ADMINISTRATIVE TRIBUNALS CONSTITUTION, PROCEDURE AND APPEALS

sixth report of
the Public and
Administrative Law
Reform Committee

PRESENTED TO THE MINISTER OF JUSTICE
30 MARCH 1973

SIXTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

ANALYSIS

INTRODUCTION

1. The main part of the Committee's work in 1972 has been the consideration of whether a code of procedure for administrative tribunals should be adopted and, if so, the contents and scope of such a code.

2. The basis for our discussions was a paper prepared by Mr K.J. Keith, Reader in Law at Victoria University of Wellington, who has since become a member of our Committee. This important piece of research is to be published by the Legal Research Foundation as an occasional paper. It may then be referred to for a more detailed examination of the issues involved.

3. In our Third Report, while recognising the diversity of the nature and functions of tribunals, we stressed the importance of a fair hearing and the need to give those affected an opportunity of adequately presenting their case before a decision is made. At the same time further study has confirmed our earlier opinion (Third Report, para. 65) that "it would, in our view, be quite impossible to force all administrative tribunals into one single detailed procedural mould".

4. At this stage we do not make any recommendation concerning a statutory code of procedure such as those enacted in the United States and Ontario. Rather we have attempted to formulate a basic set of procedural principles which we hope will influence the procedures adopted by existing and future tribunals. The formulation is neither novel nor radical: to a large extent it is a restatement of principles followed by many tribunals and recognised by legislatures and courts. To this extent our suggestions seem unlikely to be controversial.

5. We have continued to study the constitution of administrative tribunals and existing rights of appeal from their decisions. Our comments on those examined since our last report are contained in paras. 61 to 73.

6. In addition we have under consideration the powers of tribunals established by the Marine Farming Act 1971, the Noxious Weeds Act 1950 and the Apprentices Act 1948.

7. The Marine Farming Act 1971, which maintains earlier provisions to the same effect, confers on the Minister the power to grant marine leases or licences. We question the desirability of maintaining that arrangement and have asked the Ministry of Agriculture and Fisheries for its comments.

8. Uncertainty as to the suitability of the Appeal Authority under the Noxious Weeds Act 1950 led to a similar enquiry to the Ministry of Agriculture and Fisheries which has been asked to consider the desirability of having appeals heard by an independent authority.

9. The Department of Labour has been invited to comment on the functioning of the tribunals created by the Apprentices Act 1948.

10. During 1972 we had the pleasure of meeting and discussing topics of mutual interest with two overseas lawyers distinguished in the field of Administrative Law. The Hon. J.C. McRuer, a former Chief Justice of Ontario, who is currently a member of the Ontario Law Reform Commission and who was the Royal Commission that inquired into civil rights in Ontario, was present at our meeting in June and we were able to discuss fully aspects of the Royal Commission Report, particularly those recommendations relating to an additional remedy in administrative law and a code of procedure for administrative tribunals. Later, in December, we had an equally helpful meeting with

Professor H.W.R. Wade of Oxford University who is a member of the consultative panel on administrative law set up by the English Law Commission. Until recently he was member of the Council on Tribunals. The discussion was wide-ranging and covered the work and powers of the Council on Tribunals, the new remedy to obtain review of administrative decisions in New Zealand, questions of the legal standing of those seeking to challenge a tribunal's decision, and procedural rules for administrative decisions.

CONSTITUTION AND MEMBERSHIP

12. The Public and Administrative Law Reform Committee was constituted in July 1966 and its present membership is the Chairman, Dr J.L. Robson, C.B.E., Director of Criminological Studies of Victoria University of Wellington;
Mr A.C. Brassington, barrister and solicitor of Christchurch;
Mr E.L. Greensmith, C.M.G. a former Secretary to the Treasury;
Mr K.J. Keith, Reader in Law at Victoria University of Wellington;
Dr R.G. McElroy, C.M.G., barrister and solicitor of Auckland;
Mr R.G. Montagu, Senior Legal Adviser, Department of Justice;
Professor J.F. Northey, Dean of the Faculty of Law at the University of Auckland;
Mr G.S. Orr, Deputy Chairman of the State Services Commission;
and Mr D.A.S. Ward, C.M.G. Counsel to the Law Drafting Office.
Recently Mr R.M. Barlow of the Department of Justice was appointed Secretary of the Committee.

