PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

EIGHTEENTH REPORT

WELLINGTON
NEW ZEALAND
MAY 1984

18TH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

CONTENTS

INTRODUCTION

1. This report covers the work of the Committee since the 15th report was presented in July 1980. During that time reports on Appeals on Questions of Law from Administrative Tribunals (March 1982) and Statutory Powers of Entry (April 1983) have been completed, and submitted to the Minister of Justice.

CONSTITUTION AND MEMBERSHIP

2. The present membership of the Committee is:

Judge D.F.G. Sheppard, Planning Judge, Auckland, Chairman.

Mr S. G. Erber, Barrister and Solicitor, Christchurch.

Mr A. R. Galbraith, Barrister, Auckland.

Mr W. Iles, Chief Parliamentary Counsel, Wellington.

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

Mr G. R. Laking, C.M.G., Chief Ombudsman, Wellington.

Mrs J. E. Lowe, Chief Legal Adviser, Department of Justice, Wellington.

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

Mr J. B. Robertson, Barrister and Solicitor, Dunedin.

Mrs C. J. Cosgriff, Legal Adviser, Law Reform Division, Department of Justice was the Committee's secretary for most of the period covered by this report, until Mr J. P. Smith was appointed in October 1983. Ms L. D. Peters was acting secretary from February to June 1982.

Mrs Lowe and Messrs Erber, Galbraith, Iles, and Laking have been appointed to the Committee since July 1980. It is understood that the Minister has it in mind to appoint another lawyer with experience in the universities. The addition of such a person would balance the Committee and be welcomed by its members.

3. Since the last general report of the Committee, the following members have retired.

Mr D.A.S. Ward, C.M.G., in May 1980.

Dr R. G. McElroy in June 1980.

Mr R. G. Montagu in December 1980.

Professor J. F. Northey in March 1982.

Mr E. W. Thomas, Q. C., in May 1982.

Dr D. L. Mathieson in May 1983.

Mr Ward was a foundation member of the Committee who, as a distinguished parliamentary counsel, contributed much more than drafting skills. His knowledge was invaluable to the Committee over many years.

Dr McElroy was also a foundation member. We acknowledged his service to the Committee in paragraph 3 of our 15th report.

Mr Montagu was Chief Legal Adviser in the Department of Justice. Earlier he had served as the Committee's secretary. He retired from the Department to practice law in Hokitika.

Professor Northey was a member of the Committee from its foundation in 1966 to his retirement in 1982. He had a major part in all the Committee's work over that period. He is particularly remembered in relation to:

(a) The proposal for the establishment of the Administrative Division of the High Court:

(b) His contribution to the development of administrative review:

(c) His leadership as Chairman of the Committee from May 1975.

His enthusiasm for the work of the Committee continued unabated over 15 years. The Committee records with sadness that Professor Northey died on 8 October 1983.

Mr Thomas was appointed to the Committee in 1974 and Dr Mathieson in the following year. Both made substantial contributions to the Committee's work. Their wide experience at the Bar and their sound legal scholarship were of great value to the Committee.

The Committee acknowledges with gratitude the substantial assistance given by all of them.

CURRENT PROGRAMME OF THE COMMITTEE

Privative Clauses

4. This topic was referred to the Committee for study in 1981. A preliminary paper has been prepared by Professor Keith. The Committee will discuss the contents of the paper with officials from selected departments. When this has been done, a discussion paper will be circulated for comments before preparation of a final report.

Delegation

5. The Committee has prepared an issues paper identifying the questions that arise from the terms of reference. It has been distributed to interested parties and a number of substantive responses have been received. The Committee has now commissioned Dr G.D.S. Taylor to prepare a paper on the topic for general circulation. This paper is expected to be circulated for comments later this year.

Government Policy Directions

6. In 1981 the Committee obtained approval to study this topic. A discussion paper has been prepared and circulated to Government departments and other interested bodies for comment. The paper identifies, as principles which the Committee considers might apply to directions, the following four principles:

(1) A direction should be given only by a Minister of the Crown:

(2) A direction should be given in writing:

(3) A direction should be published in the Gazette and laid before Parliament as soon as practicable after it is given:

(4) A direction should be restricted to considerations of general principle.

Replies to the paper have been received and compiled. Deliberation on the topic is continuing.

ACTION TAKEN ON RECOMMENDATIONS

Statutory Powers of Entry (17th Report)

7. This was a major study involving a substantial dialogue with many departments. The study established a comprehensive set of principles of general application. The Committee found that many of the statutory powers of entry required amendment to make them accord with the principles. The report accordingly contained specific recommendations for amendments to those powers. It is satisfying to note that many of the recommendations have been implemented by Acts passed during the 1983 Parliamentary session. Other amendments implementing the recommendations are to be found in Bills held over for recess study.

Appeals on Questions of Law from Administrative Tribunals (16th Report)

8. The recommendations in this report are being implemented on an ad hoc basis rather than by way of an omnibus Bill.

In the First Schedule to the report a number of tribunals are listed as tribunals in respect of which a right of appeal on a question of law should be conferred. The right has, to the date of this report, been conferred in respect of the following of those tribunals:

- New Zealand Kiwifruit Authority (see Kiwifruit Marketing Licensing Regulations 1977, Amendment No. 3 (S.R. 1983/87)).

- Soil Conservation and Rivers Control Council. Although the Council itself has been dissolved the recommended right of appeal has been conferred, in respect of any decision of the National Water and Soil Conservation Authority or of any Tribunal under section 33A of the

Soil Conservation and Rivers Control Act 1941. (See section 13 of the Soil Conservation and Rivers Control Amendment Act 1983).

