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# A NEW CROWN CIVIL PROCEEDINGS ACT FOR NEW ZEALAND



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The Law Commission is an independent, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Foreword

When conducting a reference, the New Zealand Law Commission keeps in mind two principal goals: providing New Zealanders with better access to justice; and providing New Zealand with a modern legal infrastructure.

This Issues Paper combines both of these aims in advocating for the enactment of a new Crown Civil Proceedings Act to replace the current Crown Proceedings Act 1950. Although the Crown Proceedings Act sounds as if it is simply dry “lawyer’s law”, it has the important purpose of reflecting New Zealand’s commitment to ensuring that people are able to seek appropriate legal redress against their government. It forms an important pillar of the rule of law.

The new statute that we are proposing is designed to be fit for purpose in 21st century New Zealand. As we explore in the Paper, although the general principles around which the Crown Proceedings Act is constructed remain the same in the draft Bill, especially that the Crown and citizens ought to be equal before the courts, much has changed in government since 1950. We need a modern Act that reflects those realities.

The current statute is, in our view, convoluted and difficult to follow. Simplifying the statute would greatly assist the conduct of litigation against the Crown. We hasten to add, however, that this project is not about increasing the Crown’s liabilities per se, but ensuring that where the Crown has breached an obligation that ought to be compensated at law, the procedure is clear and effective. We are seeking submissions on whether our proposals have achieved that.

The Paper also deals with matters of considerable public importance, such as the circumstances in which the Crown can be forced to make a discovery of information the government considers to relate to a matter of national security. We seek views as to the appropriate way to balance the needs of justice that require all relevant material will be revealed on the one hand, and on the other, the legitimate national security concern that some things simply cannot be revealed.



*Sir Grant Hammond*  
President

# Acknowledgements

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We would like to acknowledge the work of Amy Orr, Parliamentary Counsel, on the draft Bill attached to this Paper. We would like to specifically acknowledge the now Justice Collins, who as Solicitor-General provided considerable assistance in the initial stages of this review. Further, we would also like to thank all of those who have spoken to in the formulation of this Paper.

The Lead Commissioner on this project is Geoff McLay, who was assisted by Legal and Policy Advisors Allison Bennett, Sophie Klinger, Marion Clifford and Kate Salmond.

# Call for submissions

The Law Commission asks for any submissions or comments on this Issues Paper that proposes a new Crown Civil Proceedings Bill. Submitters are invited to focus on any of the questions, issues or clauses. It is certainly not expected that each submitter will answer every question or comment on every clause of the Bill.

The submission can be set out in any format but it is helpful to specify the number of the question or the number of the clause of the draft Bill that you are discussing.

Emailed submissions should be sent to:

**[cpa@lawcom.govt.nz](mailto:cpa@lawcom.govt.nz)**

Written submissions should be sent to:

**Law Commission**

**PO Box 2590**

**Wellington 6011**

**DX SP 23534**

Submissions or comments on this Issues Paper should be received by **1 August 2014**. A final report and recommendations to Government will be published in 2015.

## **Official Information Act 1982**

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request and may be published on the Commission's website. The Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.





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# Part 1

## GENERAL APPROACH AND KEY ISSUES



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# Chapter 1

## Introduction

### THE REASON FOR A NEW CROWN CIVIL PROCEEDINGS ACT

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1.1 This Issues Paper seeks submissions on a draft Crown Civil Proceedings Bill, which would replace the Crown Proceedings Act 1950 with a modernised and simplified statute.

1.2 The terms of reference for this review are as follows:

The ability of citizens to bring civil legal proceedings against the Crown and its servants is an important part of New Zealand's constitution, and is protected by the New Zealand Bill of Rights Act 1990. The Crown Proceedings Act 1950 is the principal statute that governs the civil liability of the Crown. It is based on a 1947 United Kingdom Act. It was designed to solve problems with the law as it stood at that time in the United Kingdom, and does not reflect the way in which New Zealand is now governed or modern court practice. As a result the current Act presents procedural and substantive difficulties for both plaintiffs seeking to sue the Crown, and for the Crown in defending those actions.

The purpose of this review is to modernise and simplify the Crown Proceedings Act so as to provide a better mechanism for citizens to bring just claims against the Crown, and to allow the Crown to appropriately defend claims. The review will also consider the relationship between the Crown Proceedings Act, and provisions that seek to immunise or indemnify the Crown or its servants, such as s 86 of the State Sector Act 1988. This review is not intended to review the underlying civil law (tort and contract) through which people seek to bring the Crown to account. This review will include consultation with the Crown Law Office, other government departments and the profession.

1.3 The Crown Proceedings Act is a statute of considerable constitutional significance. It is an important part of the rule of law that citizens ought to be able to obtain legal redress when the government has breached those citizens' legal rights, and in appropriate circumstances to receive compensation and other remedies. This is recognised by section 27(3) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides:

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

1.4 The Crown Proceedings Act, and the indigenous New Zealand statutes that preceded it,<sup>1</sup> went a considerable distance towards abolishing the privileged position that the Crown had previously enjoyed at common law in litigation. Its aim was that suits would be taken against the Crown as if it were a private person. The old English maxim "the King can do no wrong" was replaced with an assumption that if the Crown, or its servants, had breached an obligation that would also have been owed by private individuals, then the Crown could be sued in the courts. The Act also abolished the somewhat confusing legal devices that had previously been used to circumvent the difficulties of suing the Crown, most notably the petition of right, as well as the Crown's immunity from discovery and costs, which had frustrated litigants.

1.5 It is because of its importance that the Crown Proceedings Act now needs to be updated. This reform project is a continuation of earlier work dealing with the legal nature of the

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<sup>1</sup> Crown Liabilities Redress Act 1871; Crown Redress Act 1877; Crown Suits Act 1881; Crown Suits Act 1908; and Crown Suits Act 1910.

Crown conducted by the Law Commission in the late 1980s and early 1990s.<sup>2</sup> The public service has been through large-scale changes in the last three decades, but the Act has changed little to reflect this. The State Sector Act 1988 and the Public Finance Act 1989 have created a new legal architecture for the New Zealand public service, while the Crown Entities Act 2004 has consolidated the law relating to the many government entities that have their own corporate personality. The Crown Proceedings Act contains provisions that do not reflect modern government accounting practices: for instance, those relating to the mechanics of the enforcement of judgments against the Crown.<sup>3</sup>

- 1.6 Rather than reflecting the concerns of contemporary New Zealand, the Act reflects the concerns of those who drafted the Crown Proceedings Act 1947 (UK), which was in many ways based on a 1927 report.<sup>4</sup> As a result, the Act does not reflect the way in which New Zealand is currently governed, and is somewhat confusing and convoluted. For instance, in most cases a plaintiff attempting to sue the Crown must first establish that an employee of the Crown has committed a tort. This requirement creates significant difficulties when it is alleged that the Crown or government department as a whole has breached its obligations (sometimes called systemic negligence). Moreover, the way in which the 1950 Act was drafted means that in some areas it has not kept up to date with either reform in the public sector or with changes in court procedure.

## PRINCIPLES FOR REFORM

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- 1.7 The Commission believes that the following principles, some that are new and some that are present in the current legislation, ought to be adopted in this review:
- The Crown ought to be able to sue, and be sued, as others can. This means that, as far as possible, the Crown ought to be in the same position in litigation as a private individual would be. Any departure from that principle ought to be demonstrably justifiable in a free and democratic society.
  - The Act should enable access to justice by making the procedure for bringing civil litigation against the Crown clear.
  - The Act should continue to be a procedural statute that does not seek to define the substantive rights of the Crown, or those that litigate against it, but rather seeks to provide a mechanism by which courts can determine those substantive rights.
  - The Act ought to apply to the Crown, as opposed to “government” in general. At its root the principal problem the statute needs to solve is how to enable suits that would, because of the Crown’s lack of legal personality at common law, otherwise not be possible.

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2 Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent’s Case and Harvey v Derrick* (NZLC R37, 1997). In August 1989 the Minister of Justice gave the Commission the following reference:

To give fuller effect to the principle that the State is under the law and to ensure that as far as practicable legal procedures relating to and remedies against the Crown (as representing the State) are the same as those which apply to ordinary persons. With this in mind the Law Commission is asked to examine aspects of the legal position of the Crown, including but not limited to -

1 the civil liability of the Crown, its officers and agencies, and in particular special rules limiting or excluding that liability

2 the Crown Proceedings Act 1950, with a view to its reform and simplification

3 the criminal liability of the Crown, its officers and agencies, and relevant procedures, and to make recommendations accordingly.

The issue of the criminal liability of the Crown was partially dealt with by the Crown Organisations (Criminal Liability) Act 2002.

3 See the discussion below in ch 5.

4 *Crown Proceedings Committee Report* (1927) Cmd 2834.

- It is the role of Parliament in passing particular statutes, and judges in interpreting statutes and in applying the common law, to define the nature of the Crown's obligations and whether the breach of those obligations gives rise to a right to compensation.
  - The statute should cover all monetary and civil claims against the Crown.
  - The procedure in the Act should reflect the realities of modern New Zealand government.
  - The procedure in the Act should reflect the need for departments to be accountable for the liabilities they incur.
- 1.8 This review is focused on a narrower task than the reform of government or state liability in general. Important issues remain, such as the substantive law concerning liability for administrative failings, and the appropriate immunities from liability for activities that are shared by a range of central and local government agencies as well as the Crown. At times this Paper touches on those issues, but it does not seek to resolve them.

## NATURE OF THIS PAPER

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- 1.9 This Issues Paper is designed to present the Commission's preliminary views. Part 1 of this Paper sets out our general approach, and discusses some of the broader issues.
- 1.10 Within Part 1, Chapter 2 addresses the purpose of a Crown Civil Proceedings Bill and the key change from the current Act in the proposed Bill. Chapter 3 looks at several issues relating to the Crown's liability in tort law, including whether the Crown should be directly liable for torts, the effect of employee immunity under other Acts, and how liability for the Crown arises for breaches of statutory obligations. Chapter 4 discusses how public law actions, such as administrative law breaches of statutory duty and claims for compensation under NZBORA, relate to the Crown proceedings legislation. Chapter 5 examines whether the Crown should be subject to compulsory enforcement remedies. Chapter 6 explores different aspects of the accountability of the Crown, including practical issues about how the government is accountable, the liability of Crown employees and the liability of ministers. Chapter 7 primarily looks at the issue of public interest immunity in relation to the Crown's disclosure obligations and raises options for reform. It also raises further issues of non-party discovery and the discovery obligations of different parts of the Crown.
- 1.11 Because of the technical nature of the reforms we have suggested, Part 2 of the Paper includes a draft Bill and commentary to present and explain our proposals. The provision of a draft is not intended to convey the impression that particular issues have been conclusively predetermined, but rather to promote debate and submissions on points of detail, so that the final report can get those details right.
- 1.12 The Commission welcomes submissions on all aspects of the Issues Paper. Once we have considered the submissions, the Commission will prepare its final report, which will be tabled in Parliament.

# Chapter 2

## Why is a Crown Civil Proceedings Bill needed?

### INTRODUCTION

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- 2.1 At common law prior to legislative intervention, the Crown could not be sued in the same way that private individuals could be, and the Crown had to invoke special procedures to enable it to sue.<sup>5</sup> The Crown also enjoyed other privileges. Without the Crown Proceedings Act 1950, or its antecedents, the New Zealand government could not be sued in contract if it were to breach a contract, and would not be able to be held liable for the torts (civil wrongs) of its employees. Similarly, without the Crown Proceedings Act, the Crown would not have been obliged to discover its documents in civil cases.
- 2.2 There are a number of explanations as to why the common law developed in this way, but the effect of various doctrines was that the Crown did not possess the same kind of legal personality that private individuals did. A statute was required in the countries that inherited the common law in order to confer legal personality upon the Crown. What is important for present purposes is that it is now an accepted part of the rule of law that in civil proceedings the Crown should be, as far as is possible, in the same position as private individuals.
- 2.3 The Crown Civil Proceedings Bill, which we propose should replace the current Crown Proceedings Act, has two core tasks: first, to give the Crown sufficient legal personality so that it may be sued; and second, to subject the Crown to the same law, procedure and rules as other litigants.
- 2.4 Some circumstances remain where different law, procedures or rules continue to be justified, not so much because of a desire to protect the Crown, but rather as recognition that the Crown is not always simply another litigant. Where different treatment is justified, it is important for the policy behind such a departure from principle to be clear and for the exception to be no more than necessary to give effect to that policy. For example, we consider that the replacement statute should continue to contain provisions allowing the Crown to assert public interest immunity in cases of national security to prevent the discovery of documents, but have asked for views about how best to provide a check on the possibility of blanket assertions of privilege.<sup>6</sup>
- 2.5 In most respects the changes that we have suggested are subtle, but nevertheless important. Key changes in the proposed Bill are:
- direct liability of the Crown for tort, which would avoid the difficulties faced by the plaintiff in *Couch v Attorney-General (Couch)*;<sup>7</sup>
  - clarification of the law relating to public interest immunity;

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5 The best description of the pre-reform law is in Walter Baker Clode *The Law and Practice of Petition of Right Under the Petitions of Right Act, 1860* (W Clowes and Sons Ltd, London, 1887).

6 See ch 7.

7 *Couch v Attorney-General* (on appeal from *Hobson v Attorney-General*) [2008] NZSC 45, [2008] 3 NZLR 725; and *Couch v Attorney-General (No 2)* (on appeal from *Hobson v Attorney-General*) [2010] NZSC 27, [2010] 3 NZLR 149.

- clarifying that claims for compensation under the New Zealand Bill of Rights Act 1990 and proceedings before the Human Rights Review Tribunal will be caught by the Act; and
- identifying the Attorney-General as the nominal defendant for all actions against the Crown.

## THE NEW ACT AND ITS LIMITATIONS

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- 2.6 The proposed replacement statute achieves the core task of giving the Crown legal personality to be sued. In a number of respects it goes further than the current statute: it recognises direct tort liability, rather than relying on the Crown being vicariously liable, and it provides for compulsory enforcement. However, the proposed statute is not designed to increase the liability of the Crown. It does not seek to create liability, but rather to recognise that the Crown can be sued, and can sue, in the same way as others can. Courts, through the normal processes of the common law, and Parliament, through statutes, will continue to decide in what circumstances the Crown will be liable. The proposed statute does not create obligations in and of itself; rather, it provides a mechanism through which existing obligations can be enforced.
- 2.7 Therefore, the proposed statute does not alter the essential framework for civil proceedings against the Crown. The basic principle remains the same: the Crown ought to be able to sue, and be sued, as others can. The way in which the draft Bill would do this, however, is considerably simpler than under the current Act, and more in line with the realities of the way New Zealand organises its central government. The result is a Bill that looks forward rather than one that looks backward.

