ADMINISTRATIVE TRIBUNALS CONSTITUTION, PROCEDURE AND APPEALS

ninth report of
the Public and
Administrative Law
Reform Committee
New Zealand

NINTH REPORT OF THE

PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

WELLINGTON
NEW ZEALAND

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PRESENTED TO THE MINISTER OF JUSTICE JANUARY 1977

NINTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE.

ANALYSIS

NINTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

INTRODUCTION

1. Since the presentation of the Committee's last report in 1975, our deliberations have been concentrated mainly on the disciplinary powers and procedures of professional bodies. We examined in detail the complaints and disciplinary procedures of the legal profession, and in more general terms those of a number of other professions. An outline of our study of this subject is contained in paragraphs 28 to 45 of this report.

2. The Marine Farming Act 1971, which fosters and controls the establishment of the marine farming industry in New Zealand, also received our scrutiny. We include in this report recommendations which, we consider, more fairly balance the interests of the persons and groups affected by the Act.

CONSTITUTION AND MEMBERSHIP

3. The Public and Administrative Law Reform Committee was constituted in 1966. Its present membership is -

Professor J.F. Northey, Chairman;

Mr K.H. Digby, Office Solicitor, Department of Health;

Professor K.J. Keith, Professor of Law at Victoria University of Wellington;

Dr D.L. Mathieson, Crown Counsel, Crown Law Office, Wellington;

Dr R.G. McElroy, C.M.G., Barrister and Solicitor, Auckland;

Mr E.A. Missen, O.B.E., formerly Secretary for Justice;

Mr R.G. Montagu, Chief Legal Adviser, Department of Justice;

Mr D.F.G. Sheppard, Barrister and Solicitor, Auckland;

Mr E.W. Thomas, Barrister and Solicitor, Auckland;

Mr D.A.S. Ward, C.M.G., Barrister, Wellington.

Mr J.D. Horsley, Legal Adviser, Department of Justice, is the Committee's Secretary.

4. Since our last report Mr E.L. Greensmith, C.M.G., has retired. He was a foundation member of the Committee, has given long and valuable service, and has made a special contribution to the preparation of the annual reports. Just before this report was completed, Mr R.I. Barker, Q.C., a member since 1974, was appointed a Judge of the Supreme Court. We record our pleasure on his appointment and express our appreciation of His Honour's substantial contribution to the work of the Committee.

5. The Minister of Justice has appointed Dr D.L. Mathieson, Mr E.A. Missen, and Mr D.F.G. Sheppard to the Committee. All are eminently qualified. Before taking up an appointment in 1971 as a Crown Counsel specialising in administrative and industrial law, Dr Mathieson was Associate Professor of Law at Victoria University of Wellington. Mr Missen, a former Secretary for Justice, has had wide experience in the public service. Mr Sheppard has a special interest in local government law and town and country planning.

6. We are pleased to record the appointment of Mr Montagu as Chief Legal Adviser to the Department of

Justice, and the appointment of Dr Mathieson to a Chair of English and New Zealand Law at the Victoria University of Wellington. We also congratulate Professor Keith on his appointment as Dean of the Faculty of Law.

APPLICATIONS FOR REVIEW : JUDICATURE AMENDMENT ACT 1972

7. The following decisions given in relation to applications for review made under the Judicature Amendment Act 1972 have come to our notice since the publication of our Eighth Report. The list is not exhaustive. For convenience the cases are divided into five categories:

(a) Decisions taken by Ministers:

(b) Decisions taken by Government officers:

(c) Decisions taken by local authorities:

(d) Decisions taken by statutory tribunals:

(e) Decisions taken by Courts.

(a) Decisions taken by Ministers

8. There has been one application in respect of a decision taken by a Minister.

Tobias v. May [1976] 1 NZLR 509. The applicant was granted a temporary permit under the Immigration Act 1964 to remain in New Zealand for one month. He was later granted an extension for a further 5 months, but before the time limit expired his permit was revoked. The applicant was given no reasons for the Minister's decision, nor was he given an opportunity to be heard. Quilliam J. dismissed the application for review,

holding that the decision of the Minister is final and he is not bound by the audi alteram partem principle.

(b) Decisions taken by Government officers

9. There was one application in respect of a decision taken by a Government officer.

Burrows v. Soper (oral judgment 25 November 1975, unreported M.559/75 Wellington). The applicant's form for enrolment as a voter was received after the roll had closed, and a declaration was sought by the applicant entitling him to vote at the general election. Wild C.J. dismissed the application on the ground that the respondent Returning Officer had not exercised any statutory power in respect of the applicant. He further noted that the Court should not make any declaration as to how any official should exercise powers which are to be decided on the facts before the officer.

(c) Decisions taken by local authorities

10. There were 7 applications in respect of decisions taken by local authorities. Six concerned land and planning.

Campbell Homes Ltd. v. McCutcheon (judgment 5 December 1975 unreported A662/75 Wellington). The applicant erected a building which by an oversight infringed an ordinance concerning the width of side yards by a margin of 11 inches. The Town Clerk refused to grant a dispensation and this prevented the applicant from giving title. Wild C.J. directed the Town Clerk to give the necessary certificate of approval, applying the maxim de minimis non curat lex (the law takes no account of trifling matters).

G.U.S. Properties Ltd. v. Blenheim Borough Council (judgment 24 May 1976 unreported M. 394/75 Christchurch).

The Council, in exercise of a statutory power under the Town and Country Planning Act 1953, advised the applicant that the consent to a specified departure had lapsed. Casey J. dismissed the application and observed that in exercising its function of review the Court will, if satisfied that the Council had properly directed itself on law, interfere only if it can hold that the decision was perverse in the sense that the evidence could not support it.

Hall v. Paparua County Council (judgment 29 April 1976, unreported M.502/74 Christchurch). This related to an application for review of the Council's decision refusing approval to a subdivision. Casey J. held that the Council had acted within the power conferred on it by s.23 of the Counties Amendment Act 1961 and had acted in good faith namely for proper purposes and not upon extraneous and improper considerations. The application was dismissed.

Stewart Investments Ltd. v. Invercargill City Corporation (judgment 30 April 1976 unreported C.A. 79/75). The Court of Appeal overturned the decision of Wild C.J., [1976] 1 NZLR 359, dismissing an application to review the decision of the Council which had refused to grant a building permit to the appellant after a fire had partly destroyed its premises. The Court held that the Council had misinterpreted and misapplied s.36(3)(a) of the Town and Country Planning Act 1953. The Court granted a declaration entitling the appellants to a building permit.

Coles v. Matamata County Council (judgment 30 April 1976 unreported C.A. 69/74) concerned an objection to the compulsory taking of land under the Public Works Act 1928 which was disallowed by the Council. Evidence relevant to the objection was considered by the Council but was not made available to the objectors at the hearing.

The Court of Appeal allowed the appeal against the decision of McMullin J., who dismissed proceedings seeking prerogative writs which had been treated, under s.6 of the Judicature Amendment Act 1972, as an application for review. As the objectors were deprived of a fair hearing the Court considered that it could not be safely found that the objectors had suffered no prejudice. Accordingly the Council's determination was quashed.

In Attorney-General, ex rel. Moulder v. Lower Hutt City Council (judgment 24 February 1976, unreported A. 167/74 Wellington) the applicant applied for an order quashing a resolution of the City Council that a section of roadway be closed to vehicular traffic until further notice and restraining the Corporation until such time as the Municipal Corporations Act 1954 had been complied with. White J. granted that relief, holding that "stopping" of the streets in question had been established.

One decision related to other powers exercised by a local authority.

Elson-White v. Auckland Education Board (judgment 18 December 1975 unreported A. 756/75 Auckland). The applicant sought review of a decision under which she was not granted full removal expenses. Cooke J. found that as the general conditions for removal expenses had never been laid down in the regulations, the Board had not been given a power of decision within the meaning of s.3 of the Judicature Amendment Act 1972, and the application for review could not succeed. By consent of the parties, the application was converted into an originating summons for interpretation of the regulations and Cooke J. found in favour of the plaintiff.

