PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

TWELFTH REPORT

PRESENTED TO THE MINISTER OF JUSTICE
IN SEPTEMBER 1978

WELLINGTON
NEW ZEALAND

TWELFTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

ANALYSIS

Appendices

Note:

See index to Ninth Report for the cumulative index to reports 1-9. Reports on Discipline Within the Legal Profession and Standing in Administrative Law have been published since the Ninth Report.

TWELFTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

INTRODUCTION

1. Our Ninth Report was presented in January 1977. Since then we have completed reports on Discipline within the Legal Profession (May 1977) and an Eleventh Report, on Standing in Administrative Law (February 1978). This is our Twelfth Report since the Committee was established in 1966. We have been impressed by the promptness which the Government and the Legislature has shown in carrying into effect our recommendations. Probably the most important legislation enacted on the recommendation of the Committee is the Judicature Amendment Act 1968 creating the Administrative Division of the Supreme Court, the Amendment Act of 1972 providing the new remedy, an application for review, and the Amendment Act of 1977 expanding and improving the scope of that remedy. Appendix I includes the statutes which have conferred appellate jurisdiction on the Administrative Division of the Supreme Court.

CONSTITUTION AND MEMBERSHIP

2. The present membership of the Committee is:

Professor J.F. Northey, Dean of the Faculty of Law at Auckland University, Chairman,

Professor K.J. Keith, Victoria University of Wellington,

Professor D.L. Mathieson, Victoria University of Wellington,

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

Mr E.A. Missen O.B.E., of Wellington, 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 W. Dewes, Legal Adviser, Department of Justice is the Committee's Secretary.

3. We record with regret the resignation from the Committee of Mr K.H. Digby, formerly Office Solicitor, Department of Health, whose wide knowledge of the public service and in particular of the numerous tribunals associated with the Department of Health was of substantial assistance to the Committee.

ACTION TAKEN ON RECOMMENDATIONS

4. In accordance with the view expressed in paragraph 67 of our Sixth Report the Local Government Amendment Act (No. 2) 1977 provides for appeals from the Local Government Commission being taken to the Administrative Division instead of to the Supreme Court in its ordinary jurisdiction. Also our recommendations in respect of air accident investigations have been substantially adopted in the Civil Aviation (Accident Investigations) Regulations 1978 (S.R. 1978/112).

5. Since our Ninth Report was made our recommendations in relation to discipline within the medical profession have been incorporated in the Medical Practitioners Amendment Act 1977.

6. The Judicature Amendment Act 1977 includes amendments giving effect to our recommendations concerning the Judicature Amendment Act 1972.

7. There is also draft legislation now before Parliament which will give effect to our recommendations concerning the Milk Act 1967 and appeals under the Noxious Weeds Act 1950.

RECOMMENDATIONS NOT YET ACTED UPON

8. We are not aware of any draft legislation giving effect to our recommendation that the jurisdiction of the following tribunals should be transferred to the Administrative Division viz:

Transport Licensing Appeal Authority (First Report para. 61)

Motor Spirits Licensing Appeal Authority (Second Report para. 29)

Air Services Licensing Appeal Authority (Second Report para. 40)

Harbour Ferry Service Appeals Authority (Sixth Report para. 63)

Representations are being made concerning the transfer of their jurisdictions to the Administrative Division.

9. Our Third Report recommended that appeals from the Land Settlement Board should go to the Administrative Division of the Supreme Court. We are not aware of any legislative proposal to give effect to that recommendation. Nor are we aware that any action has been taken in respect of our recommendations concerning rate postponement appeal procedures contained in our Seventh Report paras. 4 and 117-123 or marine farming licences and leases.

10. We understand that the Law Practitioners Act is being revised. No doubt those undertaking the review will consider the recommendations in our Tenth Report in relation to Discipline Within the Legal Profession. Legislation has not yet been introduced to give effect to our Report on Standing in Administrative Law made in February of this year.

APPLICATIONS FOR REVIEW

11. 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 Ninth 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

12. There have been 4 applications in respect of a decision taken by a Minister.

Arataki Honey Ltd v. Minister of Agriculture & Fisheries (Judgment 13 April 1978 M. 565/75 Wellington; Jeffries J.)

The applicants sought review of the Minister's decision made under the Apiaries Act 1969 s.30 declaring an area of 2,450 square kilometres a restricted area for the production of honey.

The applicant filed two motions seeking an order under R.161 of the Code of Civil Procedure requiring discovery by the defendant and interim orders pursuant to s.10 of the Judicature Amendment Act 1972 as amended by s.14 of the 1977 Act.

The order under R.161 was refused on the ground that the proceedings were an application for review which fell within the definition of civil proceedings in s.2(1) of the Crown Proceedings Act 1950. Therefore s.27 of the Crown Proceedings Act did not apply.

The application under s.10 for a conference of parties presided over by a Judge was granted, but no order under s.10(2)(i) for discovery was made. The question was to be decided by the presiding Judge when the conference was held.

Movick v. Attorney-General and Gill (Judgment 15 March 1978 A. 112/78 Wellington; Davison C.J.: Judgment 17 March 1978 C.A. 112/78, Court of Appeal)

The plaintiff entered New Zealand on a student permit granted under s.14 of the Immigration Act 1964. That permit expired at the end of 1977 and an application by the plaintiff to be permitted to remain in New Zealand was refused by the Minister.

A warrant was issued for the arrest and deportation of the plaintiff.

The plaintiff sought review of the Minister's decision and an interim stay of proceedings (treated as an application under s.8 of the Judicature Amendment Act 1972 as amended in 1977) pending determination of an appeal to the Education Advisory Committee, a body set up to advise the Minister of the education attainments of overseas students.

The plaintiff argued that while not under any obligation to grant a hearing to the plaintiff in the exercise of his discretion the Minister was nevertheless required to observe the principles of natural justice and to await the advice of the Education Advisory Committee before carrying out his decision.

The Chief Justice, following Pagliara v. Attorney-General [1974] 1 NZLR 86 and Tobias v. May [1976] 1 NZLR 509, held that the Minister's discretion under s.14(6) of the Immigration Act is unfettered and not reviewable by the Court.

An appeal was taken against the dismissal by the Chief Justice of the application under s.8 of the Judicature Amendment Act 1972 for an interim order staying the Minister's decision.

The Court dismissed the appeal on the ground that the appellant was not entitled to remain in New Zealand. The appellant's presence in New Zealand was not necessary for the Education Advisory Committee to dispose of the appellant's case.

Two members of the Court expressed reservations about the breadth of the Crown submission that the Minister's decision was unfettered and unreviewable.

Otto v. Auckland Grammar Schools Board and Gandar (Judgment 6 March 1978 A. 1598/77 Auckland; McMullin J.)

The applicant sought review of the decision of the Minister of Education made under the Education Act 1964 s.129(2). That provision allows the Minister to restrict the admission of pupils to a secondary or technical school where the accommodation available at that school is insufficient.

The Minister had sought to restrict the zone for Auckland Grammar School and expand those for other secondary schools whose rolls were declining.

The Court, interpreting the Minister's powers strictly, found that the reasons advanced were not contemplated by the statute

and therefore the Minister's decision was made without jurisdiction.

An order was made that the Minister's direction was ultra vires.

Southland Acclimatisation Society v. Anderson and Minister of Mines (Judgment 5 October 1977 M. 52/76 Invercargill; Quilliam J.)

The plaintiff sought review of a decision of the respondent Magistrate declining jurisdiction to hear several informations laid against the Minister of Mines and the Mines Department for alleged breaches of conditions applying to water rights. The question was whether s.34 (offences) of the Water and Soil Conservation Act 1967 applied to the Crown.

Though s.3 of the Act states that the Act shall bind the Crown, his Honour concluded that s.34 applied to "every person", and the word "person" as defined in the Acts Interpretation Act 1924, s.4, did not specifically refer to the Crown. As there was no clear indication that the Crown should be criminally bound, the Judge ruled that the informations could not be sustained.

(b) Decisions taken by Government officers

13. There were no applications under this heading.

(c) Decisions taken by local authorities

14. There were 8 applications in respect of decisions taken by local authorities.

Auckland Education Board v. Waitemata City (Judgment 21 April 1978 M. 978/76 Auckland; McMullin J.)

The Board had required the Waitemata City to make provision for an area of land to be set aside for a primary school. The Council initiated a zoning change but later upheld objections to it. The Board applied for a review of that decision. McMullin J. held that the Council could not uphold objections to a change in a scheme brought about by a Ministerial or

local body requirement. The decision of the Council was quashed and the scheme change restored thereby permitting appeals to the Town and Country Planning Appeal Board by objectors.

