

PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

POWERS OF DELEGATION
WORKING PAPER

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POWERS OF DELEGATION

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INTRODUCTON

1. The Minister of Justice has referred to the Committee the question of powers of delegation under the following terms of reference:

"In what circumstances is delegation unacceptable or undesirable -

- (a) by the Governor-General?
- (b) by a Minister?
- (c) by the holder of a public office?
- (d) by a public body?
- (e) by an official?

"What limits and safeguards are desirable for authorising the delegation and sub-delegation of public powers and duties-

- (a) by the Governor-General?
- (b) by a Minister?
- (c) by the holder of a public office?
- (d) by a public body?
- (e) by an official?

"The extent to which consistency between powers of delegation is desirable."

2. "Delegation" comprehends a number of overlapping concepts: the repository of an authority acting through another (his alter ego) otherwise known as the Carltona doctrine, agency, and delegation strictly so called. Because of the confusion between delegation in the wide sense comprehended by the terms of reference and delegation strictly so called, it may be better to refer to delegation in the sense used in the terms of reference as "devolution" - a term used by Scott LJ in Blackpool Corporation v Locker¹. The rule against delegation is expressed in the maxim delegatus non potest delegare ("a delegate cannot delegate"). As developed by the Courts, the rule against delegation seeks to balance two conflicting basic premises:

"An element which is essential to the lawful exercise of power is that it should be exercised by the authority on which it is conferred, and by no one else".²

"Since in practice government demands a great deal of delegation, this has to be authorised by statute, either expressly or impliedly."³

Both Wade in the passage immediately following that first quoted above and de Smith⁴ write that the first principle quoted above predominates subject to express or implied exceptions gleaned from the construction of the statute, but with respect this is not particularly helpful and begs the question of when exceptions are to be implied, though it does helpfully note the basis of the principle in statutory construction.

Characterisation of Powers

3. More helpful than the Wade/de Smith statement is the principle that the rule against delegation applies only to legislative powers, which may not be delegated, while administrative powers may be. Aikman's classic article, "Sub-delegation of Legislative Power"⁵ was based on the characterisation principle. He provides definitions of judicial, legislative and administrative power and makes a coherent pattern of the New Zealand and English cases, but he nevertheless acknowledges a great grey area in which there are terminological inconsistencies.⁶ Despite these difficulties, the Ministry of Works and Development in responding to the Committee's issues paper thought that characterisation is helpful while the Ministry of Defence regarded it as "appropriate".

Organisation of Paper

4. De Smith⁷ warns about the dangers of writing a short and accurate account of the law relating to delegation because the cases have arisen in diverse contexts and many of them turn on unique points of statutory interpretation. Notwithstanding that warning, it is the nature of a law reform working paper to attempt to state such principles and I will attempt to do so in Parts II and III of this paper. Part II deals with definitions in the area and the different concepts involved while Part III attempts to set out the principles applied by the Courts. Part IV contains an analysis of delegation in New Zealand and of express delegation provisions contained in our legislation. Part V sets out the principle of the paper's approach to reforms seen as needed and then sets out the particular reforms proposed.

PART IISOME DEFINITIONS AND CONCEPTSA. Characterisation of Functions

5. Because the characterisation approach has dominated judicial and academic statements on delegation in the past, it is appropriate to set out the principles relating to delegation as they have been expressed in characterisation terms. Having done so, it is intended to set those principles on one side and concentrate rather on the elements which have lead courts to accept or reject delegations as valid.

Legislative Power

6. Legislative power has been distinguished from administrative power by reference to the difference between the general and the particular,⁸ or by reference to the making of rules as distinguished from individual decisions.⁹ Either distinction is clear at its extremities, but as authors have noted there is a very large grey area in between. Stated in terms of characterisation, the rule against delegation says that "delegated legislative power cannot be sub-delegated except insofar as Parliament, which has created the power, has said that it might be sub-delegated" - Callan J in F.E. Jackson and Co Ltd v Collector of Customs.¹⁰ There, the Judge held that the delegation was of legislative power because the sub-delegate was authorised to prohibit the importation of goods generally as well as particularly. This was done by a prohibition covering the whole field coupled with a dispensing power conferred upon the delegatee.
7. Other examples of characterisation of powers as legislative or administrative when the contrast in issue is between those two concepts are as follows: power to requisition a house is administrative - Lewisham Borough Council v Roberts,¹¹ the power to fix prices is legislative - Hawkes Bay Raw Milk Products Co-operative Co Ltd v New Zealand Milk Board,¹² the making of interim development orders is legislative - Sambell v Cook,¹³ and the designation of areas as of special environmental significance is legislative - Askew v Cross Key Waterways.¹⁴

Judicial Powers

8. If the normal means of defining judicial powers in terms of the duty to adhere to the rules of natural justice is followed here, then a principle that judicial functions cannot be delegated would cover a wide range of powers from those of the High Court down to those of many administrators. Referring first to those persons and bodies exercising the most clearly judicial powers, namely, the Courts and arbitrators, the rule against delegation is applied strictly in respect of their judicial or related

powers, though delegation of ministerial functions, i.e. those involving no appreciable exercise of skill or judgment or the implementation of their decisions are always delegable.¹⁵

9. No general rule can be stated about bodies from the formal tribunals down to administrators which have to follow the rules of natural justice. As to formal tribunals, the Courts have only found implied power to sub-delegate judicial functions in respect of multi-member bodies where the rule is that not all members have to participate in the decision - Howard v Borneman (No 2).¹⁶ But even that principle is subject to some limitations such as those seen in the comparison between Olympia Press Ltd v Hollis¹⁷ and Burke v Cropper.¹⁸ Both of those cases dealt with tribunals in the form of Justices of the Peace determining whether certain publications were obscene. In the former, each book was read by two justices, though all the justices sitting made a collective decision on each book. This was held to be valid. In the latter, the photographs were divided up among the justices but the decision in respect of each photograph was that of the justice that looked at the photograph. This was held to be invalid, possibly because the Court discovered that there were two copies of one photograph, one of which had been found to be obscene and the other not. In Moore v Harding,¹⁹ some members of a licensing committee were present for the hearing and others for the handing down of the decision. It was held that the decision was invalid because the members had to be together for the whole proceedings. Finally, in R v Burnley JJ, ex parte Longmore,²⁰ a condition on licensing a cinema that no film should be shown to which any three justices had objected was held to be unreasonable.
10. The major area in which delegation is permitted in respect of judicial functions is that while a judicial body cannot delegate its decision-making function,²¹ it can delegate the investigation and the hearing of evidence and submissions provided that a full report of them is put before the decision-making body - Jefferies v New Zealand Dairy Board,²² though an adequate summary might in some circumstances suffice.²³ That decision was criticised strongly by Keith²⁴ on the grounds that it violated the principles of characterisation in that the hearing of evidence and submissions (a clearly judicial function) was delegable, while handing down the decision (an administrative function) was not. However, the authoritative statement of the rule is merely that judicial functions can seldom be delegated while some administrative functions cannot be delegated - Barnard v National Dock Labour Board,²⁵ Vine v National Dock Labour Board.²⁶ Further, what was in fact not delegable was making the decision, not handing it down - which is often done by Registrars in our Courts. Despite Keith's criticisms, the decision in Jefferies is accepted by the writers.²⁷

11. As to informal tribunals and administrators subject to the rules of natural justice, one can normally say that their judicial functions are delegable. Accordingly, as Lord Somervell noted in Vine,²⁸ characterisation provides no solution to when judicial powers are delegable or administrative ones non-delegable; e.g., the examination of a judgment debtor by a court is delegable to a Registrar - Hunt v Allied Bakeries Ltd (No. 2),²⁹ but the reappraisal of valuation for rates cannot be delegated - Esmonds Motors Pty Ltd v Commonwealth.³⁰ Aikman³¹ endeavours to resolve this difficulty by ignoring the difference between administrative and judicial powers and positing that if a power to decide by reference to particular cases is conferred then, whether the power is judicial or administrative, Parliament can be taken to have intended the personal exercise of the power. He cited Vine, where the court resolved the question of delegability by looking at the importance of the duty involved and the characteristics of the delegate. Those are two of the elements which one finds running through the cases on delegation and which have lead judges to conclude that a power is judicial and non-delegable or administrative and delegable. They will be considered in Part III.
12. Before leaving the concept of judicial power, it should be noted that disciplinary powers are not delegable³² unless there is express power of delegation.³³ That rule is really only an application of the principle that important duties are not delegable.
13. Administrative functions are defined in terms of legislative or judicial functions as the case may require.

B. Distinction Between Delegation and Agency

14. This is the question addressed in issue 1 of the issues paper which was:

"What is delegation? Should it be distinguished from agency?"

In this section "delegation" means delegation strictly so called. Before embarking upon this, it is important to note the caveat that some cases have held that no delegation is lawful, and so where the court wished to allow devolution of power it has been forced to characterise the devolution as agency and valid rather than delegation and invalid.

15. Bearing that in mind, the locus classicus of the distinction between delegation and agency is to be found in Blackpool Corporation v Locker³⁴. There Scott LJ pointed to the condition on the devolution of power from the Ministry to the Corporation that the Ministry could direct the Corporation to hand back land which had previously been requisitioned, which condition, he said, "shows conclusively the nature of the

devolution of powers effected, namely, that it was true law-making delegation of power to do things which otherwise the delegate would have had no right to do. It was essentially not a creation of the agency ... The reservation of right of control would have been superfluous had it been agency." Asquith LJ agreed with Scott LJ, while Evershed LJ³⁵ doubted whether a person to whom power has been delegated can be regarded as an agent. On the other hand, in Huth v Clarke,³⁶ Wills J said that if the word "delegate" in the maxim delgatus non potest delegare is used correctly then it means little more than "agent".

16. Of the writers, Wade³⁷ cites Huth and sees no distinction between delegation and agency. In contrast, the Australian cases support there being a distinction between delegation and agency. In O'Reilly v Commissioner of the State Bank of Victoria³⁸ the Court proceeded upon the basis that there is a distinction between delegation on the one hand and agency or an official acting through another on the other. Brennan J, sitting as President of the Administrative Appeals Tribunal in Re Reference under S.11 Ombudsman Act 1976, ex parte Director-General of Social Services³⁹ made that distinction and said that in delegation the delegate may, without further authorisation, act in effective exercise of the power delegated to him⁴⁰:

"His acts are not treated as acts vicariously done by the authority. He is not an agent to exercise the authority's power; he may validly exercise the power vested in him."

The Judge referred to Locker⁴¹ in support of this. Dixon⁴² gives special attention to the Australian cases and criticises them for being based on Locker which she in turn also finds defective. She sides with Wade in seeing no relevant distinction between delegation, agency, and one official acting through another.

17. The authorities being inconsistent in their statements on principle, the question is whether there are any legal differences between agency and delegation such that one could say that the use of a particular word in a context is more than mere semantics.
18. De Smith considers the point at two separate passages in his book⁴³:

"It is thought that the general rules of agency apply in public law, except that an agent (a) cannot bind his principal to do what is ultra vires and probably (b) cannot bind his principal by exceeding his own authority, that authority is circumscribed by the statute; but the existing case law on agency in public law is equivocal."

Later, he finds three distinctions between agency and delegation. First, he says that an agent acts on behalf of his principal and in his name, so that acts within the scope of his authority are attributable to his principal. "... it would generally be held to be ultra vires for an authority to invest a delegate with powers exercisable in his own name." The Australian cases are substantial authority for accuracy of the former but also for the inaccuracy of the latter. The second distinction he sees is that an agent can be given detailed directions by his principal and does not usually have a wide area of personal discretion, but in delegation the area of freedom may be the decisive point in determining validity. De Smith's argument here is unconvincing. While, as will appear in Part III, the width of the power delegated is a significant element in determining its validity, de Smith's argument as stated seems to negate a distinction between agency and delegation on this point. But even so, the argument goes no further than to state the usual position. This second point of distinction can probably therefore be ignored. The third point of distinction is said to be that in agency the principal holds concurrent powers but that sometimes in delegation it is said that delegation involves a denudation of power. He cites Locker⁴⁴ there, but goes on to say that that is not the usual situation. Here, again, de Smith's argument appears to negate a distinction between agency and delegation.

19. We are left, therefore, with the first distinction only, namely, that the delegate as distinct from an agent acts in his own name and exercises his own power, though paragraph 24 below reveals a second distinction. That is supported by the Australian cases only. However, when the dictum in Locker that there is a distinction is allied to the three weighty Australian cases - O'Reilly,⁴⁵ Reference⁴⁶ and Esmonds,⁴⁷ a strong argument can be made that there is a distinction in law between delegation and agency. To the contrary are authorities and, with the exception of Dixon,⁴⁸ writers who are all English. There the practice of enacting express delegation provisions is not as widespread as in Australasia and the traditional mode of communicating decisions made on behalf of Ministers is by the phrase "I am directed by the Minister". It is for this reason that the better argument is probably that the New Zealand Courts would follow the Australian on this point.
20. The argument is a sterile one for the purpose of this paper, which is to make suggestions on what if any reforms to the law there should be. The relevant question is whether there should be in the future a distinction between delegation and agency and if so how that should be provided for. I return to this in Part V.