(d) Decisions taken by statutory tribunals

11. There were 5 applications concerning decisions taken by statutory tribunals.

Roper v. Post Office Appeal Board (judgment 25 August 1975 unreported A. 471/74 Wellington). This case concerned two statutory powers, exercised by the first respondent and the Director-General as second respondent in regard to a regrading of the applicant's position as Office Solicitor. The applicant appealed against the second respondent's determination, and the Board, in dismissing his appeal, sent a letter purporting to give reasons for its decision. Haslam J. held that the letter failed to answer the question raised by the appeal, and insufficiently expressed the Board's reasons for dismissing the appeal. The decision was set aside and in conformity with s.4(6) of the Judicature Amendment Act 1972 was referred back to the Board for reconsideration

N.Z. Textile Industrial Union of Employers v. Industrial Commission [1976] 1 NZLR 241. The applicants sought a review of the Commission's award which had granted a rate of pay in excess of the express terms of the Equal Pay Act 1972. Haslam J. held that the respondent had exceeded the ambit of its enabling powers and granted the application.

Ronaki Ltd. v. No. 1 Town and Country Planning Appeal Board [1976] 1 NZLR 593. Mahon J. granted the plaintiff's application for a review of the Appeal Board's decision which had made a judicial determination settling the rights of the plaintiff. The applicant had not received notice of the appeal to or the hearing of the Board. Mahon J. held that the Board acted in breach of the rules of natural justice and set aside the decision of the Board. He noted that s.4 of the Judicature Amendment Act 1972 did not confer jurisdiction on the Court, when reviewing a decision, to substitute an amended decision for the one reviewed.

N.Z. Meat Workers Union v. Wages Tribunal (judgment 30 March 1976 unreported M. 174/75 Wellington). In this case an order was made by the Wages Tribunal pursuant to the Economic Stabilisation Regulations 1973 excluding certain categories of freezing workers from an award increasing rates of pay. A clause in the regulations prohibited any review of the tribunal's decision except on the ground of lack of jurisdiction. Ongley J. granted the application to review the order and set aside the tribunal's decision, holding that the tribunal had wrongly construed the intention of the legislation and as a consequence had purported to impose limitations on the rights of workers which it had no jurisdiction to do.

In Otago Polytechnic Council v. Teachers Court of Appeal [1976] 2 NZLR 91 the applicant sought a review of parts of the decision of the Teachers Court of Appeal which had held that the Council had acted wrongly in dismissing Mr Nairn on three months' notice pursuant to s.155(2) of the Education Act 1964, without giving him an opportunity to be heard, but that his dismissal was justified on the facts. Wild C.J. refused the application, holding that the wide power to terminate a teacher's engagement implied in s.155(2) is curtailed by the provisions of ss. 158 and 159 of the Act which respectively state disciplinary offences and prescribe the steps to be followed when an offence has been alleged.

(e) Decisions taken by Courts

12. There were 4 applications in respect of decisions taken by a Court.

Abel v. Gillies (oral judgment 18 August 1975 unreported M. 674/55 Auckland). The applicant was convicted of a traffic offence. The wording of the information was defective, as it alleged an offence which did not exist. The conviction was also defective as it

followed the same wording. Holding that the defect was merely a want of form, Wilson J. dismissed the application for review under s.204 of the Summary Proceedings Act 1957, with some reference to s.5 of the Judicature Amendment Act 1972, on the ground that no miscarriage of justice had occurred.

Nesbitt v. Patterson (judgment 27 February 1976 unreported M. 277/75 Christchurch). Somers J. declined to make declarations sought by the applicant for the return of a bail bond, paid by the applicant on his own behalf and for a third person who failed to answer his bail. He regarded a declaration as to the lawfulness of taking the applicant's deposits as serving no purpose. Although finding that the respondent Magistrate had no power to require the deposit of cash as a condition of granting bail, Somers J. left undecided the question whether relief under s.4 of the Act was available and noted that other remedies were available.

Reithmuller v. Crutchley (judgment 9 December 1975 unreported M. 522/74 Christchurch). The appellant, who had been charged with an offence under the Penal Institutions Act 1954, sought a review of the decision of the Visiting Justice on the ground that he had failed to observe the principles of natural justice. Somers J. dismissed the application as the grounds had not been established.

In N.Z. Engineering etc. Industrial Union v. Court of Arbitration and anor. [1976] 2 NZLR 283 (C.A.) the Court of Appeal dismissed an appeal against Speight J.'s decision refusing relief to the appellant in respect of a decision partaking of the character of a demarcation dispute in which the Court of Arbitration had dealt with various points of industrial law and had interpreted the rules of the Engineering Union and applied the

"representation" principle. Their Honours commented on the fact that counsel for the Court of Arbitration had actively defended its decision in both Courts. They also made reference to the permissible scope of judicial review in the face of a privative clause and having regard to Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 and the Court's previous decision in Attorney-General v. Car Haulaways (N.Z.) Ltd. [1974] 2 NZLR 331.

13. Of the 18 cases discussed above 8 applications were granted and 10 were dismissed.

JURISDICTION OF THE ADMINISTRATIVE DIVISION

14. Since our last report was made, three statutes have conferred jurisdiction on the Administrative Division of the Supreme Court. Sections 42 to 44 of the Commerce Act 1975 give a right of appeal against decisions of the Commerce Commission relating to trade practices, collective pricing agreements, individual resale price maintenance agreements, and pyramid selling schemes. Under s.122 the Chairman of the Commission may state a case for the opinion of the Administrative Division on any question of law arising in any matter before the Commission.

15. Section 14 of the Fishing Industry Board Amendment Act 1975 inserted a new s.35A in the Fishing Industry Board Act 1963, giving a right of appeal against a decision of the Fishing Industry Board refusing an application for a licence under regulations made under the Act; refusing an application for the renewal of a licence; refusing to approve the issue or renewal of a licence except subject to conditions; or revoking or suspending a licence. The appeal is to the Administrative Division and 2 assessors.

16. Section 130 of the Motor Vehicle Dealers Act 1975 gives a right of appeal against a decision of a Magistrate refusing to grant a dealer's licence or to renew a licence; refusing to grant approval of a person to act as an officer of a licensee company; refusing to grant or renew a certificate of approval of a salesman; cancelling a dealer's licence or suspending the licensee; or cancelling a certificate of approval of a salesman or suspending the salesman. It also gives a right of appeal against a decision of the Motor Vehicle Salesmen Registration Board refusing to grant registration as a salesman or cancelling a salesman's registration or suspending a salesman. The appeal is to be by way of a rehearing and is to be heard by "a Judge sitting in the Administrative Division of the Supreme Court". Section 131 of the Act gives a further right, with the leave of the Supreme Court, to appeal to the Court of Appeal against the decision of the Supreme Court on a question of law.

PART VI OF THE REVISED CODE OF CIVIL PROCEDURE

17. The Committee was invited by the Supreme Court Procedure Revision Committee to comment on that Committee's draft of Part VI of the Revised Code entitled "Extraordinary Remedies and Applications for Review". We studied the draft and submitted a memorandum to the Revision Committee in which we suggested that the draft rules should be reconsidered.

18. The chairman of the Revision Committee, Mr Justice Wilson, has acknowledged our comments, but does not endorse the view expressed in our memorandum that the deficiencies in the Judicature Amendment Act 1972 should be remedied by a further amendment to the Judicature Act.

In his view the amendments should be included in the revised Code of Civil Procedure.

19. We adhere to the opinion expressed in our memorandum that it is better, as well as more convenient for practitioners, to be able to consult a single source, the Judicature Act itself, for

(1) the nature of the remedy available on review and

(2) the procedure for obtaining that remedy.

We strongly recommend that the amendments proposed in the draft Bill included in our Eighth Report be adopted, and that the Revised Code should not include provisions which overlap or are different from those contained in that Bill.