Avonside Properties Ltd v. Christchurch City Council (Judgment 29 November 1977 C.A. 99/77 Court of Appeal; Woodhouse, Richardson and Roper JJ.)

The Court of Appeal dismissed the appeal from a decision of Somers J. as to the meaning of s.5 of the Urban Renewal and Housing Improvement Act 1965. The effect of the dismissal was to confirm the validity of the notice given in respect of a multi-unit building in August 1974.

Hogan and Others v. Waimairi County and Avonhead Play Centre Inc (Judgment 23 March 1977 M. 446/76 Christchurch; Roper J.)

The plaintiffs claimed orders to prevent the second defendant erecting a play-centre on reserve land and to quash a building permit issued by the first defendant. The plaintiff resided nearby and alleged that the proposed centre would detract from the enjoyment of their properties and that it was not authorised under the district planning scheme. The particular reserve land was designated an existing "Public recreation area and open space" with a specific use of "recreation (play)": and an underlying zoning of Residential A. A play-centre was a conditional use in the residential zone. Roper J. ruled that a conditional use application was necessary, and meantime the building permit was declared invalid.

Johnston v. Manukau City Council (Judgment 25 May 1977 C.A. 57/73; Court of Appeal)

The appellants appealed against the refusal of Wilson J. to quash the decision of the Council which terminated the rate postponement eligibility of the appellants. (An account of the Supreme Court proceedings is in para. 18 of our Eighth Report.)

The Court of Appeal allowed the appeal by the appellant and quashed the decision of the Council which had cancelled the eligibility of the land for rate postponement. Quashing the

Council's decision was not seen as resulting in the original decision granting postponement becoming unassailable. It could be challenged as irregular by the Council itself.

South Canterbury Wholesale Groceries Ltd v. Temuka Borough (Judgment 10 March 1977 3/77 Timaru; Casey J.)

The applicant sought review of a decision of the Council refusing to issue a building permit to redevelop an existing grocery business into a larger shopping complex with carparks. The Council claimed that the proposed use was not a predominant use in the applicable "Service Zone" in the District Planning Scheme.

The scheme statement stated that the policy of the zone (adjoining the central commercial area) was: "To encourage vehicle oriented commercial activities to locate in these zones". The ordinances stated:

> Predominant uses shall be: (a) Car sales and car sales yards; (b) Motor repair garages; (c) Place of assembly; (d) Drive-in wholesale or retail outlets; (e) Parking lots; (f) Petrol service stations; (g) Taverns and hotels ...

The applicant claimed that the shopping complex was authorised as a drive-in wholesale or retail outlet. Casey J. ruled that the proposed use of this land for retail shops by the applicant conformed with the predominant use. The Council was obliged to reconsider its plans.

Stewart Investments Ltd v. Invercargill City Corporation (Judgment 19 May 1977 M. 82/76 Invercargill; Jeffries J.)

This was a sequel to the decision of the Court of Appeal between the same parties, reported in [1976] 2 NZLR 362. An application for a permit to rebuild was rejected by the Council as "substantial reconstruction", and outside the protection afforded to the holder of existing use rights under s.36(3)(a) of the Town and Country Planning Act 1953.

The applicant sought review of the Council decision claiming that restoration was "repairs and maintenance" and not substantial reconstruction. The Judge concluded that the work was legitimate "repairs and maintenance", and not substantial

reconstruction; thus the applicants were entitled to a building permit.

Northcote Borough v. Auckland Regional Authority and others (Judgment 22 August 1977 A. 886/77, 362/77 Auckland; Chilwell J.)

Two applications for review were made in respect of a determination by the Local Government Commission concerning the membership of the Auckland Regional Authority. The Authority had reviewed its membership under s.54 of the Local Government Act 1974, and affirmed the number of members at 34. Five local bodies objected to the distribution, and after hearing these objections the Commission acting under s.55 not only redistributed the membership, but created new districts and reduced the number of members to 29.

The applicants claimed that the Commission had acted in excess of its jurisdiction in attempting to impose an earlier abortive "Five City Scheme" of its own. The Court construed ss. 54 and 55 together, and decided that in determining the overall number of members the Auckland Regional Authority acted properly with reference to the guidelines of rateable value, respective areas and respective populations. The objections to be considered by the Commission under s.55(2) were only the objections upon which agreement could not be reached, and the function of the Commission was described as "revising and not appellate".

The Judge ruled that the Commission was not entitled to embark on a full scale review of membership. Moreover, it appeared that the Commission had failed to consider all the material placed before it. Although a finding on a further issue of breach of natural justice was not necessary, the Judge considered the Commission had failed also to give any party adequate time to consider the issue of numbers raised by its own motion, and "there was a striking element of unfairness".

The decision of the Commission was set aside as invalid despite a privative clause limiting review.

Young v. Bay of Islands County Council (Judgment 13 December 1977 A. No. 83/77 Whangarei; Barker J.)

Exercising the wider powers conferred by the 1977 Amendment to the Judicature Amendment Act 1972 Barker J. made an interim order prohibiting the Council from confirming or putting into operation a bylaw which would have closed certain streets from 23 December 1977 to 31 January 1978. The applicant who was a licensee and owner of a hotel claimed that he would lose business. The remedy was granted. The Court held that it was doubtful that there was authority for the bylaw and that a more appropriate procedure for the creation of a pedestrian mall existed.

(d) Decisions taken by statutory tribunals

15. There were 8 applications in respect of decisions taken by statutory tribunals.

Bay of Islands Timber Co Ltd v. Transport Licensing Appeal Authority and Attorney-General (Judgment 4 April 1977 A. 1969/75; Barker J.)

Application was made by the plaintiff to review a decision of the Transport Licensing Appeal Authority. The Appeal Authority referred an application for exemption from transport regulations (S.R. 1971/87) establishing rail preference over road transport back to the Licensing Authority for reconsideration. Before doing so the Appeal Authority had not invited submissions on the proposal.

Barker J. found that the Appeal Authority had failed to act fairly or in accordance with natural justice in not inviting submissions on his intention to refer the application back to the Licensing Authority. The Court held that to be an error going to jurisdiction and, invoking s.4(5) of the Judicature Amendment Act 1972, referred the appeal back to the Transport Licensing Appeal Authority for reconsideration.

Bourke v. State Services Commission (Judgment 19 December 1977 S.28/76 Wellington; Jeffries J.)

The applicant sought review of a decision made by the respondent pursuant to its discretionary powers under the

State Services Act 1962 s.58. The applicant alleged that the respondents must exercise those powers in accordance with the principles of natural justice and that it had failed to do so. The applicant had denied charges made against him. Despite this and without a hearing the Commission found the charges proved. Jeffries J. held that the provisions of s.58 were clear and that the need to comply with the principles of natural justice should not be engrafted upon them. The application was dismissed.

Farmers Trading Co Ltd v. Industrial Commission (Judgment 2 March 1978 A. 644/77 Wellington; Davison C.J.)

An application for review was made in respect of an award made by the Industrial Commission. It was argued that the award was made without jurisdiction because the parties had not been given an opportunity to be heard, in terms of the Industrial Relations Act 1973, s.85, before making the award. This argument succeeded and the part of the award in question was severed and the matter was referred to the Commission for reconsideration in terms of the Judicature Amendment Act 1972, s.4(5) and (5A).

Layton Wines Ltd v. Wellington South Licensing Trust [1977] 1 NZLR 570

The applicant challenged two decisions of the Wellington South Licensing Trust on the ground that the Trust was unable to exercise its statutory function by reason of its pecuniary interest in the matter.

Wild C.J. found that although the Trust was a body created under statute to take decisions in which it might have a financial interest it could nonetheless become disqualified by bias.

The Chief Justice held that there was a real likelihood that the Trust was biased in making its decision and set the decision aside.

Wild C.J. also held that the Trust had made an error of law in its interpretation of s.34 of the Licensing Trusts Act 1969.

Lowe v. Local Goverment Commission (Judgment 1 August 1977 M. 29/76 Napier; Mahon J.)

The Committee appointed by the Local Government Commission to hear objections to its provisional scheme required the objectors to summarise or abridge their submissions. Cross-examination was not permitted. The objectors sought review of the Commission's subsequent approval of the provisional scheme arguing that in fact there had not been a "hearing" within the meaning of the Act.