## ONE MAJOR CONCEPTUAL CHANGE

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- 2.8 There is perhaps only one major conceptual change. Under our proposed Bill, the Crown could be sued directly in tort, as opposed to vicariously, for the actions of its servants, just as it currently can be in contract. Currently, the Crown can only be sued vicariously, with limited exceptions in the Act.<sup>8</sup> This is the position in various Australian states and it was also the case that the Crown could be “sued” in New Zealand before the 1950 Act.<sup>9</sup> The purpose of the proposed change is not to increase the potential liability of the Crown. The Crown’s liability has not been noticeably increased in the Australian states in comparison to New Zealand or the United Kingdom. The change is intended to more closely align the statute to the realities of modern government in which it is clear that the Crown, and not just its employees, owes obligations to the citizens it serves. The change would also allow the argument that the Crown might be liable in a case of systematic negligence where no one employee has committed a tort, but where the Crown has nevertheless failed to meet its obligations.
- 2.9 In doing this, the new statute would avoid much of the problem that confronted the plaintiffs in *Couch*.<sup>10</sup> It would focus attention not on whether the allegations of negligence could be made against individual officers, which is the question currently required by the statute, but on whether the government and its departments owe and have breached a duty of care. In *Couch*,

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8 For instance, the Crown itself can breach contracts or trustee duties under s 3(2)(a), can breach duties owed as an employer under s 6(1)(b) and can breach common law duties relating to the ownership, possession or control of property under s 6(1)(c).

9 See Stuart Anderson “‘Grave Injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009) 12 Otago L Rev 1. Before 1950 New Zealand enabled the presentation of petition of rights to the courts that covered a wide range of activities of the New Zealand Government.

10 *Couch v Attorney-General (No 2)* (on appeal from *Hobson v Attorney-General*) [2010] NZSC 27, [2010] 3 NZLR 149 [*Couch*]. In *Couch*, the severely injured victim of an aggravated robbery at the Panmure Returned Services Association (the RSA) sued the Attorney-General on behalf of the Department of Corrections alleging negligence and claiming exemplary damages. The offender, William Bell had been previously convicted and imprisoned for aggravated robbery and had been allowed by his probation officer to take up employment at the RSA. The management of the RSA were unaware of Bell’s criminal record. The issues considered in the case included whether the Department owed a duty of care to the plaintiff and whether exemplary damages could be claimed.



this broader issue was the question that the Supreme Court actually considered: whether the Department of Corrections and its probation service had owed a duty of care to those attacked by William Bell, as Bell was supposed to be under their supervision.

- 2.10 Under our proposal, the scope of Crown liability in particular cases would continue to be determined by the courts. Plaintiffs alleging negligence would still be required to establish loss that resulted from the breach of a duty of care. It is not intended, and it is not anticipated, that the traditional reluctance to recognise a duty of care for failures to properly regulate would be altered by this proposed reform. Indeed, the narrow grounds on which the majority of the Supreme Court recognised that there might be duty of care in *Couch* shows the generally conservative nature of New Zealand courts in this area.<sup>11</sup>

## THE OVERALL SCOPE OF THE PROPOSED STATUTE

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- 2.11 The statute we propose is not a “litigation against the government” statute. First, it is limited to civil proceedings and is not intended to cover criminal cases or judicial review cases, which will continue to have their own statutes and separate rules.
- 2.12 Secondly, it only deals with those parts of the government, or the state, that form part of the Crown, and which therefore cannot sue or be sued without statutory provisions. These include the core government departments. It would be possible to conceive of another function for a Crown Civil Proceedings Act, that of acting as funnel for all litigation against the government or state. In particular, such a statute could deal with litigation against Crown entities, some of which, like school boards of trustees or the Accident Compensation Corporation, serve as a major point of interaction between New Zealanders and their government.
- 2.13 Crown entities are, however, constituted as bodies corporate with the capacity to sue and be sued.<sup>12</sup> These entities fall outside the scope of the 1950 Act, and the Bill we are proposing. One of the reasons for setting up Crown entities as removed from the central Crown is to manage risks and liabilities in different ways from how they are managed by the core Crown. This is reflected in the Public Finance Act 1989, which provides that the Crown is not liable for the debts of Crown entities, or other agencies or bodies controlled by the Crown.<sup>13</sup>
- 2.14 Nothing prevents the government from making an all-of-government direction as to the conduct of the litigation of Crown entities under section 107 of the Crown Entities Act 2004. This could also conceivably act as a funnel for all litigation against the government or state. However, we do not think that this is the role of a Crown proceedings statute.

## THE RELATIONSHIP TO GENERAL RULES OF CIVIL PROCEDURE

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- 2.15 The special nature of the Crown requires that this Bill provides a number of special procedural rules, such as the Attorney-General being the nominal defendant except when another statute provides otherwise, or applying the common rules of discovery to the Crown (which would not apply otherwise). While these particular provisions may require specific rules, the intention is that on the whole the general law of civil procedure and High Court rules will apply to the Crown as they would to private litigants.

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11 See Geoff McLay “The New Zealand Supreme Court, the *Couch* case, and the future of government liability” (2009) 17 *Torts Law Journal* 77.

12 *Crown Entities Act* 2004, s 7.

13 *Public Finance Act* 1989, s 49.

# Chapter 3

## Tort law and Crown liability

### INTRODUCTION

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- 3.1 This chapter deals with three problematic and connected issues relating to the Crown's liability in tort. The first part considers whether, in addition to the Crown's current vicarious liability for tort, the Crown ought to potentially be liable in its own right in tort, as it can be for breach of contract. Our preliminary conclusion is that the new Bill should recognise the possibility of direct liability as a consequence of placing the Crown in the same litigation position as others. The second part addresses the effect that such direct liability would have on the statutory provisions that currently effectively immunise the Crown by virtue of immunising individual employees from liability in tort. Our preliminary position is that as part of this reform, those immunities should be recast where appropriate to immunise the Crown. Thirdly, it considers whether there ought to be any stated principle limiting the liability of the Crown in tort. Because this Act is procedural rather than substantive, our preliminary conclusion is that such limitation principles are best left to the courts to continue to develop as they have in the past.

### PROPOSED DIRECT LIABILITY IN TORT

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#### Introduction

- 3.2 For the most part, section 6(1) of the Crown Proceedings Act 1950 makes the Crown liable only vicariously for the actions of its officers or servants. This contrasts with the position under the previous New Zealand statutes, which appeared to make the Crown directly liable.

#### Other jurisdictions

- 3.3 On this point the 1950 Act follows the 1947 United Kingdom model. In drafting the 1947 Act, the United Kingdom law drafters rejected the recommendation of the Hewart Committee that would have imposed direct liability on the Crown for torts as well as contracts.<sup>14</sup>
- 3.4 The 1947 United Kingdom model continues to govern Crown proceedings in most Canadian provinces. However, Australian states along with British Columbia recognise direct liability of the Crown. The Crown Proceedings Act 1988 (NSW) provides:<sup>15</sup>
- (1) Any person, having or deeming himself, herself or itself to have any just claim or demand whatever against the Crown (not being a claim or demand against a statutory corporation representing the Crown) may bring civil proceedings against the Crown under the title "State of New South Wales" in any competent court.
  - (2) Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs

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<sup>14</sup> *Crown Proceedings Committee Report* (1927) Cmd 2834 [Hewart Committee].

<sup>15</sup> Crown Proceedings Act 1988 (NSW), s 5. Compare also Crown Proceedings Act (Vic), s 22:

(1) Every proceeding which may be taken by or against the Crown under this Part shall be taken in the court which would have jurisdiction if the proceeding were between subject and subject.

(2) Every proceeding under this Part shall be taken by or against the Crown under the title of the "State of Victoria" and shall be instituted and proceeded with in accordance with any procedure of the court specifically applicable thereto or, if no procedure is specifically applicable thereto, as nearly as possible in accordance with the procedure applicable to proceedings between subject and subject.

shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject.

- 3.5 The New South Wales Act defines “civil proceedings” in this way:<sup>16</sup>

civil proceedings includes civil proceedings at law or in equity, and also includes proceedings by way of preliminary discovery, cross-claim, counterclaim, cross-action, set-off, third-party claim and interpleader.

- 3.6 The British Columbian Crown Proceedings Act enacts direct liability in an even more economical way:<sup>17</sup>

the government is subject to all the liabilities to which it would be liable if it were a person.

### Arguments for and against direct liability

- 3.7 In many cases, the distinction between whether the Crown is directly liable, or vicariously liable, is not material to the outcome. What counts is that the Crown is liable for torts committed by its employees. The difficulty comes when there is no particular officer or servant who has committed a tort, but rather what is alleged is that the government department as a whole has failed, or a number of government departments have collectively failed.

- 3.8 *Couch v Attorney-General (Couch)* revealed some of the conceptual difficulties that arise when there is an allegation of systemic failure.<sup>18</sup> Professor Stuart Anderson makes the point that *Couch* arguably suggests that New Zealand lawyers and judges are in effect working around the difficulties caused by the Crown Proceedings Act model by conducting the case as if institutional liability were possible. Professor Anderson then continues:<sup>19</sup>

It looks plausible to them because departments function as though they are legal persons, the more so since the State Sector Act gave them chief executives along business lines ... There is no virtue in a statutory rule that judges and crown counsel conspire to evade, but which remains a trump card should the crown wish to play it. The statutory limitation of torts liability to vicarious liability is an embarrassment to our law, and a distortion of it. It has no principled justification, and it never has had. It is the result of accidents of English history. It was brought into New Zealand law that by then had its limitations, but was a rule based on principle.

- 3.9 Professor Anderson suggested that a better way of resolving the issue would be to give departments sufficient legal personality to be sued by adopting a formula based on the Australian legislation.<sup>20</sup>
- 3.10 Direct liability in tort is premised on a legal person having committed, or omitted to do, a particular act. As the Crown has no legal personality and can only act through its servants, it cannot, under this logic, commit a tort. The reason that the United Kingdom drafters rejected direct, as opposed to vicarious, tort liability was that they believed direct liability was not conceptually possible. Sir Thomas Barnes, the English Treasury Solicitor, explained in a 1948 article:<sup>21</sup>

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16 Crown Proceedings Act 1988 (NSW), s 3.

17 Crown Proceedings Act RSBC 1996 c 89, s 3(c).

18 See for instance the discussion in Geoff McLay “The New Zealand Supreme Court, the Couch case and the future of governmental liability” (2009) 17 Torts Law Journal 77.

19 Stuart Anderson “‘Grave Injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009) 12 Otago L Rev 1 at 21.

20 At 21.

21 Thomas Barnes “The Crown Proceedings Act” (1948) 26 Can Bar Rev 387 at 390.

Section 2 [the equivalent of section 6], probably the most important section in the Act, imposes upon the Crown for the first time liability in respect of tort. On this point it is essential to appreciate that, although it is possible and indeed proper in a very large part of the field covered by the activities of the Crown to draw an analogy between those activities and those of private enterprise, there are certain necessary functions of Government where no analogy exists. For instance, no private person has a duty to maintain Armed Forces or to undertake the many activities which must be undertaken by the Crown in discharging this duty to defend the Realm. Furthermore, the servant of a private person is appointed by the mere will of his employer, whereas in the case of a Crown servant the appointment may be made by an officer of the State and his duties may be controlled by statute. The legal consequences which follow from these facts were stated in the judgment of Chief Justice Earle in the case of *Tobin*. It was consequentially impossible for the Act to deal with the question of tort by the summary and attractive method of merely enacting that the Crown should be liable to be sued in tort. Section 2 therefore sets out three classes of the wrongs which it is thought completely cover, possibly with some overlapping, all that is required.

- 3.11 Some force remains to this argument. However, direct liability has been recognised in the states of Australia and in British Columbia, seemingly without the difficulties that this objection might have foretold. As Professor Anderson has observed in relation to the functioning of the Australian legislation:<sup>22</sup>

Australian experience shows that the procedural difficulties that were put forward as an obstacle in New Zealand in 1950 are illusory, and that such a provision does not predetermine what the extent of crown liability should be—that is a matter for judges to determine on ordinary principles of tort law, as they do in disputes solely between citizens.

- 3.12 Moreover, since 2002, Crown organisations (including departments) that are not bodies corporate have been recognised as having sufficient personality to be prosecuted under the Resource Management Act 1991, the Health and Safety in Employment Act 1992 and the Building Act 2004.<sup>23</sup>
- 3.13 There has also been no problem with recognising that the Crown itself can breach contracts or trustee duties in section 3(2)(a) of the current Crown Proceedings Act. Indeed section 6(1)(b) contemplates direct liability for breaches of duties owed as an employer and section 6(1)(c) contemplates direct liability for breaches of common law duties relating to the ownership, possession or control of property.
- 3.14 The Ontario Law Reform Commission advocated for a transition to direct liability following the United Kingdom model, but the recommendation was not enacted.<sup>24</sup>
- 3.15 In 1976 the New South Wales Law Reform Commission firmly rejected the suggestion that the State ought to adopt the United Kingdom model and recommended the retention of direct liability. The Commission was scathing in making its recommendations:<sup>25</sup>

Section 2 [of the United Kingdom Crown Proceedings Act] deals with the liability of the Crown in tort. It is fair comment upon the section that “in view of the barrage of criticism that has been directed against the maxim that ‘the King can do no wrong’, it might have been expected that the Crown Proceedings Act would abolish this maxim. This, however, the Act does not altogether do. There is no section of the Act, stating generally that the Crown shall be liable in tort. Indeed the general principle is left but very wide exceptions are carved out of it” [Glanville Williams *Crown Proceedings* (1948) at 28]. In comparison with the Claims against the Government Act, the United Kingdom legislation is complex

22 Anderson, above n 19, at 21.

23 Crown Organisations (Criminal Liability) Act 2002, s 6.

24 Ontario Law Reform Commission *Report on the Liability of the Crown* (OLRC, Toronto, 1989) at 25–26.

25 New South Wales Law Reform Commission *Proceedings By and Against the Crown* (LRC24, 1975) at [4.7].

and restrictive of the judicial role. The long Australian experience is that counsels of prudence do not require such complexity or restriction in New South Wales. We recommend against the adoption of the United Kingdom legislation.

- 3.16 It might be said that that this conceptual difficulty is compounded in New Zealand by the way in which statutory duties are often not placed on a department, or the Crown in general, but on particular servants or officers. For example, in the *Couch* litigation, the relevant statutory duties were not on the probation service or the Department of Corrections but on a probation officer.<sup>26</sup> There may be important reasons why obligations ought to be placed on a particular officer, as opposed to those obligations being fulfilled by a department. Such drafting may help define where the relevant accountability for the performance of an obligation lies within a department. The need to have a basis for internal accountability does not, however, necessarily answer the question of who ought to provide compensation when a particular duty is not fulfilled.