NEW ZEALAND ADMINISTRATIVE REPORTS

20. In our Eighth Report we expressed the hope that arrangements could be made for the reporting of the more important decisions of administrative tribunals. We have now been successful in arranging for the publication by Butterworths of New Zealand Ltd. of a new series of reports, to be entitled New Zealand Administrative Reports. This series will complement the existing Tax Reports (New Zealand) and New Zealand Town Planning Reports. The list of tribunals whose reportable decisions will be included in the new series has not been finally settled but includes:

The Accident Compensation Appeal Authority;

The Legal Aid Appeal Authority;

The Social Security Appeal Authority;

The Maori Land Court;

All other tribunals administered by the Tribunals Division of the Department of Justice;

The Commerce Commission; and

The Transport Licensing Appeal Authority.

21. The editor of the new series is to be Mr P.A. Black. We understand that the publication of decisions issued after 1 January 1976 in monthly parts is to begin very soon, and that a volume containing reportable decisions issued before 1 January 1976 will be published in the near future, thus enhancing the value of the new series. It is intended that the new Reports will include any Supreme Court decisions, on cases stated or appeals, related to the subject-matter dealt with by the tribunals whose decisions are reported. This does not mean that they will be excluded from the New Zealand Law Reports. We are particularly pleased that Butterworths have agreed to undertake this publication, which should prove of great value to the legal profession, especially as the reports will be professionally indexed and provided with suitable catchlines and headnotes. It is gratifying that the new series will start at the very time when considerable demand for the first decisions issued by the Commerce Commission is being expressed.

THE MILK BOARD

22. Since our Eighth Report was presented we have received further submissions from the Milk Board concerning the recommendations made in paragraphs 89 - 97 of that Report. These submissions have caused us to modify some of those recommendations.

23. In paragraph 91 of our Eighth Report we recommended that, when the Milk Act is next reviewed, s.13 be amended to require that Ministerial directions to the Board be in writing and tabled in Parliament. We are now satisfied

that so long as the directions are given in writing it is not necessary for the directions to be tabled in Parliament.

24. In paragraph 92 of our Eighth Report we recommended that s.26 of the Milk Act be amended to permit an appeal to be taken to a Magistrate's Court against a decision of the Board refusing approval of an application on the ground that there are already sufficient approved milk vendors to meet adequately the needs of the milk district. We are now satisfied that not only would such an appeal prejudice the objects for which the Board was established under s.10, but the advantage of securing uniformity in approach would be lost in that an appeal could be taken to any one of the Magistrate's Courts. We therefore withdraw the recommendation that s.26(6) be repealed.

25. We wish to expand the appeal right recommended in paragraph 92 as to the compensation to be awarded to a vendor whose licence has been revoked under either s.17(5) or s.17(6). We now recommend that s.17 be amended to give a vendor a right of appeal against a decision not to award any compensation, and against a decision fixing the amount of compensation to be paid.

26. In paragraphs 93 - 97 of our Eighth Report we recommended that a supply appeal authority should be created by statute to take the place of the existing Town Supply Appeal Committee, which has no legislative basis or authority. The new authority should be constituted in the manner outlined in paragraph 96. The new appeal authority should have jurisdiction to hear appeals not only from those who already have a quota but also those who do not. This will involve some amendments to s.57 which has been used as the basis for establishing a committee of the Board to hear disputes between members of producer associations.

THE COMMERCE ACT 1975

27. Because the Commerce Act 1975 affects the functions of two tribunals that were the subject of recommendations made by the Committee in its First Report, we considered the Act and would in the normal course have made several criticisms of it in this Report. However, knowing that the Act had been reported on by a Working Party, and that a Commerce Amendment Bill was to be drafted, we made our views known to the Minister of Justice, and were informed by him that the Minister of Trade and Industry was considering them. The Commerce Amendment Bill has now been introduced, but as we have not had time to study it before completing this Report we intend to deal with it in our next report.

DISCIPLINARY BODIES

28. In our Eighth Report we said that we had been examining, at the request of the Minister of Justice, the disciplinary procedures adopted within the legal profession, as part of our general review of disciplinary bodies. We have now examined the statutory and other provisions governing accountants, architects, dentists, engineers, lawyers, medical practitioners, opticians, physiotherapists, surveyors, valuers, and veterinary surgeons. We believe that much of what we say concerning these professions and occupations also applies to other groups. The relevant legislation, which has been adopted over a period of at least 50 years, shows some common characteristics, but there are also divergencies in important respects. Our survey has shown that there is a clear need for amendment and a greater measure of uniformity.

Self discipline

29. In many cases, the profession or occupation has been given responsibility for its own disciplinary arrangements, with recourse to an outside body or a court only on appeal. There has been little or no recognition of the desirability of having the public represented on investigative or adjudicative bodies responsible for considering allegations of misconduct. The creation in 1962 of the office of Ombudsman with responsibility for investigating complaints of government administration, and the expansion last year of his jurisdiction to other agencies and organisations, suggest that complaints of professional misconduct should also be investigated by an independent body.

30. The McRuer Report on Civil Rights in Ontario states at p.1166 (Report No. 1, Vol. 3), in its discussion of the power of self-government conferred on professional or occupational groups:

> The traditional justification for giving powers of self-regulation to any body is that the members of the body are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is a clear public interest in the creation and observance of such standards. This public interest may have been well served by the respective bodies which have brought to their task an awareness of their responsibility to the public they serve, but there is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public interest does not arise.
>
> We recommend that the principle applied in creating the British Medical Council be adopted in Ontario. Lay members should be appointed by the Lieutenant Governor in Council to the governing bodies of all self-governing professions and occupations.

31. We believe that it is both necessary and appropriate for an improved complaints procedure to be adopted

by professional and other occupational groups. In order to maintain public confidence in the integrity of complaints procedures, laymen should be included in the disciplinary process. If this is not done, there will continue to be criticisms of the disciplinary arrangements.

General principles

32. The Committee has adopted five broad principles by which the adequacy of existing and future disciplinary arrangements can be judged. These are:

(i) A representative of the public should participate in the disciplinary process.

(ii) The investigative and adjudicative functions should be kept separate.

(iii) The procedure must give a fair hearing to both the complainant and the member whose conduct is subject to inquiry.

(iv) The grounds for suspension or cancellation of registration or membership, or other punishment, must be appropriate to the profession or occupation.

(v) There must be adequate provision for an appeal from decisions of disciplinary bodies.

These principles are discussed in more detail in the paragraphs that follow.

Lay membership

33. An example of the recognition of the need for lay representation can be found in the Solicitors' Act 1974 (U.K.), which created the office of lay observer with responsibility for examining the treatment of complaints against solicitors (s.45). That Act also provided for lay members sitting on the Solicitors Disciplinary Tribunal (s.46). We believe that similar arrangements should be made here. Arrangements should be made for a complaint rejected as trivial, misconceived, or otherwise

lacking in merit to be examined by a lay representative. Provision should also be made for the public to be represented on the disciplinary tribunal to which an investigative body makes its report.

Separate membership

34. Those who serve on the investigative body should be disqualified from serving on the disciplinary tribunal.

Procedure

35. Although the procedure of the investigative body will necessarily be less formal than that of the disciplinary tribunal, provision must be made to ensure that a fair hearing is given both to the complainant and to the member whose conduct is being investigated. In general, we see the need for compliance with the principles of natural justice, described in more detail in our Sixth Report, paragraphs 24 to 27. In particular, the complaint must be in writing, and the member given an opportunity to reply and be heard by both the investigative and adjudicative bodies. The disciplinary body will in most cases need to be assisted by a lawyer, but such a person is not seen as an alternative to lay membership. The decision of the disciplinary body must be in writing and state the reasons for the decision.