Mahon J. held that the Commission, though not obliged to comply with natural justice, had a duty to permit each objector to give his full reasons orally in support of his objection. As this duty was not discharged, there had not been a valid formulation of approval of the final scheme. The Commission's decision was accordingly quashed.

Rotorua Aero Club Inc v. Air Services Licensing Authority and Another (Judgment June 1977 M. No. 16/77 Rotorua; Barker J.)

The Secretary of the Licensing Authority sent a letter to the second respondent offering an interpretation of the Air Transport Services Standard Terms and Conditions Order 1978.

Barker J. held that the "mere expression of opinion by the Secretary" did not fall within the definition of "decision" in the Judicature Amendment Act 1972. He therefore declined jurisdiction.

Oppenheimer v. Medical Council of New Zealand (Judgment 3 November 1977 M. 370/77 Administrative Division, Wellington; Wild C.J.)

The applicant sought to have a suspension imposed by the Medical Council revoked. Wild C.J. confining himself to the grounds included in the application found that the Medical Council had acted properly and that its decision should not be revoked.

Pratt v. Wanganui Education Board and Others [1977] 1 NZLR 476

The applicant sought an order quashing the decision of the Board to suspend and dismiss him and the decision of the Teachers Court of Appeal dismissing his appeal.

Somers J. found that although a right of appeal is granted by s.157(3) of the Education Act 1964 the peremptory power of dismissal conferred by s.157(1) of that Act should not be exercised by the Board without a hearing.

The decision of the Board was quashed.

(e) Decisions taken by Courts

16. There were 7 applications in respect of decisions taken by a Court.

Allied Distributors Ltd and Others v. Attorney-General (Judgment 5 November 1976 unreported A. 105/76 Wellington; Ongley J.)

The applicant sought review of the decision of a Deputy Registrar to issue a summons made pursuant to the Summary Proceedings Act 1957 s.19(1)(a). The information on which the summonses were issued had been sworn two years before the issue of the summonses. Ongley J. found that the abnormally long delay between the laying of the information and filing in the Magistrate's Court was deliberate and inexcusable. Accordingly he held that the Deputy Registrar had been unreasonable in the exercise of his discretion to issue a summons and a declaration was issued to that effect.

Daemar v. Gilliand (Judgment 4 November 1977 A.677/77 Auckland; McMullin J.)

The proceedings included applications for review and appeals from decisions of the Magistrate's Court. McMullin J. observed that the refusal by a Magistrate to commit an accused to trial cannot be the subject of an application for review because it does not finally determine the rights and obligations of the parties within the meaning of the Judicature Amendment Act 1972. Also the 1972 Act does not provide a remedy which did not previously exist and the applicant failed because he could not cite any cases where refusal to commit for trial had been successfully challenged before the 1972 Act was passed.

He held that where there is want or excess of jurisdiction

certiorari can be granted in respect of proceedings under the Summary Proceedings Act 1957. The decision of the Magistrate to amend the information being made without jurisdiction was a nullity and the Magistrate's order quashed.

The entry of a stay of proceedings by the Attorney-General is not a statutory power reviewable by application for review.

The power to issue a summons or warrant conferred by the Summary Proceedings Act 1957 is discretionary. Mandamus will not lie to compel the issue of the summons or warrant although it will lie to compel the observance of the duty to act judicially in relation to the decision.

It will be noted that the amendment made in 1977 to the definition of "statutory power of decision" enables the Supreme Court to grant an application for review even though the decision does not determine the rights of the parties.

Daemar v. Hall (Judgment 13 February 1978 A. 1187/77 Auckland; McMullin J.)

The applicant sought review of the decision of a Visiting Justice's refusal to hear the evidence of witnesses the applicant wished to call.

The Crown, using a court martial analogy, argued that the decision of a Visiting Justice was not reviewable under the Judicature Amendment Act 1972.

McMullin J. rejected this argument and held that the decision of the Visiting Justice was reviewable. Exercising his discretion under s.4(1) of the Judicature Amendment Act 1972, the Judge quashed the Visiting Justice's decision.

Neither counsel nor the Court appears to have been aware of the decision of Somers J. in Reithmuller v. Crutchley (Judgment 9 December 1975 M. 522/74 Christchurch) discussed on p.9 of our Ninth Report, where a decision of a Visiting Justice was reviewed.

New Zealand Milk Board v. Monaghan and Another [1977] 2 NZLR 31

The applicant sought review of a Magistrate's decision wherein he had ordered that a decision of the Milk Board's Vendor Review Committee revoking an approval of the second respondent as a milk vendor be stayed.

In making his decision at the hearing the Magistrate altered an application to abridge the time for service. The requirements of notice for service were abridged under s.147(1)(c) of the Magistrates Courts Rules 1948. The applicant argued that failure to comply with s.143(1)(c) by serving short notice could not be validated by an order under s.147(1)(c) of the Rules.

Ongley J. held that the requirements of s.143(1)(c) are imperative and when a notice is short served the application must be dismissed. He went on to hold that sufficiency of notice is a matter which goes to jurisdiction and ordered that the Magistrate's decision be set aside.

O'Malley v. Cooper and Paterson (Judgment 29 November 1977 M. 542/77 Christchurch; Somers J.)

The applicant sought to review the decision of the Registrar setting a date for the hearing of an adoption application and an order restraining the Magistrate from proceeding. The applicant had signed a form of consent to adoption of her child and the intending adopting parents had filed an application for an adoption order. She had then indicated that she wished to withdraw her consent. The Magistrate had ruled that the withdrawal did not, in terms of the Adoption Act 1955, s.9, prevent the applicants for adoption from proceeding with their application. The Court adjourned the application and made no order in relation to it.

R. v. Dakers (Judgment 22 February 1978 T. 8/78 Dunedin; Chilwell J.)

An application was made to review a decision of Justices of the Peace who had committed the applicant for trial. The Court decided it had jurisdiction under s.4 of the Judicature Amendment Act 1972, but it was doubtful that the Magistrate's

acceptance of accused's election of trial by jury was a "statutory power of decision". No order was made. The Judge also refused to make an order under s.5 validating what had occurred in the lower court.

Re Price (Judgment 8 June 1977 A. 324/77 Wellington; Richardson J.)

The applicant secured an order under the Judicature Amendment Act 1972 s.4, that the decision of the Magistrate's Court at Nelson in respect of a house formerly occupied by the applicant was made without jurisdiction. The Supreme Court had made an order in respect of the property when the decree absolute was made granting possession to the wife. Nearly twenty years later the husband regained possession while the wife was away, but on a summons issued by the wife an order for possession against the applicant was made. This order was the subject of the application and was held to have been made without jurisdiction as the Magistrate's Court had no direct power to enforce the consent order in the decree absolute (s.68(4), Magistrates' Courts Act 1947).

17. Of the 27 cases discussed above 17 were granted, 8 were dismissed, and in two cases no order was made.

DRAFT LEGISLATION

18. One of the functions of the Committee is at the request of the Minister of Justice to advise him on the terms of draft legislation:

(a) creating an administrative tribunal;

(b) determining the procedure to be followed before decisions are made by such a tribunal;

(c) establishing a right of appeal from those decisions; and

(d) affecting the right to have those decisions reviewed.

This advisory function can best be discharged if we are given ample time to consider and comment on the legislation. Consultation before the legislation is introduced would provide such an opportunity, but it has not always been found possible to arrange this. We are investigating whether it is possible to introduce changes in procedure whereby the Committee can carry out its functions more effectively.

PART VI OF THE REVISED CODE OF CIVIL PROCEDURE

19. Our discussions with the Supreme Court Procedure Revision Committee were referred to in paragraphs 17 to 19 of our Ninth Report. Our Report revealed a division of opinion between the two committees on the question whether deficiencies in the Judicature Amendment Act 1972 should be remedied by a further amendment of that Act, so far as they were procedural in character, or by inclusion in the revised Code of Civil Procedure.

20. On 18 March 1977, in an effort to reach common ground, two of our members met Mr Justice Wilson (as he then was) and Mr Ennor of the Supreme Court Procedure Revision Committee. The result of that meeting was that the latter Committee agreed that Part VI of the Revised Code should expressly not apply to applications for review under the Judicature Amendment Act 1972. It should apply only to the dwindling category of applications for one of the extraordinary remedies - which both Committees are in agreement should eventually fall into total disuse. Part VI will be needed in relation to any matter which falls outside the Judicature Amendment Act 1972.

