ADMINISTRATIVE TRIBUNALS CONSTITUTION, PROCEDURE AND APPEALS

fifth report of
the Public and
Administrative Law
Reform Committee

PRESENTED TO THE MINISTER OF JUSTICE
IN JANUARY 1972

FIFTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

ANALYSIS

INTRODUCTION

1. The major task before the Committee in 1971 was the translation into specific statutory provisions of the general proposals in our Fourth Report for an additional remedy in administrative law. As we observe later in this report under the heading "Judicial Control of Administrative Acts" our proposed reform is procedural only but we do stress the importance of procedure as a means of protecting substantive rights. This is recognised in the working paper (No. 40) of the United Kingdom Law Commission entitled "Remedies in Administrative Law", to which reference is made later in this report . Lord Diplock has also expressed the opinion that "the current defects in judicial control of the administrative process are ... not so much defects of substantive law as of procedure."(1)

2. There is no justification for belittling the role of procedure in the achievement of justice and for dismissing it as "mere" procedure. Lord Evershed(2) in 1956 emphasised that matters of procedure are of the greatest importance. Furthermore, we should not forget the classical dictum that "law is secreted in the interstices of procedure". This helps us to an appreciation of the practical as distinct from the theoretical aspects of law.

3. The Committee notes with pleasure the comments of the Department of Justice in its 1971 Annual Report on the need to modernise the procedures and methods of our judicial system.

(1) The Judicial Control of the Administrative Process 1971 C.L.P.1, 16.

(2) Maccabaean Lecture in Jurisprudence, "The Impact of Statute on the Law of England". Proceedings of the British Academy, Volume XLII, 1956, Pages 247, 261.

4. Procedural hurdles can very easily frustrate a substantive right. We attach importance therefore to the proposals for the additional remedy and to our continuing study of a code of procedure for administrative tribunals.

5. The speed of change in the world today and the efforts of states to attune their laws to the demands of society are evident from the number of reports issued by law reform bodies throughout the world. The exchange of reports with various law reform commissions including those in Australia, Canada and the United Kingdom has proved most helpful. In particular the draft legislation appended to this report is based largely on similar work done in Ontario and we acknowledge our debt to the Ontario reports and draft legislation.

CONSTITUTION AND MEMBERSHIP

6. The Public and Administrative Law Reform Committee was constituted in July 1966 by the Minister of Justice as part of a plan to strengthen the system of law reform in New Zealand. Its first major task covered administrative tribunals. Subsequently the Committee recommended the establishment of the Administrative Division of the Supreme Court. But under its terms of reference the Committee is concerned with the entire field of public law.

7. The Committee consists of the Chairman, Dr J.L. Robson, C.B.E., a former Secretary for Justice and now a Visiting Fellow and Director of Criminological Studies at the Victoria University of Wellington; Mr A.C. Brassington, barrister and solicitor of Christchurch; Mr R.B. Cooke, one of Her Majesty's Counsel; Mr E.L. Greensmith, C.M.G., a former Secretary to the Treasury; Dr R.G. McElroy, C.M.G., barrister and solicitor and a former Mayor of Auckland; Professor J.F. Northey, Dean of the Faculty of Law at the University of Auckland; Mr G.S. Orr, formerly a Senior Crown Counsel and now Deputy Chairman of the State

Services Commission; and Mr D.A.S. Ward, C.M.G., Counsel to the Law Drafting Office.

8. Our secretary Mr R.S. Clark of Victoria University of Wellington was appointed a full member of the Committee during the year. He relinquished both positions in August to become a Visiting Fellow at the College of Law at the University of Iowa. The Committee wishes to record its appreciation of his excellent contribution as secretary. He has been succeeded by Mr R.G. Montagu Senior Legal Adviser of the Department of Justice.

9. We record with pleasure the award to Professor Northey of a Doctorate of Laws by the University of Auckland.

We extend to Dr McElroy our congratulations upon his being made a Companion of the Order of St Michael and St George.