13. Since our last report one of our members, Mr R.B.Cooke, Q.C., has been appointed a judge of the Supreme Court and we record our pleasure on his appointment. We express our appreciation of His Honour's substantial contribution to the work of the Committee. He was appointed a member of the Committee from its inception and we have gained greatly

from his incisive mind, his wide practical experience in this field, and his standing within the profession.

PROGRAMME

14. Under the programme initially approved by the Law Revision Commission, the matters referred to us included appeals from administrative tribunals, the constitution and procedures of such tribunals and the judicial control of administrative acts. This programme has subsequently been extended to include the following topics -

- the regulation-making powers and procedures of the Executive;
- the bylaw-making powers and procedures of local authorities and the present powers of the courts to review them;
- the award of costs where Crown Privilege is claimed (para. 75).

PROCEDURES OF ADMINISTRATIVE TRIBUNALS

15. In our Third Report (paras. 63-70) we examined in a tentative and preliminary way the question of whether or not a code of procedure for administrative tribunals should be enacted. This question has been extensively discussed in recent years and in some overseas jurisdictions legislative action has been taken.

16. The importance of procedure was stressed in our Fifth Report. It is generally accepted that the body exercising a particular power of decision is likely to come to a better decision if its procedure is such that those affected have a reasonable opportunity to present their case and to answer anything prejudicial to their interest.

The parties affected are also likely to consider the decision a fairer one if they have had such an opportunity. But how can the procedural principles best be stated and guaranteed? By the courts, by the tribunals themselves, by the legislature in specific enactments relating to each tribunal or in a statute of more general application, by a recommended guide which would not be binding, or by a combination of these methods? At the moment all can be seen in one form or another and thus the question discussed here looks to a change of emphasis.

17. Although procedure may be basic the wide range of tribunals and of their powers and the diversity of their functions raise considerable doubts whether it is practicable to have a uniform code of procedure.

18. Because tribunals consider a great variety of questions it could hardly be expected that a uniform procedure would be appropriate in every case. The effect of the exercise of a tribunal's power may vary: generally the result will be a binding final decision (subject to judicial review and, possibly, to appeal), but in some instances the outcome may be only a report or a recommendation with no binding force but which, in some cases, is a basis for binding action. In some cases the powers conferred upon tribunals are designed to recognise and protect existing rights; in others they embrace the discretionary grant or withdrawal of benefits to which those affected have no legal right. Powers vary in their degree of generality. At one end of the scale we have price and wage fixing powers; and at the other end of the scale we have tribunals such as the Crimes Compensation Tribunal. Some tribunals have a positive obligation to develop and promote policies, while others, being in this respect more like courts, wait passively for those affected to bring matters before them. More generally, certain

tribunals may resemble administrative bodies while others resemble courts.

19. Courts as well as legislatures have from time to time taken account of such distinctions and have either drawn up procedures which vary accordingly or have limited themselves to stating broad principles which allow the decider to take account of "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth".[1] This variety and flexibility are reflected in the fact that the courts have never laid it down as an absolute rule that natural justice entitles those who are parties to proceedings before an administrative tribunal to be represented by counsel, or to present their case directly to the decider and not to some delegate, or to confront and cross-examine witnesses who might give prejudicial evidence, or to have the hearing in public. The determination of these questions appears to turn on the facts and circumstances of the case, viewed in the light of the broad principles of natural justice. This flexibility in legislation and common law can be seen as highly advantageous; the basic ideal of fairness in all the circumstances is not impeded by a rigid adherence to detailed procedures which may be inappropriate in particular circumstances. This flexibility is enhanced by certain rules which legislatures and courts have developed to prevent an inexorable result that every procedural error inevitably leads to invalidity. (e.g. paras. 49-50 below).