. Transport Charges Appeal Authority. (See sections 161 to 169 of the Transport Act 1962 (as substituted by section 18 of the Transport Amendment Act (No. 2) 1983)).

. Transport Licensing Appeal Authority. (See sections 161 to 169 of the Transport Act 1962 (as substituted by section 18 of the Transport Amendment Act (No. 2) 1983)).

In the Second Schedule to the Report a number of tribunals are listed as tribunals in respect of which a new procedure should apply for the purpose of appeals on a question of law. This new procedure has been substituted in the case of the following of those tribunals:

. Films Censorship Board of Review. (See Part III of the Films Act 1983).

. Licensing Control Commission and Licensing Committees. (See Sale of Liquor Amendment Act 1983).

. Planning Tribunal. (See section 32 of the Town and Country Planning Amendment Act 1983).

The new procedure has also been included in two Bills held over for recess study.

Furthermore, the principles contained in the report have been embodied in rights of appeal enacted in respect of tribunals not referred to in the report.

Commissions of Inquiry (13th Report)

9. Some of the recommendations in this report were enacted in the Commissions of Inquiry Amendment Act 1980. Subsequently there have been several court judgments arising from major commissions of inquiry. The judgments have highlighted some of the issues and emphasised the need for a general review of the Commissions of Inquiry Act 1908. The report is now being considered by government departments in the context of the review of the Act.

Discipline within the Legal Profession (10th Report)

10. A number of the recommendations of the report have been enacted in the Law Practitioners Act 1982.

RECOMMENDATIONS NOT YET IMPLEMENTED

11. Revised Code of Civil Procedure: Part IV (12th Report). The Committee's recommendation that procedural deficiencies in the Judicature Amendment Act 1972 be remedied by amendment to that Act rather than by the revised Code of Civil Procedure is still under consideration by the Rules Committee in the context of the review of the Code.

12. No action has been taken in respect of the following recommendations referred to in the following reports:

- Damages in Administrative Law (14th Report);
- The Town and Country Planning Act - section 166 (12th Report).
- Standing in Administrative Law (11th Report);
- Marine Farming Licences and Leases (9th Report);

- Public Service Tribunals (8th Report)
- Education Tribunals (7th Report);
- The Rating Act - Rate Postponement (7th Report);
- The Land Settlement Board (3rd Report);
- Motor Spirits Licensing (2nd Report);
- Transport and Harbour Ferry Service Licensing (1st-12th reports).

DRAFT LEGISLATION

13. Since its last general report the Committee has examined a number of Bills. The Committee has been involved mainly in considering draft legislation after its introduction into the House. However, on several occasions it has been asked to offer advice on departmental drafts. Recently, where important matters of principle have been involved, the Committee has asked to appear before the Select Committee considering the legislation.

14. While the Committee appreciates the opportunity to make submissions on draft legislation, the time limits for making the submissions have frequently made it difficult for it to give full consideration to the Bill concerned. This has meant that on occasions individual members have had to make submissions on the Committee's behalf. On other occasions the Committee has not been able to obtain the views of all members before completing its submission. The Committee considers that it would perform its duty better if it were given more time within which to make submissions. This comment applies, in particular, with respect to Bills containing important matters of principle.

The Committee has made submissions on the following bills:

1980

Courts Amendment Bill

15. The Committee commented on the provision increasing the number of Judges assigned to the Administrative Division of the High Court from 4 to 6. The provision was retained in the Bill.

Petroleum Amendment Bill

16. The Committee's submission concerned the right to make representations to the Minister about the exercise of his powers, the right to be heard, the procedure for the grant or refusal of pipeline applications, the power of delegation, the privative clause, the appointment of commissions of inquiry, and the provisions relating to pipelines of national importance. The submission was not successful.

Health Amendment Bill

17. The Committee's submission related to the power of entry contained in the Bill. The submission was not successful.

Tobacco Growing Industry Bill

18. The Committee's submission related to the power of entry contained in the Bill. The submission was successful.

Agricultural Pests Destruction Bill

19. Professors Mathieson and Keith made a submission on the Committee's behalf concerning notices of appeal and appeals to the Administrative Division of the High Court. The submission was not successful.

1981

Public Works Bill

20. The Committee made a lengthy submission on this Bill. The main points covered were in relation to:

(a) Declarations of public works:

(b) The acquisition of land by agreement:

(c) Compensation certificates:

(d) Objection procedures:

(e) The exemption of land covered by town planning legislation:

(f) Middle-line taking:

(g) Gazette notices:

(h) The acquisition of land for essential works under Part V:

(i) The stopping of roads:

(j) Access to land cut off by a motorway:

(k) Powers of entry:

(l) The removal of obstructions:

(m) Temporary occupation and control of private land:

(n) Polls for proposed irrigation schemes:

(o) Consequential amendments to the Town and Country Planning Act 1977.

The Committee was pleased with the reception given to its submission. Only two recommendations, one on inquiries into the safety and efficiency of public works, and the other on the inclusion of the identification principle in the power of entry, were not accepted.

Medicines Bill

21. The Committee's submission related to the breadth of the power to make regulations, the power of the Minister to give directions, the right to be heard, the need to give reasons for decisions, the rights and grounds of appeal, and the procedure in relation to Ministerial consents. The submission was successful in part.

Psychologists Bill

22. The Committee's submission related to the term of appointment of members of the Board, members' interests, objection procedures, inquiries by the Board, disciplinary procedures and terms of suspension, and the procedure in relation to appeals. The submission was not successful.