PROGRAMME

10. The matters which were referred to us for our investigation under the programme initially approved by the Law Revision Commission included appeals from administrative tribunals, the constitution and procedures of such tribunals and the judicial control of administrative acts.

11. During the year our programme was extended to include the following topics -

The regulation-making powers and procedures of the Executive;

The bylaw-making powers and procedures of local bodies and the present powers of the Court to review them;

The award of costs where Crown privilege is claimed.

ADMINISTRATIVE TRIBUNALS IN NEW ZEALAND

I. Appeals and Constitution

12. Of the 63 tribunals listed in "Citizen and Power"(3) the Committee has considered 26 together with seven other tribunals, including the Land Valuation Court, not listed in that publication. We have also been consulted concerning draft legislation establishing new tribunals. In reviewing the individual tribunals the Committee has paid particular attention to the provisions for appeal and to the constitution of each tribunal.

13. The categories of tribunals still to be reviewed are -

Tribunals relating to local bodies;
Tribunals dealing with social security benefits;
Tribunals relating to salaries and conditions of public servants;
Commissions or committees of inquiry;
Tribunals listed in "Citizen and Power" under the heading of "Miscellaneous".

Action Taken on Recommendations

14. As we have noted in successive reports, most of our recommendations have been adopted. The Parliamentary session last year saw the abolition of the Trade Practices Appeal Authority and the substitution of a right of appeal to the Administrative Division of the Supreme Court. This step was recommended in our First Report - para. 77. The Amendment to the Town and Country Planning Act providing an appeal to the Administrative Division on a point of law in part satisfied the earlier recommendation of the Committee. We refer to both these matters later in this report (see paras. 36 and 37).

(3) Published 1965 - Department of Justice

15. As far as we are aware no legislation is pending to put into effect the recommendations of the Committee in respect of the following tribunals -

Air Services Licensing Appeal Authority
Motor Spirits Licensing Appeal Authority
Taxation Board of Review (see however below - para 23 et seq.)
Transport Licensing Appeal Authority.

Application of Principles Governing Administrative Tribunals

16. Over the years the Committee has formulated principles relating to the constitution and procedures of and appeals from administrative tribunals. There has been increasing acceptance of those principles by most departments of state.

II. CODE OF PROCEDURE

17. In our Third Report (paras. 63-70) we referred to the difficulties of laying down a general code of procedure for administrative tribunals which would not have the effect of forcing tribunals into a procedural strait-jacket. At that time we thought of our next step in terms of a draft Act but we became convinced that there was a need for a research paper on the topic. This was undertaken by Mr K.J. Keith, of Victoria University of Wellington, who reported in July 1971. So far we have been able to reach only tentative conclusions on the issues raised by Mr Keith's very full report. Full consideration of the subject-matter of that report is our next major task.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTS

18. In paras. 26-28 of our Fourth Report we proposed a new remedy in administrative law which we called an application for judicial review. Under this new remedy the Court would be able, despite the existence of a right of appeal, grant any relief to which the applicant would be entitled in any proceedings for mandamus, certiorari, prohibition, declaration, injunction or any combination

of them. We do not believe that an applicant for review should be obliged first to exercise any right of appeal that may be available to him. He is not required to do so under the present law and, apart from two minor matters referred to in the following paragraph, the draft legislation to introduce the new remedy makes no change in the present law. Nor are we persuaded that the existing remedies should be abolished on the introduction of the new remedy.(4) We expect them to fall into desuetude and if after experience with the new remedy no purpose in retaining the remedies is seen to exist, they could then be abolished.

19. The proposed bill to introduce the new remedy effects procedural changes only and does not attempt, as it might have done, to codify the grounds of an application or to enumerate the tribunals to which the new procedures apply or in any other way to alter (except to the extent noted below) the remedy that may be granted on such an application. The exception relates to the Court's power to refer a matter back to the tribunal for further consideration and decision, and to validate a decision defective in form or because of technical irregularity. A review of the grounds for an application will form part of our future programme.

20. This year we have considered the detailed application of our proposals and have set them out in draft legislative form reproduced as an appendix to this report. A draft bill has been submitted to the Minister of Justice.