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1. Russell v Duke of Norfolk [1949] 1 All E.R. 109.

20. The diversity in function, nature and powers and the consequential differences in procedure between tribunals and the courts can be further emphasised by briefly recalling the differing reasons given for the establishment of tribunals and their being preferred in particular areas to the courts: as stated by the Franks Committee these reasons include "cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject". Doubtless this list of attributes can be extended by including such things as uniformity of treatment, the positive development of a policy, and a flexible attitude towards precedent. However, the list and especially its varying applicability to particular tribunals, is sufficient to warn that any attempt to force all tribunals into a single comprehensive procedural mould could well threaten and perhaps negate the original reasons for the establishment of a particular tribunal. After all, Parliament has thought it desirable to establish a separate tribunal and has not chosen to use the existing judicial structure with its more formal and possibly more rigid procedures.

21. However, flexibility is seen by some as uncertainty and for that reason intolerable. Parties and their legal advisers do not always know how they are to proceed, injustice may result from haphazard procedure and unnecessary differences in procedure may arise between different tribunals or even within a single tribunal from time to time. Notwithstanding the points made in the preceding three paragraphs, the basic principles of procedure are firmly established and widely applicable and, as will appear in the following paragraphs, there are already a number of detailed rules which apply to a wide range of very different tribunals.

22. Courts and legislatures have stated the basic principles in various ways: for example, that the decider has a duty to act in good faith and to listen fairly to both sides, that the procedure is to be fair in all the circumstances, and that the parties are to be given a reasonable opportunity to be heard. Both courts and legislatures, while stressing the importance of the fundamental general principle of fairness and while sometimes stating their reluctance to see it degenerate into a series of rigid rules, have nevertheless gone on to give the principle specific expression in respect of particular aspects of procedure.

23. While we consider that a comprehensive statutory code of procedure applying to all tribunals is not practicable, we reserve for further consideration the desirability of such a code for some specified tribunals. Hence we have no recommendation at this stage on the question of a statutory code of procedure. We do, however, outline provisions which are intended primarily for those responsible for the elaboration of procedural provisions, i.e, those who prepare principal or subsidiary legislation, also for the tribunals themselves. It would be desirable if the rules we outline are borne in mind by all concerned and tested by experience. It may be that this less formal approach will achieve the desired effect without need for an enactment of general application.

Notice

24. Notice of the time, place and purpose of the hearing should be given to all parties in such a way as to enable them to prepare adequately for the hearing. The notice should include a reference to the statutory authority under which the hearing is to be held and should indicate that the matter can

be disposed of if the party fails to attend. When appropriate those affected should be made directly aware of their right to apply to the tribunal and as to where they can obtain advice concerning the procedure of the tribunal.

25. In disciplinary cases and other cases where the good character, propriety of conduct or competence of a party is in issue, that party should be given adequate information about the allegations.

26. In cases involving a particular area of land, the notice should give the legal description and describe the area sufficiently to enable it to be readily identified without reference to the plans or records of any office.

Public or Private Hearings

27. Hearings should as a general rule be held in public. The desirability of avoiding the disclosure of certain matters in the interests of any person affected or in the public interest may however outweigh the desirability of adhering to that general principle, for instance, where public security is involved, where intimate personal or financial matters may be disclosed and, in cases affecting professional reputation and capacity, where the investigations are of an informal and preliminary kind.

Representation

28. As a general rule, any party should be able to appear in person and to be represented by counsel or agent.

Procedure at the Hearing

29. Tribunals should normally indicate, by their own rules or by less formal means, the procedure to be followed at their hearings.

Calling of Evidence

30. Parties should have the right to call evidence, to cross-examine witnesses and to call evidence in rebuttal. The right of the parties to present their case would be subject to the overall control of the tribunal which should have the power to exclude irrelevant or repetitive evidence.

31. The tribunal should have the power, subject to the payment or tender of the prescribed allowances, to require any person, by summons, to give evidence and produce documents.