Chiropractors Bill

23. The Committee's submission concerned the membership of the Complaints Assessment Committee, the procedure and onus of proof in disciplinary matters, and the grounds for disciplinary action. The submission was not successful.

Food Bill

24. The Committee's submission concerned 3 clauses which were inconsistent with the principles in the interim report on powers of entry. Attention was drawn to the contents of the report on Damages in Administrative Law. The recommendation concerning identification was accepted but those concerning notice and warrants were not.

Mining Amendment Bill

25. The Committee has had a continuing interest in mining licences. In particular it has been concerned with the relationship between the mining legislation and the town planning legislation, the procedure for granting licences, and appeals. The Committee had discussions with representatives of Link Consultants, who were commissioned by the Mines Division of the Ministry of Energy to make recommendations on the mining legislation and possible amendments to it. Subequently the Mines Division invited the Committee to comment on the departmental draft of the amendment Bill. The submission on the amendment Bill dealt mainly with the role and powers of the Planning Tribunal as an inquisitorial body, the relationship of mining activities to the planning legislation, reports on granting licences, procedure on objections, and appeals. Most of the Committee's submissions were adopted. However, the Committee was disappointed that the opportunity to avoid future problems was not taken by clarifying the relationship between the Mining Act 1971 and other legislation. The Committee considers that the opportunities to discuss with Link Consultants the question of mining licences, and to comment on the Mining Amendment Bill before introduction into the House, were of considerable value.

Official Information Bill

26. The Committee's submission concerned the jurisdiction of the High Court in relation to the review of recommendations by the Ombudsmen in the discharge of their functions under the proposed Official Information legislation. The Committee was of the opinion that the existing relationship between the Courts and the Ombudsmen should be preserved. The submission was successful.

1982

Broadcasting Amendment Bill

27. The Committee's submission opposed the provision under which it is a precondition to the investigation of a complaint that the complainant must agree that no legal action will be taken. The submission was not successful.

Land Bill

28. The Department of Lands and Survey invited the Committee to comment on the review of the Land Act. A sub-committee met with departmental officials to discuss pertinent issues. Comments were made on the following matters: the composition and functions of the Land Settlement Board, the giving of Government policy directions to the Board, the power of delegation, the provision for hearings, the provision relating to cases stated and appeals, powers of entry, privative clauses, and the consequences of failure to fulfil conditions on leases and licences.

Gas Bill

29. The Committee's submission concerned the power of entry contained in the Bill. However, the Bill was reported back to the House before the submission was received.

1983

Transport Amendment Bill (No. 5)

30. Doctor Mathieson and Professor Keith made a submission on their own behalf. This submission was later endorsed by the Committee, subject only to a minor amendment. The submission covered hearing procedure, licensing criteria, the granting, revocation, suspension, and review of licences, inquiries into fares, privative clauses, appeal authorities, appeal procedure and rights pending the hearing of appeal, the giving of reasons, and appeals to the High Court. Most of the recommendations were adopted.

Air Services Licensing Amendment Bill

31. The Committee's submission concerned membership of the Tribunal, offences, applications and hearings for the grant of licences, amendment and revocation of conditions, pricing inquiries, privative clauses, appeals, and regulation-making powers. Some of the recommendations were accepted.

Fisheries Bill

32. The Committee's submission concerned powers of entry, the hearing of appeals by the Planning Tribunal, representation, evidence, a requirement to give reasons, applications for and grant of licences, emergency restrictions, and appeals. The only recommendation accepted was that in respect of powers of entry.

Civil Aviation (Accident Investigation) Regulations 1978

33. An interdepartmental working party reviewing the regulations invited the Committee to comment on the power of entry contained in the draft. Recommendations were made in respect of the power of entry, and the Committee offered to

comment on other aspects of the regulations. After being invited to do so it recommended that the Chief Inspector make a copy of any report available to the Attorney-General to enable him to decide whether to appoint a Commission of Inquiry, and that no restriction be placed on the membership of such a Commission. The final report of the working party has been completed and is presently under consideration by the government.

Electricity Amendment Bill

34. The Electricity Division of the Ministry of Energy invited the Committee's comments on the power of entry contained in the Bill. The Committee's comments were not adopted.

Health Service Personnel Bill

35. The Committee's submission concerned the privative clause, the power to order payment of costs, the power of delegation, and the application of the Commissions of Inquiry Act 1908. The submission was successful.

Area Health Boards Bill

36. The Committee's submission concerned the jurisdiction of the Ombudsmen, the privative clause, publication of Ministerial policy directions, and procedures for removal of a board. Some of the recommendations were adopted.

Plant Varieties Bill

37. The Committee's submission concerned the restrictions on the right of appeal. The Bill is still before the House.

Films Bill

38. The Committee's submission concerned the jurisdiction of the Ombudsmen, the exclusion of lawyers from hearings, the power of delegation, and the provision for regulations to over-ride the Act. Some of the recommendations were adopted.

Town and Country Planning Amendment Bill

39. The Committee's submission concerned the term of appointment of Planning Judges, and the power to revoke or modify planning consents. The submission was not successful.

Commerce Amendment Bill

40. The Committee's submission recommended that the principles of natural justice be applied to the procedures under the Act. The recommendation was accepted in part.

1984

Immigration Bill

41. The Committee made an extensive submission on this Bill concerning privative clauses, the ministerial power to make rules, the revocation of residence and temporary permits, returning residents visas, requests for new permits, the power to request production of information, appeal procedures, and deportation procedure. Representatives of the Committee appeared in support of its submission. The Bill is still before a Select Committee of the House.