Grounds for disciplinary action

36. The grounds on which registration or membership may be cancelled or suspended, or another penalty imposed, must be seen as appropriate to the profession or occupation. In many cases, for example, bankruptcy is a ground for disciplinary action, but we are not persuaded that it should be. In those cases where disqualification following bankruptcy is appropriate for persons who are members of firms or are practising on their own account, consideration should be given to an undischarged bankrupt being permitted

to remain a member of his professional or other society while in the employment of another member. Unless this is done, the disqualified member will, while he is an undischarged bankrupt, be effectively prevented from earning his livelihood in the occupation in which he is trained.

37. We have considered whether it is desirable for the legislation to define precisely the misconduct (and in particular whether it should be confined to misconduct in a professional capacity) that will be grounds for disqualification, suspension, or other penalty. We recognise that the disciplinary bodies for the long established professions have adopted interpretations of general provisions governing misconduct, and we believe that the professions as a whole find these acceptable. But in the case of those bodies more recently established, and any created in the future, it is important to the member and the disciplinary body itself that there should be as little uncertainty as possible as to the misconduct likely to attract penalties. We note that the very general provision formerly contained in the Medical Practitioners Act 1950 (s.44(1)(b) as inserted in 1957) was repealed in 1962. In all cases, the person charged should be given written notice specifying the conduct complained of, so that he has an opportunity to answer the charges.

38. We have noted that some of the disciplinary legislation includes phrases such as "grave" impropriety, "gross" carelessness, neglect or incapacity which may no longer be appropriate. The extension of the grounds for disciplinary action (but not necessarily suspension or cancellation) to negligence per se would now seem to be justified. We regard it as desirable for each profession or occupation to try to adopt rules that might be described as a code of ethics or code of conduct to which

members would be expected to conform and for breach of which they could be charged.

Appeal rights

39. There should be an adequate right of appeal available to both parties from decisions of disciplinary bodies. The appeal right should recognise the importance of the decision both to the person whose conduct is being investigated and to the general public. The appeal should be a rehearing if the appellate body so decides. The parties should be entitled to be represented by counsel or agent. The appellate body should have power to confirm, vary, or reverse the decision appealed from.

40. We are considering the possibility of having a single appellate body which would hear appeals from all disciplinary bodies or those where the issues and the grounds for imposing a penalty are similar. We can see advantages (and also some disadvantages) in abolishing many of the existing appeal systems and creating an appellate body, whose membership would include some "permanent" members with the remainder chosen for the particular appeal from a panel. The Administrative Division of the Supreme Court is already the appellate tribunal in respect of appeals from several disciplinary bodies. It is possible that more, if not all, of such appeals should lie to that Division, with, perhaps, members of the profession concerned being added to the Court as required. On this and other proposals contained in this part of our report we intend to seek the views of the various professional and occupational groups.

THE DISCIPLINARY AND COMPLAINTS PROCEDURES OF THE LEGAL PROFESSION

41. The Law Practitioners Act 1955 and its predecessors

have been regarded by some other professions as containing a model constitution and procedure for the discipline of their respective professions. We have paid particular attention to the disciplinary provisions governing the legal profession. We are aware that our independent study coincides with a substantial review of the entire Act being carried out by the Law Society.

42. We wrote to the New Zealand Law Society and all District Law Societies requesting information relevant to our study. The detailed responses of many district societies were particularly helpful, and we have been able to form a fairly comprehensive view of the manner in which disciplinary charges and complaints against legal practitioners are handled throughout New Zealand.

43. At the same time we undertook a thorough study of the relevant provisions of the Law Practitioners Act. We also assembled as much background material as possible, including an article entitled "Discipline Within the New Zealand Legal Profession" (1973 V.U.W.L.R. 337) by W.A. Flaus and reports and articles relating to disciplinary and related matters in the United Kingdom, Canada, Australia, and the United States of America. We corresponded with Sir Godfrey Place, the Lay Observer appointed in the United Kingdom in 1975. Apart from information which he conveyed to us direct, we recently received his First Annual Report.

44. We have reached certain tentative conclusions, and have submitted a Working Paper to the New Zealand Law Society, District Law Societies, and other interested bodies and persons for comment. We hope to be able to complete a report and forward it to the Minister of Justice early in 1977.

45. In our Working Paper we have examined the legal

profession's power to discipline itself and the concept of lay participation. We have suggested significant changes in the structure of the Law Society's existing procedures, including lay representation on the disciplinary bodies responsible for hearing and determining charges against practitioners and the appointment of a Lay Observer, or Lay Observers if more than one is required, to review the Law Society's treatment of complaints. Our principal proposals may be summarised as follows:

(1) The Disciplinary Committee of the New Zealand Law Society should be renamed the Law Practitioners Disciplinary Tribunal and reconstituted as an independent and statutory disciplinary body.

(2) The Tribunal should comprise 5 members of whom at least 1 but not more than 2 would be lay members.

(3) A right of appeal should lie from the decisions of the Tribunal to either:

  (a) A single specialised appellate Court or Tribunal which would hear appeals on disciplinary matters from all professions; or

  (b) The Administrative Division of the Supreme Court.

(4) A number of Regional Disciplinary Boards should be created to exercise the adjudicative function presently carried out by the Councils of District Law Societies.

(5) The Regional Disciplinary Boards should comprise 3 members of whom 1 would be a lay member.

(6) The term of office of all members of both the Law Practitioners Disciplinary Tribunal and the Regional Disciplinary Boards would be limited to 6 years so as to ensure regular rotation of membership.

(7) The grounds for disciplinary action should be -

  (a) Professional misconduct;

  (b) Conduct unbecoming a practitioner;

(c) Conviction of a practitioner for any offence punishable by a sentence of imprisonment which reflects on his fitness to practise law or tends to bring the profession into disrepute; and

(d) Professional negligence.

(8) There should be a substantial increase in the penalties that may be imposed in respect of disciplinary matters.

(9) The Councils of District Law Societies should cease to exercise their existing adjudicative function. Their prime role in the disciplinary process should be the investigation of misconduct, the handling of complaints made by members of the public, and the prosecution of charges against practitioners before a Regional Disciplinary Board or the Law Practitioners Disciplinary Tribunal.

(10) In addition, the investigative powers and initiative of Councils should be enlarged to enable them to fulfil more adequately their policing role.

(11) Finally, a Lay Observer or Lay Observers should be appointed to review the Law Society's treatment of complaints.

MARINE FARMING

46. The Committee's attention has been drawn to the provisions of the Marine Farming Act 1971 and the Marine Farming Amendment Act 1975. The object of those Acts is to foster and control the establishment and development of the marine farming industry in New Zealand. As such they are important pieces of legislation intended to benefit the economy.

47. It is also clear that this legislation has far-reaching implications for those more directly affected by its provisions, such as applicants seeking a lease or licence to establish a marine farm, existing marine farmers, adjacent land owners, and public interest groups concerned with the impact of marine farming in the environment. Not only must the interests of the country in the development of marine farming be weighed against the considerations raised by these persons and groups but their varied interests, frequently in conflict, must also be resolved. The process or procedure provided for this is important.

THE MARINE FARMING ACT 1971

48. In broad outline, the 1971 Act provides for the grant of leases or licences by a "controlling authority" of areas below high water mark for the purpose of the establishment and carrying on of the business of marine farming. Where the area is vested in a harbour board or other local authority the controlling authority is the harbour board or local authority. Otherwise it is the Minister of Agriculture and Fisheries. The Act provides for the advertisement of applications for leases or licences and for those desiring to object to an application to notify the controlling authority in writing of the grounds for objection. Before granting the application

the controlling authority must consider whether or not the objection should be upheld pursuant to s.7. In doing so it is not bound to follow any formal procedure but is expressly required to have regard to all submissions made by or on behalf of the objector and the applicant and "to the rules of natural justice generally". The decision of the controlling authority, and the reasons for it, are to be notified in writing to the objector and the applicant. No provision is made for a formal hearing or for an appeal against the decision of the controlling authority.

49. Where more than one application is received in respect of the same area the controlling authority is to determine, in terms of s.8(2) and (3), which of the applicants is to be preferred. In the exercise of its discretion the controlling authority may determine the issue by "lot" or by having regard to the financial or other circumstances of each applicant or the likelihood of his being able to successfully develop a marine farm. Thus, no procedure at all is provided in the Act for determining which of two or more applicants in respect of a given area is to be successful in obtaining the lease or licence.