32. Tribunals should have the power in their discretion to require witnesses to give their evidence on oath or affirmation.

Rules of Evidence

33. Tribunals should not necessarily be bound by the rules of evidence applicable to the courts and should be able to receive in evidence information which they consider will assist them effectively to deal with the matter before them. Witnesses should, however, have the same privileges and rights as have those called before the courts.

Official Notice

34. Tribunals should be able to take note where appropriate of general technical and scientific information and opinions within their own knowledge.

Case Stated

35. Tribunals should have the power to state a case for the opinion of the Supreme Court on questions of law which arise in the course of proceedings before them. In those cases in which the Administrative Division has the appellate jurisdiction, that Division should consider the questions.

Reasons

36. As a general rule tribunals should, if requested, be obliged to give reasons for decisions adverse to the claims of a party. Parties should be informed of their rights of appeal against tribunal decisions.

Rehearing

37. Tribunals should have the power to grant a rehearing in appropriate cases and on appropriate conditions.

Immunities

38. Members of tribunals, the parties, representatives and witnesses should have the same immunities in respect of what they say or do as have Magistrates and those who appear before them.

Privative Clauses

39. Provisions restricting judicial review of decisions of tribunals on the ground of error of law should be enacted only in exceptional cases.

40. In the provisions suggested above the major changes from existing law and practice concern representation, reasons and privative clauses. The following three paragraphs set out the Committee's reasons for recommending these changes.

41. The common law on the right of a party to be represented is not clear. Perhaps the position is that a party is entitled to be represented before a tribunal if representation is essential to the proper presentation of his case. Many tribunal statutes are silent, a few - in the industrial area - forbid legal representation unless the parties otherwise agree, while many others allow representation with no such exclusion. Representation by counsel or other expert skilled in the particular arena is often essential to the proper presentation of a party's case; many will be unfamiliar with the procedures of the tribunal and the issues it deals with, and will not be skilled in presenting evidence and argument. We accordingly consider that parties should, in general, be entitled to representation by counsel or agent. Provision might be made to give the tribunal power to exclude for good cause agents who are not legally qualified.

42. The common law does not require tribunals to give reasons for their decisions (although a failure to provide reasons will not necessarily protect the decisions from review). The legislature has however imposed the obligation in some cases and a majority of tribunals do in fact give reasons. The Committee considers this to be

highly desirable: the tribunal proceedings will be fairer to those concerned; the decision is apt to be better if the reasons for it have been set out in writing; a better assessment can be made of the possibility of an appeal; and the giving of reasons may provide a basis for review of a decision which is erroneous in law. On the other hand the Committee realises that this obligation could be burdensome if imposed in respect of all decision. It accordingly considers that the general rule should be that reasons should be given if a party so requests.

43. Although privative clauses vary considerably in their precise wording, they can be divided into two groups. The first, which provide for finality, are generally held to have no effect on the Supreme Court's supervisory powers (although they may nullify otherwise existent rights of appeal granted by statute). They are accordingly of little importance. Of greater significance is the second group of provisions which state that no decision, order, determination or proceeding of the tribunal is liable to be challenged, reviewed or called in question in any court. The main practical effect (and perhaps the only effect) of such provisions is to exclude the court's power to review errors of law which do not go to jurisdiction. By contrast, arguments that the tribunal has acted outside or in excess of its jurisdiction can still be made notwithstanding the privative clause. The Committee considers that for the following reasons these provisions can no longer be justified, except in unusual cases:

(i) in the absence of a right of appeal, a proper distribution of functions between court and tribunal should be based on their comparative contribution, the former should be concerned with questions of law and of procedure , the latter with matters of fact, discretion and policy. A tribunal should not be able to violate the law with impunity.

(ii) The distinction between errors going to jurisdiction and other errors is often a difficult one to apply and may turn on accidents of drafting.

(iii) The courts are in any event moving to remove this difficulty by deciding that all errors of law are jurisdictional.