MATTERS CONSIDERED BY THE COMMITTEE

42. Since the 15th Report the Committee has considered a number of matters in addition to those which have or will be the subject of a separate report.

LAND RATING CLASSIFICATION APPEALS

43. Some public works, such as flood control measures, benefit landowners in a particular area only. Parliament has considered it fair that those landowners alone should bear the cost. The proportion that each should pay is frequently determined by classifying all the land involved according to the value of the land, its area, and the benefit received. Differential rates are then levied in accordance with the classification. Landowners have a right to appeal against the classification applied to their respective properties. It is these appeals which are the subject of this report.

44. Six statutes contain provision for land rating classification appeals. The most frequently used is section 103 of the Soil Conservation and Rivers Control Act 1941. That statute deals with projects to control flooding and soil erosion. The other general provisions are:

(a) Land Drainage Act 1908, sections 33 and 34:
(b) River Boards Act 1908, sections 95 to 100:
(c) Swamp Drainage Amendment Act 1928, section 3:
(d) Local Government Act 1974, sections 153, 155, and the Fifth Schedule:
(e) Agricultural Pests Destruction Act 1967, section 72 (as substituted by section 7 of the Agricultural Pests Destruction Amendment Act 1980).

45. In addition, there have been a number of local Acts empowering particular local authorities to classify land for rating purposes.

46. Those enactments contain diverse provisions for the procedure to be followed and considerations to be applied in land rating classification appeals. The Committee considered that it might be desirable to devise uniform structures and procedures for dealing with this type of appeal, and in July

1981 the Minister of Justice approved the Committee examining this issue.

Consultations

47. As a first step, the Committee obtained unreported decisions on appeals taken under section 103 of the Soil Conservation and Rivers Control Act 1941. As far as the Committee is aware, this is the only statute under which this type of appeal has been brought in recent times. The decisions illustrate various points of law and practice, but provide little illumination on questions of procedure, or on the scope or effectiveness of the right of appeal.

48. The Committee consulted with the District Court Judge currently appointed by the Minister of Justice to hear appeals pursuant to section 103. We also consulted his predecessor, who had had many years experience in hearing such appeals. It was his experience that landowners have in the main been given every opportunity to object to their classifications, and that in practice, meetings of ratepayers have usually been convened by catchment boards long before the scheme is formally published.

49. We then consulted the government departments which administer the six general statutes to ascertain whether they were aware of any additional problems. The departments were asked:

(a) To comment on the practical application of appeals in the Acts they administered;

(b) Whether they had received any complaints;

(c) Whether they could suggest any improvements; and

(d) Whether they saw any advantage in greater or complete uniformity in appeal rights and procedures.

50. There was general agreement with the idea of introducing a uniform structure and procedure for all such appeals. The Ministry of Agriculture and Fisheries added a rider that all appeals should be heard by a Land Valuation Tribunal or comparable body with suitable expertise. The only other concern expressed related to delay. The Ministry of Works and Development suggested that the appointment of an additional Judge might reduce delays.

51. We then formulated some basic proposals and circulated them to the government departments involved and to the New Zealand Catchment Authorities' Association (Inc.). The Association sent copies to individual catchment boards. Many very detailed and helpful responses were forthcoming. The Committee revised its proposals as a result of comments received, and developed a working paper which set out in detail and explained the Committee's recommendations.

52. The working paper was sent to all government departments and other bodies who might be interested, and further helpful comments were received from the relevant departments, the Agricultural Pests Destruction Council, and the New Zealand Catchment Authorities' Association (Inc.), which also conveyed the responses of individual catchment boards. All of those comments and responses have been considered in the preparation of this report.

What body should hear the appeals?

53. Under the existing general statutes, appeals lie to the District Court in five instances, and to the Land Valuation Tribunal in one. The Soil Conservation and Rivers Control Act 1941 provides for the appointment of one District Court Judge to hear all appeals, wherever they arise. In the other four instances, appeals are simply made to the nearest District Court. Under the Soil Conservation and Rivers Control Act 1941, if a person wishes to impeach the validity

of the whole classification, as opposed to the classification of his particular land, the appeal lies to the Administrative Division of the High Court. No comparable provision exists in the other Acts.

54. We considered four possible forums for hearing such appeals: the Administrative Division of the High Court, a District Court Judge sitting alone, the Land Valuation Tribunal, and a body specially constituted for the purpose, comprising a District Court Judge and two other members with appropriate expertise, one of whom would have local knowledge of the area in question.

55. The option of appeals direct to the Administrative Division was rejected for two reasons. At present the original decision is made without a formal hearing, and it would be undesirable for the Division to hear cases where there has been no tribunal decision first, and consequently no written decision to serve as a starting point. In addition, many of the appeals concern simple issues of fact, and it would seem inappropriate for those appeals to be heard in the High Court, with the attendant expense.

56. Initially we thought that there was little significant advantage in the practice of having one District Court Judge hear all appeals throughout the country. The value of local knowledge seemed more important. We therefore initially proposed that all appeals should be directed to the local Land Valuation Tribunal.

57. However, some of the catchment boards urged on us the importance of having one or two Judges who could specialise in this type of appeal, because experience was regarded as valuable in obtaining a ready understanding of the complex technical questions which can arise, and because it was considered vital that a uniform standard should be maintained throughout the country to avoid regional differences

developing. We were persuaded that country-wide uniformity is important, because classifiers rely on previous appeal decisions to guide them.