Some Characteristics of Delegations Strictly-So-Called

21. The first characteristic is that delegation does not involve the transfer of power in the sense of denudation of the delegator's power.⁴⁹ Both de Smith and Mullan⁵⁰ affirm this principle. Locker⁵¹ is to the contrary. That case arose in the particular circumstances of a delegation to an outside body (a Minister to a local authority) and it was said that delegation did involve denudation of power (though in the particular circumstances the delegation instrument provided for some limited retention of power in the Minister).
22. The principle has two corollaries: (a) a delegation contains an implied power (subject to statute) that it may be revoked at any time without notice,⁵² and (b) the delegator can still act while the delegation is in force.⁵³
23. The second characteristic is that the delegator has no power to ratify the delegatee's decision.⁵⁴ The contrary is implied by Denning LJ in Barnard⁵⁵ when he said that if there was no power to delegate then there was no power to ratify decisions made by the delegatee. Dixon⁵⁶ reads Locker as establishing two species of delegation (with and without ratification), with the Court holding there was no power of ratification if the delegation was by way of legislative instrument. As will appear in the following paragraph, this view would not appear to be correct. Whitmore and Aronson, Review of Administrative Action,⁵⁷ say that the delegator does have power to ratify the actions of the delegatee and cite Lever (Finance) Ltd v Westminster Corporation.⁵⁸ But that case stands for the proposition that an officer may make binding representations on behalf of the local authority if within his ostensible authority. They also cite Firth v Staines,⁵⁹ but that case too did not involve an implied power of ratification. The instrument of delegation enabled the committee to take certain steps but its actions were to be submitted to the local vestry for approval. The committee directed an inspector to serve a notice and to sue the person served if it was not complied with. The former but not the latter action was submitted to the vestry for approval. Hawkins J held that it was not every step of the action which had to be submitted to the vestry but only the final action, namely, the decision to sue.
24. The concept of ratification would appear to be misplaced in the area of delegation. If the delegatee has power to make the decision himself and of his own authority, it is valid and needs no ratification. If it is invalid vis-a-vis the legislative power conferred on the delegator, no ratification is possible. If it is invalid only vis-a-vis the instrument of delegation, then the delegator can exercise the power himself by reason of the second corollary of the first characteristic, but analytically that is not a question of ratification.

25. Turning now to the situation where the delegator wishes to rescind the delegatee's decision, if the delegatee's decision is invalid the delegator can act pursuant to the second corollary to the first characteristic and issue a new decision. If the delegatee's decision is valid, then for the delegator to make a different decision would be to put two valid conflicting decisions in place, and further analysis is necessary. If the delegator is in law an appellate authority from the delegatee, then there is no problem and the delegator's decision supersedes that of the delegatee. If the delegatee is not *functus officio* and the delegator has sufficient control over him, the delegator might require the delegatee to rescind his own decision and make a new and a different one. If neither of those situations pertains, then it is debatable whether the delegator can rescind the delegatee's decision. While common sense suggests that the delegator's decision should prevail over that of the delegatee, unless something such as estoppel cuts across matters, the fact that the delegatee may exercise his own power of decision suggests that the courts would be more likely to hold that the delegator has no power of rescission in this third situation. The position is far from clear.
26. Of course, statute may authorise rescission or ratification but that situation needs no elaboration here.

PART IIIPRINCIPLES ON VALIDITY OF DELEGATIONA. Under Express Delegation Provisions

27. An analysis of express delegation provisions in New Zealand is contained in Part IV of this paper. Obviously, provisions in legislation prevail over the common law principles discussed in this section, which involves principles implied in or deduced from express delegation provisions. This is a process of statutory construction.⁶⁰ It would follow that the two characteristics and their corollaries set out in the preceding paragraphs apply to express delegation provisions.⁶¹

28. An express delegation power cannot authorise the delegator to delegate the complete power conferred on him unless the provision expressly so provides:

"It would be a negation of the statutory authority given if the Governor-General, who is appointed to decide the matter by order in council, were free by virtue of this section [section 2(2) Statutes Amendment Act 1945] to delegate completely the very matter entrusted for decision. At least, we think it would require express and unambiguous language to achieve this result, and such language has not been used." Hawkes Bay⁶²

De Smith says:⁶³

"... it may generally be presumed that express authority to sub-delegate powers is to be construed as impliedly excluding power to sub-delegate the performance of duties involving the exercise of deliberate judgment, unless the performance of the duty is inextricably interwoven with the exercise of the power."

29. In the light of Mungoni v Attorney-General for Northern Rhodesia⁶⁴ and Maxwell v Commissioner of Inland Revenue,⁶⁵ it is hard to see what de Smith's conclusion could cover unless, perhaps, it covers the first stage of an expressly two stage decision such as that if (a) exists then the authority may do (b). However, the thrust of the two cases cited makes it unlikely that a New Zealand court would so find.

30. In exercising an express power of delegation, the delegator must follow the procedure set down and must identify the power delegated sufficiently - Ratnagopal v Attorney-General.⁶⁶

31. An express provision authorising delegation of certain functions and powers excludes an implied power to delegate other powers.⁶⁷ Equally, if the expressed provision authorises delegation to certain persons or classes of persons, then there is no implied power to delegate to other persons or classes of persons.⁶⁸

B. The Carltona Principle

32. In Carltona Ltd v Commissioners of Works⁶⁹ Lord Greene MR said:

"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them... It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

This is not delegation strictly so called, but is "acting through" another person as alter ego.⁷⁰ The principle has been followed in relation to devolution from ministers to officers of government departments in the cases cited in the immediately preceding paragraph and R v Skinner,⁷¹ but not where the officer held a dual function and was relevantly acting under the function which was not that of a departmental officer - Woollett v Minister of Agriculture and Fisheries.⁷² There the officer was an officer of a department but also secretary of a tribunal, and it was held that he was relevantly acting as secretary and not as departmental officer. In Australia, the principle has been followed in relation to the devolution of authority from a Deputy Commissioner of Taxation (the most senior officer in each State) - O'Reilly,⁷³ but was not followed in relation to the same devolution in Deputy Commissioner of Taxation

(SA) v. Saddler,⁷⁴ a decision by a single judge of the Supreme Court of South Australia handed down the day before the judgment in O'Reilly. The Supreme Court of South Australia in Banco also declined to apply the principle in relation to devolution from a permanent head to one of his officers in Hinton.⁷⁵

33. The principle has not been applied to the devolution of authority from statutory bodies in England - Nelms v Rowe.⁷⁶ The principle was not mentioned in Ex parte Forster, re University of Sydney,⁷⁷ but the decision is inconsistent with its application. Among the writers, Mullan⁷⁸ and Wade⁷⁹ take the view that the principle does not apply to statutory bodies. The one inconsistent case is Attorney-General, ex rel McWhirter v Independent Broadcasting Authority⁸⁰ where Lord Denning MR said that the Carltona principle applies. However, the other judges did not make similar statements and the case is in fact one of devolution of the investigatory function. The principle does not apply to local authorities - Morrison v Shire of Morwell.⁸¹
34. In Carltona,⁸² Lord Greene founded his principle on two bases: Ministerial responsibility and the impracticability of a minister exercising such multifarious functions to act himself in every case. With the exception of Nelms⁸³ and Hinton,⁸⁴ the courts have tended to look only at the second of those bases. If, therefore, following Dixon,⁸⁵ one looks strictly at the two bases then the Carltona principle can apply only to devolutions from ministers to officers of the minister's department. There is, however, an argument that because ministerial responsibility still applies where one officer devolves power to another, those cases which do so are right in looking only at the second basis. The New Zealand practice of ministerial responsibility has been to deny that any sanction attaches to a minister in respect of actions of his officers which cannot be sheeted home personally to him. It would follow that the first basis of the Carltona principle should be regarded in New Zealand as extremely weak and the courts may be justified in looking only at the second of Lord Greene's bases. Whether the situation in New Zealand is so different that the Carltona principle should not be applied is a matter that will be considered later.
35. Where the Carltona principle does apply, it permits a devolution only in respect of administrative powers.⁸⁶ It would seem, therefore, that Dixon⁸⁷ is wrong when she states as a proposition, criticising O'Reilly, that the Carltona principle does not depend for its application on the nature of the power exercised. For what it is worth, Denning LJ in Roberts said that the act of devolution is an administrative and not a legislative act. Unfortunately, none of the cases applying the Carltona principle provide any guidance as to what are the factors which led the court to view the power there devolved as administrative.

36. Even within the scope of the Carltona principle, not every function may be devolved. Functions regarded as of the greatest importance must be fulfilled personally by the minister or (if applicable) the officer on whom the function is conferred.⁹⁰
37. There is a fine line between devolution of power under the Carltona principle and delegation pursuant to an implied delegation power. Thus, in Nelms⁹¹ Lord Parker CJ held that the Carltona principle did not apply but there was an implied delegation power which could be exercised, although in Record Tower,⁹⁷ the same judge found no evidence of a delegation pursuant to the same implied delegation power. Forster⁹³ is a case of the exercise of an implied delegation power, though it has, mistakenly been seen as a Carltona case.⁹⁴
38. More important in New Zealand is the relationship between the Carltona principle and express delegation provisions. In Roberts,⁹⁵ Denning LJ said that the principle could co-exist with an express delegation provision in relation to the very same function, a point emphasised by Jenkins J⁹⁶ where he noted that the express delegation provision did not say how the delegation was to be made and so there was no reason why it could not be done in the Carltona way. Although the judge there seems to be confusing delegation and acting through an alter ego, it is plain that he supported the co-existence position. Similarly, in O'Reilly,⁹⁷ Gibbs CJ (impliedly) and Wilson J (expressly) affirm that the two may co-exist. That was also the view of the Supreme Court of Canada in R v Harrison⁹⁸. Wade⁹⁹ says:

"Even where there are express statutory powers of delegation they are not in fact employed as between the minister and his own officials. ... Such legal formalities would be out of place within the walls of a government department, as is recognised by Parliament's practice of conferring powers upon ministers in their own names."

On the other hand, the Carltona principle was restricted to situations where there was no expressed power of delegation in Commissioners of Customs and Excise v Cure and Deeley Ltd,¹⁰⁰ Reference¹⁰¹ and by Mason J in O'Reilly¹⁰².

39. While the weight of authority favours the co-existence position, it is considered that the better view is that the Carltona rule cannot apply where there is an express delegation provision. In Reference,¹⁰³ Brennan J made the formidable point that a delegate does not have a dual character and so cannot choose whether to act as delegate or alter ego. The statement by Wade is expressed in terms of an English practice which is quite different from that in New Zealand and the statement must therefore be regarded as unreliable in terms of its authority in New Zealand.

Further, there are policy reasons in support of the Cure and Deeley position. A Carltona devolution can be made informally without express (let alone formal) authorisation and without definition of the power devolved,¹⁰⁴ whereas delegation pursuant to an express provision must be both express (and follow prescribed formalities) and define the power.¹⁰⁵ To allow the Carltona principle to apply where there is an express delegation provision would subvert the statutory intention of the provision. That is the strength of Mason J's invocation of the maxim expressio unius exclusio alterius in O'Reilly.¹⁰⁶ It is for that reason that one can agree with Dixon¹⁰⁷ that to follow the Roberts line of cases would render the common law rule against sub-delegation meaningless.

40. This raises the question whether abandonment of the rule against sub-delegation would matter. It may lead the New Zealand courts to follow the United States position where their rule against delegation based on principles similar to those reviewed in Part IIIC below has largely ceased to be given effect in favour of ensuring that the sub-delegate develops adequate procedural safeguards and criteria for decision-making. This is accompanied by a greater judicial reliance on other aspects of ultra vires. Certainly, judicial review for ultra vires in New Zealand has become significantly tighter with Secretary of State for Education and Science v Metropolitan Borough of Tameside,¹⁰⁸ Bulk Gas Users Group v Attorney-General¹⁰⁹ and Cooke J's judgment in Daganayasi v Minister of Immigration¹¹⁰ approved in Bulk Gas Users. Cooke J's review for mistake of fact especially provides a basis for development of a "substantial evidence" rule in New Zealand akin to that in the United States. But the United States experience teaches that the substantial evidence ground is really only applicable to precisely phrased powers where a formal procedure is used. Where powers are more open textured, review is rather on grounds equivalent to improper purpose and unreasonableness. As a result, a number of U.S. writers, particularly Fine, "Rethinking the Non Delegation Doctrine",¹¹¹ conclude that the U.S. law has failed to provide an adequate substitute in controlling the administration for an effective rule against sub-delegation. As appears in Part V, the rule against sub-delegation fulfills a different function from other grounds of ultra vires and despite the judicial activism in New Zealand in administrative law matters, it is considered that an effective rule against sub-delegation has a role to play. Accordingly, adoption of the co-existence position would be a retrograde step.