(iv) The law of judicial review is gaining at the moment a greater coherence based on a broad power of the courts to correct all errors of law. Removal of privative clauses would assist this rational growth.

(v) The legislature is tending towards limiting the use of privative clauses, and, where they are used, their scope.

(vi) Technical, harmless errors could be dealt with by more specific rules, some of which already exist.

Other Procedural Questions

44. The above provisions do not, of course, exhaust the elements of tribunal procedure. The rules developed by legislatures and courts deal with several other matters which should also be considered by those preparing legislation relating to particular tribunals. It will be seen however that in these cases a rule or principle of general application probably cannot be elaborated: different situations will require different answers.

Oral or Written Proceedings

45. There is no general rule either of common law or in legislation as to the form of the proceedings. An exchange of written submissions may satisfy the common law unless an oral hearing is necessary for the proper presentation of the parties' case. Some statutes make it clear that the hearing must be oral, others that it can be on the papers alone, still others give the decider an option, and others are silent. If an oral hearing is not required or permitted in a particular case - either by the common law or by statute - then some of the foregoing rules (as to public or private hearings, procedure at the hearing, calling of evidence, including subpoenas and cross-examination) are not relevant.

Must the decider hear?

46. The general rule is that the tribunal itself must conduct the hearing and listen to the witnesses, but, if it can be shown that the tribunal has fairly heard the parties and fairly made the decision and not merely rubber-stamped any recommendations made to it, the courts, in some cases, have allowed delegation of the hearing or some part of it. Some of the relevant statutes expressly permit

delegation and those tribunals to which the Commissions of Inquiry Act 1908 applies may also have the power to refer certain matters to a referee for inquiry and report, but there is certainly no general practice of permitting such references.

Informal disposition

47. In many cases a tribunal may, with the acquiescence of those involved, dispose of a matter before it without following its regular procedure. So long as private and public interest are not adversely affected such a course should not be discouraged. Indeed it would be consistent with one of the reasons for setting up some tribunals: namely their informality. The common law allows such informal disposition where the parties acquiesce and where no other interests are affected. But in the absence of acquiescence specific statutory authority would probably be required. In some cases it has been so provided.

Costs

48. Many tribunals, by virtue of having the powers of a Commission of Inquiry, have the power to make orders for costs and some others have had specific authority to that end conferred on them. Others have no such power. In many cases, for instance those involving the grants of licences in a regulated industry, it would not be appropriate for a successful applicant to be awarded costs. On the other hand where the matter is more analogous to a civil suit before the courts it may be appropriate for costs to be awarded. Hence this matter ought not to be the subject of any general rule.

Non-compliance with procedural rules

49. While most of the rules and principles discussed above are seen as basic and essential, courts and legislatures have not accepted that it is an inevitable consequence of the violation of any one of them that the proceedings are invalid. The law endeavours to achieve substantial justice rather than enforce adherence to technical form. Thus, the common law rules, with their emphasis on fairness, may well be found not to have been violated - if for instance no prejudice results from the claimed irregularity; or the courts may hold that the party affected has waived certain of his rights or has acquiesced in the errors and can no longer be heard to complain; or it may be held that a requirement is directory and not mandatory and that non-compliance is only an irregularity; or the courts, in exercise of their discretion to grant the appropriate remedies, may refuse to do so if they consider that no injustice has resulted; or as the Privy Council showed recently in Durayappah v. Fernando [2] review might be denied because the litigant cannot as a mere individual establish a right to set the law in motion to consider an alleged violation of a public right.

50. Finally, the legislature has intervened in a number of ways. Thus the Acts Interpretation Act 1924, s.5(i), provides that -

> Wherever forms are prescribed, slight deviations therefrom but to the same effect and not calculated to mislead, shall not vitiate them.

This seems to be the only provision of general applicability but there are many others relating to

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2. [1967] 2 A.C. 337.

particular courts and tribunals. Thus the Magistrates' Courts Rules 1948 contain in Rule 8 the following provision which may be applicable to a large number of administrative tribunals:

> Non-compliance with any of these rules shall not render void the proceedings in which the non-compliance has occurred, unless it is expressly so provided in these rules, but the proceedings may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with on such terms as to costs and otherwise as the Court thinks fit.