58. In our working paper, we proposed that appeals lie to a body comprising one District Court Judge nominated by the Minister of Justice to hear all land rating classification appeals under each of the six general Acts, together with two members from the district in which the subject land is situated. The two members from the district would ensure that local factors would be given due weight. We rejected a suggestion that the additional members might be existing members of the local Land Valuation Tribunal, because we recognised that these appeals involve more than land valuation. Equally important is the degree of benefit the land will receive from the project which the rate is being levied to finance. People qualified to adjudicate on valuations of land do not necessarily have experience relevant to the assessment of benefit. Thus one member should have practical experience of the technical aspects of land rating classifications.

59. One response suggested that two Judges be appointed, one for each island. We do not consider that there is sufficient work for two Judges, and it would be better that all the experience be gained by one Judge.

60. Two catchment boards suggested that land rating classification appeals be brought within the jurisdiction of the Planning Tribunal, but such appeals do not involve planning considerations. Nor are they sufficiently analogous to appeals under the various statutes under which the Planning Tribunal presently exercises appellate jurisdiction to warrant the adoption of that suggestion.

61. Some of the responses to our working paper questioned whether a sufficient number of experienced persons would be available within the relevant district, and one catchment board opposed the proposal that the two members be from the district in which the land is situated, lest "local feelings predominate over a more reasoned national approach".

62. In our working paper we had proposed that the two other members should be drawn from an already constituted panel. The responses indicated that the composition of a panel may have practical difficulties, particularly because differing kinds of experience may be required, depending on the kind of scheme which gives rise to the proposed land rating classification.

63. We have therefore concluded that land rating classification appeals should be made to a body presided over by one District Court Judge who would be appointed for at least three, and preferably five, years. Two other members with appropriate experience should be appointed to sit with him, and one of them should have some knowledge of the local district. However flexibility should be obtained by prescribing the quorum as two rather than three members, since some appeals may be brought on narrow grounds wholly within the expertise of one member. There is no point in insisting that the other also attend in such cases. In cases where the tribunal comprises the Judge and the two other members, the decision would be that of the majority. Where it comprises the Judge and only one other member, then in the event of disagreement the Judge's decision would be the decision of the tribunal.

Involvement of interested parties in settling classifications

64. The Ministry of Works and Development made the following suggestion:

> "Reduce the number of cases which go to appeal, by the classifier first producing a draft classification which is made available for inspection and open for discussions between the classifier and prospective ratepayers. A good explanation by the classifier or some amendment to the classification when he feels the person has a point, has in many cases eliminated any appeals against the finalised classification.
>
> "The above procedure is used by most catchment authorities and classifiers. It is, of course, in the catchment authorities' own interest not to have formal appeals, and would therefore not seem to be necessary for the law to be amended to make it mandatory".

65. The responses we received confirm that most catchment boards already adopt some procedure of this kind. We agree that it is desirable to publish a provisional or draft classification, followed by local meetings to explain the scheme, answer questions, and respond to criticisms. However, although the Ministry suggested that publication of a draft classification need not be mandatory, in our working paper we proposed that it should be a statutory requirement in every case.

66. In responding to the working paper, the Ministry and one catchment board questioned the proposal to require publication of a draft classification. They considered that it may give opportunity for criticism on procedural matters, and could lead to complications, particularly about what constitutes a draft classification, and what degree of detail it should include. They urged the desirability of keeping legal procedures simple.

67. We are not persuaded that there need be any difficulty in defining what is involved in a draft classification. There appears to be widespread acceptance of the desirabilty of publishing such a draft, and providing for informal consultation and comment on it. That is good practice, and in our view it should be required by the law so that all rating authorities preparing a classification will adopt that practice, and all ratepayers affected will gain the benefit of it. We recommend that the publication of a provisional or draft classification, and informal opportunity for discussion and comment on it, should be a statutory requirement.

Time Limits

68. In our working paper we proposed that an appeal must be lodged within one month after the classification has been made available for public inspection. We proposed that 14 days' notice of the appeal hearing should be given to the appellant and other affected parties. Comment from two catchment boards raised problems concerning the exclusion of public holidays and the Christmas holiday period in calculating those time limits. We therefore decided to adopt the concept of "working days" used in the Public Works Act 1981, as this should meet the concerns expressed. We therefore recommend that the time for lodging appeals should be uniformly stipulated at 20 working days after public notification of the classification, which should allow sufficient time for those entitled to appeal to obtain professional guidance about the prospects of an appeal. To allow adequate time for final preparation for the hearing, we recommend that a minimum of 15 working days' notice of the appeal hearing should be given to the appellant and other affected parties.

Appeal Rights: Applications for Review

69. We considered whether a ratepayer should be obliged to pursue rights of appeal before making any application to the High Court for review of the classification under the Judicature Amendment Act 1971. However, we concluded that a prohibition of review until after appeal rights have been exhausted would be unnecessary and undesirable. The High Court has a discretion whether to hear an application for review before an appeal has been disposed of. There would be no advantage in substituting a rigid rule for that discretion.