Should Carltona be followed in New Zealand?

41. This was issue 2 in the Committee's Issues Paper:

"Should the Carltona doctrine apply in New Zealand?"

Of the departmental responses to the Issues Paper, the Department of Trade and Industry favoured application of the Carltona principle on the basis that not all statutes should have delegation provisions and the Ministry of Defence saw the application of the principle as necessary in operational conditions, while the Post Office doubted whether there was a middle way between Carltona applying in every situation and not applying at all, and the Department of Statistics and Ministry of Works and Development were opposed to application of the principle. The Department of Statistics labelled it as "futile" while the Ministry of Works and Development noted that it did not follow the Carltona principle except in respect of ministerial functions which were also noncontroversial. Predictably, Dixon¹¹² expressed opposition to application of the Carltona principle, and in New Zealand the context of so many express delegation provisions must raise a question of utility of the Carltona principal unless the co-existence position is adopted. Yet fulfilling the conditions for a formal delegation under an express provision and keeping a delegation register up to date (see the Ministry of Transport procedure outlined in Part IV below) is onerous and there is an argument against abandoning the Carltona principle in total which would have the result of requiring a formal delegation of what has been termed "ministerial" functions. In the absence of any New Zealand reported decision following or even commenting on Carltona, issue 2 is a key question to be resolved by the Committee and will be canvassed further in Part V.

C. Implied Delegation Powers

Foundations

42. At the start of this paper it was noted that the rule against sub-delegation involved a conflict between two premises. The foundation of the first premise in statutory construction is best stated by Bridge J in R. v Lampe, ex parte Maddalozzo¹¹³ when he said:

"... it seems doubtful whether that principle can be properly based on the maxim delegatus non potest delegare. To my mind, a better basis exists in the proposition that delegation of specified legislative powers does not extend beyond the powers so specified, and except in so far as they include a power to sub-delegate, any purported sub-delegation of any of them is ultra vires the terms of the delegation."

43. Bridge J is not alone in rejecting the maxim as the basis of the rule against sub-delegation.¹¹⁴ Cox J in Saddler¹¹⁵ usefully fleshes out the concept of the foundation of the rule in statutory construction, though his statement is there in the context of rejecting the application of the Carltona principle. He said:

"It all depends on the more particular considerations of the precise nature of the power and the conditions of its exercise, the object of the legislation, and so on, and these factors, in my opinion, point rather to a legislative intention that the words of the subsection, in this case, mean exactly what they say [and the decision should be made by the repository of the power]."

44. If one wishes to retain the maxim as a handy touchstone while affirming the foundation of the rule against sub-delegation in statutory construction as well, then one could say with de Smith¹¹⁶ that:

"The maxim delegatus non potest delegare does not enunciate a rule that knows no exception; it is a rule of construction to the effect that 'a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negated by any contrary indications found in the language, scope or object of the statute'".

45. Even the American writers for whom the rule is founded upon a rich lode of sources see statutory construction as one basis.¹¹⁷
46. The second and conflicting premise has frequently been noted, significantly in Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan¹¹⁸ per Dixon J when rejecting application of the American rule that any delegation of power by the Federal Parliament was a sub-delegation of power in the light of the fact that Parliament itself is supposedly a delegate of the Constitution. As one might expect, the argument based on administrative convenience or necessity has been raised in the Carltona line of cases.¹¹⁹ Administrative convenience or necessity was availed of by the courts to justify devolution in relation to the Commission for Racial Equality,¹²⁰ the Independent Broadcasting Authority approving transmission of particular television programmes¹²¹ and a university senate,¹²² but it was equally availed of to reject devolution in Barnard¹²³ on the facts, and in Jackson¹²⁴ in point of principle. Among the writers accepting the premise of administrative convenience or necessity are Whitmore and Aronson,¹²⁵ Keith,¹²⁶ Wade,¹²⁷ and notably Aikman¹²⁸ where he went further and said that it is normally desirable that the delegator should lay down the rules governing the delegatee, but administrative effectiveness may require that power be delegated within broad limits allowing the delegatee to work out rules. New Zealand administrative practice does not really support this in the sense that the vast collections of manuals and instructions governing the exercise of statutory powers are usually laid down by senior management to govern decision-making by more junior officers. Thus, even when a

power is conferred on a Minister and in fact exercised by an officer, the manual instructions are developed not by the delegatee, nor, often, by the delegator, but by someone in between. The practice appears to be that the powers are not delegated until the manual, or at least informal circulars, have been prepared by senior management.

47. Among other foundations for the rule relevant to New Zealand is that stated by the Court of Appeal in Hawkes Bay¹²⁹:

"Government today is so complex, and so many statutes confer such wide powers upon such a variety of bodies and persons, that it is essential that those to whom the legislature delegates the duty of deciding any particular matter should make the decision; if there is to be power for that person or body to whom the legislature has entrusted its legislative power to be free himself or itself to sub-delegate, it should be made clear beyond any doubt that such power of sub-delegation is given, and to whom, and if it is only a limited power of sub-delegation, that the limits should be plainly defined."

48. That foundation appears to work both ways. The size and complexity of modern New Zealand government may equally as well suggest wide delegation powers as that there should be little sub-delegation. Although the Court of Appeal does not say so, its approach would also be consistent with the proposition that legislation should confer powers upon a person or officer at the level of seniority conceived to be appropriate to the responsibilities of the power and who equally will have time to make the decisions.
49. The rich lode of sources for the rule against delegation in the United States includes the facilitation of judicial review of administrative action, political accountability in representative government, the separation of powers, due process, and the principle of "constitutional supremacy". Comment on a few of those foundations is warranted.
50. The rule against sub-delegation can be seen to facilitate judicial review by requiring the legislature to set criteria for the sub-delegate, so converting "legislative" power to "administrative". This more precise statement of the sub-delegated powers gives the courts more to bite on in judicial review. Thus, in Cross Key¹³⁰ the Florida Supreme Court tested the relevant sub-delegation by asking whether the guidelines sufficiently limited agency action by specifying which elements or factors must be present before the authority could be exercised and whether those elements or factors were modified by quantitative terms susceptible of reasonable and foreseeable definition. Such an approach is aimed overtly at promoting judicial review. In the end, Fine¹³¹ recommended a variable requirement of specificity in sub-delegation based on the magnitude of the policy-making

delegation and its susceptibility to judicial review. Similarly, Keith¹³² stripped the language in the cases of their characterisation formulae and concluded that what the courts were doing was "consistent with the broad judicial function of controlling the exercise of power" and also with Parliament's intention in empowering a particular person or body to do a particular thing.

51. The foundation of the rule in the separation of powers is a United States approach which was rejected by the High Court of Australia in Victorian Stevedoring¹³³ even though the Australian Federal Constitution provided for the separation of powers. Plainly, in New Zealand the separation of powers is no more than a feature of the background if one wishes to speak in terms of characterisation with particular utility. Again in the background, if one approaches sub-delegation from statutory construction, the rule that a power to regulate does not authorise a prohibition and sub-delegation of a dispensing power,¹³⁴ the separation of powers is useful authority in support of the accepted view.

Main Elements of the Rule

52. An analysis of the cases shows that the judgment on validity of a sub-delegation is based on a global assessment of a number of elements in the light of the relevant provision and, one may add, of the structure of the Act as a whole.¹³⁵
53. The first element is the importance of the power reposed on the delegate.¹³⁶ This element was used to reject application of the Carltona principle to important powers in Cure and Deeley¹³⁷ and Saddler.¹³⁸ In the former Sachs J noted the presence of an express delegation provision and the careful distinction in the statute between acts which were specified to be done by the Commissioners themselves (all of them important) and those which were reposed on others. In the latter, Cox J reached his decision simply on the proposition that the power in question was too important to allow to be devolved under the Carltona principle. Included in assessment of the importance of the power are the nature of the interests involved, whether they are vested or valuable, and the proposition that the more important the interest involved, the more likely is it that the power should be exercised personally by the repository. A particular application of the element is the rule that disciplinary functions cannot be delegated.¹³⁹ One could also say based on Vine that judicial functions are too important to be delegated.
54. The second element is that a sub-delegation is prima facie invalid if it extends to the whole of the power conferred on the delegate,¹⁴⁰ but pursuant to section 13 of the Bylaws Act 1910, the whole of the delegated power may be sub-delegated.¹⁴¹ Bremner v Ruddenklau¹⁴² requires some further discussion. The Bylaws Act provided that a

sub-delegation is not invalid merely because it allows someone to act "in any particular case". The majority held that particular was distinguished from general and did not mean in individual instances. Sim J in a powerful dissent based on the distinction between particular and general tested the matter by asking whether, after taking out the particular cases in which the delegatee was empowered to act, there was any residue. If there was then the sub-delegation was valid, but if not then it was not. In the particular case, he held that until the delegatee acted the bylaw was a mere shell and of no effect, so that the sub-delegation was in fact general and not particular. The majority's approach on the facts was more one of merely looking at the words of the sub-delegation and seeing if they (without reference to the power of the delegate) related to particular cases. It was held that the sub-delegation was valid because it enabled the delegatee to decide what roads should be closed to heavy traffic and when. The decisions on roads and times were particular. Although it is considered that Sim J's approach is more consistent with the law as a whole and has greater logical merit, Bremner was approved in Hazeldon v McAra¹⁴³ and one must probably now accept that it represents the law of New Zealand subject to any further legislative amendment. The reason behind this second element would appear to be that if the delegate sub-delegates the whole power, then it has not done what it was authorised to do.¹⁴⁴

55. Thirdly, the greater the proportion of power sub-delegated compared with the power conferred on the delegator, the more likely is it that the sub-delegation will be held to be invalid.¹⁴⁵ Although the decisions in Geraghty v Porter¹⁴⁶ and Re Tutira Block, Tareha v Sim¹⁴⁷ were not expressly decided on this basis, the element would also explain them on their facts. A similar approach has been taken in the United States.¹⁴⁸ The rationale of this element is as a corollary to element two; the greater the proportion of the power sub-delegated, the harder it is to say that the delegator has done what was authorised. The writers generally accept that this element is a relevant one.¹⁴⁹
56. Fourthly, the greater the area of discretion and the fewer the criteria for decision-making imposed on the delegatee, the more likely it is that the sub-delegation will be invalid.¹⁵⁰ This is also an element of the United States rule against delegation.¹⁵¹ The writers accept this element.¹⁵²
57. Fifthly, the character of the delegate is relevant. If a court can discern from the legislation that a power was reposed in a delegate because of special trust put in that delegate,¹⁵³ especially if the body is a public representative one,¹⁵⁴ then the courts will not infer a power of delegation. This element is accepted by the writers.¹⁵⁵

58. Sixthly, the greater the degree of supervision which the delegator can exercise over the delegatee, the more likely it is that a sub-delegation will be upheld - thus, in a slightly different conceptual framework, absence of control was held by the court in Locker¹⁵⁶ to mean that there was a delegation and not a relationship of agency. This approach was not followed in Roberts,¹⁵⁷ but it was accepted in Forster.¹⁵⁸ Compare relevantly Mills v London County Council¹⁵⁹ and Ellis v Dubowski.¹⁶⁰ Both cases related to a condition by the London County Council that films were not to be shown in cinemas unless they had been passed for universal exhibition by the British board of film censors. In Ellis it was held that there was an unlawful delegation. The bylaw transferred power from the Council to the British board of film censors. In Mills the Council had added a proviso to the bylaw maintaining the prohibition without the Council's consent. This proviso was held to make the bylaw valid as it retained control in the council. See also Allingham v Minister of Agriculture and Fisheries¹⁶¹ where the absence of control by an authority over its sub-committees was said to be fatal to the delegation. In contrast to Allingham, and in keeping with Mills, where the decision is definitively taken by the delegator, then the delegation is valid, even if that definitive decision is perfunctory, "taken on the nod", or taken en bloc.¹⁶² In many situations, that justification will only theoretically apply as the cases cited show.
59. Seventhly, the character of the potential delegatee is relevant if the enactment displays an intention contrary to such a delegatee being included within the power.¹⁶³ Keith¹⁶⁴ takes the view that the character of the delegatee is not relevant, but that would be inconsistent with Barnard¹⁶⁵ and Vine¹⁶⁶ where the possibility of delegating powers to a body which was not a microcosm of the delegator was regarded as a relevant consideration. Keith would appear to be correct to the extent that the question is the existence of an implied power to delegate and the two cases suggest that the character of the delegatee is relevant only in the context of possible delegates and not any particular delegatee. However, it would seem likely that if a court regarded a delegation to a particular delegatee as highly undesirable, this would be a relevant factor in deciding that there was no power of delegation (the power if valid ex hypothesi allowing delegation to this undesirable delegatee). Alternatively, the court might decide that the delegation to this particular delegatee was unreasonable; thus maintaining a power to delegate but giving effect to the court's view of the justice of the situation.
60. Eighthly, a prohibition coupled with a sub-delegated dispensing power is judged for its validity as a sub-delegation having the width of the dispensing power only, and the fact that it is coupled with a prohibition does not appear to be specially significant.¹⁶⁷ While a court

might say that a prohibition with sub-delegation of a dispensing power covering the entire field conferred upon the delegator is bad because the delegator has prohibited and not regulated, that result would equally be reached without dwelling on the words "regulate" and "prohibit". The courts have said anomalously that where there is a prohibition, a dispensing power does not interfere with rights and is therefore not specially undesirable.¹⁶⁸ De Smith¹⁶⁹ states it one way when he says:

..."if an absolute prohibition would be valid, then prima facie a conditional prohibition should be upheld ..."