Rule 599 of the Code of Civil Procedure, Rule 6 of the Supreme Court (Administrative Division) Rules 1969 and Rule 9 of the Court of Appeal Rules 1955 are all substantially to the same effect. Somewhat similar provisions are found in some tribunal statutes and regulations.

ACTION TAKEN ON RECOMMENDATIONS

51. The Judicature Amendment Act 1972 gave effect to the principal recommendation for an additional remedy in Administrative Law contained in our Fifth Report. It also gave the Supreme Court power to award costs for or against the Crown where the Crown intervenes or claims privilege. We refer to this later in this report (see para. 78).

RECOMMENDATIONS NOT YET ADOPTED

52. So 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
Transport Licensing Appeal Authority

53. We are particularly concerned over the fate of our recommendations in respect of the Air Services Licensing Appeal Authority and the Transport Licensing Appeal Authority. In our First Report in 1968 we recommended that the jurisdiction of the latter Authority should be absorbed into the proposed Administrative Division of the Supreme Court and exercised by that Division. We also expressed the view that an appeal on a point of law only should lie to the Court of Appeal. In our Second Report we made similar recommendations in respect of the Air Services Licensing Authority.

54. The Transport Department expressed reservations concerning the recommendations, on the grounds of appeals being heard by a less expert body, of delays, of additional expense and of formality. All these arguments have been canvassed and answered at length in our various reports. Indeed in the case of transport licensing we countered those views in our First Report (paras. 61 and 62). Moreover the record of the Administrative Division has made plain that such reservations have little substance.

55. We see no adequate reason why appeals in these jurisdictions should not go to the Administrative Division.

JURISDICTION OF ADMINISTRATIVE DIVISION

56. In our previous report we commented upon the acceptance by most Departments of State of the principles

propounded by the Committee regarding the constitution and procedures of and appeals from administrative tribunals. This is seen in the number of enactments, without any prompting from the Committee, providing for appeals to the Administrative Division. In 1971 the Distillation Act re-enacted (s.11) the provisions of the earlier Act providing for an appeal against the refusal of a licence under the Act but the appeal now lies to the Administrative Division instead of to the Supreme Court in its ordinary jurisdiction. In addition there now exists (s.20) a right of appeal from the Minister's decision to revoke or suspend a licence.

57. The Nurses Act 1971 (Part V) makes provision for appeals from decisions of the Nursing Council to be made to the Administrative Division of the Supreme Court. Under the repealed Act appeals were made to the Board of Appeal consisting of a Magistrate and two assessors.

58. The Coal Mines Amendment Act 1972 made a number of amendments to the Coal Mines Act 1925 that are of interest to those concerned with administrative law. The amendments included provisions for objections to the grant of a coal mining right on a question of law to be determined by the Courts (ss 23 and 28E); for a Magistrate to formally hear and report on objections (s.23C); for appeals to the Administrative Division against forfeiture by the Minister of Mines of a coal mining right (s.28E); in cases of fraud, for application for forfeiture to be made to a Magistrate's Court with provision for a further appeal under the Magistrates' Courts Act 1947 (ss 28D and 28E); for the prior consent of a Magistrates' Court to the cancellation or forfeiture of a tribute agreement and for appeals therefrom to the Administrative Division (ss. 78B, 168C); and for the classification of land to be determined by a Magistrate's Court and for appeals therefrom to the Administrative

Division (ss.168B, 168C). As a result of the amendments the Coal Mines Act has been brought into line with the provisions of the Mining Act 1971 on which we were consulted.

59. The Clean Air Act 1972 (s.33) provides a right of appeal to the Administrative Division of the Supreme Court against the grant or refusal or revocation of a licence or any renewal thereof or of any exemption or of the imposition or variation of any condition in respect of an exemption under the Act.