(4) The United Kingdom Law Commission sees difficulties in this approach. In particular it says that "any time-limit imposed by the new remedy could simply be evaded by the applicant claiming an ordinary declaratory judgment"; see working paper (no. 40) on Remedies in Administrative Law, footnote 158. This problem does not arise in New Zealand because we do not have comparable time limits.

21. The bill is based largely on the bill (No. 54) introduced by the Prime Minister of Ontario last year. That bill was one of a group of four introduced to give effect to the recommendations of the McRuer Report on Civil Rights. The chief characteristics of the Ontario bill and our draft bill are -

(a) on an application for review, the applicant may be granted any relief that could at present be secured in proceedings for mandamus, prohibition, certiorari, declaration or injunction;

(b) all statutory powers of decision, as defined in the interpretation clause, which may at present be challenged in proceedings for one of the remedies named will be subject to the new procedure.

22. We are pleased to learn that the proposals advanced by us are substantially the same as those outlined in the Working Paper No. 40 entitled "Remedies in Administrative Law", published in 1971 by the United Kingdom Law Commission. The working paper also indicates that the Commission is considering the introduction in appropriate cases of an action for damages in addition to the present remedies. We will continue to watch developments in the United Kingdom with interest.

TAXATION BOARD OF REVIEW

23. At the request of the Minister of Justice the Committee reviewed its recommendations made in the Second Report (paras. 60-67) on the Taxation Board of Review and took into account the comments of the Commissioner of Inland Revenue.

24. We reaffirm our view that in this field there should be a right of appeal on fact or discretion as well as on law. However to avoid appeals where relatively small amounts are involved we previously recommended that below $500 no appeal should lie. It has been suggested that that amount is too low. While we adhere to the amount of $500 we stress that the important thing is the principle of a right of appeal and the determination of a higher limit is of course a matter for the Government.

25. In para. 65 of our Second Report we discussed the question whether appeals on all taxation matters should lie to the Administrative Division or to the Supreme Court in its ordinary jurisdiction. We gave our view that "if the Administrative Division is chosen as the appropriate appellate body in respect of appeals from the Board of Review then it should also be the body to which an objector can apply direct under s.32 of the Land and Income Tax Act".

We qualified this opinion by drawing attention to the power(5) of the Chief Justice to refer, inter alia, a tax appeal to a judge who is not a member of the Division should it be appropriate to do so. On reconsidering the point we thought that the case for having tax appeals heard in the Administrative Division was doubtful, and at our request the views of the judges were sought. After consulting the other judges the Chief Justice advised that, as these cases depend largely on statutory construction applied to facts found by the normal Court process, appeals should continue to be to the Supreme Court in its ordinary jurisdiction. With respect, we agree.

(5) See s.26(3) of the Judicature Act 1908, as inserted by s.2 of the Judicature Amendment Act 1968.

CARTER COMMITTEE REPORT

26. The Report of the Committee of Inquiry into urban passenger transport recommended that some operating authorities should also be the licensing authorities. Because this conflicts with principles which we have set forth from time to time we would appreciate being consulted before a decision is made in relation to this portion of the report.

COSTS WHERE CROWN INTERVENES OR CLAIMS PRIVILEGE

27. In May 1971 we were asked to consider a report on whether the Court should have power to award costs for or against the Crown where Crown privilege is claimed.

28. On a preliminary consideration it became evident that the opportunity should be taken to review in addition the power to award costs where the Crown intervenes in litigation either on its own motion or as amicus curiae. Our recommendations therefore extend to these wider issues.

29. The general rule would appear to be that the Crown has, by invitation or with the leave of the Court, a right of intervention in a private suit whenever it may affect the prerogatives of the Crown or where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the Court: Adams v. Adams [1970] 3 All E.R. 572. See also In re Rhodes (deceased), Barton v. Moorhouse [1933] N.Z.L.R. 1348 at p.1361 where the Solicitor-General was granted leave to intervene and argued that "it is part of the duty and privilege of the Crown to be heard as an amicus curiae".

