STANDING IN ADMINISTRATIVE LAW

PRESENTED TO THE MINISTER OF JUSTICE
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ELEVENTH REPORT OF THE
PUBLIC AND ADMINISTRATIVE
LAW REFORM COMMITTEE

WELLINGTON
NEW ZEALAND

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REFORM COMMITTEE

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PART I
INTRODUCTION

1. As indicated in our Ninth Report, we continued our study of remedies in respect of abuse of power. Recently, we have been giving our attention to the question of locus standi, or standing to secure review. Though we would have preferred to have made our report on this subject when the amendments to the Judicature Amendment Act 1972 were before the House in 1977, we recognised that a report on discipline within the legal profession had first claim to our attention. That report was made to you in 1977.

2. We believe that it is opportune to make a further amendment to the Judicature Act 1908. The amendment we propose would do little more than recognise the result of the recent decisions on standing. It would also ensure that the same test for standing was adopted whether an application for review is made under the 1972 Amendment Act or the older remedies of certiorari, prohibition, mandamus, injunction and declaration are invoked. The English Law Commission has recommended reform on similar lines.

3. Though all the members of the Committee favour reform, we are not unanimous as to the action that should be taken. All but two of us recommend an amendment similar to that supported by the English Law Commission. Dr Mathieson and Mr Missen take a different view; they would include the Attorney-General in the screening process. The majority regard such a proposal as cumbersome, confusing and time-consuming for litigants. Moreover, if adopted, it might deprive some litigants of the direct access to the Courts they now enjoy and in other cases involve them in unacceptable delays. If there is any prospect of the law being modified in terms of the minority report, we seek the opportunity of making further submissions in relation to that proposal.

4. The majority place confidence in the judiciary and the exercise by them of a discretion which will discourage the

meddler or busybody from becoming involved in proceedings in which he has insufficient interest. But as recent cases have demonstrated, members of the public who are adversely affected are entitled to seek the assistance of the courts in securing obedience to the law and are seen as having a sufficient interest to maintain proceedings in these and other cases. It is our expectation, if the amendment outlined in the next paragraph is adopted, that the discretionary powers of the courts will be exercised consistently with recent decisions.

5. We recommend the inclusion of a new s.56D in the Judicature Act 1908. The section would provide:

> "(1) On an application for review under Part I of the Judicature Amendment Act 1972, or for a writ or order of or in the nature of mandamus, prohibition, or certiorari, or for a declaration or injunction, the Supreme Court, in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.
>
> (2) Subsection (1) of this section shall have effect in place of the rules of law and of practice relating to standing in respect of any such application.
>
> (3) This section shall not limit the provisions of any other enactment under which the Court may grant relief in any proceedings."

This amendment will avoid the confusion that would result if the amendment applied only to the applications for review made in terms of the Judicature Amendment Act 1972. Such a proposal would create problems where a litigant sought relief in the alternative - under both the Judicature Amendment Act 1972 and the earlier law. The purpose of s.56D is to strip away unnecessary restrictions on standing, to remove technicalities, and to modernise the law. It is consistent with and in fact accepts the outcome of the recent cases where individuals have brought proceedings in the public interest. Because of the importance we attach to the issue, we have set out, in greater detail than is usual, the existing law and the considerations which led the majority to support the reform recommended.

6. The remainder of our Report is divided into five parts with a schedule incorporating a draft bill:

Part II:	The competing interests (paras. 7-18)
Part III:	The existing common law (paras. 19-33)
Part IV:	Legislation as to standing (paras. 34-41)
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PART II
THE COMPETING INTERESTS

7. Standing can be seen from two points of view. One view, which we believe has diminishing support, emphasizes the injury to the plaintiff's rights:

> The civil jurisdiction of the common law courts has developed with primary concern for the enforcement or adjustment of private legal rights.
>
> (Haslam J. in Environmental Defence Society v. Agricultural Chemicals Board [1973] 2 NZLR 758, 762).

The other takes a wider view and stresses the alleged wrongdoing of the defendant administrator:

> ... in the last 50 years the courts by means of the so-called prerogative orders of certiorari, mandamus and prohibition and by the granting of injunctions and the making of declarations have succeeded in keeping statutory bodies within the limits of the law and of making them perform their duties according to the law.
>
> (Lawton L.J. in Attorney-General (on the relation of McWhirter v. Independent Broadcasting Authority [1973] QB 629, 656-657, C.A.)

8. Which is correct? Should the court be concerned with the rights of the plaintiff or with the obligation of the administration to comply with the law? The courts have in general not insisted on the plaintiff showing an invasion of his private legal rights, but nor have they in general focussed solely on the illegal actions of the defendant. Other factors about to be discussed have influenced judicial attitudes.

A flood of litigation?

9. Judges of the distant past feared a multiplicity of actions if they were to allow an individual to sue in respect of actions affecting many people. So Popham C.J., when rejecting in 1592 an action against a person for failing to

celebrate divine service, argued that there might be an infinite number of actions for one default and that it was not reasonable that the defendant should be punished one hundred times: Williams case [1592] 5 Co. Rep. 72b, 73a; 77 ER 163. A century later the fear of one hundred thousand actions deterred Rokeby J. from allowing an action for stopping a common way; Iveson v. Moore (1699) 1 Ld. Raym. 486, 492; 91 ER 1224; see also the comments of Lord Denning M.R. in the McWhirter case [1973] QB 629, at 649 (C.A.). But this argument is usually discounted for at least five reasons.

10. The first is the absence of any evidence that a relaxed standing requirement does result in an increase in litigation. A member of the general public, having no particular interest in the matter, has for centuries been able to bring proceedings for prohibition and certiorari; e.g. R. v. Surrey Justices [1870] LR 5 QB 466, 472-473. Yet there has been no sign of officious busybodies bent on harrassing and frustrating the efforts of public officials. If there were, the discretion of the Court to refuse to grant the remedy, "if it thinks that no good would be done to the public", might well be invoked. Similarly, broad powers granted by statute in New Zealand to initiate various types of court proceedings and to participate in tribunal proceedings have not led to floods of actions or unduly hampered the tribunals' proceedings. Secondly, it would be improper for the courts to be swayed by any fear, whether well or illfounded, of a significant increase in the number of cases in [their] lists of business; Cooke J. emphasised this in the context of town planning in Blencraft Manufacturing Co Ltd v. Fletcher Development Co Ltd [1974] 1 NZLR 295, 312.