60. It is noted also that appeals from Catchment Boards classification, or apportionment of rates, levying of acreage rates or compensation claims under the Soil Conservation and Rivers Control Act 1941 (ss. 103, 106B and 145B as amended by the Land Valuation Proceedings Amendment Act 1968) are made to that Division.

REVIEW OF TRIBUNALS

61. The Committee continued its review of the constitution of administrative tribunals and the rights of appeal from them.

Harbour Ferry Service Licensing Authority

62. The sole Harbour Ferry Service Licensing Authority established under the Transport Act 1962 (s.96) is centred on the Auckland district. The one-member authority has been responsible for the issue of eight current harbour ferry service licences. An appeal lies from this Authority to the Transport Licensing Appeal Authority.

Recommendation

63. In our First and Second Reports we recommended that the jurisdiction of the Transport Licensing Appeal Authority and the Air Services Licensing Appeal Authority should be absorbed by the Administrative Division. Harbour ferry services licensing is in the same category of tribunals and it follows that in our view the Transport Licensing Appeal Authority's jurisdiction in respect of Harbour Ferry Service Appeals should be vested in the Administrative Division with a further right of appeal to the Court of Appeal on questions of law only.

Local Authorities Loans Board

64. The Board is established under the Local Authorities Loans Act 1956 with the object of controlling borrowing by local bodies. It reviews local body proposals, largely on economic grounds, and exerts some influence in determining priorities for loan money. The Board consists of the Secretary to the Treasury, the Commissioner of Works and five other persons appointed by the Governor-General. Invariably appointees have had special knowledge in local authority or related affairs.

65. An examination of the Board's functions and procedures showed it to be a purely administrative body. The Committee is satisfied that appeals from its decisions are neither necessary nor desirable.

Local Government Commission

66. The Commission is a three-member body established under the Local Government Commission Act 1967 with wide powers to review the functions of local authorities, to reorganise them and to revise their boundaries. The three

members are appointed by the Governor-General in Council. One is to have special knowledge of local government, one of finance and economics and one of administration. There is a statutory right of appeal to the Supreme Court with the leave of the Commission or the Court.

Recommendations

67. The Committee considered whether wider rights of appeal should be granted in this instance but concluded that the present right of appeal seems adequate although appeals from the Commission should lie to the Administrative Division of the Supreme Court rather than to the Supreme Court in its ordinary jurisdiction. Such a change would be minimal in effect as it is understood that there have not been any appeals from the Commission.

Audit Office Powers

68. Many Statutes give the Audit Office or one of its officers the power to decide disputes in respect of financial issues relating to local authorities (for example pursuant to s.65 of the Counties Act 1956); in other cases provision is made for the Governor-General to appoint some fit person to hold an enquiry and advise him and in such cases it is customary for an audit officer to be appointed (for example pursuant to s.65 Land Drainage Act 1908). It is only if the local authorities cannot agree that the Audit Office is likely to become involved and in the great majority of cases, with Audit Office acting in a consultative capacity, agreement is reached.

69. Generally the statutory provisions were enacted and appointments of designated persons made because the officers, by reason of their duties and training received in the field of local body finance in particular and public sector finance in general, are the persons best qualified to assess the issues at stake and either make or recommend a decision.

70. The procedures followed depend on the legislative provisions. If an inquiry is required by statute one would be held. However in the great majority of cases the Office or its officers act only in a consultative capacity where local authorities cannot reach agreement.

71. In view of the absence of legal issues arising in this work and the largely consultative role the Audit Office has adopted in such matters the Committee does not recommend any change.

Regional Water Boards

72. Established under the Water and Soil Conservation Act 1967, Regional Water Boards incorporate the functions of local Catchment Boards and Catchment Commissions constituted under the Soil Conservation and Rivers Control Act 1941 and of the Waikato Valley Authority constituted in 1946. Regions are defined and these local bodies further the objects of water conservation and of pollution control within their boundaries.