30. The case of Pollock v. Pollock and Grey [1970] N.Z.L.R. 771, where Crown privilege was claimed in respect of the production of a departmental file and in respect of the giving by a civil servant of oral evidence of information and knowledge acquired in the performance of his official duties, would seem to be an application of this general rule.

31. Frequently the Crown is called upon to assist the Court with argument or to conduct cross-examination. For example, in unopposed applications where there are considerations of public policy the Court should have the assistance of counsel to undertake the cross-examination of the applicant's witnesses, including the applicant: In re Woodcock and Woodcock [1957] N.Z.L.R. 960. A request for assistance is not restricted to Crown Counsel and on occasions counsel in private practice have been asked to assist.

32. At common law the Crown neither receives nor pays costs though this rule may be varied expressly or by implication by statute: Pollock v. Pollock & Grey (No. 2) [1970] N.Z.L.R. 998 at p.999. It was in this case that the learned judge drew the attention of the Legislature to the need for possible reform and observed (at p.1001) that ".... in the climate of modern times and particularly in the climate surrounding Crown privilege since the decision in the House of Lords in Conway v. Rimmer [1968] 1 All E.R. 874, a subject the trial of whose action is extended by the need to argue such a point and who is successful should be entitled, in the discretion of the Court, to receive some relief by way of costs."

33. The Committee agrees that where the Crown intervenes the Court should have a discretion to award costs for and against the Crown. However where Crown or other counsel is

called upon to assist the Court there can be no question of costs being awarded against the Crown. Because the assistance given by counsel is often of advantage to one or other of the parties we think it proper that the Court should have a discretion to award costs against a party or parties in favour of counsel. At the same time we acknowledge that there are cases where it would be unfair to require a party to pay such costs and it is the Committee's view that the Court or judge should be able, at his discretion, to direct payment of such costs from legal aid funds.

34. The Solicitor-General was asked for his views on this topic and we acknowledge the very helpful assistance we received from him.

35. It is the Committee's recommendation that the Judicature Act be amended to give the Court or a judge a discretion to award costs as follows:

(a) for or against the Crown whenever it intervenes in a private suit on the grounds that it affects the prerogatives of the Crown or where the suit raises any question of public policy on which the Crown desires to be heard;

(b) in favour of counsel, whether or not a Crown counsel, who is called upon by the Court to cross-examine witnesses and assist it with argument. Where it would be unjust to order such costs to be paid by a party to the proceedings, then, where counsel is in private practice, the costs may be directed to be paid from legal aid funds.

TRADE PRACTICES

36. In our Fourth Report we welcomed the introduction of a Trade Practices Amendment Bill which gave effect to our recommendations on the abolition of the Trade Practices Appeal Authority and the substitution of a right of appeal to the Administrative Division. These provisions were contained in legislation enacted in the last session of Parliament.

TOWN AND COUNTRY PLANNING

37. In our previous report we referred to the Town and Country Planning Amendment Bill which was introduced but not passed in 1970. A new bill containing a right of appeal to the Administrative Division on a question of law only was reintroduced and enacted in 1971 as the Town and Country Planning Amendment Act 1971.

38. In our last report (para. 38) we expressed the view that an appeal on a question of law ought to include breach of natural justice in its technical legal sense. We also favoured an appeal where a substantial question of town planning principle was involved.

39. The amending bill, when it was before Parliament, was referred to a Select Committee which received submissions both for and against extended appeal rights. Subsequently the bill and especially the clause giving a right of appeal on a question of law only was fully debated during its passage through the House. It was disappointing that some arguments raised and rejected by this Committee and by Parliament in respect of other administrative tribunals were used again by opponents of extended rights of appeal. We refer to such arguments as appeals going to a less expert body; lack of evidence of injustices under the present system; appeals being used to delay and frustrate the objects of the Act; and earlier decisions of the

Supreme Court operating to stifle planning and the proper formation of planning policy. On the other hand we concede that there is room for genuine differences of opinion on the meaning of the terms "natural justice" and "substantial principles of town planning". We were, however, heartened by the ready acceptance by Parliament of the right of appeal on a question of law and by the body of opinion which thought that an extension of the appeal rights could be discussed again in the light of future developments.