21. One of our members undertook to prepare a draft of the five revised rules empowering the Supreme Court to grant the five extraordinary remedies, and setting out the grounds thereof. This draft, after being amended by the Committee, was sent to the Procedure Revision Committee which has adopted it in lieu of the wording it had earlier proposed.

22. It is anomalous that the grounds for the award of certiorari should appear in a code of civil procedure,

especially when elsewhere in this report (see paras. 30 to 51) we give our reasons for not recommending the codification of the grounds for judicial review of administrative action. We will keep under consideration the question whether, when once the simplified remedy introduced in 1972 and the procedure to obtain it (after alteration by the Judicature Amendment Act 1977) have become sufficiently familiar to the profession, the time will have come to abolish the extraordinary remedies altogether in relation to decisions reviewable by the new remedy. This would remove what is at present an unnecessary complexity, but it would be necessary to be sure that no remedy which can presently be obtained would thereby be taken away.

COMMISSIONS OF INQUIRY ACT 1908

23. The Minister asked us to carry out a review of the Commissions of Inquiry Act 1908, which has not been the subject of a major review since it was enacted. Commissions of inquiry are now part of the "regular machinery of government". It is therefore important that they have adequate powers to perform the tasks entrusted to them and that, at the same time, the citizen is properly protected from the misuse of those powers.

24. We have now completed a comprehensive working paper relating to the Act. In the paper we examine the functions of commissions of inquiry in modern society and the various classifications of public inquiries which have been put forward. We have found the working paper of the Law Reform Commission of Canada (Working Paper 17) relating to commissions of inquiry of invaluable assistance. Nevertheless, we have not adopted the basic recommendation of that Commission to the effect that commissions of inquiry be divided into two categories, namely inquiries to advise and inquiries to investigate, and that their powers be determined accordingly. We prefer a more uniform yet more flexible approach. We consider that a better result can be achieved by providing adequate powers for all commissions of inquiry while ensuring that the appropriate safeguards also apply to all inquiries. We believe such a system will more effectively protect the individual.

25. Our working paper is being distributed to interested persons, tribunals, statutory bodies and various government departments for comment. When we have their replies we can reach final conclusions and make our recommendations.

THE CROWN AND LOCAL BODY BYLAWS

26. The Annual Report of the Ombudsmen for the year ended 31 March 1977 referred to a fatal accident to a pedestrian which occurred during the course of the construction of a Government building in Auckland city. The Ombudsman stated that the accident "brought into focus the relationship between the Crown and the Local Body ..." He observed that: "It is the law that property of the Crown cannot be affected by any bylaws under the Municipal Corporations Act insofar as the interest of the Crown in the property is concerned". The Ombudsman commented "this is unsatisfactory" and he concluded: "I think that all safety bylaws, insofar at least as the Government buildings encroach on any public place, should be made binding on the Crown, as well as their contractors, so that a proper control should be exercised in respect of such structures".

27. Enquiries made so far indicate a considerable number of instances in which local bodies have been frustrated in attempts to secure compliance with building bylaws, health bylaws, drainage bylaws, and fire and other safety bylaws on lands sometimes owned by the Crown and sometimes owned by a Hospital Board or Education Board, which claim immunity as "agencies" of the Crown.

28. There appears to be a resistance on the part of officials of Hospital Boards and Education Boards in particular, and of some Government Departments, to submit to standards of construction and the application of safety bylaws and Health bylaws laid down by the local bodies within whose jurisdiction construction work is taking place.

29. We are examining this question with a view to suggesting possible amendments to the law, or revision of administrative procedures, whereby the desirable objective, indicated by the

Ombudsman, may be attained, at least in respect of bylaws and regulations affecting "safety" and "health", though it is not yet possible to determine the ambit of those expressions.

CODIFICATION OF THE GROUNDS FOR JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

30. We have been considering over the past year the question whether the grounds for the judicial control of administrative action should be codified in a statute. Such legislation has been enacted in several common law jurisdictions in recent years.[1] Should New Zealand take that action? Should legislation of general application but relating to only some of the grounds for review be enacted.[2] Or should the general development of the law be left to the Courts with only that assistance already accorded in the remedial area by the Declaratory Judgments Act 1908 and by the Judicature Amendment Acts of 1972 and 1977? A fourth possibility is to make changes in the powers of the courts in relation to particular administrative powers by amending the specific statute, for instance its provisions conferring the power and allowing or restricting rights of appeal or review. This final course is the one which has been established and followed in the past ten years.[3]

1. The principal example is the Administrative Decisions (Judicial Review) Act 1977 of the federal Australian Parliament. The Act has not yet come into operation; in particular, regulations which in terms of s.19 may exclude the application of the Act to certain decisions have not yet been formulated. The other major statute is the federal United States Administrative Procedure Act 1946 (now 5 U.S.C. section 706). See also the Revised United States Model State Procedure Act (1961) prepared by the National Conference of Commoners on Uniform State Laws and article 173 of the Treaty of Rome which sets out the grounds for review of the acts of the institutions of the European Community.

2. Canada provides three instances: (1) the Federal Court Act 1970 (Can), s.28, sets out three grounds for the review by the Court of Appeal of certain decisions; (2) the Judicial Review Procedure Act 1971 (Ont) provides that lack of evidence is a ground for review; and (3) the Judicial Review Procedure Act 1976 (B.C.) extends the power to set aside decisions for patent error of law to all statutory powers of decision to the extent that review is not limited or precluded by the relevant statute.

3. See especially the statutes (listed in Appendix 1) conferring jurisdiction on the Administrative Division of the Supreme Court.

31. Legislation of the general kind mentioned in the last paragraph might be justified

> first, because it would clarify the law and thereby make it more accessible to members of the public and their legal advisers; or
>
> second because it would change the balance of the law in some appropriate way, for instance by increasing (or decreasing) the extent of judicial review.

These two justifications are considered in turn with some reference to the terms of the legislation enacted elsewhere.

The clarification of the law?

32. The scope of the legislation? To what powers and decisions is the legislation to apply? The draftsman faces a dilemma. If the legislation is to cover all or a very wide range of governmental actions it will presumably apply equally to all of them. If it does, then unless it is formulated in general terms, it will bring about significant changes in the law. In particular, it would, for instance, remove the differences in the extent of the review of local government and central government decisions. It would deny the immense diversity of administrative power and the corresponding variation in judicial control. This point is further considered in para. 37. If the legislation is formulated in general terms, a different set of problems, indicated in para. 36, will arise.

33. If, by contrast, the legislation is to apply only to selected areas of administrative powers, other problems will arise. First, there will be the difficulties of definition and of the interpretation and application of those definitions. So the Canadian Federal courts have had very considerable difficulty with the exclusion of "decisions or orders of an administrative nature not required by law to be made on a judicial or quasi-judicial basis": see Howarth v. National Parole Board (1974) 50 DLR (3d) 349; [1976] 1 SCR

453; Martineau and Butters v. Mastsqui Institution Inmate Disciplinary Board (1977) 74 DLR (3d) 1 (S.C.C.). The Victorian Courts have faced similar problems in determining what decisions are "administrative" for the purposes of that State's Ombudsman Act: e.g. Glenister v. Dillon [1976] VR 550 (F.C.). Secondly, the uncertain or unsatisfactory state of the law will remain so far as the areas of power excluded from the Act are concerned. Thirdly, in that area, however, the law developed under the Act might have some effect: it would, for example, be a strange result if the law relating to a direct attack on the validity of an administrative act (the law stated in the new statute) were different from the law relating to a collateral attack on the same act (assuming, as is the case under the Australian Administrative Decisions (Judicial Review) Act 1977, it still is to be subject to the non-statutory law). The general point is that the determination of the scope of the legislation is likely to create new problems and to make the law more complex. Moreover, the problems are likely to be technical ones having no relation to the substantive issue of how extensive review is to be: consider the Canadian cases and Thames Jockey Club Inc v. New Zealand Racing Authority [1974] 2 NZLR 609, [1975] 2 NZLR 768 (note) (C.A.).

34. The clarity of the present law? In the course of the past 10 to 15 years the Courts have, in our view, taken major steps towards clarifying the law. In a series of leading decisions (especially Ridge v. Baldwin [1964] AC 40, Conway v. Rimmer [1968] AC 910; Padfield v. Minister of Agriculture, Fisheries and Food [1968] AC 997, and Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147) they have emphasised and made more explicit the principles underlying their powers of review. The law has a greater strength and coherence than it did 20 years ago. These points could obviously be made at great length. At this stage we do no more than quote the view of two senior Judges, both very experienced in this area. In 1971, Lord Diplock concluded a lecture on "Judicial Control of the Administrative Process" in the following way:

> "Given the procedural tools I would let the development of the substantive law rest in the hands

> of the High Court and the appellate courts as at present. My own belief is that they are developing it upon the right lines and should be allowed to continue."
> ("Judicial Control of the Administrative Process" [1971] C.L.P. 1, 17.)