But the cases would appear to be against him at least in the New Zealand context, if not the English one.

Examples of Applications not already covered

61. First, the power to decide whether to prosecute is not sub-delegable.¹⁷⁰ This is very strictly the rule in local authorities still.
62. Secondly, a sub-delegation to an outsider is not valid unless there is express provision empowering this.¹⁷¹ The rationale for this application may lie in the lack of control of the delegator over the delegatee, or it might lie in the rule against acting under dictation. Whatever may be its genesis, the rule is well established.
63. Thirdly, a sub-delegation is invalid if it authorises the delegatee to define his own jurisdiction.¹⁷² The rationale of this application may lie in the basic administrative law principle that all inferior jurisdictions are limited unless Parliament itself clearly says that the authority may define its own jurisdiction.¹⁷³
64. Fourthly, a sub-delegation is invalid if it has the effect of avoiding some legislative control mechanism such as an appeal right.¹⁷⁴ This application might be the explanation of the otherwise difficult Esmonds case.¹⁷⁵
65. Fifthly, unless it is expressly authorised, a sub-delegation is invalid if it allows sub-delegation of the power to delegate further.¹⁷⁶
66. Sixthly, the actions of the delegatee are valid even if he did not know he had the relevant power.¹⁷⁷ In so far as this might mean that the actions of an authority are valid even though it thought it was exercising a power it did not have, then the rule must be doubtful. If the case enunciating the rule is confined more narrowly to its facts, then it would stand for the more acceptable proposition that the actions of an authority are valid if it thinks it has the power to act and in fact has so, though it had not actually been informed.

67. Seventhly, the rule in Jeffs¹⁷⁸ that a judicial body may delegate investigatory power applies beyond judicial proceedings, with the gloss that a report to the delegator need not be so detailed as in a judicial proceeding.¹⁷⁹
68. Eighthly, it is lawful to sub-delegate the power to decide whether a particular situation exists.¹⁸⁰ This application is also found in the United States.¹⁸¹ Thus, it is lawful to sub-delegate the power to be satisfied that a condition has been fulfilled.¹⁸²
69. Ninthly, a formal delegation instrument binds both delegator and delegatee.¹⁸³
70. Tenthly, the fact that there has been an invalid sub-delegation is of no account if the delegator has acted to the same effect independently, even if that action is held to be independent merely on the basis of a particular form of words used.¹⁸⁴

D. Local Government

71. Neither the Carltona principle,¹⁸⁵ nor the possibility of implying a power of delegation,¹⁸⁶ apply to local government. The powers of local government to delegate, therefore depend wholly upon the express provisions of the Local Government Act 1974 sections 104, 665, 666 and 715, and other specific statutes such as the Town and Country Planning Act 1977 sections 88, 169 and 169A. Accordingly, while the relevance of this paper to local government is limited, the position of local government has been taken into account in the proposed reforms set out in this paper.

E. Estoppel

72. Issues 13 and 16 of the issues paper relate to this point:

"Should the delegatee's exercise of the delegated power be final? If not, in what circumstances should the delegator be able to overrule or amend the decision or refer it back?"

"What should be the consequences of an act done by a person under power "delegated" without lawful authority to him?"

This is one of the few areas where the distinction between delegation strictly so called pursuant to an express provision and pursuant to an implied power, and Carltona devolution is relevant.

73. If the delegatee has authority to act there is no problem. In delegations strictly-so-called he acts in his own right and his action is of no different quality from that of the delegator. With the limit that a public authority cannot be

estopped so as to act ultra vires, the ordinary rules of estoppel may be expected to apply. Similarly, where there is a Carltona devolution, the devolvee acts in the name of the devolvor and is authorised to do so. His action is the action of the devolvor. If the "delegatee/devolvee" is not authorised then this may be because (a) the "delegator/devolvor" has no power to act, or (b) the "delegator/devolvor" has no power to delegate or devolve the power in question or (c) the "delegation/devolution" did not authorise this act by this person, or (d) the "delegator/devolvor" considers that the act was wrong.

74. If (a) then the act is invalid and the "delegator/devolvor" cannot resolve the situation by himself doing the same thing. Nothing the "delegatee/devolvee" said or did binds or estops the "delegator/devolvor".¹⁸⁷ If (d), then the act of "delegatee/devolvee" binds and estops the "delegator/devolvor".¹⁸⁸
75. Where the difficulty arises is in (b) and (c), for the cases are inconsistent and it is not clear how each should be classified in terms of the four possibilities listed above. In Southend-on-Sea Corporation v Hodgson (Wickford) Ltd¹⁸⁹ it was said that since the "delegatee" had no power to act then whatever he did or said could not bind or estop the "delegator". However, in Robertson v Minister of Pensions¹⁹⁰ and Wells v Minister of Housing and Local Government¹⁹¹ it was said that a citizen cannot know the extent of any delegation and if the authority holds out the "delegatee" as being the type of officer who has the relevant power, then the "delegator" is bound and estopped by the "delegatee's" actions.
76. In principle and given the characteristics of Carltona devolution, implied delegation power and express delegation power, the answer in these two categories should differ according to the situation of delegation or devolution.
77. If (b) and there is an express delegation power, then the acts of the "delegatee" do not bind the "delegator" because they are ultra vires the "delegatee" to deemed public knowledge. It is more difficult if there is an implied delegation power, as the authority to delegate power is only resolved after the event, but it is common in law for powers to be resolved only after the event and the balance is probably in favour of invalidity as an application of the normal ultra vires law. Carltona devolution, however, presents a balance favouring validity. The devolvee is purporting to act as alter ego of the devolvor and ex hypothesi the particular act can be done lawfully by the devolvor. Devolution can be in an informal way and without clear definitions of the powers devolved. All this favours a member of the public being able to rely upon the authority of the officer through whom the devolvor acts.

78. If (c) then by definition the power could have been delegated or devolved and either the particular power was not delegated/devolved to this officer or the officer was one upon whom no power had been delegated/devolved. If an officer is held out by the delegator/devolver as the type of officer to act in a particular situation, then the rationale and holdings in Robertson¹⁹² and Wells¹⁹³ should apply, absent knowledge of the situation by the outsider.

PART IV

NEW ZEALAND DELEGATIONS

A. Express Delegation Powers

79. 93 express delegation provisions (listed in the schedule) have been examined in the course of preparing this paper. These are not all such provisions and a comprehensive list will be compiled. However, the sample is large enough for detailed analysis. It is not expected that the remaining delegation provisions will significantly alter the picture set out in this section.

An Identikit Provision

80. Well over one half of the sections include provisions similar to the following:

"(1) [The Delegator] may from time to time, either generally or particularly, delegate to [the Delegatee] all or any of [the Delegator's] powers.

"(2) Subject to any general or specific directions given or conditions imposed from time to time by [the Delegator], [the Delegatee] may exercise those powers in the same manner and with the same effect as if they had been conferred on him directly by this section and not by delegation.

"(3) [Every Delegatee] purporting to act pursuant to any delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.

"(4) Every delegation under this section shall be revocable at will and no such delegation shall prevent the exercise of any power by [the Delegator]"

Common Additional Provisions

81. A substantial proportion of the surveyed sections contain in addition provisions similar to the following:

"(5) Any delegation under this section may be made to any specified [Delegatee] or to [Delegatees] of a specified class or to the holder or holders of a specified office or class of offices.

"(6) Unless and until any such delegation is revoked it shall continue in force according to its tenor. In the event of [the Delegator] by whom any such delegation has been made ceasing to hold office, it shall continue to have effect as if made by the person for the time being holding the office [of the

Delegator], and in the event of [the Delegatee] to whom any such delegation has been made ceasing to hold office, it shall continue to have effect as if made to the person for the time being holding the office [of the Delegatee]."

The part of subclause (6) most commonly found is the first sentence ("tenor"), followed by the first part of the second sentence ("Delegator") and, much less commonly, the second part ("Delegatee").

Variations in Identikit

82. 27 provisions vary subclause (1) by requiring delegation to be "by writing under [the Delegator's] hand". This is predominantly in delegations within Departments, while provisions as in the Identikit predominantly involve delegation by boards or committees. Three provisions¹⁹⁴ require delegation to be under seal. Nine others require a different formality. One¹⁹⁵ provides for notification in orders as an alternative to writing, a number of boards or committees must delegate by resolution,¹⁹⁶ and of the two surveyed express delegation provisions empowering the Governor-General to delegate one specifies the form as Order-in-Council¹⁹⁷ and one requires notice in Gazette.¹⁹⁸
83. A number of provisions provide for a less extensive range of delegable powers than does the Identikit provision. 18 are expressly limited to "any" powers conferred by the instant Act, two¹⁹⁹ to "any" powers under the instant Act or regulations made thereunder, 24 restrict the powers under the instant Act, often by listing delegable or non-delegable powers, and four make delegable limited powers beyond the instant Act.²⁰⁰
84. Upon the basis that the power to delegate is not delegable without express provision, only 10 or possibly 11 surveyed provisions permit delegations of the power to delegate. Five contain unrestricted power to delegate the power of delegation.²⁰¹ Three Acts governing departments authorise the Minister or permanent head to delegate powers delegated to him,²⁰² and there are analogous provisions in other Acts.²⁰³ The departmental Acts restrict the power reposed in the permanent head by requiring the Minister's permission to delegate.
85. The possible provision referred to is the Public Works Act 1981 s.14, since the provision uses the word "any" and lists some non-delegable powers but not listing the power of delegation.
86. Two other types of provisions limiting the power of delegation may be noted. They are a general requirement of permission to delegate²⁰⁴ and a requirement that a delegating committee act unanimously.²⁰⁵

87. There are two variations to subclause (2). First, 24 provisions omit any reference to the delegator imposing directions or conditions on the delegatee, while, at the other extreme, 10 provide that the delegatee "shall be subject in all things to the control" of the delegator. Both this provision and that in the Identikit would allow the delegator to review the delegatee's decisions by imposing such a condition or direction. Both would enable the delegator to direct that the delegatee make a particular decision in a particular case.
88. The second variation on subclause (2) is in the deeming part. 15 provisions use the expression "[the Delegatee] may exercise or perform the delegated powers and functions in the manner and with the same effect as [the Delegator] could himself have exercised or performed them". It is not at all clear what is the difference between the two formulations. In the absence of any judicial decision this paper has proceeded on the basis that there is no practical difference and the Identikit formulation is preferred, though for no better reason than that it is the standard one. Neither formulation adds significantly to the common law and this view is borne out by the fact that 22 delegation provisions contain neither.
89. As to subclause (3), 29 provisions do not include it and one²⁰⁶ provides that:
- "The production of a copy of the resolution of the Board or of a certificate under the hand of the Chairman or other member of the Board shall be conclusive evidence that the Board has duly delegated its powers in accordance with the terms of such resolutions or certificate."
- Since the Identikit subclause only states the common law principle omnia praesumuntur rite est acta it is hard to see why Parliament bothers to include it so often. The provision quoted is anomalous and, if it means that the existence of a valid delegation cannot be challenged, it is obnoxious. If it means only that one is evidence of the terms of the delegation purported to be made, it is acceptable, but could be more explicitly phrased.
90. As to subclause (4), 21 provisions say nothing about revocation but presumably an implied power of revocation would be found by the courts. It must remain a matter of speculation whether the implied power would be to the same effect as subclause (4) or if it would require revocation by the same formalities as the original delegation. 5 provisions differ from subclause (4). One requires revocation by notice in Gazette, the same formality as is required for delegation.²⁰⁷ One provides for revocation

by writing under seal, again the same formality as delegation.²⁰⁸ Three provisions require revocation in writing²⁰⁹ yet, interestingly, only one of them requires delegation in writing.²¹⁰

Delegators and Delegates

91. Two surveyed provisions²¹¹ name the Governor-General as delegator, 20 name Ministers, 19 a permanent head, seven a subordinate officer, 46 a board or committee, and the Economic Stabilisation Act 1948 s.15 names any person on whom any power is conferred by, or to whom any power is delegated, under any Act or Regulation. That is considered to be unjustifiably wide. The seven subordinate officers are all statutory officers who head their own administrative structures.²¹²
- 92 15 surveyed provisions name as delegatee a specified office holder (often a permanent head as delegatee of a Minister), 38 permit delegation to "any officer", 109 permit delegation to "any person", and 44 name a committee as delegatee (though 10 do not restrict membership of the committee to membership of the delegating body). There are 10 which permit delegation to "any person".²¹³ There seems to be no pattern running through these 10 provisions, neither antiquity, nor nature of delegator, nor subject matter, nor administering department. Since each of the 10 provisions renders as naught the Parliamentary intention in conferring power on a particular person, all must be suspect though some, no doubt, can be justified.