11. A third point is that the present law is in fact uncertain, with judges sometimes taking a liberal view of the standing requirements and frequently hearing and making a ruling on the merits. Such law is hardly likely to deter a determined plaintiff. The fourth argument is that the courts already have extensive powers to control and discourage unmeritorious proceedings (see paras. 42-46 below). A final

argument takes account of the nature of the remedy sought: a single declaration or injunction or order will usually be sufficient to put an end to the matter. There will be little risk, as there may be with damages actions (to which many of the "floodgates" dicta relate), of other similar cases.

12. We note that American relaxation of standing requirements did not result in a spate of litigation. We also recall that the opponents of reform in related areas have cried "wolf" before and have been proved wrong. It was argued that allowing the Courts to determine the question of Crown privilege might prejudicially affect the public interest. This did not happen. In Dyson v. Attorney-General [1911] KB 410, it was argued that to permit declarations interpreting legislation to be sought against the Crown would lead to a multiplicity of actions which would overwhelm the Courts with frivolous proceedings. This did not happen.

13. The floodgates argument is also one which has been invoked by public authorities. Review proceedings are of course costly to the parties: time and money are diverted from other uses. They may also cause delay in implementing administrative decisions. But, as with the use of the time of the Courts, are these not costs which must be incurred in the interests of securing legality?

> If inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of any statutory powers by Government departments and Government officials ...
>
> (Farwell L.J. in Dyson v. Attorney-General [1911] 1 KB 410, 423 (C.A.))

Moreover, the argument must be put in the context of a handful of legal proceedings each year in respect of the actions of many thousands of officials. And, as will be noted later, the Court has various ways of dealing with any real cases of inconvenience.

Participation of the proper parties

14. The standing requirements might ensure - by keeping out those whose rights are not in issue or whose interests are not directly and seriously threatened - first, that matters are brought before the Court only by those parties who are able and who have an incentive to present the case from a background of knowledge and interest. They might ensure secondly that those most affected will, as the parties, be bound by the judgment given. We agree that often when one party is more affected than others only he should be entitled to obtain relief in legal proceedings. Such indeed seems in general to be the case; see e.g. the discussion in Durayappah v. Fernando [1967] 2 AC 337, 352-353, of Ridge v. Baldwin [1964] AC 40; Dean v. Attorney-General of Queensland (1971) Qd. R.391; and New Zealand Educational Institute v. Wellington Education Board [1926] NZLR 615. But this has been done without having an inflexible standing rule applied at the outset; the courts have:

(a) in their discretion, refused to entertain an application because of the incompleteness of the factual background; New Zealand Educational Institute case;

(b) after making a ruling on the merits, refused to grant a discretionary remedy to a stranger; cf. Hyland v. Phelan [1941] NZLR 1096;

(c) in their discretion made a choice between declaratory and coercive relief, as in Attorney-General and Robb v. Mt Roskill Borough Council [1971] NZLR 1030 and Fitzgerald v. Muldoon [1976] 2 NZLR 615;

(d) in their discretion, adjourned proceedings or delayed the effectiveness of their orders, as in Fitzgerald v. Muldoon and Harder v. New Zealand Tramways Union [1977] 2 NZLR 162.

The particular legislative context is however sometimes indicative of wider participation; in Attorney-General of Gambia v. N'jie [1961] AC 617, the Privy Council held that, even although the Attorney-General was not a party in the original proceedings, he was, as the representative of the Crown and guardian of the public interest, a "person aggrieved" within the meaning of the relevant appeal provisions.

15. Distinct from those cases where a particular individual is more affected than others are those where no single person is specially affected by the action in question. All 20 million Canadians were equally affected by the bilingualism legislation challenged in Thorson v. Attorney-General for Canada (1974) 43 D.L.R. (3d) 1. All Londoners were affected by the various acts (or omissions) challenged by Mr Blackburn; see paragraphs 21, 30. In this class of case, the plaintiff should not in general have to show he is specially affected. The court's primary concern should be with the alleged illegality committed by the defendant. We say in general because there may be cases in which the context indicates a limit on free access to the court. The legislation may give that indication, as for instance with much of the law imposing restraints on speech. A more appropriate judicial procedure - for instance in the criminal courts or in a special jurisdiction - might be available and preferable. Or there might be a way of handling the matter other than the procedure provided by the courts and tribunals which should be used. The very recent decision of the House of Lords in Attorney-General v. Gouriet [1977] 3 WLR 300 can be seen as an instance of this; paragraph 33 below. Except in such cases (which will often also turn on the broad discretions of the court to grant or refuse relief), the defendant public authority should not be able to argue, as it may now do with some chance of success, that because its allegedly illegal action equally affects the whole population (rather than a small part of it), it should be immune from judicial review sought by any member of it.

16. We make a second and closely related distinction. On the one hand, there are those administrative decisions made following some procedure (usually a hearing as in a town planning case) allowing the involvement of those affected. On the other hand, there are decisions made without that kind of procedure. In the first situation, the question of standing to challenge the decision in the courts will be resolved without difficulty by resort to, and interpretation of, the statutory provisions regulating participation in the administrative procedure. But those formulations do not assist in a determination of who may challenge administrative or legislative decisions made without a hearing. It is for those cases that general legislation on standing would be most significant.

The existence of alternative remedies

17. This point relates to the previous one: if the law provides an effective remedy, that remedy should, in general, be preferred to an action brought by a plaintiff representing the public interest. The remedy will sometimes be provided in a special jurisdiction as in Wellington Municipal Officers Association v. Wellington City Corporation [1951] NZLR 786, or in a different court; cf. Attorney-General v. Chaudry [1971] 1 WLR 1614 (C.A.); Stafford Borough Council v. Elkenford Ltd [1977] 1 WLR 324 (C.A.). At times, it will be available to a particular applicant - especially the Attorney-General who may either of his own motion take action to vindicate public rights in the courts or consent to relator actions. Or a quite different method of handling the matter might be available (see the Gouriet case, paragraph 33). Examples in the field of industrial relations may be found in the Industrial Relations Act 1973 and the Commerce Act 1975. But the alternative remedy may not, in the particular case, be as effective as review by the courts, as was shown in the Chaudry and Stafford cases.

The proper role of a reviewing court

18. Strict standing requirements can be seen as helping to

ensure that the courts do not go beyond their proper role. We do not see this argument as a strong one in this context. The principal constraints bearing on the proper role of the court are found in the limits of the substantive law of review which effectively confined the court to matters of law. The discretion of the court to refuse relief may also, however, be relevant to that role; see paragraphs 14 and 42-46 below.

PART III

THE EXISTING COMMON LAW

19. We shall attempt very briefly to describe the answers given by the courts, when unaided by directly relevant legislation, to the question: who is entitled to bring judicial proceedings challenging the validity of administrative action? Paragraphs 20-24 of this part deal with standing for each of the traditional remedies.