### Approach in our draft Bill

- 3.17 Our draft Bill simply states that the Crown can sue and be sued as another person can be, and therefore does not determine the degree to which the Crown might be held to be directly liable in tort.

## THE EFFECT OF EMPLOYEE IMMUNITY UNDER OTHER ACTS

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- 3.18 Under the current vicarious model of tort liability, the Crown is entitled to rely upon immunities granted to individual officers. This is confirmed by section 6(4) of the Crown Proceedings Act which provides:

Any enactment which negatives or limits the amount of the liability of any Government Department or officer of the Crown in respect of any tort committed by that Department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that Department or officer, apply in relation to the Crown as it would have applied in relation to that Department or officer if the proceedings against the Crown had been proceedings against that Department or officer.

- 3.19 The New Zealand statute book contains numerous immunities from liability, and immunities that are often drafted differently. The Law Commission has previously conducted a survey of such provisions, and in its Report 37 the Commission made a number of recommendations about the nature of such immunities which have since been followed in the statute books.<sup>27</sup> Those provisions often follow the model of section 6(4), providing an immunity for a particular official who has acted in good faith. A recent example of such a provision is contained in the Freedom Camping Act 2011:

- (1) An enforcement officer is not liable for any loss or damage to property arising directly or indirectly from the seizing and impounding of the property under section 37.
- (2) Subsection (1) does not apply if the enforcement officer acted without good faith or if his or her omission or neglect was a major departure from the standard of care expected of a reasonable person in the circumstances.

- 3.20 The effect of those provisions is not just to protect the individual officer but also to protect the government department that the officer serves.

- 3.21 One difficulty of adopting a direct liability regime and removing section 6(4) would be that all such provisions in other legislation would need to be reassessed to determine whether in fact the policy behind them was intended to protect the individual officer or whether the department

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<sup>26</sup> See Criminal Justice Act 1985, s 125 (now repealed).

<sup>27</sup> Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R37, 1997).

was also intended to be protected. Where the intention of the immunity provision in a statute is to protect the department as well, legislation will need to be amended to preserve it if the proposed change to section 6(4) is enacted.

- 3.22 While the Commission's view is that in future, Crown proceedings legislation ought to provide for direct tort liability, and not require that a particular officer be liable in tort, the reality is that many government protections are premised at the moment on the assumption in section 6(4). Once a new Act is passed, those drafting new statutes would, of course, be able to assess directly whether immunising the government department as well as the public servant from liability is justified.
- 3.23 The difficulty, then, is what to do with the range of protections that already exist. One option is a deeming clause, which would recognise the reality that the Crown at the moment is usually vicariously, rather than directly, liable in tort. Such a clause could simply deem that those protections currently applying to an officer apply to the Crown itself, regardless of whether the officer could otherwise be liable in tort. Such a change would require a re-drafting of section 6(4) to apply to statutes that were enacted before the new statute. It would be hoped that over time those who draft statutes would take account of this change.

### Approach in our draft Bill

- 3.24 The proposed Bill would no longer premise Crown liability on vicarious liability, and hence would potentially leave it open to the Crown to be held liable. The Bill assumes a revision of current immunity provisions to determine if they ought still apply to protect the Crown. Another approach would be simply to deem current immunities to apply to the Crown even though the Crown could be sued directly under the Act.

## GENERAL RESTRICTIONS ON GOVERNMENT LIABILITY

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### Introduction

- 3.25 Just because the Crown can be sued does not mean that it will always, or indeed often, be liable for breaches of the obligations that it owes under statute or common law. The Crown will only be liable if an underlying cause of action would make it liable. Most commonly this requires the Crown to have assumed obligations through contract or otherwise, or to have committed a tort. In the case of both the torts of breach of statutory duty and negligence, however, it is essentially left to judges to determine the overall scope of liability that might arise, sometimes in circumstances where no private individual could owe an obligation.
- 3.26 Government departments have legitimate concerns that liability should not be imposed for policy choices, or indeed for the general implementation of policy, except under very specific regimes like the Human Rights Act 1993. Policy necessarily involves making determinations of what risks are to be guarded against, what benefits are to be conferred and who is going to bear the cost. Resource allocation necessarily involves deciding that some good causes will not receive government support, while others will.
- 3.27 There is a question of whether the new statute should attempt to prescribe the circumstances in which liability should arise for breach of statutory obligations.

### Section 6(2) of the Crown Proceedings Act

- 3.28 The 1950 Act contains what might have been an important reservation on the ability of courts to recognise causes of action as arising from statutory duties. However, as it has been

- interpreted, section 6(2) does not in fact create such a limit and we have not proposed that it be carried over to the Crown Civil Proceedings Bill.
- 3.29 Currently section 6(2) provides:
- Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.
- 3.30 This section was inherited from the United Kingdom 1947 Act. The intention of the drafters appears to have been to exclude Crown liability where Parliament had expanded the role of the government to provide services that were not provided by private individuals, but to catch those duties that were shared with other employers. In his 1948 book on the United Kingdom Act, Glanville Williams wrote:<sup>28</sup>
- A statute that binds the Crown or its officers only is deemed to create a merely governmental duty which does not found civil liability. The object of the Act is to put the Crown on somewhat the same footing as a private matter, not to create a new department of tort by turning constitutional and administrative law into a system of duties owed by the Crown.
- 3.31 The then-Treasury Solicitor, Sir Thomas Barnes, who had been heavily involved in the drafting of the United Kingdom Crown Proceedings Act, explained the reasoning behind this section in a 1948 article:<sup>29</sup>
- The reason for this ... limitation is that there are many Acts of Parliament which impose general duties upon particular Ministers, e.g., it is the duty of the Minister of Education to promote education of the people of England and Wales. Clearly, if the Minister fails to perform this duty, he should be answerable in Parliament and not elsewhere.
- 3.32 The New Zealand provision has been the subject of conflicting interpretations in the High Court over whether section 6(2) is designed to limit the kinds of statutory duties that the Crown can be held liable for if breached, or whether it is intended to enable suits based on the breach of statutory duty tort.<sup>30</sup>
- 3.33 Two reasons may account for the conflicting views. First, the section arguably failed to deal with the reality of many governmental duties that are not cast on the Crown, but rather on the Crown's servants. For example, in child welfare cases the allegation has been that child welfare services have failed to protect a child. The obligation in question may have been owed not by the social welfare department as a whole, but by the Director-General or Chief Executive of the department.<sup>31</sup> Secondly, the section deals with statutory duties, whereas in New Zealand government liability has been developed in negligence and not categorised as a breach of statutory duty even when a statutory duty might have been breached.
- 3.34 In the most recent case to consider the section, McKenzie J in *Goodship and Pranfield Holdings Ltd v Minister of Fisheries (Pranfield)* held that the section did not operate as a prohibition on recovery, but rather enabled actions against the Crown:<sup>32</sup>

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28 Glanville Williams *Crown Proceedings* (Stevens & Sons, London, 1948) at 47–48.

29 Barnes, above n 21, at 391.

30 The restrictive interpretation had been adopted in *G v Attorney-General* [1994] 1 NZLR 714 (HC) at 722; and *Vickerman Fisheries Ltd v Attorney-General* HC Wellington CP 1007/91, 26 August 1994 at 57, while the expansive approach has been adopted in *Cashmere Pacific Ltd (in rec and in liq) v New Zealand Dairy Board* [1996] 1 NZLR 218 (HC) at 13–14; and *Goodship and Pranfield Holdings Ltd v Minister of Fisheries* HC Wellington CIV-1997-485-13, 19 December 2006 at [179]–[185].

31 See Children, Young Persons, and Their Families Act 1989, ss 7 (duty of the Chief Executive) and 17 (duty of the social worker to investigate a complaint of child abuse).

32 *Goodship and Pranfield Holdings Ltd v Minister of Fisheries*, above n 30, at [184].

Subsection (2) imposes an additional liability on the Crown. It does not limit or exclude any liability to which the Crown may be subject under subsection (1). The proposition, as expressed by Bickford Smith, that “there is no liability under the Act for breach of those duties which are laid upon the Crown and its officers alone” is true only to the extent that liability for breach of such duties is not a liability in tort. If it is a liability in tort, then subsection (1) applies to impose liability, and subsection (2) does not remove the liability. The proposition that there may have been no liability in tort for breach of a statutory duty resting only on the Crown may well have been true more than half a century ago when the Crown Proceedings Act was passed. Developments in the law of tort in the intervening period have been such that that proposition cannot now be regarded as correct. The tort of breach of statutory duty is well recognised and established now. To the extent that liability for breach of statutory duty is a tortious liability, that tortious liability is, like any other, subject to s 6(1). The proposition that the Crown can do no wrong is no longer a foundation for an exemption of the Crown from tortious liability. The liability in tort to which the Crown is exposed by s 6(1) is not limited to its liability in tort at the time when the Act was passed. It includes its liability as that has been extended and expanded in the intervening period.

- 3.35 The Court of Appeal, having found no causes of action under which the plaintiffs in *Pranfield* could recover, declined to review the operation of the defence.<sup>33</sup>
- 3.36 In some ways the courts’ preference for negligence, as opposed to a separate breach of statutory duty tort, has made the debate over section 6(2) somewhat redundant, in a way that the authors of the 1950 Act could not have appreciated. It is not clear on the face of it whether this section, in fact, applies to negligence actions and, if it were to apply, what the impact of that application might be.
- 3.37 Our present view is that section 6(2) should not be retained. It appears to us that by far the best mechanism for determining whether a particular statutory duty or power ought to give rise to a remedy in the breach of a statutory duty tort, or to a common law duty of care, is in the statute that creates those duties itself.
- 3.38 It is not our aim in proposing the removal of section 6(2) to signal to both litigants and the courts that the intention was to essentially authorise an expansion of Crown liability in areas where courts otherwise would not have expanded liability. Rather, it would be a concession that the current provision is ineffective. It would be difficult to argue that the law of Australia is any more expansive in terms of the kinds of governmental duties that might be imposed, yet the various Crown Proceedings Acts in Australia do not include anything like our section 6(2).

### The policy–operation distinction

- 3.39 One device that has been used by the courts to restrict government liability is the policy–operation distinction in negligence cases. Courts in a number of jurisdictions have recognised that it is inappropriate to impose duties of care when decision-makers are charged with making “policy” decisions, but that it might be appropriate to recognise duties of care where the public official is engaged in “operational” matters. The most famous articulation of the distinction was that by Lord Wilberforce in *Anns v Merton London Borough Council*.<sup>34</sup> An early version of the distinction is included in the United States Federal Tort Claims Act.
- 3.40 In many cases an easy distinction can be made between what might be “policy” and what might be “operational”. At the margins, the distinction is difficult to apply, and what some might consider to be an operational failure – for instance, to inspect – might be explained as a policy decision not to provide particular resources to enable the inspections.

<sup>33</sup> *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649.

<sup>34</sup> *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 754.



- 3.41 Nevertheless behind the distinction lies an important insight: that citizens might claim to be harmed, or at least not protected, by a legitimate governmental decision, but that the government should not find itself liable as a result. It is, however, difficult to generalise in what circumstances there ought to be, and in what circumstances there ought not to be liability, in a way that would make drafting a statutory provision possible. Therefore we have not included the distinction in the draft Bill. We are not intending, however, that this indicate a view that the courts should not examine whether a decision was a “policy” one and whether that might tell against recognition of a duty of care in negligence.

### **Approach in our draft Bill**

- 3.42 Our Bill does not include an express limitation of the tort liability of the Crown. Our Bill is focused on capacity to sue and be sued rather than the substantive law of whether an obligation has been breached for which there can be a tort action.

#### **QUESTIONS**

- Q1 Do you agree with the approach of making it possible for the Crown to be directly liable in tort? Do you foresee any difficulties with this approach?
- Q2 What is the best approach to take with existing provisions in other Acts that provide Crown employees with immunity if section 6(4) of the Crown Proceedings Act is repealed?
- Q3 Would repealing section 6(2) of the Crown Proceedings Act create any problems?

# Chapter 4

## Relationship to public law

### INTRODUCTION

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- 4.1 This chapter examines different forms of public law proceedings to see whether it is appropriate for them to be brought within the proposed Crown Civil Proceedings Bill. The chapter covers judicial review proceedings, damages for administrative failures and proceedings for compensation under the New Zealand Bill of Rights Act 1990 (NZBORA).

### JUDICIAL REVIEW PROCEEDINGS

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- 4.2 Placing criminal proceedings to one side, the Crown Proceedings Act contrasts civil proceedings with judicial review proceedings. Judicial review proceedings are governed by a mixture of common law, the High Court Rules and the Judicature Amendment Act 1972.<sup>35</sup> We do not propose to bring judicial review proceedings within the Crown proceedings legislation. Conceptually, judicial review proceedings are separate from private law actions that can be brought against the Crown, although in some cases the issues that can be brought in a private claim can also be brought as a judicial review claim, and both claims may sometimes be heard together. Reforming the procedure of judicial review claims, however, lies outside the scope of the current project.

### DAMAGES FOR ADMINISTRATIVE FAILURES

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- 4.3 There is no private law cause of action for the failure to meet an administrative law standard in and of itself. Our proposed Crown Civil Proceedings Bill would not change this, either by expressly enabling such a cause of action, or by expressly prohibiting one.
- 4.4 In New Zealand, courts have not generally permitted negligence or the breach of statutory duty tort as means by which administrative errors, that are not other torts, are compensated. For example, in *Minister of Fisheries v Pranfield Holdings Ltd*, the Court of Appeal overturned McKenzie J's award of damages to the affected fishermen on the grounds that they had not been able to establish what would otherwise have been considered to be a common law tort.<sup>36</sup> The Court of Appeal rejected the contention that some statutory obligations might give rise to an entitlement, the frustration of which might sound in damages.<sup>37</sup> In the context of NZBORA, the Court of Appeal has recognised that the failure to observe natural justice might give rise to a compensable interest under relatively rare circumstances.<sup>38</sup> It is not clear how such a compensable interest would equate to a common law award of damages, but it might be conceptualised as “vindication”: an appropriate amount to recognise the breach of natural justice that has occurred.

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35 The Judicature Amendment Act 1972 is to be re-enacted as part of the Judicial Modernisation Bill which is currently before Parliament.

36 *Minister of Fisheries v Pranfield Holdings Ltd* [2008] NZCA 216, [2008] 3 NZLR 649.

37 *Goodship and Pranfield Holdings Ltd v Minister of Fisheries* HC Wellington CIV-1997-485-13, 30 June 2006 at [65]–[75].

38 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56.