B. Delegators and Delegates

93. Its terms of reference expressly asked the Committee to consider whether and when certain types of authority should be able to delegate. It is worth analysing the cases in terms of those types.

The Governor-General

94. The phrase "Governor-General-in-Council" conjures up visions of the Governor-General presiding over a full Executive Council of some 20 ministers. In law the quorum for the Executive Council is two and since the new letters patent for the Governor-General make it clear that his obligation is to accept the advice of his Ministers, in practice the "Governor-General-in-Council" can mean no more than the Minister. The fact that the Prime Minister may preside without the Governor-General makes the "Governor-General-in-Council" even less realistic as a concept. Yet the cases have held that sub-delegation from the Governor-General-in-Council to a Minister can be invalid. Notwithstanding the modern reality of the situation, the rationale of continuing to hold such sub-delegations invalid lies in a second example of the

application of the principles set out above in that the sub-delegation avoids the controls associated with making regulations under the Regulations Act 1936.

95. The cases on delegation from the Governor-General-in-Council to a Minister,²¹⁴ show no special considerations articulated. The Governor-General-in-Council does not appear to be seen as an authority in whom Parliament has placed special trust, no doubt because it is recognised that the Governor-General does not act personally and independently. In situations where there would appear to be an argument that special trust is involved, e.g., when the statute provides for the Governor-General to be visitor to a university,²¹⁵ then the normal rule against sub-delegation applies.
96. The cases relating to delegation from the Governor-General-in-Council to a departmental officer,²¹⁶ show that there is no principle peculiar to delegations by the Governor-General. Hookings v Director of Civil Aviation²¹⁷ is the leading case on sub-delegation. In principle and on the cases, therefore, there seems to be no reason why delegation by the Governor-General-in-Council to persons in the line of authority Crown - Minister - departmental officer should be prohibited.
97. Outside the line of authority Crown - Minister - departmental officer, a little more can be said. In Geraghty v Porter²¹⁸ the Full Court found in the Act an intention that the matter should be regulated uniformly throughout the country and a delegation to local authorities of the power in question was held to be invalid. In contrast, Godkin v Newman²¹⁹ and Mackay v Adams²²⁰ can be seen as cases where there was a legislative intention that the law should be applied differently in different parts of the country according to local conditions. It may be said that there is a special delegation rule that powers may not be sub-delegated by the Governor-General-in-Council to different authorities in different geographical areas, or in such a way that the law may vary in different parts of the country, unless a legislative intention that the law should so vary is clear from the legislation. Cases where the sub-delegation is to a single authority for the whole of the country but outside the line Crown - Minister - departmental officer display no special considerations governing delegation by the Governor-General-in-Council.
98. So far as powers conferred upon the Governor-General personally are concerned, the common law rules, properly it is considered, appear to provide the appropriate position and prevent sub-delegation of power.

Ministers

99. Cases involving delegations/devolutions from Ministers to the departmental officers are the most common in the English cases. However, such cases are absent from the New Zealand reports, possibly because of the frequency of express delegation provisions which are amply phrased and avert challenges to delegations. Of the English cases, apart from those dealing with the Carltona principle a few are worth noting in this present context. In Woollett,²²¹ the Secretary to a Tribunal was a departmental officer. There existed a power in the Minister to appoint members to the Tribunal. In fact, a member was appointed by the Secretary to the Tribunal on consultation with its Chairman. Not only did Stable J distinguish Carltona on the basis that powers of appointment are very important and should be made strictly in accordance with the statute, but he also said that the Secretary was acting as Secretary and not as departmental officer, and for that reason the appointment was invalid. Where a departmental officer wears several hats, it may often be important to determine in what capacity he is acting, and there may be no power in the Minister to delegate powers to him in certain circumstances. In R. v Clerkenwell Metropolitan Stipendiary Magistrates, ex parte Director of Public Prosecutions,²²² there was provision for the Minister to sign a conclusive certificate that information sufficient to commence a prosecution had been brought to his attention within the previous three months. A signature was appended to the certificate on behalf of the Minister and it was held that there had been invalid delegation. Unfortunately, the case contains no reason of value to this paper, but it is worth noting that Carltona²²³ was cited in argument but not in the judgment.
100. There are no New Zealand reported cases of delegations by Ministers to persons outside their Departments, again possibly because of the pervasive incidence of express delegation provisions. However, it is worth observing that the cases in England are generally against such a delegation being valid.²²⁴ Woollett²²⁵ may also be seen as a case of delegation to an outsider, i.e., to the departmental officer wearing a particular hat. Those cases where delegations to outsiders were upheld, such as Roberts,²²⁶ were ones where there was an express delegation provision. The delegation/devolution of powers conferred on Ministers to officers within their Departments is an inevitable incident of modern government leaving aside those powers which are so important as not to be delegable. Short of a change in drafting technique to confer powers upon the lowest level of seniority deemed compatible with importance of a given power, a general rule prohibiting sub-delegation by Ministers of powers conferred on them could not be supported.

Public Bodies (Statutory Authorities)

101. The New Zealand cases involving delegations by statutory authorities to committees are restricted to Jeffs²²⁷ and Wislang²²⁸ both relating to the delegation of an investigation by a body exercising "judicial" function. The English cases show no special considerations relating to this type of delegation.²²⁹ Another pair could be brought within this classification in so far as the consideration of the obscene material was in each case delegated to a few of the members of the multi-member authority.²³⁰
102. There are no cases reported in New Zealand relating to delegations by statutory authorities to their officers, and the English²³¹ and Australian cases²³² give no indication of any special principle related to this class of case. It is the same with delegations from statutory authorities to outsiders.²³³
103. The absence of any special indications in the cases echoes what one might derive from the theory, for statutory authorities vary so greatly in the size, functions, geographical area of responsibility, etc, that their delegations could not be seen otherwise than in relation to the particular statutory authority. Thus, a large body with nationwide responsibilities such as the Accident Compensation Corporation, the New Zealand Dairy Board or the New Zealand Railways Corporation inevitably operates by delegation/devolution like a government department. Small statutory authorities are different and there could theoretically be enacted a prohibition on delegation by them. However the problem will always be in classifying authorities and general legislation would not appear to be useful.

Officials (Including Public Officials)

104. Most of the cases reported relating to delegations by government officials to other officials have been considered in different contexts earlier in this paper.²³⁴ In the absence of application of the Carltona principle, an actual delegation must be looked for.²³⁵ De Smith says:²³⁶

"Where the exercise of a discretionary power is entrusted to a named officer ... another officer cannot exercise his powers in his stead unless express statutory provision has been made or unless in the circumstances the administrative convenience of allowing a deputy or subordinate to act ... very clearly outweighs the desirability of maintaining the principle..."

105. This statement really does not advance matters as it allows for circumstances of administrative convenience outweighing the principle previously stated. Such an open-textured proviso says nothing, and in order to see its operation one would have to go back to the elements and examples of application discussed in Part III. If de Smith is saying that the general rule against sub-delegation applies to powers conferred on officers, then the cases would bear out his statement. However, if O'Reilly²³⁷ is right and the Carltona principle can apply then the proviso stated by de Smith would become the principle and vice-versa.

Local Government

106. There are no reported New Zealand cases on this classification. Given that the only power of delegation is that set out expressly by enactment and that the Carltona principle does not apply, then the English and Australian cases serve only to be illustrations of the use of statutory delegation powers or of situations where there is no delegation because, for instance, the actions or decisions of the delegatee have to be ratified, approved, or ultimately done by the delegator.

C. Types of Delegation

107. Where a power is delegated, there may be a series of delegations of narrowing width to officers at increasingly lower levels of the department or authority. Alternatively, one finds delegations to a particular level within the department or authority leaving those officers to obtain information and recommendations from ones lower in the hierarchy. Obtaining information and recommendations does not, as has been seen, constitute a sub-delegation.
108. Two particular types of delegation may be noted here. First, there is the delegation of approvals but not rejections - see Smith v Collison²³⁸ where it was said obiter that the "scheme and spirit" of the regulations was best recognised by holding that refusals had to be by the Director-General of Health personally, though grants could be sub-delegated. Delegation of power to approve but not refuse is a common form of delegation in the New Zealand Public Service.
109. The second type of delegation is of what could be called the "easy" cases where the delegatee is given power to decide but with the rider that if he has any doubts he should refer the matter to the delegator. This again is a common form of delegation in the New Zealand Public Service and although there is no case approving it, there would appear to be no objection in terms of principle. A variation is delegation of matters which may be determined "within policy", i.e. without departing from the manual of instructions. This overlaps with delegations of "easy" decisions, but is

somewhat wider as it would appear to entrust the delegatee with power to decide cases where it is difficult to determine on which side of the line they fall. Again, there is no authority approving such a form of delegation but there would appear to be no objection in principle.

PART VPROPOSALS FOR REFORM

110. The basic principle is taken to be that powers should be exercised at the lowest level of the administrative hierarchy consistent with their being well exercised and with the public having effective access to information about who exercised them and how, and to remedies if aggrieved.
111. In applying that principle to the various aspects of delegation and sub-delegation, it has been borne in mind that holding an exercise of power unlawful because of invalid delegation can be a guise for the courts to overturn policies of which they do not approve. This is a criticism made of the conventional approach to the rule against delegation by K.C. Davis,²³⁹ and some writers see the rule against delegation if expressed in terms of requiring adequate criteria and a limited area of delegation as due to a conservative bias against modern regulation.²⁴⁰ In so far as New Zealand is concerned, legislation is replete with delegation provisions so that that criticism is not so relevant. In so far as this paper contains proposals restricting express delegation provisions, the author has been conscious of the need to articulate the basis for them.
112. The proposals here are in three parts: those which could be contained in a "Delegations Act", those which state standards to be applied to delegation provisions individually, and those which would be appropriate for implementation administratively.

A. A "Delegations Act"

113. Certain principles are conceived to be common to delegations and, for desirable uniformity, a "Delegations Act" could be enacted containing all those provisions common to delegations or to a broad range of them.

Acting Office Holders

114. Enactments confer powers on corporate bodies by name but on natural persons by office. Office holders are unavailable to exercise powers at particular times because of death, retirement, resignation, illness or leave of absence. Often the exercise of powers can be postponed until the office holder returns to duty or a formal appointment to replace the holder is made, but normally when the length of absence or nature of office held makes the exercise of powers in the interim likely, someone acts in the position of the office holder. An acting office holder should be able to exercise all the powers of a formally appointed office holder.

115. The first proposal is that the "Delegations Act" provide that unless otherwise expressly provided for, powers conferred by enactment on an office holder shall be deemed to be conferred upon anyone lawfully acting in that office. The Ministry of Defence in its response to the Issues Paper made the point that it was important for officers in operational areas that those acting in their positions have the powers of the position. The proposed provision would accommodate that.
116. The other side of the coin is the position of members of corporate bodies. They are office holders and while powers might not be conferred on them by virtue of their office, their participation in a corporate decision is likely to be needed.
117. The second proposal is that the "Delegations Act" provide in respect of members of corporations or authorities that, unless otherwise expressly provided for, acting, or "alternate" members should be able to participate in actions as if they were the formally appointed members.
118. The further corollary of the first two proposals is that delegations should continue after change in personnel of the delegator or delegatee. This was raised as issue 18 of the issues paper as follows:
- "Changeover of personnel.
"Would it be sensible to provide that a delegation continues until revoked notwithstanding that the person holding the position of delegator or delegatee has altered?"
119. While one may expect the courts to recognise delegations to continue through a change of personnel, a number of delegation provisions provide expressly to this effect and it is considered that it would be best so to provide. Delegations adhere to offices not particular people. One may assume that persons appointed to offices are competent to carry out the duties. If that is not so in a particular case, the delegation may be revoked.
120. The third proposal is that the "Delegations Act" provide that, subject to any contrary provision, delegations shall continue notwithstanding that the delegator or delegatee shall have vacated the office held at the time the delegation was made.

Transparency of Delegations

121. It is considered to be important that members of the public should be able to know who in fact makes decisions affecting them. This enhances the responsibility of office holders in keeping with the philosophy of the Official Information Act 1982 s.4 (a)(i). Equally, members of the public should be able to know the extent of the decision-maker's authority.

This was emphasised in Locker.²⁴¹ A number of proposals are made to implement this principle.

122. Some Departments keep detailed registers of delegations: the Ministry of Transport is one of these. In its response to the Issues Paper, it advised that it maintains a register of delegations setting out the section or clause of the statute or regulation authorising delegation, a precis of the powers delegated, any limitations on the delegation, and the office held by the delegatee. Three registers are kept each containing that information but organised one by instrument of delegation, another by functions delegated and the third by officers by which powers are delegated. The Ministry points out that delegations change and it was intended to place the registers on computer for ready access. It is not known to what extent other departments or statutory authorities maintain similar admirable registers, but no other responses to the Issues Paper indicated the existence of such indices. The actual delegation made by departments, statutory authorities and local authorities should be adequately indexed and made available to the public on request.