In 1975 Cooke J. concluded his address to the New Zealand Legal Conference in this way:

> "I think we may be said to have reached a stage when, in general, the procedural machinery and principles of substantive law available to the Courts are reasonably adequate to enable justice to be done in administrative law."

35. The clarity of a codification? Far from clarifying the law, legislation might have the opposite effect. First, while the statute would probably in large part restate the law, in some degree it would not. But it will probably not be clear of every provision whether it merely restates the law or effects some change in it. Do the Australian provisions for the striking down of decisions for unreasonableness change the law or not? The Explanatory Memorandum to the bill which became the Administrative Decisions (Judicial Review) Act says no, and yet the Australian Courts have not claimed such a power over central government decisions: e.g. Jones v. Metropolitan Meat Industry Board (1925) 37 CLR 252. Secondly, the particular drafting might introduce linguistic arguments not available (or not so readily available) under the present law: for instance, what is the difference between a "consideration" and a "purpose" in the context of the improper use of the power? And why, on the one hand, should there be an express reference both to taking an irrelevant consideration into account and to exercising powers for an improper purpose, but, why on the other hand, should the statute expressly include a failure to take into account a relevant consideration but not refer to the failure to consider a relevant purpose (see s.5(2)(a), (b) and (c) of the Australian Act)?

36. Clarity and predictability" Clarity of expression of the grounds for judicial control will not necessarily bring greater predictability of result. On the contrary, a short, easily understood text applicable to a range of greatly different

situations will not always produce easy answers in particular cases. (Even if it could we indicate in the next paragraph why we do not think it should.) This point can be illustrated by decisions interpreting broad legislative and constitutional texts. Such decisions include Kanda v. Government of Malaysia [1962] AC 322 (J.C.), Munusamy v. Public Service Commission [1967] 1 AC 348 (J.C.), R. v. Randolph [1966] SCR 266, In re the Royal Commission on the State Services [1962] NZLR 96 (C.A.), Londoner v. Denver (1970) 210 U.S. 373, Bi-metallic Co v. Colorado (1915) 239 U.S. 441. In none of these cases did the general legislative language (requiring, for example, "due process of law") really assist the court. The point can also be made by reference to provisions of the Australian Act: one ground for review is "breach of the rules of natural justice ... in connection with the making of the decision" (s.5(1)(a); see also s.6(1)(a)). The reviewing court will still be faced with the often difficult questions whether natural justice is applicable to the particular power and, if it is, what natural justice requires in the circumstances. The legislation does not in any way help to provide answers to those questions. Nor does it provide any assistance to a court determining the considerations that are relevant to the exercise of any particular statutory power in the context of an argument that "an irrelevant consideration" has been taken into account (ss. 5(2)(b) and 6(2)(b)). The point is that in these two areas - natural justice and abuse of discretion by reference to relevance - the legislation states powers which are unquestioned. It is the relevance and application of those powers in particular contexts which causes the courts the difficulties. (Some other provisions of the Australian Act may confer more extensive powers on the court. We consider possible changes later.)

37. We must hasten to add that we do not see the uncertainty of which we have just spoken - essentially the same uncertainty as is to be found in the present law - as necessarily undesirable. On the contrary it provides in many cases for an appropriate recognition of the fact that those principles of judicial review which are to apply over a very broad range of administrative powers and situations cannot take precise and

easily applicable form. If the principles did take that form, they would take insufficient account of such matters as the following:

(a) different deciders: the Governor-General in Council, Ministers, officials of central government, statutory boards, local government councils and officials, administrative tribunals ...;

(b) different impact of the powers: investigative, initiating, reporting, recommendatory, or definitive (either final or subject to appeal); applicable to one or two individuals or to a much larger group;

(c) different interests subject to the power: personal liberty, reputation, property, trade, profession, interest created by statute ...;

(d) different formulations of the power: subjective or objective; bare or limited by purpose or by relevant considerations;

(e) different safeguards on the exercise of the power: explicit procedural safeguards, rights of appeal, rights of review ...;

(f) different contexts in which the power is exercised: emergency, routine ...

We do not, of course, attempt in this report to spell out the law of judicial control. We would, however, stress that the courts' task involves a careful consideration of the precise features of the statutory power in issue with reference to the general principles of review.

38. To summarise, we are not persuaded that legislation of the kind considered will provide a valuable or acceptable clarification of the law. Even if it does effect a partial clarification, it will not really assist the courts in the difficult cases they face unless it involves an unacceptable uniformity of review.

Changes in the law?

39. Recent discussions and legislation involve changes in the grounds of review in three main areas:

(a) review for all errors of law (whether the error is patent or not and whether the body in question is obliged to act judicially or not) (see e.g. s.5(1)(f) and (j) of the Australian Act);

(b) review for no evidence or other material to justify the making of the decisions (s.5(1)(h) and (3) of the Australian Act);

(c) review for unreasonable exercise of power (s.5(2)(g) of the Australian Act).

After considering these possible changes in the law of review, we discuss the question whether the person aggrieved by an administrative act should be entitled to a statement of the reasons for the decision (see ss. 13 and 14 of the Australian Act).

40. Error of law. The courts, in recent years, have taken broader powers to strike down administrative acts for error of law; see especially the Padfield and Anisminic cases (para. 33 above). The Declaratory Judgments Act 1908 also confers very extensive powers on the Supreme Court to interpret legislation and to determine the validity of many administrative acts (see especially ss. 3, 4, 10 and 11). Several statutes give parties in the proceedings before administrative tribunals the right to appeal on questions of law. There are probably few situations in which errors of law relating to administrative actions cannot be remedied. If there are any, it is likely to be because the particular legislation is seen, especially through the inclusion of a privative clause, as conferring an area of power in which the review of some errors of law is excluded.

41. No evidence. The courts are moving towards some review of factual findings. A lack of evidence may found an argument that there is either lack of jurisdiction or an error of law: eg

Ashbridge Investments Ltd v. Minister of Housing and Local Government [1965] 1 WLR 1320 (C.A.). Any such development as that suggested by the Australian provisions would probably be dependent on the keeping of a record by the decision maker in question.

42. Unreasonableness. The New Zealand courts have made it clear that while they can review the actions of local authorities on the ground of unreasonableness, they will not review the actions of central government - at least if they take the form of regulations - on that ground (see e.g. Carroll v. Attorney-General [1933] NZLR 1461, 1478, a passage repeatedly affirmed in later decisions of the Court of Appeal and Supreme Court, e.g. Martin v. Attorney-General [1970] NZLR 158, 159-60). It may well be that with the broadening of the grounds of review this proposition might be questioned in the Courts, at least for some central government decisions. There is one case where the Courts have applied the Wednesbury dictum (see e.g. Allied Distributors Ltd v. Attorney-General, Ongley J. Wellington, 5 November 1976, noted [1977] Recent Law 2). We do not, however, think that we should propose such a change, probably of far reaching consequences for the relationship between the Courts and the executive, in a statute of general application. F.E. Jackson & Co Ltd v. Collector of Customs [1939] NZLR 682 presumably contrasts bylaws and regulations rather than acts of administration generally. The present state of the law is based on the strong argument that while the courts should be able to review relevant questions of law they should not, as a general rule, review the merits or substance in policy of an administrative decision. If such a power is to be conferred by legislation, it would be conferred by a particular statute concerning a specific area of administration (e.g. the right of appeal from Ministerial deportation orders proposed in the Immigration Amendment Act 1978).

43. It is our view that the question whether the courts should have such powers as those set out in paras. 40-42 is best answered in the context of a careful consideration of the particular legislation. The power of review and its extent are especially dependent on:

(i) the drafting of the provision conferring the administrative discretion;
(ii) the extent of any provision allowing appeals; and
(iii) the extent of any privative clause.

The practice of the Committee over the past ten years has been to consider those questions (especially the second) in relation to a particular jurisdiction and to general principles which it has developed. We propose to continue this particularistic approach. It is an approach, moreover, which tends to maintain - properly as we see it - the differences between the powers of the courts in their appellate jurisdiction conferred by particular statutes and in their review jurisdiction based, in essence, on the general principles of the common law.