- 4.5 The Law Commission for England and Wales suggested in a Discussion Paper issued in 2006 that there should be a remedy for administrative failing based on a concept of “serious fault”.<sup>39</sup> In its final Report the Commission recorded that its proposals had failed to garner significant support, and indeed had received much opposition in England.<sup>40</sup>
- 4.6 Our view is that setting out the circumstances in which administrative law breaches might result in compensation lies outside the scope of this project, which is focused on procedural reforms. Considerable wisdom remains in the views of the 1980 Public Law Committee:<sup>41</sup>

We recommend that whenever a new statute confers powers that, if exercised unlawfully will cause economic loss, consideration should be given to the inclusion of a provision relating to compensation for losses flowing from any unlawful decisions given by the donee(s) of the power. We recommend that the Government should, by Cabinet minute, impose the responsibility for this consideration on the Government Department initiating such legislation, on the office of Parliamentary Counsel, and on our Committee. If we decided to recommend the inclusion of a compensation provision, we would transmit our recommendation both to the department responsible for the legislation and to the Minister of Justice. The compensation would not necessarily be recoverable as damages in a tort action. The principles on which liability should be determined could be tailor-made to the nature of the power exercised.

## PROCEEDINGS FOR COMPENSATION UNDER THE NEW ZEALAND BILL OF RIGHTS ACT 1990

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### Is a *Baigent* action a “civil proceeding”?

- 4.7 There is a question, however, of where to fit claims brought under NZBORA, especially when they are for monetary compensation.<sup>42</sup>
- 4.8 In *Simpson v Attorney-General (Baigent’s case)*, the Court of Appeal recognised that public law compensation could be sought for breaches of NZBORA.<sup>43</sup> Such an action exists independently of private law claims for damages, although in many circumstances a tort may be brought in relation to the same facts. For instance, a claim for an unreasonable search and seizure under section 21 might also give rise to a trespass claim, or a claim for arbitrary detention under section 22 might also give rise to a false imprisonment claim.
- 4.9 Such claims are not cases for private law damages, and some cases have held that, as a result, the provisions of the Crown Proceedings Act currently do not apply.
- 4.10 In *Baigent’s case* itself, the claim for public law compensation for the wrongful search was held by majority not to be caught by the prohibition in the current section 6(5) that the Crown was not liable in tort for discharge of responsibilities of a judicial nature.<sup>44</sup>
- 4.11 Similarly in *Choudry v Attorney-General*, another claim for compensation for unreasonable search and seizure, it was assumed, without being decided directly, that the provisions of section 27 relating to discovery did not apply directly to the actions for public law compensation.<sup>45</sup>

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39 The Law Commission for England and Wales *Administrative Redress: Public Bodies and the Citizen* (Consultation Paper No 187, 2006) at pt 4.

40 The Law Commission for England and Wales *Administrative Redress: Public Bodies and the Citizen* (Report No 322, 2010) at pt 3.

41 Public and Administrative Law Reform Committee *Damages in Administrative Law* (Report 14, May 1980) at [23].

42 See *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent’s case*].

43 See Geoff McLay “Damages for Breaches of the New Zealand Bill of Rights – Why Aren’t They Sufficient Remedy?” [2008] NZ L Rev 333; and Geoff McLay “Damages under the New Zealand Bill of Rights Act 1990” in Peter Blanchard *Civil Remedies in New Zealand* (2 ed, Brookers, Wellington, 2011) 203.

44 *Baigent’s case*, above n 42, at 716.

45 *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) at 595; and *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at 404.

- 4.12 Having said that, in many cases the result might not be much different in holding that the Crown Proceedings Act does not formally apply. There is little doubt that at least in relation to discovery, the same or similar rules as those in the Crown Proceedings Act apply, as do the High Court Rules. Similarly, while section 6(5) does not apply directly to the exercise of judicial responsibilities, the Supreme Court has held that the Crown is not liable to pay compensation for the actions of judges.<sup>46</sup>
- 4.13 From both the plaintiff's and defendant's perspectives, a claim for common law damages or for public law compensation will be similar. The evidence presented and the procedure followed will be the same, and indeed will often be combined within the same set of proceedings.
- 4.14 On the other hand there are important differences between common law claims and those under NZBORA. Awards for the latter have been held to be "discretionary" rather than "as of right" in the way that common law claims are normally described. Perhaps more importantly, the Supreme Court has emphasised that monetary compensation is just one of a range of public law remedies that might be granted, and that non-monetary remedies might be more appropriate.<sup>47</sup> There is, then, a legitimate view that compensation, and more especially those other remedies that might be awarded instead, are so quintessentially public that they should not be considered "civil proceedings".
- 4.15 The principal reason for including such claims in the Crown Civil Proceedings Bill would be to standardise the procedure for all monetary claims against the Crown. This would prevent technical arguments that different kinds of proceedings for damages are governed by different procedural law. It would, for instance, clarify that in a NZBORA compensation case against the Crown the proper defendant is the Attorney-General.
- 4.16 However, a number of objections are possible:
- Such claims are "constitutional" and so ought not to be defined as civil proceedings, and moreover the inclusion of them as such might influence the development of the remedy.
  - Courts have emphasised that NZBORA compensation is just one of the range of public law remedies that might be awarded for a breach of NZBORA. Defining all claims for compensation as civil proceedings may create procedural issues in relation to the claims for other relief.<sup>48</sup>
  - If, as we discuss below, the Crown Civil Proceedings Bill no longer excludes injunctions and allows compulsory enforcement of judgments, there may be a conclusion that the inclusion of NZBORA actions somehow removes the discretion the courts have so far been careful to emphasise in their development of NZBORA remedies.
- 4.17 On balance our current view is that NZBORA claims should be included in the Bill, in the same way as they are in the Limitation Act 2010.<sup>49</sup> That Act includes compensation under NZBORA within the definition of money claims, and treats NZBORA claims in the same way as other money claims. We propose a similar approach for a new Crown Civil Proceedings Act. However, the provision needs to be drafted so that it is clear that it is the role of the courts to define what the Crown's liability is.

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46 *Chapman v Attorney-General* [2011] NZSC 110, [2012] 1 NZLR 462.

47 *Taunua v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

48 See, for instance, the observations in *Taunua v Attorney-General*, above n 47. See also McLay, above n 43.

49 Limitation Act 2010, s 12(2): "A claim for monetary relief includes a claim— ... (c) for monetary relief for a breach of the New Zealand Bill of Rights Act 1990".

## APPROACH IN OUR DRAFT BILL

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- 4.18 The proposed Bill seeks to preserve the current divide between judicial review proceedings and civil proceedings that are brought under the Crown Proceedings Act. It contemplates, however, that the definition of civil proceedings would include claims for monetary compensation under NZBORA.

### QUESTIONS

- Q4 Should compensation claims under the New Zealand Bill of Rights Act 1990 come within the proposed Crown Civil Proceedings Bill?

# Chapter 5

## Compulsory enforcement

### INTRODUCTION

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- 5.1 Common law courts have traditionally declined to grant injunctions or make mandatory orders against the Crown.<sup>50</sup> The Crown Proceedings Act 1950 does not allow injunctions against the Crown. When the Judicature Amendment Act 1972 introduced the granting of interim orders, a similar prohibition was introduced in relation to the Crown.<sup>51</sup> Neither prohibition applies to the granting of injunctions or orders against officers, although the Crown Proceedings Act prevents an injunction if such an injunction would, in effect, be granted against the Crown. This chapter looks at whether this position should be retained or whether it should now be possible for the court to grant an injunction against the Crown.

### CURRENT PROHIBITION ON MANDATORY ORDERS AGAINST THE CROWN

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- 5.2 Section 17 of the Act provides:

- (1) In any civil proceedings under this Act by or against the Crown or to which the Crown is a party or third party the court shall, subject to the provisions of this Act and any other Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

provided that—

- (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may instead make an order declaratory of the rights of the parties; and
- (b) in any proceedings against the Crown for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may instead make an order declaring that any person is entitled as against the Crown to the land or property or to the possession thereof.
- (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

### ARGUMENTS FOR AND AGAINST THE CURRENT PROHIBITION

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- 5.3 There has been considerable controversy over the retention of the prohibition on mandatory orders in the Crown Proceedings Act and a similar immunity against compulsory orders in judicial review. For example, in 2001 the then President of the Law Commission authored a Study Paper that argued for mandatory orders to be granted in judicial review proceedings and

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<sup>50</sup> However, such orders were traditionally granted in Scotland. See the discussion in *Davidson v Scottish Ministers (No 1)* [2005] UKHL 74 at [60] per Lord Rodger.

<sup>51</sup> The prohibition against injunctions is in s 8 of the Judicature Amendment Act 1972.

was consequently critical of section 17 of the Crown Proceedings Act.<sup>52</sup> The principal argument in favour of abolishing section 17, and indeed of enabling mandatory orders, is that the rule of law, and section 27(3) of the New Zealand Bill of Rights Act 1990 (NZBORA), require that the Crown be subject to court orders as if it were an individual. A number of arguments oppose abolishing the immunity from compulsory enforcement. The most important is that it is unnecessary, as the Crown will almost always comply even if compliance is not mandatory, but that there may be unforeseeable situations where in the public interest the Crown should be able to decline to comply.

- 5.4 The effect of this provision is actually much narrower than might be supposed. There is no prohibition against making officers or indeed ministers liable when a duty is cast directly onto them.<sup>53</sup> Moreover there is, at least according to the House of Lords in *M v Home Office*,<sup>54</sup> no difficulty in holding a minister responsible for contempt if he or she breaches an undertaking or an order.
- 5.5 In the 2001 Study Paper, the then President of the Law Commission noted in the foreword that his conclusion was not the view of the Commission.<sup>55</sup> A real question exists as to whether the prohibition on injunctions, or indeed the prohibition on other remedies like specific performance to compel a particular course of action should be continued in new legislation. Our preliminary view is that we should not bring the prohibition into this new Act in the same form. It would be difficult to argue that section 17 or any equivalent does not breach section 27(3) of NZBORA. While section 5 of NZBORA allows limitations that are justifiable in a free and democratic society, it is not clear that the current broad limitation on injunctions is proportionate to the need to provide the Crown with the ability not to comply with injunctions in extreme cases.
- 5.6 Consideration needs to be given, however, to the interface of this prohibition with the inability to give mandatory orders in judicial review proceedings. Those seeking mandatory orders might be tempted to recast what might otherwise be a judicial case within the rubric of civil proceedings.

## OPTIONS FOR REFORM

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- 5.7 We have provided alternative options in clause 9 of the draft Bill. One alternative is simply to allow remedies against the Crown as if it were a private party, and to implicitly allow courts to choose the appropriate way in which the results of the Crown's breach of obligation might be prevented. Under the second option, we have provided a more narrowly phrased exception that courts might choose to issue a declaration as opposed to granting an injunction. An injunction should also not be permitted where it would have the effect of requiring the transfer of particular property.

## QUESTIONS

Q5 Should the Crown be subject to compulsory enforcement remedies?

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52 New Zealand Law Commission *Mandatory Orders Against the Crown and Tidying Judicial Review* (NZLC SP10, 2001).

53 See HWR Wade "Injunctive Relief against the Crown and Ministers" (1991) 107 LQR 4.

54 *M v Home Office* [1993] UKHL 5, [1994] 1 AC 377.

55 New Zealand Law Commission, above n 52, at v.

# Chapter 6

## Accountability of the Crown and its employees

### INTRODUCTION

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- 6.1 This chapter addresses a central question for any system of government liability: how to promote the accountability of the government when it fails in its obligations? It also addresses the important issue of the potential personal liability of government ministers and employees for breaching the obligations that they owe.

### ACCOUNTABILITY OF THE GOVERNMENT IN GENERAL

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- 6.2 Compensation (or restitution of property) is an important goal of many civil proceedings against the Crown. Traditionally, actions against the Crown, and before the Crown against officers, have been used as a way of holding the Crown and its officers to account for their use of public powers. Many of the great constitutional cases in English legal history are in fact tort cases against officers, alleging that they have either exceeded or abused their powers.<sup>56</sup> The Crown Proceedings Act 1950 promotes this sense of accountability in that it provides a clear route for taking legal action against the Crown. There are, however, two aspects of this accountability that can, in our view, be improved: first, relating to the source of the compensation, and second, relating to how information about settlements is provided.

#### Source of the compensation

- 6.3 The 1950 Act provides that payment of judgments should be made effectively from the consolidated fund rather than from the particular department's appropriation. The trouble with this is that if accountability, as well as compensation, is an important goal then it would make sense for the payment to come directly from the department that got things wrong. Moreover, the statute on the face of it creates the rather odd position that while settlements are presumably paid from appropriations, judgments do not need to be.
- 6.4 Our understanding of the Government's current practice is that if an individual department is unable to satisfy a judgment from its existing appropriations then it will apply for a supplementary appropriation to cover the debt. This has the benefit of triggering the internal public sector accountability process. Our Bill seeks to legislate in line with the current government practice. It makes it clear that it is the individual department that is responsible for meeting the cost of any judgment, not the consolidated fund as is the case under the present legislation. A potential objection, which we consider more theoretical than real, is that the absence of an appropriation might frustrate a claimant from getting judgment. The reality of modern government accounting practice makes this unlikely.

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<sup>56</sup> For example *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807; and *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126.



## Information about settlements

- 6.5 Accountability could also be enhanced by providing a simplified process by which the public can learn of settlements made by the Crown in contemplation of litigation. Information about the claims that departments are settling, as well as the judgments that they are paying, is important for the public in assessing the number and seriousness of the cases that have been brought against particular departments.<sup>57</sup> Some of this information is currently available, but it is difficult to access. Many departments have adopted a policy of considerable openness to providing this information on request.
- 6.6 One suggested approach would be to adopt a procedure like that currently used in British Columbia, which requires the disclosure of settlements annually in one source in a document tabled in Parliament by the Attorney-General.<sup>58</sup> This one document would give greater attention to what actions have been conducted against the Crown, and what, if anything, that might say about the performance of particular departments. We have, however, provided in our draft that such reporting should be made through the established reporting mechanisms of government departments.
- 6.7 Any reporting would need to safeguard the legitimate privacy interests of those who have had disputes against the Crown. For instance, the public has no legitimate interest in the identity of a particular claimant for compensation resulting from sexual abuse by a Crown employee.

## Proposals in the Bill

- 6.8 Our proposals in relation to the general accountability of the government are found in clause 21 of the draft Crown Civil Proceedings Bill.

## LIABILITY OF CROWN EMPLOYEES

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- 6.9 When and how such employees ought to be protected from legal suit are important questions, as is the effect of any such protections on the position of the Crown. Whether individual Crown employees are personally responsible should be dealt with separately to whether the government on behalf of which they act ought to be responsible. We examine the issue of how best to protect Crown employees from civil proceedings, and put forward some possible solutions for comment. Even if New Zealand were to depart from a vicarious liability model (see discussion at paragraphs [3.2] to [3.17]), and the Crown were able to be sued directly, it would still be necessary to consider the position of Crown employees.
- 6.10 Following the Supreme Court decision in *Couch v Attorney-General (Couch)*,<sup>59</sup> the Government took steps to clarify the degree, if any, to which Crown employees ought to be personally liable for actions undertaken in good faith in the performance of their public duties. The approach taken in amending the State Sector Act 1988 was to provide an immunity for Crown employees if they had acted in good faith in the performance of their work, while preserving the ability of those who had suffered loss to pursue the claim directly against the Crown. In its report, the Select Committee that considered the Bill addressed the possibility that this review might conclude that an immunity was a preferable approach, but concluded that the doubt the *Couch* decision created should, nevertheless, be removed:<sup>60</sup>

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57 See Geoff McLay “Tort, Settlements and Government: A Preliminary Inquiry” (2011) 9 NZJPIL 247.