Effect of the Judicature Amendment Act 1972

20. At common law the standing requirement is more difficult to satisfy in the case of some remedies than of others. That law has still to be considered because it is not clear whether the Judicature Amendment Act 1972 has removed those differences. While we had the question of standing in mind in 1971 when we recommended a simplification of the law by the creation of a single remedy for judicial review, and while it would be consistent with our broad intention that the different tests for standing should disappear, it is by no means clear that the 1972 Act did remove the differences. In at least one reported case, Waikouaiti County Ratepayers and Householders Association v. Waikouaiti County [1975] 1 NZLR 600, the court proceeded on the basis that the differences remained. A commentator has taken that view (Mullan [1975] NZLJ 154, 160-162). One effect of our proposed amendment to the Judicature Act will be to make it clear that any differences as to standing under the common law have been eliminated.

21. Prohibition and certiorari may be granted to a member of the general public who has no particular interest in the matter; e.g. R. v. Surrey Justices (1870) L.R. 5 Q.B. 466, 473. Indeed, if the excess of jurisdiction is patent, the Courts have said - protecting the public interest rather than private rights - that they do not even have a discretion to

refuse a "stranger" the two remedies. Where the discretion exists, it is very rarely exercised. There is a recent Privy Council decision applying a very narrow standing rule. It held that the decision of the Minister of Local Government dissolving a council without a hearing could be set aside only at the instance of the person against whom the order was made, that is the council and not the mayor; Durayappah v. Fernando [1967] 2 AC 337, 335. On the other hand, however, the most recent Blackburn case, in which prohibition was sought, proceeds on a very wide view of standing; R. v. Greater London Council, ex parte Blackburn [1976] 1 WLR 550 (C.A.).

22. The standing requirement for mandamus is often seen as more difficult to satisfy than that for prohibition and certiorari; e.g. Waikouaiti County Ratepayers and Householders Association Inc v. Waikouaiti County [1975] 1 NZLR 600, 606. Sometimes it is said that the applicant is required to establish a breach by a public official or body of a duty owed to him; e.g. Environmental Defence Society v. Agricultural Chemicals Board [1973] 2 NZLR 758, 762-763. But this is sometimes widened to include damage to a special interest held by the applicant; ibid., 763. Some recent English judgments appear to have interpreted that requirement liberally; see e.g. R. v. Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 QB 118 (C.A.) and R v. Commissioner of Police of the Metropolis, ex parte Blackburn (No. 3) [1973] QB 241 (C.A.) discussed by the Law Commission, Report on Remedies in Administrative Law Law Com. No. 73, Cmnd 6403 1976, n.23.

23. The standing requirement for injunction is sometimes stated very narrowly:

> It is a fundamental rule that the court will only grant an injunction at the suit of a private individual to support a legal right.
>
> (Thorn v. British Broadcasting Corporation [1967] 1 WLR 1104, 1109, per Lord Denning M.R.)

It is more commonly stated in broader terms similar to those applied to mandamus. The plaintiff is required to show either

(1) interference with some private right or violation of some statutory provision for the protection of the plaintiff; or

(2) special damage suffered over and above that suffered by the general public where no private right is affected. But even in this case the plaintiff must show that he is specially affected.

These two views of the law have also been applied - though not without dispute - to the declaration; Collins v. Lower Hutt City Corporation [1961] NZLR 250; see also Part IV.

24. Although there is a trend, noted later, to remove the distinctions between standing for the remedies, a scale does appear to exist. Does such a scale make sense? Does it make sense to have any scale? The view that access to the court should depend on the remedy being sought challenges the general purpose of the Judicature Amendment Act 1972 that the technical differences between the remedies should disappear. Thus the applicant who is trying to take advantage of the allegedly more liberal rules for certiorari would probably be obliged, notwithstanding that general purpose, to show that the power in question has to be exercised judicially. Further, if there is to be a scale, should it not be around the other way? It does appear odd that decisions of judicial bodies which usually affect only a handful of litigants are, prima facie, more widely challengeable than say statutory regulations which usually have nation-wide effect. We therefore consider that as a general rule the law relating to standing should not distinguish between the remedies.

25. In the remainder of this part, we consider very briefly the ability of particular groups of plaintiffs to bring matters before the Courts. We do this not only to round out our description of the present law by looking at the kinds of plaintiffs and the kinds of interests they try to protect in public interest litigation; we also do this because:

(a) it shows the general tendency of the courts to widen the individual's access; and

(b) it provides material against which the legislation we propose can be tested.

Ratepayers

26. In England, Northern Ireland, Scotland and Canada, courts have held that a ratepayer can challenge the actions of his local authority, at least when expenditure is involved; R. v. Hereford Corporation, ex parte Harrower [1970] 1 WLR 1424; R. (McKee) v. Belfast Corporation (1954) N.I. 122; Nicol v. Trustees of Harbour of Dundee 1915 S.C. (H.L.) 7; McIlreith v. Hart (1908) 39 S.C.R. 659. It is now doubtful whether the 1961 decision in Collins v. Lower Hutt City Corporation [1961] NZLR 250 to refuse standing to ratepayers seeking to enjoin the flouridation by Lower Hutt City of its water would be followed; cf. Anderson v. Valuer-General [1974] 1 NZLR 603, 615-6, in which it was held that a ratepayer could claim that the valuation roll was invalid. This is explained on the basis that the ratepayer's individual interests are affected: he contributes to the funds. This is of course a slender explanation, for the amount of money per capita in many cases will be very small; and moreover a large number of people may be equally affected. Certainly it is a rule which does not relate at all well to the reasons (touched on in Part II) for restricting access to the courts.

Competitors

27. In two recent cases, the English Divisional Court has held that a competitor did not have standing. In one, the action of the Chancellor of the Exchequer in granting illegal tax concessions to bookmakers was challenged by other bookmakers; R. v. Commissioner of Customs, ex parte Cook [1970] 1 WLR 450. In the other, the refusal of a council, allegedly in breach of its standing orders, publicly to seek tenders was impugned by those who were interested in tendering; R. v. Hereford Corporation, cited in paragraph 26. In that case, however, the potential tenderers were held to have standing because ratepayers were included among their number. This, it is submitted, points up neatly one of the oddities of this part of the law; in any real sense, those