73. Appeals generally lie to a Town and Country Planning Appeal Board from a hearing of objections at local authority level and since 1 April 1972 there has been by virtue of s.16 of the Water and Soil Conservation Amendment Act (No 2) 1971 a further right of appeal on points of law to the Administrative Division. Our views on the extension

of the rights of appeal under the town planning legislation are stated in our earlier reports and at this stage we make no recommendation to extend appeal rights in respect of decisions of Regional Water Boards.

COMPULSORY ACQUISITION OF LAND

74. In our Fifth Report (para. 40) we referred to those features of the Public Works Act 1928 which relate to compulsory acquisition of land. The initial task of reconciling the conflicting attitudes towards reform was allotted to a subcommittee which was asked to study procedures followed overseas. The subcommittee has adopted the paper of Mr R.I. Barker to the N.Z. Legal Conference in 1969[3] as an appropriate basis for discussion with the Ministry of Works whose cooperation is necessary to secure reform in this area. The Committee favours the adoption of procedures similar to those incorporated in English legislation which calls for a public inquiry to hear objections. This approach is also adopted in Canada.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTS

75. In our Fourth Report we took the view that a citizen is entitled to a less complex and less uncertain system for obtaining a review by the Courts of an administrative decision which is claimed to be ultra vires, wrong in law or in breach of the rules of natural justice. We then proposed a new remedy called an application for judicial review on which the Court might grant relief to the applicant.

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3. [1969] N.Z.L.J. 251.

76. We are pleased with the prompt enactment of the Judicature Amendment Act 1972, based on the draft Bill appended to our Fifth Report. We do, however, note that section 15 of the amending Act does not fully meet the view of the Committee that all applications for judicial review should be considered by the Administrative Division.

77. Professor H.W.R. Wade commenting on the U.K. Law Commission's Working Paper on "Remedies in Administrative Law" (No. 40), described the New Zealand proposals as "eminently sensible measures of law reform". The New Zealand measure is considered by Professor Wade as likely to facilitate the operation of existing remedies, allowing them to be freely interchanged and combined and removing procedural difficulties.

COSTS WHERE CROWN INTERVENES OR CLAIMS PRIVILEGE

78. The recommendation in our Fifth Report (para. 35) that the Judicature Act be amended to give the Court or a judge a discretion to award costs for or against the Crown has been incorporated in section 21 of the Judicature Amendment Act 1972.

PUBLICATION OF ADMINISTRATIVE TRIBUNAL DECISIONS

79. In our view there is a need for more publication of more decisions of administrative tribunals. This came particularly to our notice in connection with the decisions of the Appeal Authority under the Water and Soil Conservation Act 1967. These decisions are now being published. The Committee will be reviewing the question of improving arrangements for the reporting of decisions of administrative tribunals.

ACCIDENT COMPENSATION ACT 1972

80. In our Fifth Report (para. 42) we gave preliminary consideration to those clauses of the Accident Compensation Bill which came within the terms of our reference. Representations were subsequently made about the Bill and all but one of our recommendations were adopted and included in the bill which was duly enacted. The exception concerned the appointment of assessors under clause 155. We considered that the appointment of an assessor should be by consent of both parties to an appeal. However, the clause as enacted (s.160) gives the Appeal Authority power to appoint a suitable person in the parties fail to agree.

FUTURE PROGRAMME

81. A research paper on the regulation-making powers and procedures of the Executive has been prepared by Mr G. Cain, Senior Lecturer in Law at Victoria University of Wellington. This paper will occupy our attention during the coming months.

82. It is also hoped to initiate a research paper on the exercise of bylaw-making powers of local authorities

83. In addition we will continue our examination of those administrative tribunals not previously reviewed.

84. We propose to review the grounds upon which an application for judicial review can be made.

85. The awarding of damages for acts or omissions of administrative authorities [4], discussed in the English Law Commission's Working Paper (No. 40), will also receive further consideration.

(J.L. Robson)
Chairman

4. This was inadvertently referred to in para. 48 of our Fifth Report as "administrative tribunals".

INDEX

(Roman numerals refer to the Report;
small numerals to paragraphs;
bracketed references denote subparagraphs)