PUBLIC WORKS ACT

40. Some features in the Public Works Act 1928 have claimed the attention of this Committee. The New Zealand Law Society has expressed concern too and a committee of that body has discussed with the Ministry of Works reforms which the Society believes desirable in the field of compulsory acquisition of and compensation for land and the hearing of objections.

41. The Committee is aware that there are two conflicting points of view to be reconciled. First there is the respect to be accorded the rights of the individual. The second is the need for the Government to govern and in so doing to determine when the public interest should prevail over the rights of the individual. This is the concern of administrative law - to balance private and public interest, including settling which official acts and omissions can and should be the subject of judicial review. It is a lawyer's natural inclination to suppose that judicial review should be encouraged, the administration's to seek greater freedom of action within its concept of the wider national interest. As part of our terms of reference, it is our task to attempt to reconcile these opposing views. More and more we see procedure as the most useful tool to achieve these ends. We seek procedures which ensure that before the administration takes a decision the legitimate interests of

individuals and all aspects of the public interest are consulted and considered. To take a topical instance of a similar kind, we refer to conservationist objections to new projects. We believe that public confidence that such objections, whether sound or otherwise, have been fully weighed would be much strengthened if there were machinery ensuring an adequate hearing at an early stage. It is along this path that the Committee is seeking a solution and to this end has appointed a subcommittee to study the procedures followed overseas.

COMPENSATION FOR PERSONAL INJURY

42. One of the most important social reforms to be considered in this country is that arising out of the report of the Woodhouse Commission. The proposal as accepted by the Government and embodied in the Accident Compensation Bill (which was introduced in Parliament at the end of the 1971 session) calls for the abolition of the common law action for damages and the substitution of a right to compensation, irrespective of fault, for personal injury suffered by persons in motor accidents and by earners in all accidents. The establishment of new tribunals to handle claims under the proposed Act is of direct interest to this Committee, especially the constitution, functions and procedures of such tribunals and the rights of appeal provided. At the request of the Government we have examined in a preliminary way the rights of appeal and the roles of an appeal authority and of the Courts but we are now studying the issues more closely in the context of the actual bill.

43. Clause 148 of the bill provides that any person who is dissatisfied with a decision of the Accident Compensation Commission, or of any member, officer, employee or agent thereof, may apply to the Commission for a review of that decision in any case where the decision adversely affects -

(a) The cover under the bill of the applicant or any employee of the applicant; or

(b) The liability of the applicant to pay any levy under the bill, or the amount of any such levy for which he is liable; or

(c) The granting or payment of rehabilitation assistance under the bill to any person or of compensation under the bill to or in respect of any person or deceased person.

Any such application may be heard by the Commission or, locally, by a Hearing Officer appointed for that purpose. Detailed provisions are included for the hearing and determination of the application.

44. Under Clause 157 an appeal lies to an appeal authority against -

(a) Any decision of the Commission or a Hearing Officer on an application for review under clause 148;

(b) Any revocation by the Commission of the appointment of an agent.

The appeal authority is to be known as the Accident Compensation Appeal Authority which shall consist of one person who shall be a barrister or solicitor of not less than seven years practice.

45. Under Clause 163 an appeal to the Administrative Division of the Supreme Court lies against a decision of the Authority on a question of law or on any question which, by reason of its general or public importance or for any other reason ought to be submitted to the Supreme Court for decision. The leave of the Authority is required for any such appeal; but, if the Authority refuses to grant the leave, the Supreme Court may grant special leave to appeal. Under Clause 164 there is a

further appeal to the Court of Appeal by way of case stated on a question of law. The leave of the Administrative Division is required for any such appeal; but, if such leave is refused, the Court of Appeal may grant special leave to appeal.