Grounds of Appeal

70. The grounds of appeal permitted by the six current general Acts show some common features. However, some of those Acts set out more grounds than others, and they vary in degree of detail. Section 103 of the Soil Conservation and Rivers Control Act 1941 contains the following seven grounds:

(1) That the classification does not fairly classify the land of the appellant:

(2) That any land liable to be classified is omitted from the classification or is not fairly classified:

(3) That any land is improperly included within or excluded from the area to which the classification relates:

(4) That the proportions in which the rates are proposed to be imposed on the several classes do not fairly represent the varying degrees of benefit to the land in the several classes, or that the proportion of the rate imposed on any particular class or classes is too great or too small:

(5) That the rateable value of any piece of land is not fairly apportioned between the portions thereof which are classified in different classes:

(6) That any information in the classification list has been incorrectly transcribed from the valuation roll:

(7) That the Board or the classifier has not complied with the requirements of the Act for the making of a valid classification.

71. Grounds (a) to (d) above are the same as the grounds of appeal set out in section 34(3) of the Land Drainage Act 1908. Grounds (a), (b), and (d) correspond with the grounds set out in section 96 of the River Boards Act 1908. Grounds (b), (c), and (d) are similar to the grounds of appeal set out in section 3(4) of the Swamp Drainage Amendment Act 1928.

72. Under clause 6 of the Fifth Schedule to the Local Government Act 1974 the grounds for appeals are:

(a) That the land of the appellant, or any other land in the rating area, has not been fairly classified in accordance with the benefit received or likely to be received from the expenditure involved, or has not been classified; or

(b) That the proportions in which the rates are proposed to be imposed on the several classes do not fairly represent the varying degrees of benefit to the land in the several classes, or that the proportion of the rates imposed on any particular class or classes is too great or too small.

73. Section 72(7) of the Agricultural Pests Destruction Act 1967 has just one ground, namely "that the land of the appellant, or any other land in the district, has not been fairly classified".

74. We recommend that one uniform set of grounds for appeal be included in each Act, and that section 103 of the Soil Conservation and Rivers Control Act 1941, which contains the most comprehensive list of grounds, be adopted as the model. If the effect of the alternative lists is to narrow the right of appeal, we see no compelling reason why the right of appeal should be less extensive in the other instances than it is under section 103 of the Soil Conservation and Rivers Control Act 1941.

75. We note that the provisions of section 72 of the Agricultural Pests Destruction Act 1967 (as substituted by section 7 of the Agricultural Pests Destruction Amendment Act 1980) do not correspond with our recommendations. We recommend that they be brought into line with them notwithstanding that they were relatively recently amended. Furthermore, we understand that the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967 are being reviewed, with a view to one comprehensive Bill being introduced to replace both enactments. That would provide an opportunity to incorporate our recommendations, and corresponding amendments could be made to the other general Acts which provide for land rating classification appeals. The Secretary for Local Government has suggested that the local Acts which make provision for land rating classification should also be brought into line. We agree that in principle there should be consistency, but consider that it would not be appropriate to amend local Acts by general legislation. Rather, it would be more appropriate for the Secretary for Local Government to take up the matter with the promoters of the local Acts concerned.

Hearing of Appeals

76. One catchment board suggested that amending legislation should provide for appeals to be heard within six months of the closing date for lodging them. We consider that this

may be unrealistic in the case of classifications which give rise to large numbers of appeals, although we agree that it is desirable that appeals be heard promptly. We recommend that the enactments concerned contain a provision similar to section 158 of the Town and Country Planning Act 1977 prescribing that every appeal shall be heard and determined as soon as practicable after the date on which it is lodged.

Acknowledgments

77. We gratefully acknowledge the assistance which we have had in our examination of land rating classification appeals from all who responded to our preliminary proposals and working paper, and, in particular, the Agricultural Pests Destruction Council, the New Zealand Catchment Authorities' Association (Inc), the Hauraki, Hawkes Bay, Southland, North Canterbury, and Westland Catchment Boards, the Commissioner of Works, the Secretary for Local Government, and the Director-General of Agriculture and Fisheries. Substantial work on this topic was done by Dr D. L. Mathieson before his resignation from the Committee in July 1983, and we gratefully acknowledge his contribution.

Summary of Recommendations

78. We summarise our recommendations as follows:

(a) All land rating classification appeals should lie to a body comprising one District Court Judge who is nominated by the Minister of Justice to hear all land rating classification appeals under each of the six general Acts which provide for them, together with two other persons appointed by that Minister, who have appropriate knowledge of or experience in land rating classification, and at least one of whom shall have some knowledge of the local district.

(b) The District Court Judge should preside as Chairman, and should be appointed for a term of at least three, and preferably five, years. The two other members would normally sit with him, but a quorum should consist of the District Court Judge and one other. Where the tribunal comprises the Judge and two other members, the decision would be that of the majority. Where it comprises the Judge and only one other member, the Judge's decision would be the decision of the tribunal in the event of disagreement.

(c) The legislation should require publication of a draft classification, and provision for informal discussion and comment before formal public notification.

(d) The legislation should provide for appeals to be lodged within 20 working days after the public notification of the classification. Further, the time for giving notice of the appeal hearings should be prescribed as not less than 15 working days.

(e) No provision should be made for prohibiting applications for judicial review. The question of postponing applications for review while appeal rights are pursued should be left to the discretion of the High Court.

(f) The grounds of appeal prescribed by section 103 of the Soil Conservation and Rivers Control Act 1941 should be adopted as the model for the other general Acts.

(g) The various Acts should prescribe that every appeal is to be heard and determined as soon as practicable after the date on which it is lodged.

(h) The promoters of local Acts which contain provision for land rating classification should be encouraged to promote amendments to bring those local Acts into line with the recommendations of the Committee.