44. Our proposed course of action will also allow us to observe the Australian Act in operation. We shall be able to learn from that experience.

A right to reasons?

45. In considering the Administrative Decisions (Judicial Review) Act 1977 enacted in Australia, we have also asked ourselves whether a right to reasons for administrative decisions should be established. The Australian Act makes a major change in the law by enabling a person who is entitled to challenge a decision under it to request "a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision" (s.13(1)). The Attorney-General has a conclusive power to prevent disclosure by certifying that for one of three reasons the disclosure would be contrary to the public interest (s.14).

46. In our Sixth Report (1973) we proposed that

> As a general rule tribunals should, if requested, be obliged to give reasons for decisions adverse to the claims of a party (para. 36).

Paragraph 42 set out the reasons for our recommendation:

> The common law does not require tribunals to give reasons for their decisions (although a failure to provide reasons will not necessarily protect the decisions from review). The legislature has however imposed the obligation in some cases and a majority of tribunals do in fact give reasons. The Committee considers this to be highly desirable: the tribunal proceedings will be fairer to those concerned; the decision is apt to be better if the reasons for it have been set out in writing; a better assessment can be made of the possibility of an appeal; and the giving of reasons may provide a basis for review of a decision which is erroneous in law. On the other hand the Committee realises that this obligation could be burdensome if imposed in respect of all decisions. It accordingly considers that the general rule should be that reasons should be given if a party so requests.

The effect of the Australian provision is to make the general rule suggested in our Report mandatory.

47. Several statutes setting up tribunals enacted since 1973 have included provisions requiring the giving of reasons: e.g. Inland Revenue Department Act 1974, s.42(2), Local Government Act 1974, s.21(6), Tobacco Growing Industry Act 1974, ss. 32(8), 33(4), 34(5) and 35(5), Fire Services Act 1975, s.70(2), Motor Vehicle Dealers Act 1975, s.99(7), Broadcasting Act 1976, s.79, Cinematograph Films Act 1976, s.4(8)(i), Commerce Act 1975, ss. 95 and 99(4), Optometrists and Dispensing Opticians Act 1976, s.34(13), and Plumbers, Gasfitters and Drainlayers Act 1976, ss. 30(3) and 43(14), Town and Country Planning Act 1977 s.67(2). [This is certainly not a complete list.] A significant number also empower tribunals whose decisions are subject to appeal to provide a report on their reasons and other relevant material; the appeal tribunal can in those cases order such a report. The Supreme Court (Administrative Division) Rules 1969, rule 37, contains general provisions to that effect.

48. The proposal made by the Committee in 1973 and (for the most part) the developments just reviewed extend only to administrative tribunals. They do not relate to statutory powers exercised by other public bodies, for instance those of Ministers, public servants and local authority officials. Such officials are not in general obliged to give reasons, although the House of Lords has indicated that a failure to give reasons

will not necessarily protect the decision from judicial review (Padfield v. Minister of Agriculture and Fisheries [1968] AC 997, 1032-33, 1049, 1053-54, 1061-62; see also 1007). As indicated above the Australian Act does extend to such administrative decisions.

49. Should such a provision be enacted in New Zealand? The question needs to be considered in the context of several recent changes in the law. First has been the development of the powers of the court to require the disclosure of government information, especially since Corbett v. Social Security Commission [1962] NZLR 878. That law has increasingly enabled plaintiffs to obtain government information relevant to decisions affecting them. This access is, however, in general, available only after proceedings have been launched. (The House of Lords has recently recognised that in limited circumstances equity does allow an action purely in discovery: Norwich Pharmacal Co v. Customs and Excise [1974] AC 1331.) The Australian provision is not dependent on litigation. That limit is not to be found in the second area: the powers of the Ombudsmen. The procedures established under the Ombudsmen Act 1975 open up governmental administration. The Ombudsmen are very much involved in explaining decisions. Further, one of the grounds on which they may recommend that action be taken in relation to a decision made in the exercise of any discretionary power is that reasons should have been given for the decisions (Ombudsmen Act 1975, s.22(2); see also s.22(3)(f)). Thirdly, several changes have been made in particular areas of the law to provide for the disclosure of information and of management intentions in some areas of administration: e.g. Forests Act 1949, ss. 63C and 63E(5) (as enacted in 1976), Reserves Act 1977, ss. 24(2), 41, 54(2), and 120. There have also been changes in administrative practices in the direction of greater openness.

50. We think that again we should take the opportunity to observe the effect of these changes and of the change made in Australia. Two other factors suggest that we should not propose any general change at this time. The first is that we have yet to take up our examination of the exercise of governmental discretion. That examination will illuminate the

question whether there should be a general obligation to provide reasons. It might be, for instance, that the obligation should exist in some cases but not in others. The second is that the government has established a committee to consider the revision of the Official Secrets Act and the broader question of freedom of information.

51. While we are not proposing general legislation in this area at the moment we would stress that we consider that in the normal course those affected by administrative decisions are entitled to an explanation for the broad reasons indicated in para. 46 above. Recent developments head strongly in that direction. The main issues are of timing and presentation and not of substance.

DELEGATION OF DISCRETIONARY POWERS

52. In November 1977 the Minister of Justice referred to us for our examination the clause in the Land Amendment Bill which enables wide discretionary powers to be delegated. Unfortunately the Committee could not meet in time to permit it to respond before the Bill was enacted. The power to delegate which led the Minister to refer the clause to us has appeared in a similar form in much recent legislation. It is a subject which falls within the area of statutory discretions which we are now examining. We are seeking a statement from several Government Departments and statutory bodies as to their practice in relation to delegation. We shall soon turn our attention to the information provided.

LIABILITY OF ADMINISTRATIVE AUTHORITIES

53. This very difficult problem, which might just as conveniently be entitled "Damages in Administrative Law", has exercised the minds of members of the Committee for some time: see paras. 100-103 of our Eighth Report and paras. 97-99 of our Ninth Report. We have decided to pursue our investigation of the problem, even although the litigation in the Takaro Properties case has not yet reached finality. A Working Paper is being issued by the Committee, which is not at present

committed to the view that reform, or any particular reform, is necessary. After comments on the Working Paper have been received, we will make our recommendations as to how the public interest and private rights should be balanced in this area. Those recommendations will appear in our next annual report unless the Committee (which is anxious to receive all the help it can from lawyers experienced in the area of administrative law) concludes that it would be more appropriate to issue a special report devoted to this topic alone.

ROYAL COMMISSION ON THE COURTS

54. We forwarded a written submission to the Royal Commission on the Courts. It stressed three points. First, it suggested that the jurisdiction of the Administrative Division should be enlarged to have all applications for a prerogative writ, declaratory judgment, or injunction against a public authority involving a question in administrative law automatically referred to the Division. This would be consistent with our original objective of obtaining the maximum advantage from specialisation in the Administrative Division. It is also in line with submissions made to the Commission by the Justice Department and the New Zealand Law Society.

55. Secondly, we submitted that judicial appointments to the Division should be made by the Governor-General as originally recommended by us. At present s.25(2) of the Judicature Act 1908 authorises the Chief Justice to assign Judges to the Administrative Division. If our original recommendation were accepted, Judges could be recruited direct from the bar and the specialised character of the Division further facilitated.

56. Finally, we recommended that s.25(2) of the Judicature Act 1908 (as substituted by s.2 of the Judicature Amendment Act 1968), limiting the number of Judges who may be appointed to the Division, should be reviewed. It seemed to us that in the event of the workload of the Division increasing, the Governor-General should be able to appoint such number of Judges as may from time to time be required to cope with that workload without losing the advantage accruing from specialisation. At the time this report was being prepared the report of the Royal Commission had not been published.

REGULATION-MAKING POWERS AND PROCEDURES

57. Section 8 of the Regulations Act 1936 requires that all regulations be laid before Parliament within 28 days after their making if Parliament is then in session, and, if not, within 28 days after the commencement of the next ensuing session. In practice, this is the responsibility in each case of the Department administering the regulations.

58. In paragraph 33(9) of our Seventh Report we said that we were aware that through oversight some regulations either have not been tabled at all or have not been tabled within the prescribed time. This defeats the purpose of the legislation, namely to bring all regulations to the attention of Parliament. Moreover, if there is a failure to lay regulations that require confirmation, Parliament may also fail to confirm them; and in such cases validating legislation is necessary. We recommended that some central agency of the Executive should be charged with the responsibility of ensuring compliance with the Act.