MINING ACT

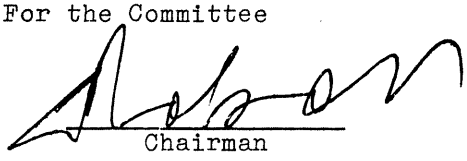
46. We referred last year to the suggestions we made in respect of the bill as introduced in 1969. The new Mining Act has now been passed and gives effect to most of our recommendations.

FUTURE PROGRAMME

47. Our first consideration in the coming months will be to determine whether a code of procedure for administrative tribunals should be adopted and, if so, its contents and scope. We would expect that during 1972 research papers on subordinate legislation and the compulsory acquisition of land would be available to the Committee to enable us to consider these subjects and report thereon to the Minister. In addition we intend to continue our detailed consideration of some of those administrative tribunals not yet reviewed.

48. We also need to consider the question of an adequate system for reporting decisions of administrative tribunals. We would hope to review the grounds upon which an application for judicial review could be made. It may be timely to consider here, as in the United Kingdom and elsewhere, whether it would be appropriate for damages to be awarded in respect of acts or omissions of administrative tribunals.

For the Committee



Chairman

Dated at Wellington 12th March 1972.

APPENDIX

JUDICATURE AMENDMENT

PROPOSALS FOR A BILL

INTITULED

An Act to amend the Judicature Act 1908, and to provide a single procedure for the judicial review of the exercise of or failure to exercise a statutory power

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title - This Act may be cited as the Judicature Amendment Act 1971, and shall be read together with the Judicature Act 1908* (hereinafter referred to as the principal Act) and deemed part of Part I of that Act.

2. Interpretation - In this Act, unless the context otherwise requires, -

"Application for review" means an application under subsection (1) of section 3 of this Act:

"Decision" includes a determination or order:

* 1957 Reprint, Vol. 6, p.699
Amendments: 1958, No. 40; 1960, No. 109; 1961, No. 11; 1963, No. 133; 1965, No. 62; 1966, No. 67; 1968, No. 18; 1968, No. 59; 1969, No. 86; 1970, No. 72.

"Licence" includes any permit, warrant, authorisation, certificate, approval, or similar form of authority required by law:

"Person" includes a corporation sole, and also a body of persons whether incorporated or not; and, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power of decision, includes a Magistrate's Court, the Court of Arbitration, the Compensation Court, the Maori Land Court, and the Maori Appellate Court:

"Statutory power" means a power or right conferred by or under any Act -

(a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or

(b) To exercise a statutory power of decision; or

(c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or

(d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person:

"Statutory power of decision" means a power or right conferred by or under any Act to make a decision deciding or prescribing -

(a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or

(b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

3. Application for review - (1) On an application by motion which may be called an application for review, the Supreme Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

(2) Every application for review shall be heard and determined by the Administrative Division of the Court.

(3) Where on an application for review the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid, the Court may, instead of making such a declaration, set aside the decision.

(4) Where in any of the proceedings referred to in subsection (1) of this section the Court had, before the commencement of this Act, a discretion to refuse to grant relief on any grounds, it shall have the like discretion, on like grounds, to refuse to grant any relief on an application for review.

(5) Subsection (4) of this section shall not apply to the discretion of the Court, before the commencement of this Act, to refuse to grant relief in any of the said proceedings on the ground that the relief should have been sought in any other of the said proceedings.

(6) Without limiting the generality of the foregoing provisions of this section, on an application for review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision the Court may direct any person whose act or omission is the subject-matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the

application relates. In giving any such direction the Court shall -

(a) Advise the person of its reasons for so doing; and

(b) Give to him such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

(7) In reconsidering any matter referred back to him under subsection (6) of this section the person to whom it is so referred shall have regard to the Court's reasons for giving the direction and to the Court's directions.

4. Defects in form, or technical irregularities - On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

5. Disposition of proceedings for mandamus, prohibition, or certiorari - Where proceedings are commenced for a writ or order of or in the nature of mandamus, prohibition, or certiorari, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the proceedings shall be treated and disposed of as if they were an application for review.