58 Crown Proceedings Act RSBC 1996 c 89, s 15.

59 *Couch v Attorney-General* (on appeal from *Hobson v Attorney-General*) [2008] NZSC 45, [2008] 3 NZLR 725 and *Couch v Attorney-General (No 2)* (on appeal from *Hobson v Attorney-General*) [2010] NZSC 27, [2010] 3 NZLR 149 [*Couch (No 2)*]. For a summary of the *Couch* case, see above n 10.

60 State Sector and Public Finance Reform Bill 2012 (55-2) (explanatory note) at 14.

... and thus restore what was widely understood to be the status quo, in the knowledge that it would be open to Parliament to amend the provision once the Law Commission's review was concluded if there were a compelling case for doing so.

- 6.11 The Law Commission is considering whether providing a general immunity of this type is the most appropriate way of protecting Crown employees, and whether a statutory indemnity might instead be preferable. Feedback is sought on the choice between an immunity and an indemnity for Crown employees. Below we compare the two respective approaches and assesses the advantages and disadvantages of each.

### Underlying principles

- 6.12 The broad starting point is that the ordinary rules governing liability for torts committed by servants apply to the Crown and its employees: when a Crown employee commits a tort, the employee is personally liable, even if the tort is committed in the course of their employment.<sup>61</sup>
- 6.13 Crown employees, however, should be protected from personal liability in cases where they have acted in good faith in pursuance of their jobs, just as private sector employees are often indemnified by their employers. Indeed, given the nature of their jobs, Crown employees undertake activities that have little parallel in the private sector, often in circumstances of conflict or difficulty. Moreover, they sometimes exercise extensive powers that can have a significant impact on individuals or groups. There is a proper concern that able employees may not wish to be involved with such activities or might exercise their roles defensively if faced with the possibility of being held personally liable.<sup>62</sup>
- 6.14 The question is, then, how best to achieve the aim of providing a remedy to be paid by the Crown to those who have been wronged, while still protecting Crown employees acting in good faith.
- 6.15 Whether an immunity or indemnity is used has implications for the personal responsibility of the individual employee involved. Preference for one or the other approach may depend on how responsibility is conceptualised and whether individual responsibility is seen as a necessary element. From one view, it is sufficient for accountability purposes to have corporate responsibility; in this case, direct liability of the Crown. From this view individual responsibility is less important because a mechanism still exists for sheeting home responsibility to the corporate body, so someone who is wronged is not left without a remedy.
- 6.16 On the other hand, an approach that discounts the significance of personal responsibility, as immunity is said to do, might be seen as discouraging individuals from taking an appropriate level of care in carrying out their work. Since the connection is severed between the individual providing the service or carrying out the function and the party that is held accountable for these actions, the individual has less incentive to take responsibility for their actions.

### Current situation: Immunity in the State Sector Act 1988

- 6.17 Section 86 of the State Sector Act gives an immunity to Crown employees and chief executives in certain situations. Section 86(1) was amended in July 2013 to provide:

Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.

61 P Hogg, PJ Monahan and WK Wright *Liability of the Crown* (4th ed, Carswell, Scarborough, 2011) at [8.1].

62 At [8.4].

6.18 At the same time an amendment was also made to section 6 of the Crown Proceedings Act, inserting the following provision as subsection (4A):

Despite certain Crown servants being immune from liability under section 86 of the State Sector Act 1988,—

- (a) a court may find the Crown itself liable in tort in respect of the actions or omissions of those servants; and
- (b) for the purpose of determining whether the Crown is so liable, the court must disregard the immunity in section 86.

6.19 The intended effect of these provisions is that while chief executives and employees are immune, that immunity does not prevent the Crown from being vicariously liable for their actions. The Select Committee stated that the amendments would “resolve present uncertainty” and “restore what was widely understood to be the position prior to the majority decision of the Supreme Court in *Couch*”.<sup>63</sup>

6.20 Before the 2013 amendment, section 86 provided:

No chief executive, or ... employee, shall be personally liable for any liability of the Department, or for any act done or omitted by the Department or by the chief executive or any ... employee of the Department or of the chief executive in good faith in pursuance or intended pursuance of the functions or powers of the Department or of the chief executive.

6.21 The Supreme Court in *Couch* was divided three to two over the correct interpretation of section 86. Tipping J, in the majority, held that section 86 could best be interpreted as creating a bar on a department seeking contribution from a negligent chief executive or employee when the department itself was liable. In his view this interpretation preserved the structure of tort liability under the Crown Proceedings Act, as there was no indication that the State Sector Act was designed to alter that structure.

6.22 McGrath J for the minority would have held that while section 86 might absolve a chief executive or employee of personal liability, it did not affect the Crown’s liability under the Crown Proceedings Act.<sup>64</sup>

6.23 There were difficulties with both approaches. The difficulty with the minority approach was, as Tipping J in his judgment argued, reconciling it with the wording of section 6(1) of the 1950 Act. The difficulty with the majority approach was that it meant section 86 neither immunised nor indemnified individual Crown employees who committed a tort, but only prevented a contribution being claimed by the department.

### Immunity compared with indemnity

6.24 Crown employees can be protected in a number of different ways from the consequences of civil proceedings. An immunity from suit, such as that currently in section 86, means no proceedings may be brought against persons exercising powers under the Act, or that a person exercising a power under the Act is immune from civil proceedings. Accordingly, a party wronged by a Crown employee that is immune cannot sue that employee, and so may be left without a remedy unless the same remedy could be sought against the Crown.

6.25 In the case of section 86, section 6(4A) of the Crown Proceedings Act enables suits against the Crown for torts committed by its employees, notwithstanding the employees’ immunity under section 86. Therefore, under the new scheme the remedy for a person wronged will be similar.

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63 State Sector and Public Finance Reform Bill 2012 (55-2) (select committee report) at 13.

64 *Couch (No 2)*, above n 59, at [190]–[192].

However, it is possible to conceive of a gap where a person is left without a remedy, since an action falls outside of the scope of vicarious liability, so that the Crown is not liable, and the individual employee is immune by virtue of section 86. This potential gap, though, is likely to be very narrow in light of the wide scope of vicarious liability that exists at present, and the parameters of the section 86 immunity. If the employee commits actions that are outside the scope of vicarious liability, then it is highly likely the section 86 immunity would not be available, because that person would almost certainly not have been acting in good faith in pursuance of their duties, as required to come within the immunity.

- 6.26 An alternative is to provide Crown employees with an indemnity, whereby the Crown pays for any judgment and any legal costs. Indemnification by the Crown must be in accordance with an express statutory provision.<sup>65</sup> Indemnities for a Crown employee currently need to be approved individually by the Minister of Finance under the Public Finance Act 1989.<sup>66</sup>
- 6.27 A model for an immunity can be found in section 86 of the State Sector Act, set out above, which provides that chief executives and employees are “are immune from liability in civil proceedings”. In contrast, section 122 of the Crown Entities Act 2004 gives the ability to provide an indemnity:
- A statutory entity may only indemnify a member, an office holder, or an employee in respect of an excluded act or omission (including costs incurred in defending or settling any claim or proceeding relating to that excluded act or omission).
- 6.28 In terms of financial risk and actual financial cost to the individual employee, the outcome of both an immunity and an indemnity is the same (so long, of course, as the indemnity covers the costs of litigation and judgment as they come due): the employee will not personally be required to pay for damages and court costs resulting from any action. Under an immunity this is because the employee is not able to be sued in the first place, while under an indemnity the reason is that there is an agreement or statutory requirement that the Crown rather than the employee will be responsible.
- 6.29 Although each approach effectively achieves the same result of avoiding financial cost to the employee, a different process is involved in getting to that outcome, depending on whether an immunity or indemnity is in place. If the employee is immune, no proceedings can be taken against the employee, so he or she will not be named as a defendant in litigation. Immunity also means that any judgment resulting from the litigation will not be made against them personally. By comparison, an employee who is indemnified is still able to be sued and named as a party, and judgments can be made against the employee individually, even if the cost is actually met by another through the indemnity.

## Advantages and disadvantages of indemnity versus immunity

### *Effect of threat of personal liability*

- 6.30 Employees who are indemnified by the Crown remain at risk of having litigation brought against them for their actions. This creates a risk that the threat of liability could lead to these employees conducting their work in an overly cautious or risk-averse way, and leave them feeling exposed. Without a protection against potential personal liability, it might be difficult to attract employees into public service positions. Immunities remove these risks by preventing the possibility of proceedings, allowing Crown employees to undertake their work without

<sup>65</sup> See Public Finance Act 1989, s 65ZC: “Except as expressly authorised by any Act, it is not lawful for any person to give a guarantee or indemnity on behalf of or in the name of the Crown.”

<sup>66</sup> Public Finance Act 1989, s 65ZD.

the fear of personal liability. On this view, the scrutiny and personal pressure threatened or actual litigation would entail is an unjustified interference with the ability of Crown employees to carry out their functions, even if the financial cost were to be met via an indemnity. An immunity provides more effective protection from this perspective, as it would shield Crown employees from even the possibility of being named as a defendant, let alone having to undergo the process of being sued and found to have breached obligations.

#### *Certainty of protection*

- 6.31 A key concern about indemnities might be the uncertainty for individual employees about whether they will ultimately be indemnified by the Crown. An immunity provides certainty to employees about whether they are protected, whereas an indemnity, depending on its nature, may not guarantee that an employee would be indemnified in a particular instance. The present regime requires the Minister of Finance to approve the individual indemnity, if it is in the public interest to do so. It is likely that Crown employees would be entitled to be indemnified by their employer for any act or omission carried out in good faith in the course of their duties, but it is still conceivable that approval for indemnification could be withheld, leaving the employee to meet any judgment against them from their own personal funds.
- 6.32 However, these concerns about uncertainty can be met by departing from the current discretionary regime and providing that indemnification is mandatory for the Crown. Under the indemnity proposed in the draft Bill,<sup>67</sup> there would be an express statutory indemnity which would not require the approval of the Minister of Finance; the indemnity must be paid by the relevant department. The statute would provide that the department must indemnify Crown employees for proceedings relating to good faith actions done in pursuance of their duties. This would remove the discretion about whether the employee would be covered, as long as he or she was acting within the terms of the indemnity. Taking this approach would provide greater reassurance and security for Crown employees than the present form of the indemnity, and would remove the personal financial risk. It would effectively give employees the same protection as an immunity as far as their financial position is concerned.

#### *Constitutional significance of suits against Crown employees*

- 6.33 There may be a symbolic concern that an immunisation is a departure from previous constitutional history. Being able to sue an officer personally for the failure to perform statutory functions or for acting in excess of lawful authority has some constitutional significance. There is a long-standing principle that any civil wrong committed by a Crown employee in the course of his or her role is committed in his or her personal capacity and the employee can be held responsible in a court for that wrong, even if someone else is covering the cost. Such suits may be seen to be a check on misuse of power, as they clearly were seen in earlier years.
- 6.34 An indemnity approach preserves the option of personal suits against the employee, so in this respect would better reflect the constitutional principles at stake. We submit, however, that the better policy is to make suits against employees dependent on the absence of good faith, as this limits possible proceedings to those concerning the type of behaviour where it is appropriate for an individual to be exposed to liability.

#### *Nature and focus of the litigation*

- 6.35 Arguably immunities may change the nature and focus of the litigation. There may be fears that, without the ability to bring proceedings against a particular individual, the actions of the

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<sup>67</sup> See draft Crown Civil Proceedings Bill, cl 11 (Indemnity for [Ministers and] Crown employees); any damages and litigation costs would be paid by the department.

employee concerned will not face scrutiny in the same way as they would if the employee were the subject of the proceedings. A potential unintended consequence of adopting an immunity approach could be to remove some of the incentive for an employee to exercise an appropriate level of care in his or her work. In contrast, the focus of litigation where a Crown employee is indemnified is still unquestionably on the actions of the individual employee involved.

#### *Effect on litigation against the employee and the Crown*

- 6.36 In terms of how the litigation would proceed under each scenario, an indemnity approach carries the practical advantage that proceedings would continue as they have done so far (no proceedings yet having taken place under the new immunity provision). That is to say, the individual employee would be a party to the litigation and action brought against the Crown through a vicarious liability action (or, under the proposed direct liability scheme, directly against the Crown). It is the Commission's view that in the case of good faith performance of their duties, employees of the Crown and others in positions similar to employees, such as Defence Force personnel, should be indemnified by the Crown, but that such an indemnification should not prevent the Crown itself being liable.
- 6.37 With an immunity in place, litigation would necessarily proceed differently as the employee could not be sued, although it is unclear that this would be problematic in practice. Under the scheme introduced in 2013, individual employees have an immunity under section 86, but this immunity may be disregarded and the Crown found liable, per section 6(4A) of the Crown Proceedings Act. Section 6(4A) addresses the basic conceptual difficulty that would otherwise arise with an immunity approach: namely, that since tort liability in New Zealand is, at present, vicarious, ordinarily if a tortfeasor is immunised the employer will normally take the benefits of that immunisation. The Crown's vicarious liability would change under our proposal simply to state that the Crown can be liable as a natural person. By comparison, an indemnity does not affect the tort liability of the Crown at all, whether direct or vicarious, since all it does is ensure that if a judgment is actually made against an employee, that judgment would be covered by the department that employs that employee (under the option in clause 11 of the Bill).
- 6.38 Concerns about the possible effects of an immunity must be balanced against the reality that in Australia, or at least in New South Wales, similar provisions seem to work well enough. In New South Wales the general vicarious liability reforms of 1992 mean that all employees, including Crown employees, are exempted from liability, but their employers are not able to take advantage of that exemption in a vicarious liability action.<sup>68</sup>
- 6.39 The operation of the New South Wales system of liability was explained recently by the New South Wales Court of Appeal in *Kable v New South Wales*.<sup>69</sup> That case concerned a statute that enabled the New South Wales Government to continue to imprison Mr Kable even though his sentence had finished. It addressed the question of whether this statute was a legitimate exercise of legislative power, and found that the continued imprisonment of Mr Kable was a legitimate exercise of judicial power.<sup>70</sup> In its consideration of various matters, the New South Wales Court of Appeal considered how such a false imprisonment claim would be dealt with. Under the vicarious liability reform in New South Wales, there was a statutory saving of the Crown's liability, even though the individual employee would not be liable. Essentially the New South Wales Court of Appeal considered that the result of this saving was that the action proceeded as

68 Law Reform (Vicarious Liability) Act 1983 (NSW), ss 7 and 8.

69 *Kable v New South Wales* [2012] NSWCA 243.

