealand Police
Northern Regional Health Authority
Office of the Controller and Auditor-General
Parliamentary Commissioner for the Environment
Serious Fraud Office
The Treasury
Valuation New Zealand

Rt Hon Sir Ivor Richardson – President, Court of Appeal
Chief District Court Judge RL Young
Dr DL Mathieson qc
Mr JJ McGrath qc, Solicitor-General
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