123. In responding to issue 10:

"How should delegations be recorded? Should it be in writing? Should it be made known to those affected?"

three Departments made comments on the third question. The Ministry of Defence and the Departments of Statistics and Trade and Industry all regarded it as important that the existence of delegations should be made known to persons affected by them.

124. The fourth proposal is that the "Delegations Act" provide that the information maintained by the Ministry of Transport about delegations should be maintained in a readily accessible form by all departments, statutory authorities and local authorities and should be available to members of the public on request. This could be achieved in relation to central government by regulations under section 21(2) of the Official Information Act, but the proposal is considered to be of sufficient importance as a principle that it should be comprehensive of central and local government and so enactment in the "Delegations Act" is preferable.

125. Where an office-holder acts pursuant to a delegated authority, it should be made clear. This follows from the principle of transparency of delegations; the delegatee is acting in his own right and not on behalf of anybody else. He is therefore to decide in his capacity as office holder and sign any letter with his own name and office.²⁴² This was also the view of the Ministry of Transport and it appears to be part of the Ministry's standard instructions.

126. The fifth proposal is that the "Delegations Act" provide that in communicating an action taken under a power of delegation, the communication should state (a) that the action was taken by a named office holder and the office held, (b) that the action was taken pursuant to delegation and (c) the instrument of delegation and the source of the power to delegate.

127. Issue 2 of the Issues Paper raises the Carltona principle and asks:

"Should the Carltona doctrine apply in New Zealand?"

128. The Carltona principle and its application in New Zealand has been considered in detail above. It cuts across the principle of transparency as devolution need not be formal nor need the powers of the devolvee be defined, yet Carltona devolution has a place by virtue of its informality where statutory powers of decision are not in issue.

129. The sixth proposal is that the "Delegations Act" provide that the rule in Carltona Ltd v Commissioners of Works²⁴³ be abolished as it applies to statutory powers of decision. That would leave informal devolution to apply in other areas, particularly so-called ministerial functions, dealing with enquiries and implementing decisions.²⁴⁴

130. The principle of transparency can be undermined if delegations are made informally since then there can be doubt about the width of the delegation, the identity of the delegatee and, indeed, whether any delegation was made. This is part of issue 10 quoted above. In addressing that issue, the Departments of Statistics and Trade and Industry affirmed that all delegations should be in writing. To some extent the Ministry of Defence disagreed by saying that it may not always be essential that delegation be in writing.

131. The seventh proposal is that the "Delegations Act" (a) provide that subject to any contrary provision all delegations shall be made by writing under the hand of the delegator and (b) revoke any contrary provisions of previous Acts which require less formality.

Powers of Delegator after Delegation

132. As noted above, delegation does not denude the delegator of power which can be exercised at any time and the delegator may revoke the delegation at any time. This would appear to be the desirable position save in one respect. The principle of transparency suggests that revocation, like grant, should be in writing to make clear what powers do or do not lie where.

133. The eighth proposal is that the "Delegations Act" provide that subject to any contrary provision delegations shall be revocable in writing at any time, but that the revocation will come into effect only when communicated to the delegatee. The limitation of communication is inserted to avoid the possibility of a delegatee taking action which affects the public without in law having power to do so though under a reasonable apprehension that he has power. An undesirable consequence of that limitation might be that a delegatee is taking action when he no longer has the confidence of the delegator, but that consequence is overcome by the ninth proposal.

134. Issues 11, 13 and the fourth question in Issue 3 in the Issues Paper were:

"Where there has been a delegation should people who may be affected by exercise of the power have access to the delegator?"

"Should the delegatee's exercise of the delegated power be final? If not, in what circumstances should the delegator be able to overrule or amend the decision or refer it back?"

"Should the power to review delegated decisions ever be reserved to the original decision-maker?"

These raise questions about the relationship of delegator and delegatee. Whether the delegator has power to ratify or rescind the delegatee's actions has been discussed above. In commenting on issue 3, only the Department of Trade and Industry adverted to the fourth question and it submitted that the delegator should not review the delegatee's decisions, but that if new information is to hand then the member of the public should put that before the delegator. The Department's response lays emphasis on the desirable finality of decision-making. On the other hand, it is considered to be sound administrative sense and efficient use of resources that the first recourse of an aggrieved person should be to internal review within the authority concerned unless action has already been taken at the highest level. This represents the procedure of the ombudsmen (see section 17(1)(a) of the Ombudsmen Act 1975) and can be considered by the courts in exercising their discretion whether to grant remedies on judicial review.²⁴⁵

135. The ninth proposal is that the "Delegations Act" provide that subject to any contrary provision a person aggrieved by the exercise of a statutory power of decision by a delegatee may apply to the delegator to review the decision. This would not involve the delegator of his own motion deciding to review the decision because he disagreed with the result. It is considered that this first step of internal review is acceptable if it is not seen as a substitute for rights of

appeal to or review by independent authorities. The proposal is in keeping with the juristic nature of the delegatee's authority and with the appropriate autonomy of a delegatee consequent upon decision-making power being conferred, while recognising the existence of a superior-subordinate relationship between delegator and delegatee.

- 136 Issue 16 raised the question of estoppel and has been considered in detail above. Given the uncertainty of the case law on the subject, and the important implications estoppel has for the public, it is considered desirable that the matter should be clarified by legislation if it is practicable to enact a provision doing so, though it is recognised that this might be difficult.
137. The tenth proposal is that before the Committee makes its final decision Parliamentary Counsel should consider whether it is practical to insert a provision in the "Delegations Act" providing for estoppel by the actions of "delegatees" who in fact are unauthorised, which would be in keeping with the views set out earlier in this paper.

Delegation Powers and Delegatees

138. The Issues Paper raised a number of fundamental issues on this general area, only some of which would be relevant to a "Delegations Act". The first three questions in Issue 3 were:

"In what circumstances should delegation be authorised? What are the powers that should be open to delegation? Should the power to delegate ever itself be delegated?"

The second question is appropriate for consideration in the context of the "Delegations Act". If, as seems likely in terms of principle the power to delegate the power of delegation is not implied (and there are no authorities on the point) then in New Zealand such power exists only in the few enactments where the power to delegate the power of delegation is expressly conferred. Those provisions are anomalous both in number and in principle. Of the Departments commenting on the Issues Paper, the Ministry of Defence identified a provision in the Defence Act giving power to delegate the power of delegation, while the Department of Trade and Industry took the view that the power to delegate should be delegable but only subject to the approval of the original delegator. It is considered that there is no necessity to provide a power to delegate the power of delegation given that the delegator can at any time revoke and remake the delegation. Thus, if it appears that there is a need for different or more far-reaching delegations than originally made, the delegator can achieve this without the delegatee having the power to delegate the

power of delegation. Such an additional power in the delegatee would sever the connection of control and supervision between delegator and decision-maker and subvert Parliament's intention in conferring powers of decision on the delegator.

139. The eleventh proposal is that the "Delegations Act" should repeal pre-existing powers to delegate the power of delegation and provide that the power of delegation does not include the power to delegate that power.

140. Issue 4 was :

"Should all powers of delegation of public powers be conferred by statute?"

While the Ministry of Defence considered it impracticable to confer all powers of delegation by enactment in view of the operational needs of armed forces, the Department of Trade and Industry said that all powers of delegation should be conferred by enactment and the Department of Statistics agreed if the Carltona principle were to be abolished. It having been proposed that the Carltona principle should be abolished in respect of statutory powers of decision, the question really becomes whether all powers to delegate statutory powers of decision should be conferred by enactment. So restricted, the apparent answer is yes in the interests of the public knowing who can make decisions in respect of them. It might be argued that such a provision could cut across some common law principles, e.g. delegation of investigation by judicial bodies.²⁴⁶ However, such a delegation would not appear to be a delegation of a statutory power of decision and it is considered that there are no common law principles allowing implied delegation of statutory powers of decision which could not equally well be provided for by express provision.

141. The twelfth proposal is that the "Delegations Act" provide that statutory powers of decision are delegable only pursuant to an express provision to that effect. By restricting the provision to statutory powers of decision it will exclude powers to make regulations, etc, and "ministerial" powers.

Other Matters

142. Issue 17 asked:

"Is a statutory presumption that the delegatee has authority to act in the absence of proof to the contrary necessary or desirable?"

The principle stated in the issue and the common law maxim omnia praesumuntur rite est acta are the same. It was proposed above that the "Delegations Act" should provide that a delegatee state his authority when communicating a

decision. That would facilitate the public's checking the delegatee's authority. A number of express delegation provisions make the presumption of authorisation conclusive. At common law, such provisions have been held to have the effect they state, namely of preventing any enquiry into vires (here the existence and effectiveness of delegation). This is considered obnoxious to the basic and essential principle that powers are limited.

143. The thirteenth proposal is that the "Delegations Act" repeal all such "conclusive evidence" provisions relating to delegation and provide that any purported exercise of delegated power is presumed to be pursuant to a valid and effective delegation, in the absence of proof to the contrary. Although this goes no further than the common law, it is considered desirable as legislative affirmation of the proper situation.

B. The Individual Delegation Provisions

144. In a number of situations a uniform provision may not be appropriate, but it is desirable that each delegation provision should be examined to ensure that any deviation from the standards discussed below is justified.

145. Issues 3 (1st two questions) and 15 are interrelated and centre on issue 15:

"In what circumstances should delegation be authorised? What are the powers that should be open to delegation?"

"If all the decisions are made by delegatees, would it be desirable and practicable for the legislation to identify directly the body which in practice exercises the function, and so avoid the conferring of a discretionary power on one body or person and its delegation to another?"

This poses a question whether the typical New Zealand practice of conferring powers on the Minister, statutory authority, local authority or permanent head is appropriate in many cases. It is certainly convenient, but it means that the promoter of legislation and therefore Parliament need not turn its attention to the proper level at which actions should be taken. It may not always be possible to predict what that appropriate level of decision-making is and when it is a very low level, it is questionable whether a statute should confer power upon officials so low in the hierarchy. The prior question is whether promoters of legislation (and therefore Parliament) should be encouraged to determine the proper level of decision-making under their legislation.

146. It is considered that they should be so encouraged on the basis that less senior office holders should have less discretionary power than more senior ones. The corollary is that powers exercised by the former should be more tightly drawn than those exercised by the latter. The power of delegation enables that principle to be avoided. While one may expect that the instrument of delegation and collateral instructions will restrict the delegatee, and that those restrictions and instructions will be accessible pursuant to proposal four above, it is still considered desirable that legislation should itself assure the public that the powers are appropriate to the decision-maker. It is axiomatic given that position that if the power will always be exercised at a particular level, then it should be conferred at that level - as the Ministry of Defence responded to the Issues Paper. Yet, as noted above, one typical form of delegation is delegation of the easy cases and it is really to that that the Department of Trade and Industry referred when it opposed the position of all decisions being taken by the delegatee and said that important decisions should be taken by the delegator.
147. The first standard proposed is that, where practicable, legislation should confer statutory powers of decision on the office holders at the level appropriate to the power conferred unless it is impractical, undesirable (see Department of Trade and Industry response) or would result in a very low level of office holder being specified (in which case the power should be conferred on the lowest practical and desirable level above that expected to exercise the power).
148. The second standard proposed follows from the first and is that there should be provision to delegate statutory powers of decision only where it is recognised that it is impractical or inappropriate to confer power at the level appropriate for decision.
149. Issue 7 was:
- "Is it practicable for legislation to restrict the classes of bodies or officials to which public powers may be delegated or sub-delegated?"
150. If the first two standards are adopted then it would seem ex hypothesi proper to ask to whom is it anticipated that power would be delegated and to restrict the power of delegation to those classes of persons. Both the Ministry of Works and Development and the Department of Trade and Industry accepted the desirability of such restrictions. The doubts by the Ministry of Defence based on operational conditions would not appear to be particularly relevant given the first proposal on acting office holders. If the first two standards are not adopted, then the consequence is a policy of widespread delegation and any restriction would have to be negative

rather than positive and set on the basis that the promoters and Parliament would not want the power to be exercised by particular class of persons.

151. The third standard proposed is that powers of delegation should limit the potential delegates positively to those office holders or others envisaged as appropriate to exercise the power conferred or (if widespread delegation is envisaged) negatively to exclude those by whom the promoters in Parliament would not wish the power to be exercised.

152. Issue 6 was:

"Should the scope of an individual statutory provision empowering delegation be limited to the statute it appears in?"