50. The fact that the grant of a lease or licence is not a purely administrative matter is recognised in the provision for the disposition of objections; but this falls short of a hearing. After careful consideration of the views of the Fisheries Management Division of the Ministry of Agriculture and Fisheries, we have concluded that a more formal procedure is warranted. The nature of the subject matter and the importance of the issues involved warrant this change.

Right of appeal to Town and Country Planning Appeal Board

51. In our view there should be a right of appeal from the decisions of the controlling authority to the Town and Country Planning Appeal Board. Such a right of appeal permits the controlling authority to exercise primary responsibility for the development of marine farming under the Act in an informal manner while at the same time providing the protection of a formal appeal procedure to an independent tribunal in disputed cases. An appeal to the Appeal Board would be by way of a de novo hearing.

52. We believe that the Appeal Board is the appropriate appeal authority. That tribunal is being increasingly called upon to exercise jurisdiction in planning or planning-related matters which are outside the ambit of the Town and Country Planning Act. Examples of this are to be found in the Water and Soil Conservation Act 1967 (ss. 25 and 26), Sale of Liquor Act 1962 (s.92), Municipal Corporations Act 1954 (s.351H) and Counties Amendment Act 1961 (s.33).

53. It was argued that an appeal would involve the twin evils of delay and expense. We concede that any effective right of appeal must necessarily prolong the period for disposing of an application. The critical question, however, is whether that further delay is justified in the public interest and in the interests of the parties. We believe that it is.

54. This conclusion was reached in the knowledge that an objector pursuing an appeal could cause an applicant to miss one, possibly two, seasons in establishing a marine farm. Considerations such as these, however, must be balanced against the matters already adverted to. The need to reconcile conflicting interests and to ensure

administrative justice as between the persons and groups affected is the most important consideration. Moreover, it is not only objectors who may exercise the right of appeal; an unsuccessful applicant (and there have been disgruntled applicants), who may have expended a considerable sum of money in preparing and pursuing his application, can be expected to welcome the opportunity to have the issues fully traversed on appeal before an independent tribunal. In this area, therefore, as in other areas of administration where a right of appeal is regarded as imperative, the appeal procedure should be accepted as being an essential part of the process of achieving the objects of the Act in accordance with recognised standards of fairness.

55. We also remain unconvinced that the expenses of an appeal to a tribunal such as the Town and Country Planning Appeal Board would seriously discourage a would-be farmer. Again, it must be conceded that an appeal would increase the expenses of applicants and objectors. We believe this additional cost would not represent a significant or forbidding proportion of the initial investment which an applicant would expect to outlay in establishing a marine farm. Higher expenses are unavoidable if effective appeal rights are created, but in our opinion they will have little or no detrimental effect on the promotion of the marine farming industry.

56. Recommendation

An appeal should lie to the Town and Country Planning Appeal Board against decisions in respect of a lease or licence for a marine farm.

The scope of the appeal

57. The right of appeal should extend beyond decisions given under s.7. Under s.8(1) of the Act the controlling

authority has an overriding discretion whether to grant a lease or licence. In the result, it could disallow an objection under s.7 and yet refuse to grant a lease or licence on other grounds. Unless the appeal embraces decisions taken under s.8, an unsatisfactory situation could arise. Although the Appeal Board may disallow an objection under s.7, the applicant could still be refused a lease or licence by the controlling authority on policy grounds under s.8, thereby giving the appearance of vacating or reversing the Appeal Board's decision. The Appeal Board should be seized of all relevant issues and be empowered to determine the critical question of whether or not the lease or licence should be granted.

58. For the reasons stated, provision will need to be made for the consolidation of proceedings under ss. 7 and 8. If this is not done, there would be a duplication of the right of appeal in respect of substantially the same issue. This would be cumbersome and time-consuming and involve unnecessary expense for all concerned.

59. Subsections (2) and (3) of s.8 provide that the controlling authority is to determine which of two or more applicants for a lease or licence of the same area is to be preferred. As already mentioned, it is authorised to determine this question by "lot" if it so chooses. We consider that an applicant should be entitled to have his application determined on its merits where a privilege of substantial financial benefit is in issue and where he may have incurred substantial expenses in connection with the preparation of the application. This is no less necessary where there are two or more applicants and it has to be determined which one has the better claim. Applicants in this situation are not unlike applicants for liquor licences under the Sale of Liquor Act 1962. Clearly, to determine the issue by lot is inconsistent

with natural justice and the basic requirement of fairness in the exercise of any discretion.

60. An appeal should not lie in respect of the terms of a lease or licence. The matters specified in s.6(2), and the fact that the terms of the lease or licence may not be settled until after an application has been approved, effectively preclude an appeal on this ground. Furthermore, it is appropriate that, subject to ss. 9 to 12 of the Act, the terms and conditions of the lease or licence are left to the controlling authority.

61. We consider that the Appeal Board should have power to attach conditions to a decision. The Fisheries Management Division informed us that it is also necessary for the controlling authority to be able to impose new conditions or reconsider existing conditions in the light of changed circumstances. Although the Appeal Board could be expected not to impose conditions which would unreasonably restrict the controlling authority's supervisory power or inhibit the introduction of advances made in marine farming techniques, provision should be made for a review by the Appeal Board, on the application of the controlling authority, of any conditions which the Board had imposed.

62. Recommendation

(1) The appeal should lie against -

(a) a decision under s.7, and

(b) refusal to grant a lease or licence under s.8.

(2) Provision should be made for the consolidation of proceedings under ss. 7 and 8.

(3) On any appeal the Appeal Board should have the right to recommend or require such conditions, consistent with the provisions

of the Act, as it sees fit to be inserted in any lease or licence to be granted.

(4) The controlling authority should be able to seek a review by the Appeal Board of any conditions imposed by the Board.

Persons entitled to appeal

63. Applicants and objectors, being parties to the proceedings before the controlling authority, should be entitled to appeal. If this is done, there is the possibility of a Minister of the Crown challenging the decisions of the Minister of Agriculture and Fisheries before the Appeal Board. At first sight, this might appear to be a constitutional anomaly in that the Government would not be speaking with one voice.

64. However, under s.6(5), as it is presently worded, "any person desiring to object to the application" may be an objector. This would include any Minister of the Crown such as the Minister of Works and Development or the Minister of Lands. Indeed, under s.6(3)(b) the Minister of Lands is to be served with notice of the application where land adjoining the area in issue is a public reserve or national park. Consequently, that Minister could be an objector and a potential appellant in respect of decisions by the Minister of Agriculture and Fisheries as the controlling authority. Again, where the controlling authority is a local authority the Minister of Agriculture and Fisheries could take a different view from, say, the Minister of Lands or the Minister of Transport and the difference could become evident on appeal. The existing definition of an objector recognises the possibility of this sort of conflict between Ministers. It has arisen under the Water and Soil Conservation Act 1967. In all but rare cases the Minister's advisers would no doubt resolve their differences in advance of any hearing before the Appeal Board. We believe that it is

constitutionally acceptable for government departments to express different points of view before the decision-making body. There is much to be gained from making the information and expert knowledge possessed by government departments available to the tribunal and the public.

65. It is not necessary for the Minister of Works and Development to have special rights of appeal. He may already lodge an objection and qualify as an appellant in that capacity. The appeal should be subject to the relevant provisions of Part III of the Town and Country Planning Act 1953 (see s.42(4) of that Act). Section 42(2) of that Act gives the Minister of Works and Development (and any other local authority affected) the right to be represented by counsel and to call evidence on any matter that should be taken into account in determining an appeal. This would also provide other departments (and possibly the Commission for the Environment) with the opportunity to be heard through the Minister of Works and Development.