59. We have since corresponded with the Clerk of the Executive Council, the Chief Parliamentary Counsel, the Clerk of the House of Representatives, the Secretary for Internal Affairs, and the Government Printer about the suggestion. We are indebted to Mr Littlejohn, the Clerk of the House, and Mr Marquet, the Second Clerk-Assistant, for putting forward proposals to give effect to our recommendation, and to the Secretary for Internal Affairs for agreeing to them. We understand that in future, as soon as regulations are finally printed, the Gazette Clerk in the Department of Internal Affairs (who already is responsible for the numbering of regulations and for authorising their printing after enactment) will send a copy to the Clerk of the House for presentation to Parliament in accordance with the Standing Orders of the House.

60. We are also concerned about the time that elapses between the publication of regulations and the arrival of printed copies in areas remote from Wellington. Normally, regulations are on sale in Wellington on the day on which they are notified in the Gazette; and the Government Printer sends copies to

other centres as soon as possible. However, the time taken for them to become available in such places as Auckland, Westport, and Invercargill varies with the speed of the postal service, and can sometimes, we believe, be a week or more. It is possible that in some cases large sections of the public do not have access to a regulation before it comes into force. This is undesirable, at least in the case of a regulation imposing duties or restrictions on members or sections of the public.

61. We understand that it has long been the practice of the Parliamentary Counsel Office to fix the commencement of regulations, whenever practicable, at a date later than the date of making, so as to allow for their distribution. It is our experience, however, that postal deliveries of printed matter now take much longer than they used to. We accordingly suggested to the Chief Parliamentary Counsel that the commencement of regulations should, in general, be set at a date that allows for them to become available, even in the most remote areas, before their commencement. He agrees that as a general rule of practice it is reasonable that regulations should come into force on the 14th day after their notification in the Gazette; but he points out that the Government must necessarily have a complete discretion to fix an earlier or later date. Examples of the need for earlier commencement dates are regulations conferring benefits, removing restrictions, or increasing salaries. Also, some regulations must be brought into force at once to give effect to important economic policies or to deal with emergencies; but regulations of this kind are usually given wide publicity by the news media.

STANDING IN ADMINISTRATIVE LAW

62. As indicated in para. 1 of this Report, the Committee has submitted a Report on Locus Standi. It is significant that both the Law Commission Report on Remedies in Administrative Law (Law Com No. 73 Cmnd. 6407, 1976) and the Australian Law Reform Commission in its Discussion Paper No. 4 Access to the Courts - I Standing : Public Interest Suits (1977), are seized of this subject. We are awaiting the response of the Minister to our Report which recommends a liberalisation of the requirements for standing.

STATUTORY DISCRETIONS

63. The Committee has continued its work on statutory discretions. Some 5,000 have been identified. A study of those concerned with entry is being made. The Committee was assisted by an Auckland law student, Ms E. Jamieson, whose LLB (Hons) dissertation will shortly be available to the Committee.

NEW ZEALAND ADMINISTRATIVE REPORTS

64. We were instrumental in persuading Butterworths to publish this series of reports and we take a continuing interest in them. During the year we were concerned that the lapse of time before a case was reported tended to detract from the worth of the series. Moreover we saw ways of improving the presentation and hence the value of reports through wider indexing, a changed format in citing cases, the inclusion of Supreme Court decisions on appeal from tribunals and a continuation of the section on the reports of Ombudsmen. We thought that the reports could usefully include the decisions of the Broadcasting Tribunal.

65. These suggestions were discussed with the Editor of the Reports, Mr P.A. Black. We were pleased to learn that the backlog of cases would be cleared soon and future cases reported in a more timely way. Our views on more extensive indexing and on the way cases were reported, especially accident compensation cases, were adopted. The decisions of the Broadcasting Tribunal are to be reported.

66. The Editor was concerned that the inclusion of relevant Supreme Court decisions might make the Administrative Reports too unwieldy though he acknowledged the advantages in including them especially where the decision was not reported in the New Zealand Law Reports. In the result and given the small number of decisions - 4 or 5 a year - Mr Black has agreed to include them in the new series. Where the judgment is reported in the New Zealand Law Reports a summary only of the case will be reported in the Administrative Reports.

These changes should, in our opinion, enhance the worth of the new series. The inclusion of some of the reports of Ombudsmen is still being discussed.

DISCIPLINE WITHIN THE LEGAL PROFESSION

67. In May 1977 we forwarded our Report to the Minister entitled "Discipline Within the Legal Profession". Our study had been carried out at the request of the Minister. The Committee had first written to the New Zealand Law Society and all District Law Societies requesting relevant information. The detailed responses of many District Societies were particularly helpful and we were able to form a fairly comprehensive view of the manner in which disciplinary charges and complaints against legal practitioners are handled throughout New Zealand. At the same time we undertook a study of the relevant provisions of the Law Practitioners Act.

68. A detailed working paper was then prepared and circulated to the New Zealand Law Society, District Law Societies and other interested persons and bodies for comment. We duly received the report of the New Zealand Law Society and were pleased to find that there was so much common ground between it and our Committee. The proposals contained in the working paper in respect of which substantial agreement was reached were summarised in paragraph 2 of our Report.

69. In particular, the Society agreed with the appointment of a lay observer or lay observers to review the Society's treatment of complaints, with the separation of the investigative and adjudicative aspects of disciplinary proceedings and with the inclusion of a lay member or members on disciplinary bodies. We understand that legislation is now being drafted for the Law Society.

AIRCRAFT ACCIDENT INVESTIGATIONS

70. In our Seventh Report, paras. 35-48, we examined the procedure in relation to aircraft accident investigations, i.e. in relation to inquiries into aircraft accidents and the

constitution of the Court of Inquiry appointed to conduct public inquiries. We are pleased to note that in the Civil Aviation (Accident Investigations) Regulations 1978 (S.R. 1978/112), which replace the former regulations, most of our recommendations have been adopted.

71. The new regulations incorporate the objective test which we recommended should determine whether notification of the inquiry should be given by the investigating inspector. They also give effect to a further recommendation prescribing a 28 day period for any person so notified to make his statement or to produce his evidence. The regulations do not however confer the power to grant an adjournment, or a right of appeal against an unreasonable refusal to grant an extension of time, which we had recommended.

72. The former provision for the inclusion of an inspector on the Court of Inquiry has been abolished in accordance with our recommendation. The appointment of the Court of Inquiry is to be made by the Attorney-General and not by the Minister of Civil Aviation. We had recommended that appointments be made by the Minister of Justice, but the principle that the power of appointment should be vested in a disinterested person has been adopted.

EDUCATION AMENDMENT BILL

73. In our Eighth Report, paras. 34-36, we offered comments on the legislation prepared by the Department of Education concerning the suspension of school pupils. We then indicated that we had submitted our views to the Department and were awaiting their comments. We were subsequently advised that legislation along the lines proposed by the Department would not be proceeded with. Instead, s.130 of the Education Act 1964 was repealed and more detailed provisions were substituted for it in the Education Amendment Act (No. 2) 1976 (ss. 130-130F). Though these provisions incorporated many of the recommendations made by the Committee, they did not provide the kind of appeal arrangements suggested by the Committee.

EGG MARKETING (PRODUCTION ENTITLEMENT) REGULATIONS 1970

74. These Regulations were drawn to our attention by one of our members. The right of appeal conferred by Regulation 16 is to an "independent arbitrator", who is a barrister or solicitor nominated by the President of the New Zealand Law Society. Very considerable sums of money are at stake when an application is made for an entitlement licence. For that reason it may be desirable that any appeal against the decision of the Egg Marketing Authority refusing a licence, or revoking the licence, or imposing an onerous term, should lie to the Administrative Division. Further, difficulties have arisen in practice because the Arbitrator has no staff and must look for assistance in fixing a place and date of hearing to the Egg Marketing Authority, and this is apt to raise some fear of bias. We are pursuing inquiries with the Ministry of Agriculture and Fisheries.

JUDICATURE AMENDMENT ACT 1977 Sections 10-14

75. In paras. 23 to 30 of our Eighth Report (September 1975) we recommended that the Judicature Amendment Act 1972 be amended to clarify some of its provisions relating to the powers of the Court on an application for review, to remedy some deficiencies that had become apparent, and to improve the procedure on an application for review. We attached a draft bill to the Report.