BYLAWS

79. In 1970 the topic of bylaw-making powers was referred to the Committee for study. Since that time detailed consideration has been given to the topic. The Committee has concluded that while there are practical difficulties encountered in the area - defective drafting, amendments not adequately registered, lack of availability - these are not matters that can be remedied by legislative action.

80. The Committee decided to prepare a memorandum for the Minister of Local Government offering practical advice about the drafting of bylaws. Comments were invited from the Ministry of Transport, Department of Health and Department of Internal Affairs, concerning the contents of the memorandum and the most effective means of distributing it. The memorandum was prepared and forwarded to the Secretary for Local Government. The memorandum is reproduced in the Appendix to this Report.

DELEGATED LEGISLATION

81. In October 1983 the House of Representatives asked the Statutes Revision Committee to consider whether any changes to Standing Orders may be desirable to enable more effective and comprehensive parliamentary scrutiny and control of delegated legislation, and to consider the desirability of establishing a Regulations Review Committee to scrutinise regulations.

82. The Committee prepared a submission for the Statutes Revision Committee setting out its views on regulation-making procedure.

83. The Committee appended to its submission a brief note on the scrutinising procedures in Canada, Australia, and the United Kingdom. Furthermore, Professor Keith forwarded to the Statute Revision Committee a summary of research materials compiled during the preparation of the submission.

84. This was one case where, because of the lack of time available, not all the members were able to participate in the discussion on the submission.

TIME LIMITS ON MOTIONS FOR REVIEW

85. At present there is no time limit on the filing of a motion for review. This may be contrasted with the position in England, where judicial review is a two-stage process. There, before the actual hearing of the motion for review, an applicant must first obtain leave to bring the application. This is designed to eliminate frivolous, vexatious, or untenable applications. There is a specific rule dealing with delay in applications for relief. Normally an application for an order of certiorari must be brought within three months.

86. Judge A. R. Turner, now the Principal Planning Judge, has raised the question whether or not a time limit should be introduced into the Judicature Amendment Act 1972. The introduction of a time limit would avoid uncertainty about the finality of decisions of administrative bodies.

87. The Committee recognises that there is a need to strike a balance between persons who have obtained rights following a hearing and other people who discover a valid basis for seeking judicial review of that hearing some months after a decision. Among the latter group may be people who were not involved in the original proceedings and so may not learn of the outcome or even their existence for some considerable time. An example of such a person would be the interested

property owner whom the Planning Tribunal has, in its discretion, determined not to direct be served with notice of the proceedings.

88. Even if a time limit were imposed for lodging applications, this would have no effect on the long delays currently experienced in preparing for the hearing of the motion for review. It would do little to deter litigants from filing an application for review merely as a delaying tactic.

89. The existing system has the clear advantage of flexibility and avoidance of arbitrary standards. Delay is a factor the court considers in the exercise of its discretion, particularly when there has been prejudice to the respondent. The system operates on the basis of unambiguous and well-known rules and provides a working balance between the competing interests involved.

90. By way of contrast introduction of time limits would restrict access to judicial review by imposing a presumption against applications lodged out of time. There would be little more certainty about the fate of late applications than at present, as it would be unclear just when the court would be prepared to exercise its discretion and allow an application. A time limit would reduce the workload of courts by screening out applications which could have no chance of success because of undue delay at a preliminary stage.

91. The Committee takes the view that an adoption of the English position would not be any more advantageous in practice than the existing situation. When analysed, the English system has only the effect of specifying where the burden of proof lies and does not particularly affect the substantive position. The free availability of judicial review is a fundamental principle. It would be undesirable to restrict the right by imposing time limits as is now the case with the

lodging of appeals. The Courts are fully equipped to deal with applications lodged after an unjustifiable delay, and in addition the Courts will also have regard to the existence of appeal rights in determining the exercise of its discretion.

LOCAL AUTHORITIES (MEMBERS' INTERESTS) ACT 1968

92. The Committee was asked to look at the Local Authorities (Members' Interests) Act 1968 and its impact on the Fishing Industry Board Act 1963.

93. Section 6(1) of the Local Authorities (Member's Interests) Act 1968 provides that a member of a local authority shall not vote on or take part in the discussion of any matter before that authority in which he has a direct or indirect pecuniary interest, other than an interest in common with that of the public.

94. The Fishing Industry Board comprises seven members, of whom five represent interests within the Fishing Industry. Therefore in discussing any matter it is likely that some, if not all, of those five members would have a direct or indirect interest in the matter beyond the interest of the public. If disqualified in such circumstances, it could mean that the Board would not have the required quorum of five members. The Board's legal advisers suggested that the word "public" could be narrowly interpreted as meaning a section of the public comprising the fishing industry interests which the Board member represents. The Committee rejected this argument as a matter of statutory interpretation.

95. It was agreed that the situation was unsatisfactory and that the Fishing Industry Board Act 1963 needed to be amended to make it clear that the member would only be disqualified if he had a direct or indirect pecuniary interest different in kind to the interest of the members of the industry whose

interests he represents. The Act was amended in accordance with this recommendation in 1981.

96. The Committee noted that the only other board similarly affected was the New Zealand Wheat Board established under the Wheat Board Act 1965. A similar amendment to that Act was also passed in 1981.