66. However, we consider it unsatisfactory for the Minister of Agriculture and Fisheries, as the Minister primarily responsible for establishing and developing the marine farming industry, to be obliged to act through the Minister of Works and Development. Consequently, we recommend that the Minister of Agriculture and Fisheries should have the same right of appearance by counsel and of calling evidence on any relevant matter in an appeal as the Minister of Works and Development. This would be preferable to the Minister of Agriculture and Fisheries being given a right of appeal in respect of decisions by a controlling authority that is a local authority. It would be more appropriate for an applicant or objector to proceed with the appeal, leaving it to the Minister to enter an appearance when he considered that questions of national importance should be placed before the Appeal Board.

67. Recommendations

(1) The right of appeal should extend to -

(a) the applicant (including the applicant refused a lease or licence under subss. (2) and (3) of s.8);

(b) any objector.

(2) The appeal will remain subject to Part III of the Town and Country Planning Act 1953, by virtue of s.42(4) of that Act.

(3) Where the controlling authority is the local authority the Minister of Agriculture and Fisheries should have the same rights as the Minister of Works and Development under s.42 of the Town and Country Planning Act.

The respondent in the appeal

68. The controlling authority is the appropriate respondent in any appeal. This recognises the nature of the obligation of the controlling authority under the Act and the fact that the appeal is against the authority's exercise of its discretion. The unsuccessful applicant or objector should not, we think, be the respondent. Only if the controlling authority is the respondent will the issues seen as material by that authority be brought out on appeal.

69. We note that a territorial local authority is the respondent under the procedures laid down by the Town and Country Planning Act and the regulations made under that Act. It would be difficult to provide for the town planning procedure to be applicable to appeals under this Act if the controlling authority was not to be in the position of local authorities under that Act.

70. Even though it is the respondent, the controlling authority will not necessarily have to defend its decision (or defend it vigorously) where the issue is essentially

one between the applicant and objectors. It is not at present unusual for a local planning authority to be neutral in respect of certain issues coming before the Appeal Board when the question in issue is more critical to the applicant and objectors. If, for example, the objectors are commercial fishermen and the issue is whether the grant of the lease or licence will unduly interfere with commercial fishing (see s.7(1)(a) and (b)) the controlling authority can still stand to one side and allow the applicant and objector to contest that question before the Appeal Board.

71. If the controlling authority is to be the respondent, the Minister of Agriculture and Fisheries will be the respondent where he is the controlling authority. There is a parallel in s.26(1A) of the Town and Country Planning Act, which provides that the Minister of Works and Development is to be the respondent in an appeal affecting a requirement issued to a local authority.

72. Recommendation

The controlling authority should be the respondent in any appeal.

Appeal against a decision to vary conditions or extend the term of a lease or licence under section 13 of the Act

73. Section 13 confers wide powers on the parties to vary the conditions and covenants of a lease or licence. Because we do not recommend that an appeal should lie in respect of the conditions of a lease or licence, we have concluded that, subject to what we have to say in the following paragraph, the holder of a lease or licence should not in general be required to make a formal application which would be open to objection and appeal before the conditions of his lease or licence could be varied. In many cases, the variation is likely to relate

to matters arising in the course of the operation of the marine farm, which may appropriately be left for administrative determination.

74. However, a formal application should be made in two specific cases. First, an application should be required where the condition proposed to be varied is one that was imposed to give effect to a decision upholding an objection in whole or in part. Secondly, we have already recommended that conditions imposed by the Appeal Board should be capable of being varied only by the Board on application by the controlling authority. The right to apply should be extended to the holder of a lease or licence. If on receipt of an application for review the Appeal Board considers that the matter should be advertised for further objections, it can require this to be done.

75. Section 13 also empowers the controlling authority to grant an extension of the term of a lease or licence for a further period of 14 years, even though the original lease or licence may not contain a right of renewal. The Committee considers that this power should remain unaltered except where the original decision to grant the lease or licence expressly specified a single term, or where the holder of the lease or licence has not commenced farming operations. We recognise that once the issues referred to in s.7 have been determined, the determination is likely to have about it the colour of permanence. Moreover, where the area has been farmed it will represent an existing investment. The original situation will no longer persist, and objections on broad grounds would have a disruptive effect on an established or developing marine farming operation.

76. We also note that an extension of the term of a lease or licence requires the consent of both the Minister of Agriculture and Fisheries and the Minister of

Transport. This provides some safeguard in respect of decisions made pursuant to this section.

77. Recommendations

(1) No general right of objection or appeal should lie against a variation of conditions or extension of the term of a lease or licence under the Act.

(2) If the holder of a lease or licence seeks a variation of a condition that was imposed to give effect to a decision upholding an objection in whole or in part, he should be required to apply, in accordance with s.6 of the Act, for the variation.

(3) No condition of the lease or licence imposed by the Appeal Board should be varied without the subsequent approval of the Board granted pursuant to an application to review the conditions.

(4) The existing provisions enabling the holder of a registered lease or licence to obtain an extension of the term should remain unaltered, except that a further application should be required if -

(a) the original decision granting the lease or licence expressly specified it would be for one term only, or

(b) the holder of the lease or licence has not commenced farming the area in question.

The original objection procedure

78. We have also examined the procedure for the hearing of objections. We make the following recommendations.

79. In the first place, consideration might be given to adopting a more formal procedure for the hearing of objections. Experience since the Act became effective (1 January 1972) may well have indicated that more formal proceedings are required to resolve the issues raised in

respect of applications under the Act. Moreover, wider notification of the controlling authority's decisions, to persons other than just the applicant and objectors, may be required to make the appeal procedure fully workable.

80. Secondly, we do not think that the requirements of s.7, to the effect that the controlling authority shall have regard to the rules of natural justice "generally", are adequate. Departmental officers or the local authority concerned may not have a precise appreciation of what the rules of natural justice are, or they may adopt an unusual interpretation of the word "generally". The controlling authority should be specifically required to make all reports, evidence, and submissions received by it available to all parties, whether applicants or objectors, for comment before the authority reaches a decision.

81. If an appeal is to lie against the controlling authority's decision under s.8 in respect of competing applicants, some provision will need to be made in respect of the procedure to be followed in the initial proceedings, in determining which of the applicants is to be successful. The controlling authority's decision and the grounds on which it is based should be notified in writing to the interested parties.

82. Recommendations

(1) The desirability of making the original proceedings more formal should be considered in the light of experience obtained since the Act came into force.

(2) The controlling authority should be expressly required to make all reports, submissions, or evidence received relating to the application available to the applicant and any objectors for comments, before a decision is made.

(3) The procedure to be followed where more

than one application is received should be specified in the Act. The controlling authority should be required to specify the grounds of its decision.

THE MARINE FARMING AMENDMENT ACT 1975

83. The Marine Farming Amendment Act 1975 provides for two new kinds of licences, namely research licences and pilot commercial scheme licences. It also legislates for spat-catching areas.

84. A research licence authorises research into the requirements and habits of species of fish or marine vegetation suitable for cultivation, or actual cultivation.

85. A pilot commercial scheme licence enables the suitability of an area for the farming on a commercial scale of species of fish or marine vegetation to be determined.

86. In the case of each licence the term is not to exceed 5 years, without a right of renewal, but the term may be extended for a further 5 years. There are restrictions on area, and the number of rafts or structures. Although the application has to be advertised, and notices given to the same bodies and persons as in s.6(3) of the 1971 Act, there is no right of objection. The controlling authority is required to have regard to present and future recreational activities in and adjacent to the area, and to the public interest.

87. In the case of a pilot commercial scheme licence, the licensee may, on the expiry of his licence, apply for an ordinary lease or licence. The controlling authority then has a discretion, subject to the advertising and objection procedures in ss. 6 and 7 of the 1971 Act, to offer him a lease or licence for the area in preference to

any other person who may have applied for a lease or licence for that area.

88. Under the new s.14E, in s.6 of the 1975 Amendment Act, the Minister may declare any area to be a spat-catching area. He must have the concurrence of the Minister of Transport and of any harbour board or local authority having jurisdiction over the area. No one may moor a raft to catch spat in the area except under a permit granted by the Director-General. A permit may be granted only to a lessee or licensee under the Act. There is no provision for objections.