153. Many delegation provisions provide for delegations to persons other than those in the hierarchy within which the delegator is included. Others, especially those establishing departments, statutory authorities and local authorities, authorise the delegation of powers conferred on the delegator by enactments other than those in which the power of delegation appears. Both are often useful, especially with respect to members of the police and armed forces and local government officers. There is need for delegation of powers conferred on the delegator by other enactments only if those other enactments confer power at an inappropriately high level, but a standard against that is proposed as the first standard. If it is adopted, there will be need to delegate powers conferred by other enactments only in those exceptional cases where it is impractical or inappropriate for confer the power at the appropriate level of exercise. This is unlikely to be the case where the police and armed forces are concerned as most powers (except those relating to high policy or very important matters) are conferred at the level of commissioned officer, constable or member. It is different in local government where the structure of the local authorities can vary widely.

154. The fourth standard proposed is that, save in respect of delegation provisions relating to local government, powers of delegation should not extend to powers other than those conferred by the Act in which the delegation provision appears unless they are specially justified as unavoidable.

155. Issue 12 was:

"To what extent should the exercise of a delegated discretionary power be fettered by control exercised by the delegator?"

It raises the question of how far delegators should control actual exercises of authority by delegates. To a large extent, this has been covered earlier. If one restricts the issue to controls other than the revision on appeal of the delegatee's decision, then the answer to the issue depends on the nature of the power of delegation and its purpose. If there is delegation in order to decentralise decision-making or to relieve pressure of work on the delegator so as to enable him to concentrate on his more important functions, one may posit that there is a reasonably high volume of decisions. As a matter of practice, there will be instructions setting out the policies, decisions to be taken in typical circumstances and factors to be considered. This will be so even in the absence of delegation in order to achieve consistency on decision-making. Such instructions will be accessible under section 22 of the Official Information Act where applicable. The contents of these instructions will necessarily vary from delegation to delegation and it is not considered to be possible to lay down any general rule beyond the principle that delegators consider the need for adequate instructions to delegates.

C. Administrative Arrangements

156. The remaining issues in the Issues Paper will be considered in this section for the sake of completeness. In respect of one of the issues a proposal is made to be implemented in administrative arrangements within departments.
157. Issue 12 raises in part the question of the propriety of a statement that the delegatee is "subject in all things" to the delegator. There is no inherent reason why this should be unacceptable in all cases, though it is certainly most unusual. The Ministry of Defence and the Department of Trade and Industry both made useful comments in relation to this aspect of issue 12. Both agreed that the level of control retained by the delegator should be expressed. That is in keeping with the transparency of delegations and such written instructions would be accessible under section 22 of the Official Information Act 1982 where applicable. The Department made the point also that the exercise of discretionary power by the delegatee should not be unduly fettered by control exercised by the delegator as this would defeat the point of delegation. Certainly, that is true if the consequence would be that the delegatee kept referring matters up to the delegator. Equally, if the effect of the instructions was to remove most of the decision-making from the delegatee, then the delegation might lose most of its point. That, however, is a matter to be resolved by the delegator in his administrative arrangements, and it is not conceived that it would be useful to make any special recommendation.

158. Issue 14 asked:

"Should a delegatee be required to report back?"

It suggested that the requirement of reporting back is a matter of practice. It is considered that that is its proper place. The extent to which reporting back should be required will depend not only on the power delegated but also on the nature of the delegatee. That can only be resolved by administrative practice. One must remember the nature of delegation, namely, that the delegatee exercises power in his own right and in respect of his own office. Where there remains room for the Carltona principle to apply or for implied delegation powers, i.e., outside the area of statutory powers of decision, then a requirement in the delegation instrument that the delegatee report back to the delegator would influence a court in upholding the delegation or devolution. That, however, really does not take matters any further forward.

159. Issue 9 was:

"In what circumstances is the exercise of the power of delegation appropriate? What criteria should determine the selection of the delegatee?"

The first question is largely answered in the first and second standards above. It is recognised that the standards may well mean that in the event of uncertainty powers will be conferred at a higher level than is expected to be necessary along with a power of delegation. If the standards are operating properly, then it will mean that the person upon whom power is conferred should first seek to exercise the power himself and only delegate if that becomes impracticable. When that will be the case cannot be provided for with any useful degree of specificity whether in enactment or by administrative arrangement. The second question merits answer only in terms of the basic principle stated at the beginning of this part, namely, that powers should be exercised at the lowest level of hierarchy consistent with their being well exercised and with the public having effective access to information about who exercised them and how, and to remedies if aggrieved. Those are the criteria.

160. The commentary after the second question in issue 9 raised directly a specific problem of human nature. The delegator may very well not apply his mind to the most appropriate level of delegation. Particularly in the case of a Minister, a recommended delegation schedule will be submitted to him for signature. However, at some stage someone in the hierarchy must apply his mind to the appropriate level of delegation. It is important that this should be at a senior (though not necessarily the most senior level). That is so even if the delegator is someone lower in the hierarchy than the person determining the appropriate level of delegation.

161 As a matter of administrative arrangement it is proposed that the level of delegation of particular powers should be substantively considered and recommendations or decision made at a level no lower than the equivalent of assistant secretary in central government departments.

SCHEDULEExpress Delegation Provisions in Survey

Adult Education Act 1963 s.16
Agricultural Pests Destruction Act 1969 s.9
Animal Remedies Act 1967 s.10
Apprentices Act 1974 ss.14 and 14A
Armed Forces Discipline Act 1971 ss.114 and 115
Arms Act 1983 s.72
Bank of New Zealand Act 1979 s.22
Building Performance Guarantee Corporation Act 1972 s.16
Burial and Cremation Act 1964 s.24
Civil Aviation Act 1964 s.18A
Coal Mines Act 1959 s.233
Consumer Council Act 1966 s.14
Consumer Information Act 1969 s.16
Customs Act 1966 ss.9(1) and (2) and 142
Defence Act 1971 ss.29 and 84
Dental Act 1963 s.11
Development Finance Corporation Act 1973 s.16
Distillation Act 1971 s.6(1) and (2)
Economic Stabilisation Act 1948 s.15
Education Act 1964 ss. 5, 8, 29 and 67L
Electrical Registration Act 1979 s.13
Explosives Act 1957 s.8A
Fire Service Act 1975 s.15
Forests Act 1949 s.4
Geothermal Energy Act 1975 s.9A
Historic Places Act 1980 s.19
Industrial Designs Act 1966 s.10
Inland Revenue Department Act 1974 s.11
Land Act 1948 s.15
Law Practitioners Act 1982 s.15
Maori Affairs Act 1953 s.10
Maori Trustee Act 1953 s.9
Marine Mammals Protection Act 1978 ss.21 and 28
Meat Export Grants Amendment Act 1960 s.14
Milk Act 1969 s.9
Ministry of Agriculture and Fisheries Act 1953 ss.9 and 10
Ministry of Energy Act 1976 s.9
Ministry of Transport Act 1965 s.8
Motor Vehicle Dealers Act 1975 s.34
Native Plants Protection Act 1934 s.6
New Zealand Army Act 1950 s.81
New Zealand Railways Corporation Act 1981 s.10
Optometrists and Dispensing Opticians Act 1976 ss.11 and 52.
Pacific Islands Polynesian Education Act 1972 s.12
Passports Act 1980 s.15
Pesticides Act 1979 s.18
Petroleum Demand Restraint Act 1981 s.14
Pharmacy Act 1970 s.9
Plant Varieties Act 1973 s.10
Plumbers, Gasfitters and Drainlayers Act 1976 s.12
Police Act 1958 ss.3, 4 and 55A
Post Office Act 1959 ss.10 and 11

Public Works Act 1981 ss.14 and 15
Queen Elizabeth II Arts Council of New Zealand Act 1974 s.13
Radiation Protection Act 1965 s.4
Real Estate Agents Act 1976 ss.74 and 101
Recreation and Sport Act 1973 s.14
Royal New Zealand Air Force Act 1950 s.81
Royal New Zealand Foundation for the Blind Act 1963 s.25
Society of Accountants Act 1958 s.9
Soil Conservation and Rivers Control Act 1941 s.23A
Standards Act 1965 s.14
Technicians Training Act 1967 s.13
Toxic Substances Act 1979 s.8
Trade and Industry Act 1958 ss.10 and 11
Transport Act 1962 s.104
Universities Act 1961 s.10
University Acts 1961 (individual) s.35
University of Otago Amendment Act 1961 ss.13 and 15
Wanganui Computer Centre Act 1975 s.18A
War Pensions Act 1954 s.15
Wild Animals Control Act 1977 s.7
Wildlife Act 1953 ss.44 and 44A
Wool Act 1977 s.15

FOOTNOTES

1. [1948] 1 All ER 85 (CA). It is better to avoid unfamiliar terminology in a paper such as this, so "delegation" will here be used in a wide sense unless the context otherwise requires.
2. Wade, Administrative Law (5th Edition, 1982) at 319.
3. Ibid at 325.
4. Judicial Review of Administrative Action (4th Edition, 1979) at 301.
5. (1960) 3 VUWLR 69.
6. At 70, a point also noted by de Smith at 73 and 301.
7. N.4, at 301.
8. See de Smith, n4, at 73.
9. See Aikman, n5, at 70-71.
10. [1939] NZLR 582 at 733.
11. [1949] 1 All ER 815 (CA).
12. [1961] NZLR 218 (CA).
13. [1962] VR 448.
14. 372 So 2d 913 (Fla, SC; 1978).
15. R v Brentford JJ, ex parte Catlin [1975] 2 All ER 201 (QBD,DC), Hinton Demolitions Pty Ltd v Lower [1968] SASR 370 (SC in Banco), Allam and Co Ltd v Europa Poster Services Ltd [1968] 1 All ER 826.
16. [1975] 2 All ER 418 (HL).
17. [1974] 1 All ER 108 (QBD,DC).
18. [1962] 2 All ER 14 (QBD,DC).
19. (1911) 30 NZLR 122.
20. (1916) 85 LJKB 1565.
21. Osgood v Nelson (1872) LR 5 HL 636 and Devlin v Barnett [1958] NZLR 828.
22. [1967] NZLR 1057 (PC).

23. Ibid.
24. "Delegation and the Rules of Natural Justice" (1968) 31 MLR 87.
25. [1952] 1 All ER 1113 (CA) per Denning LJ at 1118.
26. [1956] 3 All ER 939 (HL) per Lord Morton at 945, Lord Cohen at 947, and Lord Somervell (Lord Keith concurring) at 951.
27. See de Smith, n4, at 220-221, Mullan, Administrative Law (2nd edition, 1979) at para 10.
28. N26.
29. [1959] 1 All ER 37 (CA).
30. (1970) 120 CLR 463.
31. N5 at 70.
32. Barnard, n25, Vine, n26, Attorney-General for the Gambia v N'Jie [1961] 2 All ER 904 (PC), Wislang v Medical Practitioners Disciplinary Council [1974] 1 NZLR 29, General Medical Council v Dental Board [1936] Ch 41, and Ex parte Mitchell, re Public Service Board [1972] 2 NSWLR 89 (CA).
33. See Taylor v Public Service Board [1975] 2 NSWLR 278 (CA).
34. N1, at 89.
35. Ibid.
36. (1890) 25 QBD 391 at 395.
37. N2 at 320.
38. (1982) 44 ALR 27 (HCA).
39. (1979) 2 ALD 76.
40. Ibid at 94.
41. N1.
42. In her unpublished article, "Delegation, Agency and the Alter Ego Rule".
43. N4, at 101 and 301-302.
44. N1.
45. N38.

46. N39.
47. N30, per Kitto J at 473.
48. N42.
49. Huth, n36, per Lord Coleridge CJ at 394, Bayly v Municipal Council of Sydney (1927) 28 SR (NSW) 149 (FC), Morrison v Shire of Morwell [1948] VLR 73, and Gordon Dadds and Co v Morris [1945] 2 All ER 616.
50. Nn4 and 27.
51. N1.
52. Huth n36, per Lord Coleridge CJ at 394-395, Bayly, n49, at 155, Wade, n2, at 326 and Mullan, n27, at para. 14.
53. Locker, n1, per Evershed LJ at 103, Huth, n36, per Lord Coleridge CJ at 395, Bayly, n49, at 155, although Wade, n2, at 326 regards this corollary as debatable.
54. Locker, n1, per Scott LJ (Asquith LJ concurring) at 96, Wade, n2, at 323 and de Smith, n4, at 302.
55. N25, at 1119.
56. N42.
57. (1978) at 196.
58. [1970] 3 All ER 496 (CA).
59. [1897] 2 QB 70.
60. Provident Mutual Life Assurance Association v Derby City Council [1981] 1 WLR 173 (HL) per Lord Roskill at 181.
61. See Wade, n2, at 326.
62. N12, at 225. See also General Medical Council, n32, which is cited by Wade, n2, at 325 in support of the above proposition.
63. N4 at 305.
64. [1960] 1 All ER 446 (PC).
65. [1962] NZLR 683 (CA).
66. [1970] AC 972 (PC), see Record Tower Cranes Ltd v Gisbey [1969] 1 All ER 418 (QBD,DC) and de Smith, n4, at 306.
67. Barnard, n25, per Romer LJ at 1121.