who might tender were much more affected than a ratepayer who indeed might not be affected financially at all. Potential tenderers would also be more likely to argue the case fully from a background of their real interest. The potential number of plaintiffs was much smaller. And yet they were allowed to sue only because they, along with many thousands of others, happened to pay rates in Hereford. In the bookmaker's case, the argument on competitors is a little fuller. Lord Parker stated that no specific legal right of the plaintiffs was being affected, and he roundly asserted that they had no sufficient interest since the statute in question was entirely fiscal, having nothing to do with regulating competition amongst bookmakers. This part of the reasoning suggests that if it is possible to see in the statute in issue some purpose related to the plaintiff's concern, that may provide a basis of interest. That particular idea is central to the judgment of Cooke J. in a town planning case involving a disputed application for change of use; Blencraft Manufacturing Co Ltd v. Fletcher Development Co Ltd [1974] 1 NZLR 295. The legislation is in general terms, allowing objections by those who claim to be "affected" by the proposed use. He held that "a person who reasonably claims to be appreciably affected by the use in question has a right to be heard"; and that this may include a person who claims that he is likely to suffer significant economic consequences differentiating him from the general public; ibid., 314. Accordingly, he allowed a commercial competitor to object to the application. The interesting point in the reasoning of Cooke J. for our purposes is that, in holding that economic consequences could provide a basis for objection, he took account of the very wide range of matters which the statute made relevant to the decision on the objection; they included "the public interest" and "the economic and general welfare" of the district. This approach to standing - which looks to the range of interests relevant to the power in question and which involves at least a partial examination of the merits - is to be seen in some other recent cases and is common in United States judgments decided under general legislative formulations of standing.

Consumers

28. Should a consumer be able to challenge the operation of a minimum price scheme or of food and drug standards? Those providing the goods and services will generally be able to, but the consumer is less likely to have standing. Much, however, will depend on the legislation, especially if an approach similar to that mentioned at the end of the last paragraph is adopted. Recent cases relating to broadcasting show the reluctance of the courts to give consumers standing, but there is an indication of a change in that attitude. In one case, the decision of the Canadian Broadcasting Corporation to change an English speaking radio station in Toronto into a French speaking one was challenged by a resident of that city who also attempted to sue on behalf of all other English-speaking taxpayers of the area; Cowan v. Canadian Broadcasting Corporation (1966) 2 O.R. 309, (Ont. C.A.). The proceedings were struck out because the plaintiff had shown neither interference with a private right nor the sustaining of special damage peculiar to himself. There have been indications that the same fate might meet members of the New Zealand public; Mitchell v. N.Z.B.C. [1970] NZLR 314, 316, and Maling v. N.Z.B.C., unreported, cited, ibid.

29. The McWhirter case in England adopts a different line, however. Lord Denning and Lawton L.J. were willing to accept that decisions of the Independent Broadcasting Authority (on questions of the indecent or offensive character of a proposed programme) could be challenged by members of the public in no way specially affected by the decision, if the Attorney-General had unreasonably refused his consent to a relator action or if time is too short for that consent to be obtained; Attorney-General (on the relation of McWhirter) v. Independent Broadcasting Authority [1973] QB 629 (C.A.). A majority of the Court of Appeal accordingly was prepared to grant, at the suit of a member of the public, an interim injunction in respect of the showing of an Andy Warhol film. Lord Denning distinguished between the case of an action for damages and an application for an injunction or declaration. So far as the latter was concerned, he would not restrict the circumstances in which an individual may be held to have

sufficient interest. He declared that this residual right was a most important safeguard for the ordinary citizens of the country:

> in these days when government departments and public authorities have such great powers and influence ... [the ordinary citizens] can [thereby] see that those great powers and influences are exercised in accordance with law (at 649).

Lawton L.J. also spoke of the "age old problem" of what to do about powerful persons or bodies who seem to be above the law:

> So far, the flexibility of our constitution has been such that the weapons used for cutting down the over-mighty to size have varied from age to age. (at 656).

He instanced the Tudor use of prerogative courts, Parliament's use of legislation to control the misuse of economic strength, and, in the last 50 years, the courts' success in keeping statutory bodies within the law (at 656-657). He was accordingly prepared to rule that in a last resort situation a member of the public might come to the court directly.

Police and similar powers

30. The major remaining cases centre on, but are not restricted to, the exercise of powers to enforce the law - particularly the cases initiated by Mr Blackburn in England. His cases share the characteristic that he was no more affected than millions of others - 50 million when he challenged the British decision to enter the European Economic Community (Blackburn v. Attorney-General [1972] 1 WLR 1037), and 8 million when he challenged what he saw as the failure of the London police to enforce the gaming and pornography laws and when he questioned the test applied by the Greater London Council in censoring films (R. v. Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 QB 118; ibid (No. 3) [1973] QB 241; and R. v. Greater London Council, ex parte Blackburn [1976] 1 WLR 550). It could not be said that he was specially affected, that he had in any way been singled out. Nor could that be said of Mr McWhirter and his objection to a

television screening of an Andy Warhol film nor of Mr Thorson in his attack on the constitutionality of Canada's bilingualism legislation. And yet none of them was stopped at the threshhold of the court on the ground of want of standing.

31. While reaching identical decisions, the judgments mentioned in the last two paragraphs provide interesting contrasts: in some, the standing question is barely mentioned, in others the right of the individual to have questions of administrative legality decided is put forward as a grand constitutional principle, while in still others the formulation is much more careful and the broad discretions of the court to grant or not to grant the relief are stressed. It is accordingly difficult to state the law with confidence. Moreover, none is a New Zealand case and they had no real impact in any reported case here. That having been said, however, they, along with other recent cases, do suggest general conclusions about the current state of the law:

(i) Standing requirements are being liberalised.

(ii) The courts will not always insist on the plaintiff showing that he was specially affected in a way distinguishing him from many others subject to the action impugned.

(iii) That test will probably not have to be met in cases in which there is no other effective method of testing the legality of the action.

(iv) When the standing issues are discussed in more than a cursory way, the emphasis is likely to be on the broad context of the action or on the court's discretion rather than on a narrow range of technical issues. This may mean that the standing question is considered along with other issues and that it is not isolated and dealt with as a purely preliminary matter. If that is so, then the standing rules will not preclude at least some argument on the merits of the case.

(v) Many, but not all, recent cases draw no distinction between the standing requirement for the different remedies.

32. These conclusions can, however, be stated with more confidence for England and Canada than for New Zealand. New Zealand courts have tended to be more restrictive on standing, and the discussion is often brief, sometimes affected by the remedy sought, and sometimes of a narrow and preliminary character. There is, however, no binding decision to stop the courts here from moving in the way that the English courts have. We commend and support such a development.

33. It follows that in our consideration of what the law should be we have not agreed with some of the broader statements made by members of the House of Lords in its very recent decision, Attorney-General v. Gouriet [1977] 3 WLR 300. Lord Wilberforce stated at p.310 that

> in general no private person has the right of representing the public in the assertion of public rights.