6. Disposition of proceedings for declaration or injunction - Where proceedings are commenced for a declaration or injunction, or both, whether with or without a claim for other relief, and the exercise, refusal to exercise, or proposed or purported exercise of a statutory

power is an issue in the proceedings, the Court on the application of any party to the proceedings may, if it considers it appropriate, direct that the proceedings be treated and disposed of, so far as they relate to that issue, as if they were an application for review.

7. Interim orders - On an application for review, the Court may make such interim order as it thinks proper pending the final determination of the application.

8. Sufficiency of application - (1) In an application for review it is sufficient if the applicant sets out in the motion the grounds on which he is seeking relief, and the nature of the relief sought, without specifying the proceedings referred to in subsection (1) of section 3 of this Act in which the claim would have been made before the commencement of this Act.

(2) In an application for review, the person whose act or omission is the subject-matter of the application shall be cited as a party to the proceedings.

(3) For the purposes of subsection (2) of this section, where the act or omission is that of any two or more persons acting together under a collective title, they shall be cited by their collective title.

(4) Notice of an application for review shall be served on the Attorney-General, who may apply to the Court for leave to be heard in person or by counsel on the application.

9. Court may give directions as to filing of record - On an application for review of a decision made in the exercise or purported exercise of a statutory power of decision, the Court may direct that the record of the proceedings in which the decision was made, or any part of the record, be filed in an office of the Court.

10. Appeals - Any party to an application for review who is dissatisfied with any final or interlocutory order in

respect of the application may appeal to the Court of Appeal; and section 66 of the principal Act shall apply to any such appeal.

11. Procedure - Subject to the provisions of this Act, the procedure in respect of any application for review shall be in accordance with rules of Court.

12. Act to bind the Crown - Subject to section 13 of this Act, this Act shall bind the Crown.

13. Application of Crown Proceedings Act 1950 - (1) Section 2 of the Crown Proceedings Act 1950 is hereby amended by adding to the definition of the term "civil proceedings", in subsection (1), the words "or proceedings by way of an application for review under the Judicature Amendment Act 1971 to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari".

(2) In its application to the Crown, this Act shall be read subject to the Crown Proceedings Act 1950, as amended by subsection (1) of this section.

14. References in enactments - Subject to section 13 of this Act, every reference in any enactment (other than this Act), or in any regulation, to any of the proceedings referred to in subsection (1) of section 3 of this Act shall hereafter, unless the context otherwise requires, be read as including a reference to an application for review.

PROPOSALS FOR A JUDICATURE AMENDMENT BILL

Explanatory Note

The purpose of the proposed bill is to provide an additional remedy for the judicial review of the exercise or failure to exercise statutory powers, including statutory powers of decision possessed by tribunals. The intention is to avoid the difficulties involved in the use of the so-called "extraordinary" remedies of mandamus, prohibition, or certiorari, and in actions for declarations or injunctions, as a means of obtaining judicial review in such cases.

The bill will not expressly abolish proceedings for mandamus, prohibition, certiorari, declaration, or injunction; but it will provide an alternative single procedure, by way of application to the Supreme Court by motion, on which the Court may grant any relief that the applicant is now entitled to in any of those proceedings, or in any combination of them.

The proposals are put forward by the Public and Administrative Law Reform Committee, and are based on paragraphs 11 to 28 of the Fourth Report of that Committee (January 1971).

In two respects, the proposals add to the powers now possessed by the Court under the extraordinary remedies:

(a) At present, the decision of a Court quashing a decision of a tribunal renders the tribunal's decision a nullity, and may make it necessary for the tribunal to rehear the whole matter. It is proposed that, where appropriate, the Court may refer the whole or any part of a matter back to a tribunal for further consideration:

(b) Where the sole ground of relief established is a defect in form or a technical irregularity, and no substantial wrong or miscarriage of justice has occurred, it is proposed that the Court have power to validate a decision from such time and on such terms as the Court thinks fit.

Clause 1 relates to the Short Title of the proposed bill.

Clause 2 is the interpretation clause. In the definition of "person", it is made clear that, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power of decision the term includes a Magistrate's Court, the Court of Arbitration, the Compensation Court, the Maori Land Court, and the Maori Appellate Court.