89. We raised with the Fisheries Management Division the question whether there should be a right of objection to the granting of a research licence, a pilot commercial scheme licence, or a permit to moor a raft in a spat-catching area.

90. In respect of the two new kinds of licences, the Division in its reply stressed the need for a minimum period of delay in the commencement of a research or pilot scheme, together with some security of tenure. It thought that the procedures ought not to be such as to act as a disincentive. It agreed that the requirement of public notice of an application without provision for a right of objection might seem anomalous, but said that there was perhaps no inconsistency because the obtaining of a licence would not establish rights but would merely provide a permission or concession. The intention behind the provision for public notice was that if it resulted in objections being made to the controlling authority the authority could, if it chose, treat them as having persuasive value only, without being bound to follow any quasi-judicial procedure or to have regard to the rules of natural justice (as required by s.7(1) of the principal Act). The Division also said that if the objection

procedure laid down by the principal Act were to apply, and objections were not sustained, the applicant would be entitled to a grant as of right; whereas it was intended that the grant of the new kinds of licences should be only in the exercise of a discretionary power. On this last point, we cannot agree with the Division's interpretation of the Act. The new s.14A(6)(1), as enacted by s.5 of the 1975 Act, provides that where the controlling authority is satisfied that the preceding provisions of the subsection have been complied with, the controlling authority "shall consider the application and, subject to this Act, he or it may, if he or it thinks fit, grant a research licence to the applicant". The same formula is used in the new s.14B(4)(n) in respect of a pilot commercial scheme licence. Each provision has clearly been adapted from s.8(1) of the principal Act, under which, if there is no objection, or objections made have not been sustained, the controlling authority "may, if he or it thinks fit", offer to the applicant a lease or licence. Thus the controlling authority has a discretion under the principal Act as well as the 1975 Act.

91. In respect of spat-catching, the Division said that so far it has not been possible to determine the factors that will predict the time of year or location of the occurrence of spat, or the density of the spat, and that these things vary from year to year. When spat does occur, catching surfaces must be put in place within a few days and must remain, for up to 2 months, until the spat can be transferred to a licensed area.

92. Having considered the Division's views, we see no need for a formal objection or appeal procedure in respect of an application for a research licence or for a permit to moor a raft to catch spat. A research licence is for a small area and a relatively short term. It may be

considered as necessary to provide facts that will help in the development of an industry that is still largely on an experimental basis. A spat-catching permit is clearly desirable for the proper control of the mooring of rafts by licensees or lessees for the purposes of catching spat; and the need to act quickly when spat is thrown makes objection procedures inappropriate.

93. Different considerations apply to pilot commercial scheme licences. Whereas the area of a research licence is limited to 100 square metres, the area of a pilot commercial scheme licence can be up to 2,000 square metres. Also, when the licence expires, the licensee is to be given a preference over other applicants for an ordinary lease or licence for the area. It is only at that stage that the advertising and objection procedure applies. This means that persons who, on good grounds, would have objected to the grant of a licence in the first instance if the application had been for an ordinary licence are handicapped in their later objections by the fact that the rafts and associated structures are already there, and have been there for up to 5 years. The licensee, on the other hand, has proved the suitability of the area for commercial farming and has the advantage of an already established business. In these circumstances, it will be difficult for the objector to prove his case, and for the controlling authority to refuse to grant a lease or licence. We therefore think that an application for a pilot commercial scheme licence should be made subject to the same procedure in respect of objections and appeals as an application for an ordinary lease or licence. Unless this is done, the new provision is inconsistent with the provisions in the 1971 Act for the protection of the rights of the public. If it is done, we see no need for these procedures to apply to the preferential claim to an ordinary lease or licence when the pilot licence expires.

94. As we have mentioned in paragraph 86, the term of a research licence or a pilot commercial scheme licence may be extended for a further 5 years. This is the effect of ss. 14A(7)(b) and 14D(b), as enacted by s.5 of the 1975 Amendment Act. We questioned the need for this, and have been informed by the Fisheries Management Division that it was not intended that there should be any extension or renewal of either kind of licence beyond the original 5 years. We agree that it is neither necessary nor desirable that these kinds of licences should be extended.

95. Recommendations

(1) An application for a pilot commercial scheme licence should be made subject to the same procedures in respect of objections and appeals as an application for an ordinary lease or licence.

(2) If recommendation (1) above is adopted, the right to object to the preferential grant of an ordinary lease or licence on the expiry of the pilot licence should be abolished.

(3) Sections 14A(7) and 14D of the principal Act, as enacted by s.5 of the Marine Farming Amendment Act 1975, should be amended to exclude the power to extend the term of a research licence or a pilot commercial scheme licence.

FUTURE PROGRAMME

96. Apart from completing our work on disciplinary bodies, and in particular the disciplinary and complaints procedures of the legal profession, we expect to concern ourselves during the next 12 months with the matters mentioned below.

The liability of administrative authorities

97. In paragraphs 100 - 103 of our Eighth Report we said that we had given preliminary consideration to a research paper prepared for us by Mr E.J. Haughey (since published by the Legal Research Foundation, Auckland, as an Occasional Paper) on the law governing the award of damages against administrative authorities for their acts or omissions and the extent to which reform was needed to provide a right to damages. Mr Haughey, in his paper, supported the view expressed by Mr B.A. Gould ((1972) 5 NZULR 105, 122) that the major requirement now is to establish in our law the tort of misfeasance in a public office; that the materials in the form of precedents in our case law are there; and that all that is needed now is their development in order to fill a substantial gap in our administrative law. We said in our report that if legislative intervention is found to be necessary Parliament must determine whether, and if so in what circumstances, an action should lie for improper performance or non-performance of statutory duties or other lawful acts.

98. The action for damages brought by Takaro Properties Limited against the former Minister of Finance has now focussed attention on the question of the extent to which Ministers or officials may be held liable in damages in respect of the exercise of statutory powers. We await the final decision of the Court in this case before proceeding further with our consideration of this topic.

99. We have also just received, and will study, along with other material, a dissertation, entitled "Damages in Administrative Law", submitted by Mr James Clad for the degree of Bachelor of Laws (Honours) of the University of Auckland.

Bylaw making powers and procedures

100. In 1971 we were asked to examine the bylaw making powers and procedures of local bodies and the present powers of the Court to review them. One of our members was able to interest an Auckland practitioner, Mr N.W. Horne, in writing his LL.M. thesis on the subject. His comprehensive and thoroughly researched paper was received in 1975, and we sought the comments of the Department of Internal Affairs, the Standards Association of New Zealand, the New Zealand Counties Association, and the Municipal Association of New Zealand on it. We have had some comments, and expect soon to receive the rest and to be able to start on a consideration of the topic.

101. Meanwhile, Mr E.H. Hitchcock, who was formerly Chief Technical Adviser with the Standards Association, is working on a doctoral thesis on the legal application of technical standards. He has offered to produce a paper on that subject for our Committee. We have gratefully accepted his offer.

Grounds for review of administrative action

102. Professor Keith, a member of the Committee, has completed the basic research for a paper on the grounds for judicial review of administrative action. The Committee hopes to be able to take up this very large subject in the course of the next year.

Discretionary powers conferred on public authorities

103. In our Eighth Report, paragraphs 109 - 112, we reported on the progress being made with our survey of discretionary powers conferred by statute on public authorities.

104. The Department has provided funds for the research to be undertaken at the Auckland Law School under the

supervision of the chairman. The work is proceeding but it has proved to be more extensive than we had expected. Even by excluding all discretionary powers conferred on the Governor-General in Council to make subordinate legislation and those conferred on the judiciary, we have found that each volume of the Reprint has more than 100 instances of statutory discretions that call for classification and study, especially in relation to any appeal rights provided.