TRIBUNALS PROCEDURE

97. The Departments of Justice and Internal Affairs have expressed concern about the effect of the Commissions of Inquiry Act 1908, as amended in 1980, on tribunals conferred with the powers of a commission of inquiry. Copies of a preliminary working draft of a Tribunals Procedure Bill dealing with such bodies have been circulated to the Committee for consideration. In addition to making specific comments on the contents of the Bill the Committee has also made a number of general recommendations. It does not consider that membership provisions are relevant in a statute concerning the procedures and powers of tribunals. It has raised the possibility of including a power of contempt. In some cases it may not be desirable to repeal specific provisions in statutes dealing with procedure, and in other cases it will be difficult to determine if a specific provision has been overridden, and if so, to what extent. The Committee considers that as the Tribunals Procedure Bill will contain general provisions for many tribunals exceptions should be dealt with in individual statutes.

SUSPENSION OF SCHOOL CHILDREN

98. This topic was considered by the Committee in 1975 and is referred to in paragraphs 69 to 72 of the 7th Report. The Committee has a continuing interest in this topic. It has offered to assist the Education Department in the drafting of any part of the Education Act 1964 dealing with suspension

when it is reviewed. By way of general comment it has been suggested that a formal appeal against suspension tends to polarise parties. It might be less divisive to have someone in the role of a mediator brought in before a firm resolution is passed by the Board of Governors in support of the principal's act of suspending a pupil.

MISCELLANEOUS MATTERS

Administrative Review Council

99. The Attorney-Generals of New Zealand and Australia approved in February 1981 the setting up of a document exchange between the Committee and the Australian Administrative Review Council. This involves the exchange of both final reports and working papers. The Committee has received a number of very useful reports from the Council.

Justice-All Souls

100. In July 1980 the Committee met with Mr F. P. Neil Q. C., and Mr D. Widdicombe, Q. C., members of the Justice All Souls Administrative Review. Discussions centred around the Administrative Division of the High Court, applications for review, codification of grounds for review, and the Committee's report on Damages in Administrative Law.

The Hon. Mr Justice Kirby

101. In May 1981 the Committee met with Mr Justice Kirby, Chairman of the Australian Law Reform Commission. Matters discussed included recent developments in the Australian administrative law area, problems experienced, and delays and expense.

Australian Law Reform Conferences

102. The Chairman attended the 8th Australian Law Reform Agencies Conference and the 22nd Australian Legal Convention, both held in Brisbane, in July 1983. Useful informal discussions were held with those involved in law reform at federal and state levels. The programme for the Convention included a number of papers relevant to the work of the Committee.

For and on behalf of the Committee

Chairman

APPENDIX

MEMORANDUM FOR BYLAW-MAKING AUTHORITIES

In the course of an examination of bylaw-making powers, the Public and Administrative Law Reform Committee became aware of some respects in which the practices of some bylaw-making authorities are capable of being improved.

The Committee commends the following practical matters to bylaw-making authorities:

Necessity

1. Authorities should consider whether the proposed control is necessary and reasonable.

Reasonableness

2. To be valid a bylaw must be reasonable.

Consultation

3. Where an authority is proposing a new bylaw on a particular topic, early consultation with those interested or affected is generally desirable and likely to result in better legislation.

4. Prior consultation and prior publicity is generally beneficial in ensuring that the bylaw made can be, and is, complied with.

Citing of Authority

5. The statutory authority under which a bylaw is made should always be checked. That authority should always be cited in the resolution by which the bylaw is made.

Drafting

6. Drafting bylaws requires particular care and special skills to ensure that their provisions -

   (a) Are within the scope of the bylaw-making power;

   (b) Are expressed clearly and unambiguously;

   (c) Do not infringe principles of law, e.g., are reasonable and avoid the creation of unreasonably wide sub-delegations of discretionary powers;

   (d) Are not repugnant to general law.

Law Practitioners

7. As drafting is a specialist task the engagement of law practitioners with relevant experience is recommended.

8. The difficulty of constructing a satisfactory bylaw should not be underestimated.

Standard specifications

9. Where a bylaw is made by adopting a standard specification under the Standards Act 1965 it is necessary to comply strictly with the requirements of that Act.

10. It is also necessary to ensure that the standard specification suits the needs of the bylaw-making authority.

11. The bylaw must have attached to it or incorporated in it not only the standard bylaw itself, but also any other standard specification which is incorporated by reference in the standard bylaw.

12. The bylaw must also state the modifications (if any) with which the standard was adopted.

13. The bylaw takes the form of the latest published standard in existence when the bylaw is made. Later amendments issued by the Standards Association do not automatically amend the bylaw: the bylaw-making authority must take its own action to incorporate subsequent amendments in its bylaw. See sections 27 and 28 of the Standards Act 1965.

Records of bylaws

14. Bylaw-making authorities should maintain record copies of their bylaws. Such copies should -

    (a) Include all relevant procedural details concerning their making and public notification; and

    (b) Be complete in all respects; and

    (c) Be annotated with all amendments; and

    (d) Where the approval of a Minister is required, include the date of the approval; and

(e) Where the bylaw is confirmed by a Minister, include the date of its confirmation; and

(f) Where a bylaw is required to be notified before it is made, the date and manner of notification.

Deposit at District Court

15. The practice of many local authorities of depositing copies of their bylaws in the local District Court is also desirable.

Public availability of bylaws

16. Bylaws should be readily available for examination by members of the public at all offices of the bylaw-making authority, and at other convenient places such as public libraries.

17. Copies should also be readily available for purchase. Section 689 of the Local Government Act 1974 requires a Council to keep copies of all its bylaws at its office and to make copies available to anyone upon payment of a reasonable fee.

Copies to be up to date

18. It is important to ensure that copies of bylaws which are available for public examination or sale, and those deposited at the Court, are kept up to date.

Review of bylaws

19. Regular review of bylaws is desirable to ensure that they remain relevant and up to date.