76. A bill including our draft was introduced into Parliament in 1976. It was deferred and replaced by another bill in which our draft was altered in several respects. Some of our members had serious misgivings about the effect of one new provision that would protect from review any investigation, not only by the Police but also by any Government Department, into any alleged breach of the law. Also, we thought that another provision, relating to the Court's power (under s.4(5) of the 1972 Act) to refer a matter back to a tribunal for reconsideration, reflected some misunderstanding of our proposals. Our draft was intended to make it clear that the power to refer back was not merely an

ancillary one exercisable only when relief was granted under s.4(1) of the 1972 Act, but could also be exercised instead of granting relief. The bill, however, made the power only an ancillary one.

77. We expressed our views on both matters to the Minister of Justice. We were pleased to see that the bill was amended in Parliament. The provision protecting investigations was dropped, and the provision relating to reconsideration is now in line with our views.

MARINE FARMING LICENCES AND LEASES

78. In our Ninth Report, paras. 46-95, we gave detailed consideration to parts of the Marine Farming Act 1971. Our concern was directed to the provisions authorising the grant of a lease or licence to establish a marine farm and with the adequacy of the procedures before decisions were taken and the appeal rights from such decisions. The Ministry of Agriculture and Fisheries has been asked to advise what action it proposes to take on the recommendations made in our Ninth Report.

MEAT AMENDMENT ACT 1976

79. We became aware of a defect in the provisions of the Meat Amendment Act 1976. In brief, a person proposing to erect premises to be used as an export slaughterhouse must, under the substituted s.28(1) of the Meat Act 1964, give the Meat Industry Authority notice that he has submitted his plans and specifications to the Director-General of Agriculture and Fisheries. The Authority is then required to consider whether or not there is any economic need or justification for the proposed work in the area, the effect of the proposed work on the ability of licensees to obtain regular and sufficient supplies of stock, and all other relevant matters. The Authority may then undertake to issue an export slaughterhouse licence. Later on, if but only if the premises have been completed to the satisfaction of the Director-General, the Authority is empowered, under the substituted s.30, to issue a licence. Under s.78A there is a right of appeal to the

Administrative Division against (inter alia) the Authority's refusal to grant a licence. Clearly a right of appeal should be available earlier in the sequence of events, following the Authority's possibly broad-ranging review of the question of economic need.

80. We were concerned at some other minor features of the Act. We wrote to the Minister of Agriculture who has replied acknowledging the anomalous appeal arrangement and undertaking to make an amendment at the first available opportunity. This matter will be kept under review.

MILK ACT 1967

81. The Milk Amendment Bill gives effect to the recommendation made in our Eighth Report (paras. 93-79) that an independent appellate body, the Milk Inquiries Appeal Authority, be created to hear appeals from decisions of the committees appointed under s.57 of the principal Act. This Appeal Authority replaces the informal committee set up by the Milk Board.

82. Our recommendations in relation to s.26 of the Milk Act are still being considered by the Ministry of Agriculture and Fisheries.

NOXIOUS PLANTS BILL

83. We have maintained our interest in the development of this legislation and we are pleased to see that our recommendations concerning appeals, made in our Seventh Report, have been adopted. We recommended that an independent person or body should hear appeals from occupiers. The Noxious Plants Bill provides for the appointment of an independent arbitrator for each region. He will be appointed by the Noxious Plants Council to hear appeals under the Act.

84. The arbitrator is to be a barrister or solicitor of the Supreme Court nominated by the President of the New Zealand

Law Society. We understand that a very speedy disposal of the matter is required because of the rate at which noxious plants mature. The Ministry of Agriculture and Fisheries has adopted this method as the quickest way of disposing of appeals while still affording fairness to those affected by the enforcement provisions of the Act.

85. The Committee was given the opportunity to comment on the Bill at the first reading stage. Our comments on the powers of entry for inspection purposes by Noxious Plants Officers were forwarded by the Minister of Justice to the Lands and Agriculture Committee considering the Bill. Our recommendation that notice be given to the occupier of intention to enter resulted in an amendment being made to the Bill which now requires 24 hours' notice to be given to the occupier before the power of entry and inspection is exercised.

PUBLIC WORKS ACT 1928

86. In our Eight Report, paras. 38-45, we recommended that a Commission of Inquiry be appointed to examine the working of the Public Works Act 1928 and related matters, and make recommendations for reform. Although the Public Works Act Review Committee appointed by the Minister of Works and Development unfortunately lacked the standing and resources of a Commission of Inquiry, we welcomed the opportunity of making submissions. We were also able to forward a research paper which we had commissioned from Professor Eric C.E. Todd, the eminent Canadian authority on the law of compulsory acquisiton of land. We are pleased to see that many of the Review Committee's recommendations are consistent with our submissions.

87. We understand that the Minister of Works and Development intends to introduce into Parliament a Bill to consolidate and revise the existing legislation in the light of the Review Committee's recommendations. We have recommended that the reform proposals recently published by the Australian Law Reform Commission be considered when the legislation is being formulated; and have requested the opportunity to comment on the Review Committee's report before the new Bill is drafted.

RATING ACT 1967

88. In our Seventh Report, paras. 117-123, we referred to certain provisions of the Rating Act 1967 for councils to make decisions as to the eligibility of properties for postponement of rates; and we recommended that there should be rights of appeal from those decisions. In recording, in para. 18 of our Eighth Report, the decision of the Supreme Court in Johnston & Ors v. Manukau City Council [1975] 2 NZLR 469 we mentioned that the circumstances of that case illustrated the difficulties that could arise; and noted that no action had been taken on our recommendation. The subsequent proceedings in Johnston's case in the Court of Appeal (referred to in para. 4 of this report) reinforce our view that a right of appeal should be provided. We are disappointed that the suggested provision was not incorporated in the amendments to the Rating Act 1967 enacted in 1976 and 1977. However we understand that a major review of the rating legislation is to be undertaken next year, and we hope that our recommendation will then be implemented.

TOWN AND COUNTRY PLANNING ACT 1977

89. In the limited time available after publication of the Town and Country Planning Bill, we offered to the Parliamentary Select Committee on the Bill comments on three of its provisions. The first related to the functions of the Minister of Works and Development in the approving of regional planning schemes, and in that respect our concern was met by amendment to the bill. Our second comment related to the unusually short time of 14 days allowed for councils to lodge appeals against the proposed locations of public utilities. The arguments we advanced for retaining the one month appeal period in that respect were ineffective.

90. Thirdly, we drew attention to apparent oversights in the provision precluding review by the Supreme Court of appealable decisions: and Parliament adopted a suggested rewording (now s.166 of the new Act.) Subsequent consideration of this section has shown that it goes further than is necessary or desirable, and that if we had had more time to consider it our

submission would have taken a different course. (Our remarks in para. 18 of this report are relevant here.) We are now satisfied that what is needed is a provision under which, if there are proceedings in the Supreme Court for a review of a decision and also an appeal to the Planning Tribunal, an application may be made to the Court for a stay of the review proceedings until the appeal to the Tribunal is finally disposed of.

91. Recommendation: We therefore recommend the substitution of the following section for s.166 of the Act:

> 166. Stay of review proceedings where appeal to Tribunal commenced - (1) Where proceedings by way of 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, are commenced in respect of a decision of a united or regional council, a Regional Planning Authority, a Council, or a Maritime Planning Authority, any party to the proceedings or to any appeal to the Tribunal that has been commenced in respect of the same decision may at any time apply to a Judge of the Supreme Court for an order staying the proceedings on the grounds that such an appeal has been commenced and that in the circumstances of the case it is undesirable or inexpedient that any further step be taken in the proceedings until the appeal is finally disposed of.
>
> (2) On an application under this section the Judge may in his discretion make an order staying the proceedings on such terms and subject to such conditions as he thinks fit.

For and on behalf of the Committee

Chairman

August 1978

APPENDIX I

LEGISLATION CONFERRING JURISDICTION ON THE ADMINISTRATIVE DIVISION 1977

Citizenship Act 1977 s.19
Beer Duty Act 1977, s.10
Fisheries Amendment Act 1977 s.2 (inserting new s.138)
Human Rights Commission Act 1977, ss. 42 and 63
Nurses Act 1977, s.49
Contraception, Sterilisation and Abortion Act 1977 s.26
Gaming and Lotteries Act 1977, s.65
Local Government Amendment (No. 2) Act 1977, s.37

APPENDIX II

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977
SECTION 5

5. (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds:-

(a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;

(b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to -

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless -

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based on the decision on the existence of a particular fact, and that fact did not exist.

APPENDIX III

APPLICATIONS FOR REVIEW

E. C. KEATING, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1978