The main definitions are those of "statutory power", and "statutory power of decision". The former definition includes the latter; but it also includes power to make a regulation, bylaw, or order, or to give a notice or direction having force as subordinate legislation, statutory authority to require persons to do acts, and statutory authority to take action infringing rights. All of these powers may at present be the subject-matter of one or other of the existing remedies mentioned above.

"Statutory power of decision" is a more limited definition, which is necessary for ensuring that the powers given to the Court by clauses 3(3), 3(6), 4 and 9 do not extend to cases covered by paragraphs (a), (c) and (d) of the definition of "statutory power".

Clause 3 is the main clause of the bill.

Subclause (1) provides that on an application by motion (called an application for review), the Supreme Court may, notwithstanding any right of appeal possessed by the applicant, grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, any relief that the applicant would otherwise be entitled to against the respondent in any one or more of the proceedings for mandamus, prohibition, certiorari, declaration, or injunction.

Subclause (2) provides that every application for review is to be heard by the Administrative Division of the Court.

Subclause (3) relates only to a statutory power of decision. As a declaratory judgment does not legally invalidate a decision, power is given to the Court to set aside the decision instead of making a declaration.

Subclauses (4) and (5): Where the Court has at present a discretion to refuse to grant relief on any grounds, it is to have the same discretion on an application for review, except its present discretion to refuse relief on the procedural ground that one of the other remedies (for example, certiorari instead of a declaration) should have been sought.

Subclauses (6) and (7): Where a decision made under a statutory power of decision is in question the Court may direct the person who made the decision to reconsider it in whole or in part.

Clause 4 relates only to a statutory power of decision. If the sole ground of relief established is a defect in form or a technical irregularity, and no substantial wrong or miscarriage of justice has occurred, the Court may refuse relief, and validate the decision (if made) from such time and on such terms as it thinks fit.

Clause 5: Proceedings for one of the extraordinary remedies are to be treated as an application for review.

Clause 6: Where proceedings are taken for a declaration or injunction, or both, whether with or without a claim for other relief, and the exercise, etc., of a statutory power is an issue in the proceedings, the Court

may on application treat the proceedings, so far as they relate to that issue, as an application for review.

Clause 7: The Court may make interim orders.

Clause 8: It is sufficient for the applicant to set out in his motion the grounds and the nature of the relief sought, without specifying which of the proceedings (mandamus, etc.) would otherwise have been taken. The person whose act or omission is challenged is to be cited as a party, and a collective body is to be cited by its collective title.

Under subclause (4) notice of the application is to be served on the Attorney-General, who may apply to the Court to be heard on the application for review.

Clause 9 relates only to decisions under a statutory power of decision. The Court may direct the filing of the whole or any part of the record of the proceedings in which the decision was made.

Clause 10 gives a right of appeal to the Court of Appeal against any final or interlocutory order made on an application for review.

Clause 11: The procedure on an application for review is to be in accordance with rules of Court.

Clause 12: Subject to clause 13, the new Act will bind the Crown.

Clause 13: The purpose of this clause is to preserve the status quo in relation to the Crown under the new procedure. At present, under section 2 of the Crown Proceedings Act 1950, the term "civil proceedings" does not include proceedings in relation to mandamus, prohibition, or certiorari. Section 17(1) of that Act forbids the granting of an injunction against the Crown, and provides for a declaratory order instead. Section 27 allows the Court to require the Crown to answer interrogatories and produce documents (subject to the rules of law concerning Crown privilege) in any "civil proceedings".

The amendment made by subclause (1) of this clause is intended to preserve this position, as stated above, if there is an application for review.

Subclause (2) makes the proposed bill subject to the Crown Proceedings Act, as amended by subclause (1).

Clause 14 provides that references in other enactments to the existing remedies mentioned in clause 3(1) are to be read as including references to an application for review. One result is that if an Act contains an express provision preventing the granting of any of those existing remedies against a tribunal, an application for review will also be prevented.