As against that, the special features of that case, as noted in the judgments, must be recalled:

(i) an alternative remedy was available - a private prosecution in the criminal courts;

(ii) the defendant in such a prosecution would have the protections of the onus of proof in criminal cases and of a jury;

(iii) the power was being invoked in anticipation of a possible offence in a situation in which no offence had yet been committed;

(iv) in any event the breach would be by Post Office employees and not by the defendants;

(v) a problem could be created for the jury if a Judge

had already found the defendant guilty of contempt of the injunction;

(vi) the power of the Attorney to invoke the civil courts in aid of the criminal law was an exceptional power, invoked in only limited cases in practice, and not without its difficulties;

(vii) Parliament had conferred and by recent legislation had reinforced a great deal of immunity from suit upon trade unions and in particular it had placed special restrictions on seeking injunctions against unions; and

(viii) there were severe restrictions on court proceedings against the Post Office.

All or even most of these features will only rarely be present when an action is being brought against a government agency alleging administrative illegality. Lord Wilberforce, with reference to the great delicacy of invoking the preventing injunction, stressed (at p.314) that it might involve a decision of policy into which conflicting considerations of policy might enter.

> Would the law best be served by preventive action? Would the grant of an injunction exacerbate the situation? - very relevant in industrial disputes. Was the injunction likely to be effective or might it be futile? Would it be better to make it clear that the law would be enforced by prosecution and to appeal to the law-abiding instinct, negotiations, and moderate leadership, rather than provoke people along the road to martyrdom? All those matters ... and the exceptional nature of that civil remedy painted the matter as one essentially for the Attorney's preliminary discreton.

It is significant that two of the Law Lords (Viscount Dilhorne at 327 B-E and Edmund Davies at 347H) raised the question of legislative reform.

PART IV

LEGISLATION AS TO STANDING

34. Three statutes already directly answer the question: who is entitled to challenge particular kinds of administrative action by civil proceedings in the Courts?

Declaratory Judgments Act 1908

35. Section 3 of this Act, prima facie at least, confers standing on a very broad basis:

> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General under statutory authority, or any bylaw made by a local authority ...; or
>
> Where any person claims to have acquired any right under any such statute, regulation, bylaw ... or to be in any other manner interested in the construction or validity thereof, - such person may apply to the Supreme Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw ... [emphasis added]

The group of persons identified in this provision - those "in any other manner interested" - appears to be an extremely broad one. While in two cases it has been said that this phrase is to be read eiusdem generis with the preceding requirements, that would not appear to impose any real restriction on the scope of the provision and, moreover, that view has recently been rejected and a more liberal interpretation given: New Zealand Educational Institute v. Wellington Education Board [1926] NZLR 615 and Wellington Municipal Officers' Assn v. Wellington City Corporation [1951] NZLR 786; cf. Turner v. Pickering [1976] 1 NZLR 129. In particular, a plaintiff would not have to show that he was specially affected in some way that distinguished him from others. The scope of the provisions of the Act is reduced, however, by the fact that courts have refused to enter upon

matters involving disputed questions of fact under the originating summons procedure established in the Act; e.g. Collins v. Lower Hutt City Corporation [1961] NZLR 250, 254-256. More generally, s.10 of the Act makes it clear that there is a broad discretion to refuse a declaration.

Bylaws Act 1910

36. Section 12 of this Act empowers "any person" to apply to the Supreme Court for an order quashing a bylaw on the ground of its invalidity. No qualification is stated. No interest is required. The applicant need not even be a ratepayer (see para. 26 above). In at least one case, the Supreme Court, adverting to the simple method provided by the Act, has refused to restrict the wide right conferred; clear words would be needed to impair the right; In re a Waipa County Bylaw ex parte Deposit and Finance Co Ltd [1935] NZLR 449, 456-458.

Charitable Trusts Act 1957

37. Under s.60 of this Act, "... the Attorney-General or any officer of the Government service or person" may apply to the Supreme Court for a variety of orders, including an order requiring compliance with the trust, in respect of any property or income subject to a trust for a charitable purpose within the meaning of either Part III or Part IV of the Act. The general definition of "charitable purpose" (applicable to Part III) is "every purpose which in accordance with the law of New Zealand is charitable" (s.2); for Part IV the definition is extended to include certain other purposes whether or not they are beneficial to the community or a section of it (s.38). The general definition of charitable purposes is, of course, broad, and the apparently unrestricted standing requirements might allow easy access to the courts to challenge many administrative actions, particularly those involving land vested in some public authority on trust for some charitable purpose, e.g. for the protection of river banks and river-protection works, or for public recreation and enjoyment: Kaikoura County v. Boyd [1949] NZLR 233 (C.A.); Watchtower Bible Society v. Mt Roskill Borough [1959] NZLR

1236; and Morgan v. Wellington City Corporation [1975] 1 NZLR 416 (C.A.). The potential of s.60 was shown in the challenge by a private individual to actions of the Wellington City Council affecting part of the Town Belt. The Supreme Court at p.418, held that Morgan did not have standing:

> because of the well established principle that a citizen cannot sue to enforce a public right unless he can show either that the interference with the public right is such that some private right of his own is at the same time interfered with, or that he suffers special damage peculiar to himself from the interference with the public right: Boyce v. Paddington Borough Council [1903] 1 Ch. 109.

The Court of Appeal held on this point that, because the grant of the land to the City had created a charitable trust, the standing problem disappeared; s.60 applied to the trust and the appellant was a "person" with the right to come to court under the provision.

38. This legislation is significant not only in conferring broad rights to apply to the courts for declaratory and related relief in many areas of administrative power. It is also significant in indicating the willingness of the legislature to provide such broad rights of access when it considers the issue. Moreover it has not led to the abuses and problems feared by those opposing wide access.

39. That willingness is also seen in the legislation relating to the right of individuals to initiate prosecutions for summary offences against officials and government bodies:

> Except where it is expressly otherwise provided by an Act, any person may lay an information for an offence [Summary Proceedings Act 1957, s.13].

Similar provision is made for indictable offences in s.146(a) and in the Crimes Act 1961, ss. 313 and 314. The High Court of Australia has insisted that this right must not readily be treated as derogated from by implication; Bedingfield v. Keogh (1912) 13 C.L.R. 601. This right of prosecution may enable an individual to avoid any restrictive standing rules applicable to civil proceedings, for most statutes contain

offence provisions and the Crimes Act 1961, s.107, makes it an offence (subject to a broadly stated exception) to violate statutory obligations where no other penalty is provided.

40. It is true that there are a number of provisions which restrict the right of prosecution (for instance where there is an international element in the offence, where speech is involved, or where there is a wider context of enforcement procedures), and the Attorney-General has a power (conferred in 1967) to stay any summary prosecution. But the basic right of individual prosecution remains.