70 *New South Wales v Kable* [2013] HCA 26. The High Court of Australia ultimately held that the judicial order made did provide lawful authority to detain Mr Kable, notwithstanding that this order was subsequently set aside by the High Court because the empowering legislation was invalid. The Court did not, however, need to address vicarious liability and so did not comment on the New South Wales Court of Appeal's remarks on the issue.

it would have done without the vicarious liability reforms. The exception is that the employee, in this case the prison governor, was not a defendant and would not have been held liable.

### Views sought on best approach

- 6.40 The Commission is seeking feedback on whether an indemnity or immunity is the most appropriate means of protecting Crown employees. Comment is sought on the options set out in the draft Bill for an immunity or an indemnity in the context of the direct liability model, as well as comments on the merit of each approach more generally.

## ACCOUNTABILITY OF MINISTERS

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- 6.41 The two options, immunity of Crown employees and indemnity of Crown employees, both have the added issue of whether ministers should come within the scope of the provision, or whether it should be limited to Crown employees only (non-state sector employees, in the case of the immunity option as state sector employees are already immune by virtue of section 86 of the State Sector Act 1988). Ministers are clearly within the proposed Crown Civil Proceedings Bill's definition of the Crown.<sup>71</sup> However, there is an option about whether or not to include them within the Bill's indemnity or immunity clause.
- 6.42 At present, ministers are protected by an indemnity for legal costs or damages incurred in the course of legal proceedings brought against them in their capacity as ministers, through a process set out in the Cabinet Manual.<sup>72</sup> There is no absolute right to indemnity by the Crown in respect of proceedings brought against a minister personally. The minister is required to approach the Prime Minister and Attorney-General, for determination of whether the minister has acted within the scope of his or her authority. The Attorney-General forms a view on this issue and submits a paper to Cabinet seeking a decision on whether or not to indemnify the minister's expenses.
- 6.43 Regardless of whether an immunity or indemnity approach is preferred for Crown employees, there may be arguments to distinguish or align the position for ministers. If an indemnity approach is favoured for Crown employees, for instance because it is considered important to be able to bring suits directly against the individual Crown employee concerned, the same may well be desired for ministers.
- 6.44 Whichever approach is preferred, from one point of view it would be clear and logical to make provision for ministers as well as Crown employees in the same statutory provision, rather than leaving part of the process to the Cabinet Manual. In the case of an indemnity, the coverage would essentially be the same as under the Cabinet Manual, since those guidelines only provide for indemnification when a minister is acting in the course of his or her duties. It may be useful to have indemnification of ministers included in the proposed statutory indemnity scheme. However, it could instead be said that ministers, as political actors, should be in a different position to Crown employees and should not be protected by an automatic indemnity; it may be appropriate for a minister to justify why they ought to be indemnified in a particular case, where a similar obligation should not be put on a Crown employee.

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<sup>71</sup> See cl 4.

<sup>72</sup> Cabinet Office *Cabinet Manual 2008* at [4.34]–[4.57].

## QUESTIONS

- Q6 Do you agree that the Crown proceedings legislation should clarify that a department must meet judgments for compensation from its own appropriation? Do you foresee any problems with this approach?
- Q7 Do you think that the government should be required to disclose the amount of money spent on settlements made in contemplation of litigation?
- Q8 Do you prefer the option of an immunity or an indemnity from legal suit for Crown employees?
- Q9 Should ministers be in the same position as Crown employees with regard to an immunity or indemnity from legal suit?



# Chapter 7

## Disclosure and public interest immunity

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### INTRODUCTION

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- 7.1 This chapter addresses the particular issue of public interest immunity, which is a limitation on the Crown's obligation for disclosure established under Crown proceedings legislation. This is followed by a brief discussion of other disclosure issues.
- 7.2 Section 27 of the Crown Proceedings Act 1950 addresses the discovery of information in civil proceedings involving the Crown. There is an important intersection with the doctrine of public interest immunity, whereby the production of documents may be refused if disclosure would be injurious to the public interest. An assertion of public interest immunity is made by the executive. It consists of a statement that the disclosure of certain information in proceedings is against the public interest, although it would otherwise be part of the discovery. The existence of public interest immunity is acknowledged in the proviso to section 27(1) and in section 27(3) of the Crown Proceedings Act.
- 7.3 The law on public interest immunity, and in particular the operation of section 27 of the Crown Proceedings Act, is currently unclear. Any replacement of the Crown Proceedings Act will need to address public interest immunity. For the Law Commission to recommend replacement of section 27, we need to give consideration to the proper place for requiring the Crown to discover documents for court, over and above any other obligations to disclose information through regimes like the Official Information Act 1982.

### CURRENT LAW

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- 7.4 The doctrine of public interest immunity has long existed at common law. It prevented discovery where discovery of that material was against the public interest. One view was that the assertion of public interest immunity was conclusive. However, the modern view is, perhaps, that the courts should retain some role in assessing whether the assertion has been correctly made.
- 7.5 Currently two different provisions in the statute book relate to the assertion of public interest immunity: section 27 of the Crown Proceedings Act and section 70 of the Evidence Act 2006.

### Legislation

#### *Crown Proceedings Act 1950*

- 7.6 Broadly speaking, the Crown Proceedings Act enables the Prime Minister in the case of national security, or the Attorney-General in the case of the administration of justice, to issue a certificate that essentially prevents discovery being granted for particular documents. Section 27 reads:

- (1) Subject to and in accordance with rules of court,—
  - (a) in any proceedings (other than criminal proceedings) to which the Crown is a party or third party, the Crown may be required by the court to answer interrogatories if the Crown could be required to do so if it were a private person of full age and capacity; and
  - (b) in any such proceedings as aforesaid the Crown may be required by the court to make discovery of documents and produce documents for inspection if the Crown could be required to do so if it were a private person of full age and capacity: provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
- (2) Any order of the court made under the powers conferred by paragraph (a) of the last preceding subsection shall direct by what officer of the Crown the interrogatories are to be answered.
- (3) Without prejudice to the proviso to subsection (1), any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if—
  - (a) the Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice—
    - (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
    - (ii) any interest protected by section 7 of the Official Information Act 1982; or
  - (b) the Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the prevention, investigation, or detection of offences.

7.7 The issuing of a certificate under subsection (3) can be subject to challenge by judicial review.

7.8 Subsections (1) and (2) were intended for the purpose of simply enabling discovery against the Crown. Subsection (3) was inserted from 1983 to provide for rules to be made regarding Prime Minister and Attorney-General certificates.<sup>73</sup> The timing of this amendment coincided with the introduction of the Official Information Act. The intention of subsection (3), along with the rule 8.26 of the High Court Rules and its predecessors, was to preserve the understanding that, despite subsection (1), the Crown can claim the additional public interest privilege.

### *High Court Rules*

7.9 The High Court Rules direct that an order must be made to prevent disclosure under section 27 if certain certificates are provided by the executive. Rule 8.26 provides:

An order made under section 27(1) of the Crown Proceedings Act 1950 must be construed as not requiring disclosure of the existence of any document if—

- (a) the Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice—
  - (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
  - (ii) any interest protected by section 7 of the Official Information Act 1982; or
- (b) the Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the prevention, investigation, or detection of offences.

<sup>73</sup> Crown Proceedings Amendment Act 1982, s 2(2).

- 7.10 The phrasing of this rule is somewhat unusual. It repeats the conditions of section 27(3) for the making of rules securing that the existence of a document will not be disclosed, but states that an order under section 27(1) “must be construed” in a certain way. The rule gives the appearance that it is directing how the statute is to be interpreted. The current wording of the rule was inserted in 1986 following the amendment to section 27 in 1983.<sup>74</sup> However, the rule, including the direction about how an order under the statute shall be construed, has its origin in the 1952 Supreme Court (Crown Proceedings) Rules.<sup>75</sup> It appears that this unorthodox framing of the rule has been maintained in the statute book since 1952.

### *Evidence Act 2006*

- 7.11 Section 70 of the Evidence Act gives judges a power to determine whether particular information that relates to “matters of state” must be disclosed. It provides:
- (1) A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
  - (2) A communication or information that relates to matters of State includes a communication or information—
    - (a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or
    - (b) that is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act.
  - (3) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.
- 7.12 This section has wider application than section 27(3) of the Crown Proceedings Act. It applies, for instance, to all litigation, including criminal litigation, whereas section 27 applies only to civil proceedings and discovery. Section 70 does not require a ministerial certificate to apply. It requires the court to undertake a balancing exercise to see whether public interest in disclosing the information outweighs the public interest in withholding it.

### **Common law public interest immunity**

- 7.13 Public interest immunity has existed in the common law for many years.<sup>76</sup> It is uncertain to what extent common law public interest immunity continues to exist in tandem with the statutory forms in the Crown Proceedings Act and Evidence Act. The proviso to section 27(1) of the Crown Proceedings Act does appear to assume the existence of a rule of law of public interest immunity separate from statute. The Crown Proceedings Act does not affect claims for public interest immunity made by someone other than the Crown, so the common law could well apply in these cases. However, arguably section 70 of the Evidence Act may override common law public interest immunity as a cause of action.

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<sup>74</sup> Judicature Amendment Act (No 2) 1985, sch 1.

<sup>75</sup> Supreme Court (Crown Proceedings) Rules 1952, r 24 inserting r 167C of the Code of Civil Procedure.

<sup>76</sup> It was formerly referred to as “Crown privilege”, but this is now considered an inaccurate description of its effect because public interest immunity is determined by a court pursuant to an evaluative process rather than simply being claimed as a privilege by a party (*Duncan v Cammell Laird & Co Ltd* [1942] AC 624 (HL) at 641: “Crown privilege is not a happy expression”).

- 7.14 Common law public interest immunity does continue to have relevance to how public interest immunity is currently applied by the courts. The common law public interest immunity doctrine recognises that sometimes the public interest in non-disclosure of information regarding the state outweighs the public and private interests in the proper administration of justice.<sup>77</sup> The immunity is a rule of evidence that restricts the disclosure of otherwise relevant evidence in legal proceedings where its disclosure would be against the public interest. It is a question of balancing the competing public interests in withholding information and the right of a litigant to be able to bring all relevant evidence before a court.
- 7.15 Under the common law, claims to public interest immunity have been made based on either the class to which information belongs or the content of the information. In claims based on the class of information, it is merely the fact that they belong to a sensitive category of information that is material, regardless of the actual contents of the particular information.<sup>78</sup> In recent decades the courts have shown a greater willingness than in earlier times to inspect the contents of documents even where they belong to a sensitive class, such as Cabinet papers, on the basis that not every document in the class is automatically immune from disclosure.<sup>79</sup>

### *Role of the court*

- 7.16 Public interest immunity is generally claimed by the Crown, usually because the Crown is a party to litigation. It is the duty of the court, however, to enforce public interest immunity, whether it is claimed or not.<sup>80</sup> The court has jurisdiction to inspect documents that are the subject of a public interest immunity claim. However, the court will not lightly disregard a ministerial certificate.<sup>81</sup>
- 7.17 It is the duty of the court to prevent the use of information, even where there is no intervention from any minister, if possible serious injury to the national interest is apparent.<sup>82</sup> The court has a role in safeguarding genuine public interests, but, as is discussed below, it must balance the competing interests involved.

### **Issues with current law**

- 7.18 As the law currently stands, it is unclear how section 70 of the Evidence Act and section 27 of the Crown Proceedings Act relate to each other. The lack of clarity in the current law is unsatisfactory. It is also not entirely clear how section 27 interacts with common law public interest immunity.

### *Conclusiveness of a certificate issued under section 27(3)*

- 7.19 Under section 70(1), in considering whether material should be disclosed, the judge is to consider whether “the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information”. It is uncertain whether the issuing of a certificate under section 27 in respect of that communication or information has conclusive status for the purposes of the judge considering an order under section 70. This would mean that the judge is not able to look behind the certificate to consider the merits of the disclosure. If the certificate is not considered

77 Hamish Stewart “Public Interest Immunity after Bill C-36” (2003) 47 Criminal Law Quarterly 249 at 250.

78 *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA).

79 *Elston v State Services Commission* [1979] 1 NZLR 193 (SC); *Conway v Rimmer* [1968] AC 910 (HL).

80 *Gisborne Fire Board v Lunken* [1936] NZLR 894 (CA); *Duncan v Cammell Laird & Co Ltd*, above n 76, at 642.

81 *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 157; *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA); *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA).

82 *Conway v Rimmer*, above n 79, at 952.

- conclusive, it would simply be evidence weighing against disclosure, although it would likely be strong evidence.
- 7.20 The courts have not been called upon to settle this question. There are doubts about whether the two sections have equal weight or whether either one should prevail over the other. On one hand the Court of Appeal has referred to the Crown’s power as “an apparently conclusive power of veto” when discussing section 27(3).<sup>83</sup>
- 7.21 On the other hand, a number of court decisions on public interest immunity generally have nonetheless indicated that the courts will look behind a Crown objection to the release of material on public interest grounds, although there may be some classes of material for which the courts will give considerable deference to ministerial certificates. Traditionally, it has been held in both the United Kingdom and New Zealand that it is for the court to decide whether a claim to public interest immunity is properly made.<sup>84</sup> It is not clear whether the courts would take this approach when applying section 27(3).
- 7.22 In *Tipene v Apperley*,<sup>85</sup> the Court of Appeal stated that for some documents a minister’s certificate regarding public interest immunity should be decisive, such as diplomatic or defence papers, because the courts are not in a position to form judgements as to the prejudice to the public interest. It also stated there are other situations where the courts will balance the public interest to decide whether documents should be produced. That case involved a statement made to the police regarding the commission of an offence, and it was found that the court would consider the release of this type of information.
- 7.23 In *Fletcher Timber Ltd v Attorney-General (Fletcher Timber)*, the Court of Appeal held that a certificate claiming Crown privilege should state precisely the grounds of objection so that the court can evaluate the competing interests. In the absence of particularity or specificity a decision might often have to be made in favour of disclosure.<sup>86</sup> The Court made observations on the contemporary movement towards open government. It found that while a minister’s conclusion that documents ought not to be produced always will be respected by the Courts, it can never become a substitute for informed judicial decision and so the certificate is not conclusive.