68. R v Chapman, ex parte Arlidge [1918] 2 KB 298 (KBD,DC) and Hinton, n15, at 377.
69. [1943] 2 All ER 560(CA) at 563.
70. Ibid, Roberts, n11, per Jenkins J at 828, Re Golden Chemical Products Ltd [1976] 2 All ER 543 per Brightman J at 548, Reference, n39, at 93, O'Reilly, n38, (implied by all judges who considered the point), and see Wade, n2, at 328 and de Smith, n4, at 307.
71. [1968] 3 All ER 124 (CA).
72. [1954] 2 All ER 776.
73. N38.
74. (1982) 13 ATR 662.
75. N15.
76. [1969] 3 All ER 1379 (QBD,DC)
77. [1963] SR (NSW) 723 (FC).
78. N27, at para. 10.
79. N2, at 328.
80. [1973] 1 All ER 689 (CA) at 700.
81. N49, at 79, see also Wade, n2, at 328.
82. N69.
83. N76.
84. N15.
85. N42.
86. O'Reilly, n38, at 30 per Gibbs CJ, Roberts, n11, at 824 per Denning LJ.
87. N42, at 5.
88. N38.
89. N11, at 824.
90. Roberts, n11, at 828 per Jenkins J, McWhirter, n80, at 700 per Lord Denning LJ, Ramawad v Minister of Manpower and Immigration [1978] 2 SCR 375, and see also R. v Chiswick Prison Governor, ex parte Sacksteder [1918] 1 KB 587 (CA) at 586 per Pickford LJ. This proposition is supported by Wade, n2, at 328 and de Smith, n4, (more diffidently) at 308.

91. N76.
92. N66.
93. N77.
94. N69, a mistake pointed out by Dixon, n42, at 19.
95. N11, at 824.
96. Ibid at 829.
97. N38.
98. [1977] 1 SCR 238.
99. N2, at 328.
100. [1961] 3 All ER 641.
101. N39, at 94.
102. N38, at 37-38.
103. N39, at 94.
104. See de Smith, n4, at 307.
105. Ibid, at 306.
106. N38, at 38.
107. N42, at 23.
108. [1976] 3 All ER 665 (HL).
109. [1983] NZLR 129 (CA).
110. [1980] 2 NZLR 130 (CA).
111. (1982) 62 Boston ULR 257.
112. N42, at 17 and 23.
113. (1963) 5 FLR 160 (SC,NT) at 171.
114. See also Wade, n2, at 319.
115. N74, at 669.
116. N4, at 301.

117. E.g., Fine, n111, at 283 and 314-315 where the author says that the rule against sub-delegation should be revitalised by adopting a narrow construction of the powers enacted by Congress rather than by reaffirming a principle based on characterisation.
118. (1931) 46 CLR 73 at 117.
119. E.g. Carltona itself, n69, at 563, Roberts, n11, at 828 per Jenkins J and Hinton, n15, at 377 where the existence of an express delegation provision was held to make irrelevant any argument based on administrative necessity for a Carltona devolution (see also Saddler, n74, at 669).
120. R v Commission for Racial Equality, ex parte Cottrell and Rothon [1980] 3 All ER 265 (QBD,DC).
121. McWhirter, n80.
122. Forster, n77.
123. N25.
124. N10, at 736.
125. N57, at 194.
126. N24, at 338.
127. N2, at 323 and 325.
128. N5, at 82.
129. N12, at 226.
130. N14.
131. N111, at 318.
132. N24, at 329.
133. N118.
134. See Jackson, n10.
135. See Ideal Laundry Ltd v Petone Borough [1957] NZLR 1038 (CA).
136. Hawkes Bay, n12, Vine, n26, per Vicount Kilmuir LC at 943 and Lord Somervell (Lord Keith concurring) at 951.
137. N100.
138. N74.

139. Vine, n26.
140. Jackson, n10, and Marlborough Education Board v Blenheim School Committee (1896) 15 NZLR 551.
141. Bremner v Ruddenklau [1919] NZLR 444 (FC) and Hazeldon v McAra [1948] NZLR 1087 (FC).
142. Ibid.
143. N141.
144. See Keith, n24, at 329.
145. Hookings v Director of Civil Aviation [1957] NZLR 929 at 938, Mackay v Adams [1926] NZLR 518, Re Clarke and Attorney-General for Canada (1977) 81 DLR (3d) 33, and see the approach of Jenkins J in Roberts, n10, at 829.
146. [1917] NZLR 554 (FC).
147. (1908) 28 NZLR 505 (CA).
148. See Island Properties Inc v Martha's Vineyard Commission 361 NE 2d 385 (SC, Mass; 1977).
149. See Keith, n24, at 335, Mullan, n27, at paragraph 11, and de Smith, n4, at 300.
150. Mackay, n145, Hanna v Auckland City Council [1945] NZLR 622 (CA), Saddler, n74, and R v Joy Oil Company [1964] 1 OR 119.
151. Wayman v Southard 23 US 1 (1825), Butfield v Stranahan 192 US 470 (1904) and United States v Grimaud 220 US 506 (1911) though the test has been substantially diluted since then except in some states - see, e.g., Cross Key, n.14.
152. See de Smith, n4, at 302, Mullan, n27, at para. 11, Keith, n24, at 335, though Aikman proposed a different approach at 82-83 in the passage quoted above.
153. Vine, n26, per Vicount Kilmuir at 943 and Lord Somervell (Lord Keith agreeing) at 951, and Sambell, n13.
154. R v Chapman, ex parte Arlidge, n68, at 304 per Atkin J.
155. De Smith, n4, at 298, Keith, n24, at 333, Mullan, n27, at para. 12.
156. N1.
157. N11, per Denning LJ at 824.
158. N77.

159. [1925] 1 KB 213 (KBD,DC)
160. [1921] 3 KB 621 (KBD,DC).
161. [1948] 1 All ER 780.
162. High v Billings (1903) 89 LT 550 (KBD,DC) at 553 per Lord Alverstone CJ, Firth, n59, Morrison, n49, and see Wade, n2, at 321 where the principle is stated with its theoretical justification, namely, that the delegator must still bring his mind to bear on the question.
163. Hawkes Bay, n12.
164. N24, at 333-334.
165. N25.
166. N26.
167. E.g. Hookings, n145, Mackay, n145, at 522, Jackson, n10, Abbott v Lewis (1903) 22 NZLR 552 and Vic Restaurant Ltd v Montreal City [1959] SCR 58.
168. Taratahi Dairy Co Ltd v Attorney-General [1917] NZLR 1 (FC).
169. N4, at 307.
170. Bob Keats Ltd v Farrant [1951] 1 All ER 899 (KBD,DC).
171. Jackson, Stansfield and Sons v Butterworth [1948] 2 All ER 558 (CA), H. Lavender and Son Ltd v Minister of Housing and Local Government [1970] 3 All ER 871 (CA), Ellis, n160, Morrison, n49. There was such express empowering provision in Locker, n1, and Roberts, n11.
172. Ratnagopal, n.66.
173. R v Commissioners for Special Purposes of the Income Tax (1884) 12 QBD 461 (CA).
174. Attorney-General v Mt Roskill Borough [1971] NZLR 1030.
175. N30.
176. Becker v Crosby Corporation [1952] 1 All ER 1350 (QBD,DC), see also de Smith, n4, at 304.
177. Sacksteder, n90.
178. N22.

179. Selvarajan v Race Relations Board [1976] 1 All ER 12 (CA) McWhirter, n80, and Devlin, n21, where the report consisted of the marks awarded by the delegatee to candidates upon a test. See also Cottrell and Rothon, n120, where the report does not make particularly clear how detailed the delegatee's report was.
180. King-Emperor v Benoari Lal Sharma [1945] 1 All ER 210 (PC), Allingham, n161, Tutira Block, n145, (one of the two possible explanations of this case).
181. See the cases which follow Field v Clark 143 US 639 (1892).
182. Turner v Allison [1971] NZLR 833 (CA).
183. Locker, n1, per Evershed LJ at 100, Wade, n2, at 325.
184. Re S [1969] 1 All ER 949 (visitors to Grey's Inn).
185. Goddard v Minister of Housing and Local Government [1958] 3 All ER 482, Bowyer Philpot Payne Ltd v Mather [1919] 1 KB 419, see Wade, n2, at 328.
186. Morrison, n49, at 79, see Verrault Fils Ltee v Attorney-General for Quebec (1975) 57 DLR (3d) 403 (SCC).
187. Essex County Council v Essex Corporated Congregational Church [1963] 1 All ER 326 (HL).
188. Lever (Finance) Ltd, n58, and Brickworks Ltd v Warringah Shire Council (1963) 108 CLR 568. Although the decision in R. v Secretary of State for Home Department, ex parte Choudhary [1978] 3 All ER 790 (CA) was correct, the formulation of the Court that an immigration officer has no authority to put an incorrect date stamp in a passport would appear to be wrong.
189. [1961] 2 All ER 46 (QBD,DC).
190. [1948] 2 All ER 767 (CA).
191. [1967] 2 All ER 1041.
192. N190.
193. N191.
194. The Maori Trustee Act 1953 s.9, the Meat Export Control Amendment Act 1966 s.14 and the Wool Act 1977 s.15.
195. The Armed Forces Discipline Act 1971 s.115.
196. The Education Act 1964 s.67, the Law Practitioners Act 1982 s.15, the Motor Vehicle Dealers Act 1975, s.34, the Real Estate Agents Act 1976 s.74, the Maori Affairs Act 1953 s.10 and the Development Finance Corporation Act 1973 s.16.

197. The Burial and Cremation Act 1964 s.24. The Post Office Act 1959 s.10 prescribes writing under hand.
198. The Geothermal Energy Act 1976 s.9A.
199. The Petroleum Demand Restraint Act 1981 s.14 and the Police Act 1958 s.55A.
200. The Education Act 1964 s.64L, the Historic Places Act 1980 s.19, the Ministry of Energy Act 1976 s.9 and the Optometrists and Dispensing Opticians Act 1976 s.11.
201. The Economic Stabilisation Act 1948 s.15, the Explosives Act 1967 s.13, the Law Practitioners Act 1982 s.15, the Queen Elizabeth II Arts Council of New Zealand Act 1974 s.15 and the Wildlife Act 1953 s.44A.
202. The Ministry of Agriculture and Fisheries Act 1953 s.9, the Education Act 1964 s.8 and the Trade and Industry Act 1956 s.10.
203. The Adult Education Act 1963 s.16, the Wild Animals Control Act 1977 s.7 and the various University Acts (here viewed as one) s.35 (s.13 in the University of Otago Amendment Act 1961).
204. The Petroleum Demand Restraint Act 1981 s.14, the Technicians Training Act 1967 s.13, the Wanganui Computer Centre Act 1975 s.18A, and the War Pensions Act 1954 s.15.
205. Apprentices Act 1974 s.14A.
206. The Maori Affairs Act 1953 s.10(5).
207. The Geothermal Energy Act 1975 S.9A.
208. The Maori Trustee Act 1953 s.9.
209. The Motor Vehicle Dealers Act 1975 s.34, the Real Estate Agents Act 1976, s.74 and the Wildlife Act 1953 s.44.
210. The Wildlife Act 1953 s.44.
211. The Burial and Cremation Act 1964 s.24 and the Post Office Act 1959 s.10.
212. E.g. the Chief Inspector of Air Accidents (Civil Aviation Act 1964 s.18A).
213. The Customs Act 1966 s.142, the Economic Stabilisation Act 1948 s.15, the Historic Places Act 1980 s.19, the Native Plants Protection Act 1934 s.6, the Passports Act 1980 s.15, the Universities Act 1961 s.10, the individual Universities Act 1961 s.35 (regarded here as one), the Wildlife Act 1953 s.44, and the Wool Act 1977 s.15

214. Jackson, n10, and Hawkes Bay, n12.
215. See Rigg v University of Waikato [1984] 1 NZLR 145.
216. Hookings, n145, and Taratahi, n168.
217. Ibid.
218. N145.
219. [1928] NZLR 593 (FC).
220. N145.
221. N72.
222. [1984] 2 WLR 244.
223. N69.
224. Jackson, Stansfield, n171, Locker, n1, and Lavender, n171.
225. N72.
226. N11.
227. N22.
228. N32.
229. Vine, n26, Barnard, n25, and Selvarajan, n179.
230. Olympia, n17, Burke, n18.
231. High, n162, Cottrell and Rothon, n120.
232. Maddalozzo, n113, Sambell, n13.
233. Tutira, n147.
234. E.g. Nelms, n76, Cure and Deeley Ltd, n100, O'Reilly, n38, Saddler, n74, Hinton, n15, Reference, n39, and in New Zealand Maxwell, n65.
235. See Record Tower, n66, where a police officer wrote making a requirement authorised by statute to be made by the Commissioner of Police and recited in the letter that he was acting for the Commissioner of Police. This was held to be insufficient, cf West Riding County Council v Wilson [1941] 2 All ER 827 ("I am directed by the Minister") and Point of Ayr Collieries Ltd v Lloyd George [1943] 2 All ER 546 (CA) ("It appears to the minister that").