41. The legislature has traditionally adopted a policy of permitting broad access to the courts to challenge official action. The courts, we have noted, are moving in the same direction. We consider that the policy is, in general, the correct one. We consider that properly framed legislation could help effectuate that policy.

PART V
OTHER RELEVANT POWERS OF THE COURT

42. The powers (which will overlap in practice) that the courts have to control proceedings challenging administrative action are:

(1) the discretion to refuse to grant a remedy;

(2) the discretion to defer to other more appropriate remedies;

(3) the discretion to grant one remedy rather than another;

(4) the power under s.5 of the Judicature Amendment Act 1972 to refuse relief in respect of defects of form or technical irregularities;

(5) the power to strike out frivolous and vexatious proceedings;

(6) the power to award costs.

These powers - which are recognised and conferred in such legislation as s.4(3) of the Judicature Amendment Act 1972 and s.10 of the Declaratory Judgments Act 1908 - are relevant in two broad ways. First, as we have already seen, they can be, and are, used to reconcile the various interests already discussed. And, secondly, they indicate the context of discretionary powers in which the standing question often arises.

43. The operation of the first and second powers can be illustrated by cases under the Declaratory Judgments Act 1908. In New Zealand Educational Institute v. Wellington Education Board [1926] NZLR 615, the court of its own motion ruled that the Institute, because of the irreconcilable interests of its

classes of members, was not qualified to seek the declaratory order. Their interests could not be properly put before the court by one party to the proceedings. Moreover no member or class of members was before the court and none of them would be bound by any declaration; they would be free to act and litigate on an opposite interpretation of the statute. The declaration would not settle the matter.

44. In Wellington Municipal Officers' Association Inc v. Wellington City Council [1951] NZLR 786, the association sought a declaration about members' conditions of employment. Again there was doubt about whether the Association was entitled to apply, but the factor that on this occasion persuaded the court not to enter into the merits of the question was that the whole matter was peculiarly within the scope of the Court of Arbitration; answering the question would be contrary to the spirit and purpose of industrial legislation. In its discretion, the court therefore refused to intervene.

45. The third power of the court - the discretion to grant one remedy rather than another - can be used in such a way that the substantive issues debated by the parties are in fact resolved, but that the minor character of the effect on the plaintiff's interests (if such it be) is appropriately recognised in the order made. In Attorney-General and Robb v. Mt. Roskill Borough and Wainwright [1971] NZLR 1030, McMullin J. declared that the Mt Roskill Borough Council had no power to grant dispensations from the building line requirements of its planning scheme and that its action in allowing the plaintiff's neighbour to build in violation of that line was unlawful. But the plaintiff was denied an injunction preventing the building from going ahead. It was refused on the basis that all the plaintiff would be deprived of was a view from his bedroom of "the rather colourful spectacle" of golfers convening on the first tee of a nearby golf course.

46. The power to award costs will often operate as a considerable deterrent. A would-be applicant needs a lawyer

and must face the prospect of paying his lawyer's costs. He must also face the possibility of an award against him of party and party costs should he lose; the order may be substantial if the applicant's case is patently weak. And he must cope with the complicated procedure involved in this class of proceedings.

PART VI
PROPOSED GENERAL LEGISLATION ON STANDING

47. We have seen (in paras. 25-33) that the courts have shown a tendency to liberalise standing requirements in the interests of securing compliance with the law. We have also seen (paras. 34-41) that existing legislation confers judicial control over the administration in three important areas and that in those cases the legislature has provided access to the courts on a generous basis. We are advocating the extension of that legislation. We favour the adoption of comprehensive legislation such as that enacted by the United States Congress in 1946 (5 USC s.702) and that proposed recently by the English Law Commission on their Report on Remedies in Administrative Law [Cmnd. 6407, 1976). The former reads:

> A person suffering legal wrong because of agency action, or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The latter proposes at p.32:

> The Court shall not grant any relief sought on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates. [Emphasis added]

48. The enactment of a provision of this kind can be justified on at least two levels. It is likely to produce law which will be found more satisfactory technically. It will also achieve a better balance between the competing interests we have already outlined.

49. A more liberal standing requirement will improve the courts' powers of review. Essentially, review is concerned with questions of law and there is no justification for restricting review on such questions. There is no evidence that liberalised standing rules have led to abuse. In any event, the courts possess adequate means of controlling proceedings challenging administrative action (see para. 42).

50. The phrase "sufficient interest" is one which has already been adopted by the courts; see, for example, Attorney-General, ex rel McWhirter v. Independent Broadcasting Authority [1973] QB 629, 649, (Denning M.R.) and the High Court of Australia in Brettingham-Moore v. St Leonard's Corporation [1971] ALR 3, 12. The English Law Commission in their Report on Remedies in Administrative Law (Cmnd 6407, 1976), paras. 13, 22, 27 and 59 has adopted this test. We expect that the courts will assess the interests protected by the legislation in issue and the extent of the applicant's involvement with those interests. Some courts have already begun to adopt this approach (see para. 27). Moreover we reject any suggestion that the use of the phrase will introduce vagueness into the law. As already indicated in paras. 11, 20-24 and 31-33, there is already much uncertainty in the present law.

51. We support, with respect, the view expressed to and adopted by the English Law Commission: "that any attempt to define in precise terms the nature of the standing would run the risk of imposing an undesirable rigidity in this respect". We also agree with its view "that what is needed is a formula which allows for further development of the requirement of standing by the courts having regard to the relief which is sought" (para. 48). The discretion conferred on the court is entirely consistent with the discretionary nature of administrative law remedies.

52. We therefore recommend the enactment of the bill set out in the Schedule to this report. It is similar in concept to clause 1(3) of the English Law Commission's draft bill, but we have deliberately adopted a different wording. Whereas the English proposal requires that the court "shall not grant relief ... unless it considers that the applicant has a sufficient interest", our proposal empowers the court, in exercising its discretion to grant or refuse relief, to refuse it if in the court's opinion he does not have a sufficient interest. The purpose of this approach is to make it clear that in general the question of standing is not one to be dealt with as a purely preliminary matter, but is to be considered along with other issues in the context of the

court's general discretion (cf. para. 31(iv)above). We have formulated the provision in permissive terms ("may refuse ...") and not in the mandatory terms proposed by the Law Commission ("... shall not grant ...") because we consider that the liberalising thrust of the proposal might be endangered by a mandatory, negative formula. The formulation emphasises the discretion conferred on the court.