105. On the basis of the work so far completed, we expect to identify more than 4,000 examples of statutory discretions and to classify each of them under one of the following heads:

(i) Powers of acquisition and disposition of property;

(ii) Powers of approval, suspension, cancellation and refusal;

(iii) Powers of arrest and detention;

(iv) Powers to borrow or lend money;

(v) Powers of delegation;

(vi) Powers of entry and seizure;

(vii) Powers to grant exemptions or dispensations;

(viii) Powers of inspection and investigation;

(ix) Powers to licence, grant or certify;

(x) Powers to make orders, including prohibition;

(xi) Powers of rate setting;

(xii) Powers to submit recommendations or reports;

(xiii) Miscellaneous powers.

106. Once the various powers have been identified, the Committee expects to examine the procedures for decision

making and the adequacy of the appeal provisions. We plan to examine first the powers of entry and seizure, and then powers of arrest and detention (no doubt in consultation with the Criminal Law Reform Committee).

SUMMARY OF RECOMMENDATIONS

107. The recommendations made in this report are contained in the following paragraphs:

The Milk Board

(i) That so long as Ministerial directions to the New Zealand Milk Board are given in writing it is not necessary that they be tabled in Parliament (paragraph 23).

(ii) That there should not be an appeal to a Magistrate's Court against a decision of the Milk Board refusing approval of an application on the ground that there are already sufficient approved milk vendors to meet adequately the needs of the milk district (paragraph 24).

(iii) That a milk vendor should have a right of appeal against a decision not to award compensation on the revocation of his licence under s.17(5) or s.17(6) of the Milk Act 1967, and against a decision fixing the amount of compensation to be paid (paragraph 25).

(iv) That the town milk supply appeal authority recommended in paragraphs 93 - 97 of our Eighth Report should have jurisdiction to hear appeals not only from those who already have a quota but also from those who do not. This will involve some amendments to s.57 of the Milk Act 1967 (paragraph 26).

Disciplinary bodies

(v) That arrangements should be made for a complaint made to a disciplinary body of a profession or occupation and rejected as trivial, misconceived, or otherwise lacking in merit to be examined by a lay representative; and that the public should

be represented on the disciplinary tribunal to which an investigative body makes its report (paragraph 33).

(vi) That those who serve on the investigative body should be disqualified from serving on the disciplinary tribunal (paragraph 34).

(vii) That the procedure of the investigative body should be such as to ensure that a fair hearing is given to both the complainant and the person whose conduct is being investigated; and that, in general, the principles of natural justice should be complied with (paragraph 35).

(viii) That the grounds on which registration or membership of a profession or occupation may be cancelled or suspended, or another penalty imposed, must be seen to be appropriate to the profession or occupation (paragraphs 36-38).

(ix) That there should be adequate appeal rights available to both parties from decisions of disciplinary bodies (paragraphs 39-40).

The disciplinary and complaints procedures of the legal profession

(x) That changes be made in the Law Society's procedures, including the making of arrangements for lay representation on the disciplinary bodies and also for the appointment of a Lay Observer or Lay Observers to review the Law Society's treatment of complaints. Our proposals are summarised in paragraph 45, and have been conveyed to the New Zealand Law Society and District Law Societies for comment. We hope to be able to complete a final report to the Minister of Justice early in 1977 (paragraphs 41 - 45).

Marine farming

(xi) That an appeal should lie to the Town and Country Planning Appeal Board against a decision upholding or disallowing an objection to an application for a lease or licence, or a decision refusing to grant a lease or licence (paragraphs 56, 62, 67, 72).

(xii) That if the holder of a lease or licence seeks a variation of a condition imposed to give effect to a decision upholding an objection in whole or in part, he should be required to apply in accordance with s.6 of the Act; that no condition imposed by the Appeal Board should be varied without the

approval of the Board; and that where an extension of the term of a lease or licence is sought a further application should be required if the original decision granting the lease or licence expressly specified a single term, or if the holder has not commenced farming the area (paragraph 77).

(xiii) That consideration should be given to the desirability of making the original objection procedure more formal; that the controlling authority should be required to make all reports, submissions, or evidence relating to an application available to the applicant and any objectors, before a decision is made; that the procedure to be followed where there is more than one application should be specified in the Act; and that the controlling authority should be required to specify the grounds of its decision (paragraph 82).

(xiv) That an application for a pilot commercial scheme licence should be made subject to the same procedures in respect of objections and appeals as an application for an ordinary licence (paragraph 95(1)).

(xv) That if recommendation (xiv) above is adopted, the right to object to the preferential grant of an ordinary lease or licence on the expiry of the pilot commercial scheme licence be abolished (paragraph 95(2)).

(xvi) That there should be no power to extend the term of a research licence or a pilot commercial scheme licence (paragraph 95(3)).

108. We have also made recommendations to the Minister for the amendment of the Commerce Act 1975 (paragraph 27).

For and on behalf of the Committee

Chairman

December 1976

APPENDIX

LEGISLATION CONFERRING JURISDICTION ON THE ADMINISTRATIVE DIVISION

Soil Conservation & Rivers Control Act 1941, s.103
Land Valuation Proceedings Amendment Act 1968, s.2
War Pensions Amendment Act 1968, s.4
Sale of Liquor Amendment Act 1968, s.3
Cinematograph Films Amendment Act 1969, s.4
Animal Remedies Amendment Act 1969, s.8
Land Amendment Act 1970, s.12
Medical Practitioners Amendment Act 1970, s.2
Pharmacy Act 1970, s.40
Mining Act 1971, s.239
Town & Country Planning Amendment Act 1971, s.11
Distillation Act 1971, ss. 11 and 20
Nurses Act 1971, ss. 46 and 47
Clean Air Act 1972, s.35
Coal Mines Amendment Act 1972, s.49
Accident Compensation Act 1972, s.168
Broadcasting Act 1973, s.85
Social Security Amendment Act 1973, s.4
Plant Varieties Act 1973, s.30
Private Investigators & Security Guards Act 1974, s.64
Tobacco Growing Industry Act 1974, s.38
Local Government Act 1974, s.23
Commerce Act 1975, ss. 42 and 122
Fishing Industry Board Act 1963, s.35A
Motor Vehicle Dealers Act 1975 ss. 130 and 131
Meat Amendment Act 1976, s.78A
Real Estate Agents Act 1976, s.112

I N D E X

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

Hydrofoil Services Ltd. v. Shipping Industry Tribunal & Ors. 3.7.74 VIII:19

Hall v. Paparua County Council 29.4.76 IX:10

International Building & Investment Society v. Government Actuary 14.3.75 VIII:16

Johnston & Ors. v. Manakau City Council 27.5.75 VIII:18

Karamu Land Co. v. Attorney-General /1974/ 2 NZLR 583 VIII:16

Law Practitioners Co-op. Society Ltd. v. Government Actuary /1975/ 2 NZLR 96 VIII:16

Lower Hutt City Council v. Bank /1974/ 1 NZLR 545 VIII:18

Lucas v. Colman & Anor. 27.3.75 VIII:15

McDougall v. Henderson 19.12.74 VIII:20

Montana Wines Ltd. v. Waitemata County Council 23.10.74 VIII:18

Mulvern and Ellesmere County Councils v. Administering Committee of the Christchurch Tax Area 13.11.75 VII:22

N.Z. Engineering etc. Industrial Union v. Court of Arbitration /1976/ 2 NZLR 283 (C.A.) IX:12

N.Z. Engineering etc. Industrial Union v. Court of Arbitration /1973/ 2 NZLR 534 VII:20; VIII:19

N.Z. Textile Industrial Union of Employers v. Industrial Commission /1976/ 1 NZLR 241 IX:11

N.Z. Meat Workers Union v. Wages Tribunal 30.3.76 IX:11

O'Farrell v. Mt. Herbert County 23.12.74 VIII:17

Otago Polytechnic Council v. Nairn /1976/ 2 NZLR 91 IX:11

Pagliara v. Attorney-General /1974/ 1 NZLR 86 VII:20

Reithmuller v. Crutchley 9.12.75 IX:12