#### Textual issues

- 7.24 A concern has been noted about the reference to the “existence” of a document in section 27(3) rather than to the content of a document. It is often not just the existence of the document that the Crown wishes to keep confidential, but some or all of its content. On one reading of section 27(3), if a party already knows of the existence of a document it is not possible for the Crown to certify that it should not be disclosed. It seems unlikely that this was the intention of the provision.
- 7.25 A further issue with section 27 is its need for modernisation. It refers to disclosure of a “document”. Document is now an outdated term and would not cover all of the forms of information that would be desirable for the provision to cover. Section 70 of the Evidence Act refers to “communication or information”, which is a more helpful term.

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83 *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at 404.

84 *Conway v Rimmer*, above n 79; *Konia v Morley* [1976] 1 NZLR 455 (CA); *Fletcher Timber Ltd v Attorney-General*, above n 78.

85 *Tipene v Apperley* [1978] 1 NZLR 761 (CA).

86 *Fletcher Timber Ltd v Attorney-General*, above n 78.

## PRINCIPLES

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### Competing interests

- 7.26 At the heart of consideration of public interest immunity are several potentially competing principles and factors. The starting point of this consideration must be the axiomatic requirement of justice that litigants must have an opportunity to present their case, which includes the opportunity to place evidence before the court.<sup>87</sup> Parties to litigation have the right to bring all relevant evidence before the court.<sup>88</sup> This principle represents both a private interest and a public interest, as not only does the proper administration of justice affect an individual litigant's rights and interests, but it affects the confidence reposed by the public in the justice system.<sup>89</sup>
- 7.27 However, the commitment to having all relevant evidence available at court proceedings is restricted by the doctrine of public interest immunity. It has long been acknowledged that in some cases relevant and important evidence needs to be kept secret where the public interest requires it. Because these two interests lead to opposing conclusions regarding whether evidence should be available in court proceedings, it has traditionally been the court's duty where a public interest immunity claim is raised to balance the public interest considerations involved in order to determine the claim.
- 7.28 It is considered that the government represents the public interest and so will bring an objection to discovery or disclosure of information where the public interest is imperilled. There are numerous public interests that governments have sought to protect through public interest immunity. Common grounds put forward in support of public interest immunity claims are that disclosure would:<sup>90</sup>
- reveal the deliberations of Cabinet;
  - reveal high level policy processes of government;
  - harm international relations or national security;
  - reveal law enforcement methodology;
  - reveal the identity of confidential police informers; and
  - reveal information obtained confidentially by the state.
- 7.29 If such information were disclosed, it could hinder the ability of Cabinet to debate freely and be fully informed while remaining collectively responsible for decisions, damage New Zealand's international reputation, prejudice police investigations or harm informers. Some of these interests more self-evidently demand protection, whereas others are of a character where it is important to weigh the strength of the interest against those that would be curtailed by allowing the public interest immunity claim.

### National security

- 7.30 Claims of public interest immunity based on the need to protect national security, defence or international relations are something of a special category. The claims might relate to the contents of a particular piece of information, but may also relate to the mere existence of

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87 AAS Zuckerman "Public Interest Immunity – A Matter of Prime Judicial Responsibility" (1994) 57 MLR 703 at 703.

88 *Glasgow Corporation v Central Land Board* [1956] SC 1 (HL) at 18–19; *Conway v Rimmer*, above n 79.

89 Zuckerman, above n 87, at 703.

90 A Hoel, J Kummrow and K Miller "Public Interest Immunity" (paper presented to the Victorian Government Solicitor's Office Seminar "Access to Information: Public Interest Immunity, Legal Professional Privilege and Freedom of Information", Melbourne, October 2012).

information. There can be a concern that even disclosing the existence of information, or the capability through which it has been collected, creates risks for New Zealand or its security relationships. A particular concern may be that, because New Zealand is heavily dependent on national security information being passed on to it by its allies, those allies could be reluctant to pass on information in the future without guarantees that it will not be made available in court proceedings. Courts have generally viewed claims to national security as non-justiciable, or barely justiciable, or as requiring judicial deference to exercises of ministerial discretion.<sup>91</sup> The rationale is that these matters are considered to be firmly within the knowledge, expertise and judgement of the executive. Often what is at risk through disclosure in court proceedings is of relative significance to the country. In *Konia v Morley*, the Court of Appeal stated that in some classes of cases a minister's statement that public interest immunity is required should be treated as decisive, such as when the safety of the state or diplomatic relations with another state would be put at risk.<sup>92</sup>

- 7.31 When the matter was considered in *Choudry v Attorney-General*, the Court of Appeal made it clear that claims based on national security are not conclusive merely because of the grounds claimed,<sup>93</sup> but that deference to a minister's certification in these cases is particularly strong and only rarely would the court decline to grant immunity.<sup>94</sup> The Court did note, however, that a wide spectrum of interests may fall under the "national security" umbrella, and that not all risks to national security call for equal treatment.<sup>95</sup> Consequently, even in cases where public interest immunity is claimed on the basis of national security, it is likely that the court will give serious consideration to the claim by ensuring the nature of the interest is fully understood, and possibly by examining the documents and applying a balancing of interests test before public interest immunity is granted.<sup>96</sup>

### The balancing exercise

- 7.32 The balancing exercise carried out by the courts in public interest immunity claims has been an opportunity to weigh competing interests to ensure public interest immunity is only used in appropriate circumstances. Lord Reid made the following helpful statement regarding the process required of the court in the House of Lord's judgment in *Conway v Rimmer*:<sup>97</sup>

It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. ... But there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved.

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91 *Choudry v Attorney-General*, above n 83, at 403.

92 *Konia v Morley*, above n 84, at 461. In this case, relating to police conduct, the Court found that it was not one where the minister's statement should be treated as decisive: "instead it is one where two aspects of the public interest have to be weighed one against the other".

93 *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA). The Court considered that this had been the position since *Corbett v Social Security Commission* [1962] NZLR 878 (CA) in New Zealand and *Conway v Rimmer*, above n 79, in England.

94 *Choudry v Attorney-General*, above n 93, at 593.

95 At 595.

96 In *Choudry v Attorney-General*, above n 93, the Court of Appeal found that the Prime Minister's certificate lacked sufficient detail to allow it to properly determine the claim for public interest immunity and gave the Crown the opportunity to reconsider the matter and swear new affidavits. When it considered the matter again on the basis of a further certificate from the Prime Minister, the majority of the Court found that it was unable, responsibly, to go behind a ministerial certificate claiming public interest immunity on the basis of national security (*Choudry v Attorney-General*, above n 83).

97 *Conway v Rimmer*, above n 79, at 940.

- 7.33 Cooke J's statement in *Brightwell v Accident Compensation Corporation* provides further insight into the balancing process in the New Zealand context:<sup>98</sup>

What is always essential is to examine closely the issues and ambience of the particular case in order to decide, bearing in mind that a Ministerial objection is never to be set aside lightly, whether or not there is good reason for upholding it in all the circumstances. ... The Courts have nonetheless moved to the position that clear and convincing grounds must be shown before they should allow an objection on such a ground to prevent a party from getting at the truth.

- 7.34 The interests that weigh against withholding sensitive information that is the subject of a public interest immunity claim are significant to the legal system and structure of the government. The courts do not lightly override them. Declining to allow evidence to be discovered may well affect a litigant's chance of success or even their ability to bring a case at all, and puts into question the right to natural justice.

- 7.35 It should be noted that neither of the above cases involved issues of national security, for which the balancing exercise arguably requires greater weight to be placed on the interest in withholding the information than would have been the case in the exercise described by Lord Reid and Cooke J. However, as the Canadian Federal Court of Appeal acknowledge in this statement about the interaction of competing public interests, the public interest in national security is to be balanced against other public interests, including the fundamental principles underlying the administration of justice:<sup>99</sup>

It is the very essence of any judicial system deserving of public confidence that, above all else, every litigant be given a fair chance and be seen to have been given it. Justice may not be done, and it is most unlikely that it will be seen to have been done, if a party, even by reason of compelling public interest, is prevented from fully making out its case or answering the opposing case.

- 7.36 The New Zealand Bill of Rights Act 1990 protects the "right to the observance of the principles of natural justice" and the "right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals".<sup>100</sup> The exercise of public interest immunity could well be a prima facie breach of both of these aspects of the right to justice, as the Crown is effectively given an advantage that is not available to others to the detriment of the individual litigant. Consequently, the courts have a responsibility to ensure that public interest immunity only applies where it is necessary and justified.

- 7.37 Public interest immunity claims can also have an impact on the principle of the accountability of government. The impact on the accountability of government is another factor that the courts often must weigh in determining public interest immunity claims. Those who exercise public power are held accountable for their exercise of it. At times this accountability is only available through the courts exercising the judiciary's constitutional role of supervising the use of executive power. The invocation of public interest immunity can prevent litigants from being able to bring proceedings against the Crown or from having the full truth exposed, thereby restricting the ability to hold the Crown to account.<sup>101</sup> It is important that immunity is not used by the Crown for improper motives or to shield itself from criticism or embarrassment. As stated

98 *Brightwell v Accident Compensation Corporation*, above n 81, at 139.

99 *Gold v Canada* [1986] 2 FC 129 at 135. See Jasminka Kalajdzic "Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases" (2010) 41 *Ottawa L Rev* 289.

100 New Zealand Bill of Rights Act 1990, s 27.

101 Thomas J emphasised this point in his dissenting judgment in *Choudry v Attorney-General*, above n 83, at 411. He considered that because of the very nature of national security, the Security Intelligence Service cannot be held accountable by anybody other than the courts and it is the responsibility of the courts to perform a supervisory function to ensure that the Service is answerable in a society which places high value on the accountability of public servants.



by the Supreme Court of Canada in *Carey v Ontario*, “[t]he purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government”.<sup>102</sup>

### *Changing societal values*

- 7.38 Case law in New Zealand on public interest immunity has been affected by the contemporary movement towards more open government. The Court of Appeal in *Fletcher Timber* noted that this had found statutory expression in the Official Information Act 1982.<sup>103</sup> In *Choudry v Attorney-General (Choudry)*, this was described as being “part of the growth of greater controls over public power developed in recent decades by Parliament and the Courts”.<sup>104</sup> These “evolving public attitudes”<sup>105</sup> have led to greater scrutiny of public interest immunity claims and greater likelihood that the courts will look behind ministerial certificates. The Court of Appeal also noted in *Choudry* that section 27(3) of the Crown Proceedings Act was narrowed at the time of the introduction of the Official Information Act to give it a focus consistent with the new policy of openness, but that it was significant that the Crown retained an apparent power of veto regarding the release of documents.<sup>106</sup> The Court did not comment on whether it considered that common law privilege existed outside of the provision.
- 7.39 National security continues to have been approached with caution by the courts. Internationally in the 21st century the law regarding the secrecy of national security has taken on new significance following the events of 11 September 2001, the ensuing “war on terror” and its aftermath. Heightened concern to protect against terrorism has led to some governments taking a more restrictive approach to the ability to challenge claims for the protection of sensitive information. At the same time, some courts and commentators have evidenced a concern that states may avoid accountability for human rights violations that have occurred in this period by using public interest immunity to keep sensitive information out of court proceedings where such proceedings are the only effective remedy for these violations.<sup>107</sup>

## **LAW REFORM ISSUES**

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- 7.40 In deciding whether to amend section 27, to simply repeal it, or to replace it with an entirely new approach to public interest immunity, several issues of significance will need to be settled.

### **Whether the court should decide claims of public interest immunity**

- 7.41 At present section 27 of the Crown Proceedings Act gives an apparently conclusive right to the Crown to prevent disclosure of documents on public interest immunity grounds (although, as discussed above, it is unclear whether this is affected by section 70 of the Evidence Act). Consideration of whether section 27 should remain in the law is effectively consideration of whether claims for non-disclosure of sensitive information should be able to be conclusively

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102 *Carey v Ontario* [1986] 2 SCR 637 at 673. The first prominent judgment in the United States addressing public interest immunity on national security grounds, or state secrets privilege, as it is known there, was *United States v Reynolds* 345 US 1 (1953). The case involved a tort claim by the widows of civilian observers killed when a military aircraft crashed while testing secret electronic equipment. The Supreme Court found that the privilege claim relating to the accident report and statements of surviving crew members was valid and that the plaintiffs could only continue the claim on the basis of other evidence. However, decades later when the accident report was declassified, it was determined that “[t]here were no national security or military secrets; there was, on the other hand, compelling evidence of the government’s negligence”. See *United States State Secrets Protection Act of 2008: Hearing of JR 5607 Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties 110th Cong* (Washington DC, United States Government Printing Office, 2009) at 41.

103 *Fletcher Timber Ltd v Attorney-General*, above n 78, at 296.

104 *Choudry v Attorney-General*, above n 83, at 403.

105 *Fletcher Timber Ltd v Attorney-General*, above n 78, at 296.

106 *Choudry v Attorney-General*, above n 83, at 404.

107 Kalajdzic, above n 99, at 316–7; Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/10/3* (2009); and *Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653 at [26].

settled by the executive alone or whether such claims should come before a court for judicial decision.

- 7.42 In its 1999 Report on the Evidence Act, the Law Commission recommended that section 27(3) of the Crown Proceedings Act be repealed:<sup>108</sup>

The Commission does not consider that this special exemption from the ordinary requirements of discovery is justified. The provision is not consistent with the general principle that the court, not the Crown, is ultimately responsible for determining whether a claim to public interest immunity should be upheld.

- 7.43 The Commission considered that section 70 of the Evidence Act obviated the need for section 27 and that the better approach was for the courts to decide these matters. Despite the Commission's recommendation, section 27 was not repealed when the 2006 Evidence Act was enacted. Questions remain about whether there are any advantages in retaining section 27, and whether there would be any gaps left by its repeal. A repeal of section 27 would raise both practical issues and more fundamental issues of approach.
- 7.44 From a practical viewpoint, it has been suggested that the repeal of section 27 would be disadvantageous because of potential gaps for documents that are not covered by section 70. The "public interest" protected in section 27 (the security or defence of New Zealand, international relations, any interest protected by section 7 of the Official Information Act 1982 and the prevention, investigation or detection of offences) may well be broader than the "matters of state" protected under section 70. In particular, matters relating to the prevention, investigation or detection of offences are likely not to involve "matters of state". If section 27 were repealed, and with it Rule 8.26 of the High Court Rules, without the introduction of anything to fill the gaps, problems may be caused for the Crown in seeking to protect certain information from disclosure. If it was considered that the law was best served by relying solely on the Evidence Act process for public interest immunity, the issue of the gap caused by the repeal of section 27 could be remedied by amending section 70 of the Evidence Act to expand its application.
- 7.45 However, repealing section 27 may not be the best policy approach to addressing claims regarding disclosure of sensitive Crown information. While it is appropriate and in line with case law for many public interest immunity claims to be decided by a court, there are concerns that the courts should not be deciding issues of national security or defence. The real question of principle is whether sensitive Crown information should be subject to judicial consideration (as it would be if section 70 were pre-eminent) or whether the Crown should be able to conclusively decide that disclosure should not be made.