53. The effect of our proposal will be to establish a single test for standing both for applications for review under the Judicature Amendment Act 1972 and the older remedies. Only if the court decides that the applicant does not have sufficient interest in the matter will relief be refused on the ground of lack of standing. This statutory extension of the court's discretion will be exercised in accordance with the principles which the courts have already applied. It is our expectation that it will receive a liberal interpretation and that no applicant will be refused standing who would have been permitted to bring an action under the existing law. The provision simplifies the law and eliminates any differences that may exist as between remedies.

J.F. Northey
Chairman
for the Committee

February 1978

MEMBERS:

Professor J.F. Northey (Chairman)
Professor K.J. Keith
Professor D.L. Mathieson
Dr R.G. McElroy
Mr E.A. Missen
Mr R.G. Montagu
Mr D.F.G. Sheppard
Mr E.W. Thomas
Mr D.A.S. Ward
Mr W.K. Dewes (Secretary)

SCHEDULE

DRAFT JUDICATURE AMENDMENT BILL
Explanatory Note

This bill amends the Judicature Act 1908 to give effect to the report of the Public and Administrative Law Reform Committee on the law of standing. Its purpose is to provide a general rule for the guidance of the Supreme Court in determining whether a person has standing (i.e., the right to be heard by the court) to challenge the validity of an administrative act or decision.

At common law a person seeking to make such a challenge may proceed in one of five different ways, choosing the one that applies to the facts of the case. These are: an application for one of the "prerogative" orders of certiorari (to quash a decision of the administrative authority), prohibition (to prevent the authority from acting in excess or abuse of jurisdiction or contrary to the rules of natural justice), or mandamus (to compel the performance of a public duty); or an action for an injunction (commanding the authority not to do a particular act) or for a declaration (under which the court makes a binding declaration of right). In each case the court has a discretion whether or not to grant the remedy. Different rules of practice and procedure have been developed by the courts for the different remedies, and there is uncertainty as to what tests of standing apply in different cases.

Part I of the Judicature Amendment Act 1972 enacted a single procedure under which the court has a discretion, on an application for review, to grant the applicant any relief that he would be entitled to if he applied for any of the five common law remedies. However, the 1972 Act did not expressly deal with the law of standing.

This bill proposes a single test of standing to be applied by the Supreme Court when exercising its discretion to grant

either an application for review or an application for any of the common law remedies mentioned above. The new rule will replace the different sets of rules that now apply unevenly to the different remedies.

Clause 1 relates to the Short Title of the Bill.

Clause 2: Subclause (1) inserts a new section 56D in the Judicature Act 1908.

Subsection (1) of the new section provides that on an application for review, or for mandamus, prohibition, certiorari, declaration, or injunction, the Supreme Court, in exercising its discretion to grant or refuse relief, may refuse relief if in its opinion the applicant does not have a sufficient interest in the subject-matter of the application.

Subsection (2) of the new section provides that subsection (1) replaces the common law rules of law and practice as to standing.

Subsection (3) of the new section makes it clear that the new rule does not limit the provisions of any other enactment. (For example, the Declaratory Judgments Act 1908, the Bylaws Act 1910, and the Charitable Trusts Act 1957 all confer broad rights to apply to the court for a variety of purposes.)

Subclause (2) consequentially amends section 4 of the Judicature Amendment Act 1972 so as to make it clear that the question of standing on an application for review is to be determined under the new section 56D of the principal Act.

JUDICATURE AMENDMENT

ANALYSIS

A BILL INTITULED

An Act to amend the Judicature Act 1908

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

1. Short Title - This Act may be cited as the Judicature Amendment Act 1978, and shall be read together with and deemed part of the Judicature Act 1908 (hereinafter referred to as the principal Act).

2. Standing - (1) The principal Act is hereby amended by inserting, after section 56C (as inserted by section 3 of the Judicature Amendment Act 1960), the following heading and section:

"Standing

"56D. (1) On an application for review under Part I of the Judicature Amendment Act 1972, or for a writ or order of or in the nature of mandamus, prohibition, or certiorari, or for a declaration or injunction, the Supreme Court, in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.

"(2) Subsection (1) of this section shall have effect in place of the rules of law and of practice relating to standing in respect of any such application.

"(3) This section shall not limit the provisions of any other enactment under which the Court may grant relief in any proceedings."

(2) Section 4 of the Judicature Amendment Act 1972 is hereby amended -

(a) By inserting at the beginning of subsection (1), before the words "On an application", the words "Subject to section 56D of the principal Act,":

(b) By inserting in subsection (3), after the words "on any grounds", the words "other than lack of standing".

MINORITY VIEW

1. We dissent from the proposal made by the majority of the Committee that there should be a statutory provision in New Zealand similar to that recommended by the Law Commission (but not as yet enacted) in England. In so dissenting we should not be taken to disagree with all the arguments advanced in paras. 1-46 of the Report. Specifically, we do not contend that a liberalisation of the law of standing, so far as applications for review are concerned, would in fact open the way to a flood of litigation.

2. We regard the proposal of the majority as proceeding upon the unexpressed premise that a person challenging the legality of administrative action is genuinely doing so in order that the question of legality or illegality may be tested. But in practice a significant number of applications for judicial review seem to be brought not for such high-minded reasons but in order to secure the advantages of delay, without any real desire that the question or questions formally put in issue by the pleadings be resolved by the court. Such proceedings either are, or border on, an abuse of the Court's procedure. During the period of delay secured the respondent will be under great pressure to desist from any consequential (and perhaps much-needed) action. The practice is to give a voluntary undertaking to desist from consequential action. The resulting administrative complexities are sometimes considerable. The applicant's real purpose may be to gain time to influence public opinion and to make political representations. Very little can be done by a respondent to dispose of applications for review that are suspected to be holding actions only, or otherwise not intended to be brought to court. An application to strike out because inadequate grounds are pleaded will succeed only in the very clearest cases. A motion to strike out the proceedings for want of prosecution is usually successful only after a quite extraordinary period of time has elapsed. Our point is that this position, which obtains under the present law, will be magnified if the right to challenge administrative action is granted to all people claiming to have a "sufficient interest".

3. We agree that the law governing standing in respect of particular remedies is unclear and uncertain. Indeed, one of the main reasons for our dissent is our belief that the majority proposal will increase, rather than reduce, the uncertainty in application of the present law. The majority proposal will inevitably mean that much will depend upon the judge before whom a particular case comes, and we draw attention to the circumstance that applications for review are presently not dealt with by judges assigned to the Administrative Division only, but by all the judges of the Supreme Court.

4. The question as to whether English case law would be uncritically adopted by the New Zealand courts is speculative. For instance, in the latest Blackburn decision, R. v. G.L.C., ex parte Blackburn [1976] 1 WLR 550, Lord Denning M.R., in the guise of "recasting" the principle in McWhirter's case, in truth revolutionized the law in a way for which no prior judicial support could be found.

5. With respect, the wording of the proposed s.56D of the Judicature Act, proposed by the Committee in the draft Judicature Amendment Bill annexed to this report, provides no basis for predicting who will, and who will not, be afforded standing. No guidelines or criteria are offered as to what is to be "sufficient". The future development of the law of standing would become unpredictable, especially since it would be problematic whether it would assume a definite shape at an early date; whether it would involve recourse to previous case law to ascertain what interests had hitherto been recognised as sufficient at common law; and whether arguments over standing would involve a new set of ingenious distinctions between cases. The greater the scope for argument over standing, the more complications attend the trial of the proceedings on their merits. Moreover, there are two crucial objections to the adoption of anything similar to the English proposal in this country. First, in England it is necessary to obtain leave from the Divisional Court to seek one of the prerogative orders, and the Law Commission proposes

the continuance of a requirement to obtain such leave in order to bring its proposed new simplified remedy (an "application for judicial review") We consider that there is a considerable difference between a wide general formula which is accompanied by such a screening process, and such a formula not so accompanied - as the statistics quoted by the Law Commission tend to demonstrate. Secondly, the English formula makes no distinction between applications for review commenced by an individual in the interests of the public as a whole or a section thereof, on the one hand, and applications for review commenced by an individual who represents only himself, or himself and one or two others, on the other.

6. Another principal reason for our dissent is that under the majority proposal some bodies that certainly deserve to achieve standing will not necessarily be granted it. For example, an environmentalist group, with no property of its own to be affected by some development, but representing some hundreds of concerned citizens, will not necessarily qualify, because no one member has any greater material interest than any other. Under what we propose, however, it will be virtually certain that such a group will obtain standing. This result is achieved by the wording of our proposed guideline, set out later.

7. The salient features of our proposal are:

(1) an initial application for consent to the Attorney-General in his role as traditional guardian of the public interest, coupled with a recognition that in matters affecting the state itself it is difficult for him always to give the appearance of having acted solely in the public interest and without reference to the possibly conflicting interests of the Government:

(2) the conferment of a new power in the Courts to make what we call "standing orders", notwithstanding that the Attorney-General has declined his consent to an application for review being commenced;

(3) the settlement of standing problems at a preliminary stage, before the expense of preparing for trial is embarked on by a would-be applicant or by respondent(s), thus usefully eliminating arguments over standing from the substantive hearing;

(4) supplementary provisions to avoid multiple applications for review in relation to the exercise of the same "statutory power";

(5) the Court's function, upon application being made to it for a standing order, would be as follows:

"If the Court is satisfied, upon the hearing of an application for a standing order -

(a) that the person claiming to represent the public interest genuinely represents the interests of the public or a significant section of the public; and

(b) that the public or, as the case may be, that section of the public, has or may reasonably consider that it has, a cause of complaint in relation to the exercise, refusal to exercise, or proposed or purported exercise of the statutory power in question (whether or not relief under this Act is likely to be granted); and

(c) that in all the circumstances, having regard to the nature of the statutory power in question, and the number of persons who are or may be affected thereby, it is appropriate that the person claiming to represent the public interest should be permitted to commence an application for review, -

the Court shall make a standing order."

8. Our proposed innovation would benefit only those claiming to represent the public interest. Those who are specifically affected by a decision will continue to be able to commence an application for review without being obliged to seek a standing order: in cases of doubt their standing will be determined by the common law, which on the whole evinces, we agree, a liberalising tendency. If a decision affects X, Y and Z only, none of those three would have enhanced rights under our proposal since they would not constitute a "significant section of the public". Borderline cases would undoubtedly arise as to how many must be affected before a "significant section" is affected. Such problems would be decided by the court on application for a standing order. We prefer not to be more precise: there is advantage in leaving some room for flexibility and judicial creativity, but creativity within a scheme the spirit of which will be at once discernible to the judge. The majority argues (in para. 51) "that any attempt to define in precise terms the nature of the standing would run the risk of imposing an undesirable rigidity in this respect". For that view it is able to claim the direct support of the English Law Commission. We also agree, but if the quotation is taken as a criticism of our own proposals, it misses the point. The Law Commission did not apparently consider the possibility of a solution other than the conferment of a broad discretion or the enactment of qualifying rules expressed "in precise terms". Our proposal is a third solution.

9. Under our proposal if the Attorney-General declines to consent, the "public interest" applicant may apply to the Court not to review the Attorney-General's decision, which would be undesirable, but for an independent consideration of his entitlement to bring his proposed application for review. If he is held to be so entitled, the Attorney-General will thereafter drop out of the picture, his earlier decision having been superseded.

10. Our recommendation makes no distinction between statutory powers affecting the environment and powers

unrelated to the environment. Nor is any distinction proposed between individuals and organisations; but an organisation would rightly find it easier to convince the Court that, having regard to its constitutional objectives and its number of members, it genuinely represents (at least) a significant section of the public.

11. Upon the hearing of an application for a standing order it would be no part of the Court's function to guess at the likelihood of the application for review being successful. Thus our proposal is quite different from a requirement that the leave of the Court be obtained in every case. The English procedure serves to eliminate frivolous or obviously mistaken applications: we prefer to leave any rejection on the merits either to the Court after reading all affidavits filed and hearing counsel, or to interlocutory applications invoking the inherent jurisdiction to strike out frivolous and vexatious proceedings.

12. The essential conditions of obtaining a standing order are set out in paragraph 7(5). The deluded or high-principled individual who in truth represents only himself would not obtain standing. The Court would have regard to "all the circumstances".

13. In deciding whether to grant a standing order the Court would have regard to the "nature of the statutory power" in question. This is vital and in accord with common sense. The scheme of the statute, its general objectives, the criteria prescribed for decisions made under it, and the ambit and likely practical effect of the decision, should all be taken into consideration.

14. If a public interest application for review is successful the most appropriate relief will often be a declaration. But other relief, for example relief in the nature of an injunction, will occasionally seem appropriate to the Court. We have considered whether the range of remedies available under section 4 of the Judicature Amendment Act 1972 should be restricted in the case of public interest

applicants. It might be argued that an individual should not be able to obtain an injunction against a tribunal or other eligible respondent, with the possibility of enforcement by attachment, unless he is in some sense specially affected. But on balance we consider that any such restriction might lead to less than full justice being done in a few cases which are hard to foresee. Similarly, we see no reason to discriminate between "ordinary" applicants and "public interest" applicants so far as the right to seek an interim order preserving the status quo pending hearing is concerned.

D.L. Mathieson

E.A. Missen