### **Whether immunity on the grounds of administration of justice and immunity on the grounds of national security should be treated the same**

- 7.46 Section 27(3) of the Crown Proceedings Act refers to two types of certificate: one issued by the Prime Minister and one by the Attorney-General. If section 27(3) is retained, there is a question of whether jurisdiction for the issuing of both types of certificate should continue to be located in the Crown Proceedings Act. The two types of certificate relate to quite different subject matters. Certificates by the Prime Minister relate to New Zealand's security, defence and international relations, while the Attorney-General's certificates relate to the administration of justice (prevention, investigation and detection of offences).
- 7.47 One suggestion is that the provision for the issue of certificates by the Attorney-General, at least, could be located more appropriately in section 70. This would mean that it would be

<sup>108</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [314].

subject to a judicial discretion about whether it should be disclosed, despite the certificate. These kinds of requests will raise issues with which courts ought to be familiar, and which they are well placed to evaluate. Unlike material relating to national security, which requires appropriate security clearances to view, there is no concern over judges examining material in the sphere of criminal offences, as this is well within the ambit of what judges are required to consider in the ordinary course of judicial business.

## Whether a broader regime is needed

### *A comprehensive framework for public interest immunity*

- 7.48 It may be helpful to have a more comprehensive legislative framework for public interest immunity. Such a framework could outline the applicable procedure for assessing and challenging claims of public interest immunity, and could define roles and terms more clearly. For instance, public interest immunity could apply to information (as opposed to documents). It would also be possible to more clearly define the roles of the executive and the courts in deciding whether disclosure of sensitive information is possible, and to set out how the decision is to be made.
- 7.49 This approach would allow the concern that public interest immunity does not allow for the adequate consideration of the needs of the other party to the litigation to be addressed. That party may be disadvantaged by not having the opportunity to argue that there is a case for sensitive information to be disclosed. Their interest clearly must be balanced against the need to ensure protection of the sensitive information. One way legislation could address this is through allowing the appointment of special counsel to view the material and represent the interests of the individual or entity concerned when there is a claim for public interest immunity. The Act could codify a process involving the appointment of a security-cleared special advocate.
- 7.50 In *Dotcom v Attorney-General (Dotcom)*, a special advocate has been appointed to look after the plaintiff's interests but without the plaintiff or his lawyer having full access to the documents themselves.<sup>109</sup> The special advocate is cleared to see the documents without redaction and consider the possibility of challenging the assertion of confidentiality. No ministerial certificates have been issued yet relating to these documents. So far this has been an ad hoc process happening by consent from both parties, through the inherent jurisdiction of the court.

### *A general regime for the use of classified information in civil proceedings*

- 7.51 An even broader regime that more widely addresses the use of classified information in civil proceedings could also be considered. A claim for public interest immunity is a rather blunt instrument. It has the effect of preventing the disclosure of sensitive information and thereby excluding the information from a proceeding. This can prevent the proceeding from being able to be heard at all. Ways of allowing this information to be used despite its classified nature have been introduced overseas, for instance by allowing the partial disclosure or disclosure of a summary of the information or by providing for closed court hearings. Special advocates may also prove useful in the context of closed court hearings in order to represent the other parties' interests. We will discuss these options in more detail in our summary of overseas approaches below.
- 7.52 A consideration of this even broader new regime for protected information could be seen as extending beyond the bounds of the Crown Proceedings Act review. It would no longer be a question of public interest immunity and the role of executive certificates, but would be a more expansive consideration of how protected information can be used in civil proceedings. These

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109 *Dotcom v Attorney-General* [2012] NZHC 3268.

matters do raise controversy because they pit considerations of fair hearing and natural justice against national security and matters of state. The Commission needs to address these issues. Contemporary cases, such as *Dotcom*, illustrate that a clear legal procedure of this nature could be useful.

## WHAT APPROACHES HAVE BEEN TAKEN OVERSEAS?

- 7.53 Different approaches have been taken in other jurisdictions. Canada and Australia have enacted statutory schemes that set out a process for the executive's claim to withholding sensitive information that are quite detailed. The United Kingdom has taken the broader approach of introducing a statutory scheme for closed proceedings for sensitive information to be heard and used in civil proceedings.

### Canada

- 7.54 Canada inherited public interest immunity from the United Kingdom but made statutory provision for it in 1970.<sup>110</sup> The original statutory position was absolute protection to national security, defence or international relations based on a certificate by a minister of the Crown, but in 1982 this was amended to allow judicial oversight by the Federal Court.<sup>111</sup> The Canada Evidence Act was amended again in December 2001 with the passage of the Anti-Terrorism Act,<sup>112</sup> in ways that increased the kinds of information over which immunity can be claimed and to make opposition to such a claim more difficult.<sup>113</sup>
- 7.55 Under the Canada Evidence Act 1985, parties in proceedings and officials must notify the Attorney-General if it is believed that sensitive information will be disclosed in a proceeding.<sup>114</sup> The Attorney-General then decides whether to authorise the disclosure of the information. If the Attorney-General decides not to disclose it, the decision is submitted to the Federal Court. There is a two-tiered process so that the hearing regarding the disclosure takes place in a separate court from the final proceeding. The Federal Court decides who can appear at the hearing. Defendants and their counsel may be excluded.
- 7.56 The Federal Court applies a public interest balancing test in deciding whether the information should be disclosed. The Court has the flexibility to decide that the information should be disclosed in part or in summarised form.
- 7.57 If the Federal Court decides to allow disclosure, the Attorney-General does have the power to nevertheless prohibit disclosure by issuing a certificate that "prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity ... or for the purpose of protecting national defence or national security".<sup>115</sup> This certificate can only be reviewed on the narrow grounds of whether the information subject to the certificate relates to the permissible ground for issuing the certificate.

110 Canada Evidence Act SC 1970-71-72 c 1, s 41(2).

111 Canada Evidence Act RSC 1970 c E-10, s 36 as amended by SC 1980-81-82-83 c 111, s 4. The Federal Court observed a few years later in *Gold v Canada*, above n 99, at 138 that "[t]he executive had been unable to sustain the credibility of the system of absolute privilege codified in subsection 41(2)".

112 Anti-Terrorism Act SC 2001 c 41.

113 Peter Rosenthal "Disclosure to the Defence After September 11: Sections 37 and 38 of the *Canada Evidence Act*" (2003) 48 Crim L Q 186; Kalajdzic, above n 99, at 311.

114 Canada Evidence Act 1985, s 38.

115 Canada Evidence Act 1985, s 38.13.

- 7.58 In summary, the Canadian process allows the executive to decide whether information should be withheld. The Federal Court then gets to review and decide the matter, but this is still subject to an effective veto by the Attorney-General.

## Australia

- 7.59 Public interest immunity was once wholly a creature of common law in Australia. It is now referred to in state uniform Evidence Acts.<sup>116</sup> Particularly in relation to national security, the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) provides for notification to the Attorney-General where national security information may be disclosed in federal criminal or civil proceedings. The Act was introduced as a result of an Australian Law Reform Commission report which made recommendations to create:<sup>117</sup>

... a flexible system that incorporates both legal and practical solutions, emphasises the central role of the courts, and is consistent with the Government's stated policies in relation to open government and the proper protection of classified and security sensitive information.

- 7.60 Under the National Security Information (Criminal and Civil Proceedings) Act, as with the Canadian regime, the Attorney-General may determine whether to allow disclosure or not, and then a court considers the matter. The court has the power to determine that the information should be disclosed in full, in part, in summary form or not at all. There is also the possibility for disclosure to be made to a closed hearing.
- 7.61 In the Australian procedure, it is the trial court that makes the disclosure decision. The judge applies a test that requires greatest weight to be given to national security concerns.<sup>118</sup> The Attorney-General does not have a right to trump the court's decision.

## United Kingdom

- 7.62 The watershed House of Lords decision in *Conway v Rimmer* has had significant influence on the law of public interest immunity in common law countries. It overturned the previous approach established in *Duncan v Cammell Laird*, which had severely limited the court's ability to look behind an objection by the Crown. *Conway* held that it was the court's responsibility to decide whether evidence should be withheld and established the balancing exercise test and the court's right to inspect the sensitive materials. However, since *Conway* the courts in England have continued to show reluctance to subject ministerial claims for immunity to strong scrutiny, and particularly in relation to national security.<sup>119</sup>
- 7.63 The United Kingdom's Crown Proceedings Act 1947 contains a similar proviso to discovery by the Crown to New Zealand's Crown Proceedings Act, although it does not address ministerial certification in the way that section 27(3) of the New Zealand Act does. It appears that the standard process is for the Crown to present ministerial certificates asserting immunity and it is for the court to decide the matter, although considerable deference is given to the Crown's assertion.
- 7.64 While the Canadian and Australian statutory schemes are generally public interest immunity procedures in that they are about whether information should be disclosed or withheld, the United Kingdom has recently introduced legislation relating to the issue of the use of sensitive information in civil proceedings in a protected way. The procedure does not replace public

116 In Australian states, a claim of public interest immunity may be made under common law (see *Sankey v Whitlam* (1978) 142 CLR 1 (HCA) at 38) and is also available under section 130 of the uniform Evidence Acts.

117 Australian Law Reform Commission *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, 2004) at [11].

118 National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), s 38(8).

119 Zuckerman, above n 87, at 709 and 714; Kalajdzic, above n 99, at 305.

interest immunity, which will still be available where it is more appropriate to withhold disclosure of information.

- 7.65 The highly controversial Justice and Security Act 2013 (UK) introduced a “closed material procedure” to be used in cases where a successful public interest immunity application would result in the exclusion of evidence without which the matter could not be fairly heard. The legislation resulted from cases that criticised closed hearings on open justice and natural justice grounds and held that the courts could not use their common law powers to hold closed proceedings in civil trials for damages without statutory authorisation.<sup>120</sup>
- 7.66 The Justice and Security Act allows the court seized of the relevant civil proceedings to determine, following an application by the Secretary of State, whether or not the procedures are to be used. If a closed material proceeding is to be used, the court must consider requiring a summary of the material to be provided to all excluded parties where it is possible to do so without damaging national security. A special advocate may be appointed to represent the interests of the excluded party.

### Comparison with New Zealand

- 7.67 The Canadian and Australian statutory approaches to public interest immunity involve both a decision from the executive and a determination of the court. This may be the position in New Zealand under section 27 of the Crown Proceedings Act and section 70 of the Evidence Act, although it is not clear whether a certificate under section 27(3) is effectively a veto on the disclosure of sensitive information in the same way that an Attorney-General’s certificate is in Canada. Both Canada and Australia have a more defined and elaborate process to reach a decision about public interest immunity than is the case under the New Zealand statute.
- 7.68 Although the Canadian and Australian schemes are about public interest immunity and the withholding of sensitive information, they do incorporate the ability for the courts to allow the partial disclosure of the information or disclosure of a summary, and in Australia’s case the use of a closed hearing. These are ways in which the sensitive information may be used in civil proceedings without full disclosure.
- 7.69 The United Kingdom has taken the more fundamental step of allowing sensitive information to be used in civil proceedings through the use of closed proceedings that alter general principles about how trials are carried out. New Zealand has no general procedures for closed proceedings but there are several specific regimes that allow classified information to be used in proceedings without disclosure: the Immigration Act 2009,<sup>121</sup> Terrorism Suppression Act 2002<sup>122</sup> and Passports Act 1992.<sup>123</sup>

### OPTIONS FOR REFORM

- 7.70 It is undesirable for New Zealand to retain two partially conflicting provisions concerning the critical issue of what information the government has to discover. Moreover, there is a legitimate question as to whether either the purported conclusiveness of government certificates under section 27 or the reliance on judicial discretion in section 70 is the appropriate policy.

120 See for example *Al-Rawi v Security Service* [2011] UKSC 34. There had been several high profile cases involving United Kingdom officials relating to the international transfer of an individual without the legal protection of extradition laws, treaties and due process as a part of the “war on terror” (known as extraordinary rendition). This involved the transfer of individuals for interrogation in countries known to use torture. Some of these individuals later started proceedings against the United Kingdom Government for its role in their subjection to torture. The Government had attempted to use closed proceedings to rely on sensitive information but not have this disclosed to the plaintiffs or public.

121 Immigration Act 2009, ss 240–244, 252–262 and 263–271.

122 Terrorism Suppression Act 2002, s 38.

123 Passports Act 1992, s 29AB.

- 7.71 Three general approaches could be taken to reform in this area. The first and narrowest is to make certain the hierarchy between section 27 and section 70 and, in doing so, make it clear whether the courts can overrule a decision of the Crown to withhold information. The second approach is to replace section 27, and possibly section 70, with a more comprehensive public interest immunity process that addresses the grounds for withholding sensitive information, the respective roles of the executive and the courts, a possible role for special advocates and the ability to disclose information in part or summary. The third approach is to introduce a new process for allowing the use of sensitive information in civil proceedings. This is separate to the question of how public interest immunity should be addressed and so the third approach could be taken in addition to the first or second approaches.

### **Clarification of hierarchy between section 27 and section 70**

#### *Option A: Clarify conclusiveness of certificate but make no other change*

- 7.72 One option is to clarify the conclusive status of a certificate under section 27 of the Crown Proceedings Act for the purposes of a judge's determination under section 70 of the Evidence Act, but to make no further changes in this area. This would mean that the court could not look behind the decision of the Prime Minister or Attorney-General to issue a certificate and the information would be withheld automatically.
- 7.73 While this is a simple approach, there would be no direct way of challenging the decision. It removes the judicial oversight from the process when the courts may be best placed to balance the competing interests at stake. Some might argue that this is appropriate in the areas of national security, but it may be too blunt an approach in many cases where more subtlety would be appropriate.

#### *Option B: Repeal section 27(3) entirely leaving only section 70*

- 7.74 Another option is to repeal section 27(3) of the Crown Proceedings Act to remove the certification process altogether. A decision about whether information should be withheld from civil proceedings because of public interest immunity would be made by a judge under section 70 of the Evidence Act. The decision would be made on the basis of whether the judge considers that the public interest in the information being disclosed is outweighed by the public interest in withholding the information.
- 7.75 This was the Commission's preferred approach during the initial review of evidence law in 1999. The Commission considered that the ordinary principles of discovery should apply to sensitive information and that it should be for the court to decide whether disclosure should occur.
- 7.76 However, there is a strong case that in the area of national security a government needs to be able to be more certain of protecting against disclosure and that the Prime Minister should continue to be able to issue certificates for withholding information on national security grounds. It is also arguable whether section 70 is sufficient as it stands at the moment to resolve all of the issues that could arise in this area. Potentially some matters that fall under section 27 would not fall under section 70.

#### *Option C: Amend section 70*

- 7.77 In addition to option B, it would be possible to broaden section 70 of the Evidence Act so that it covers the withholding of information on wider grounds. This could be done to address the gap that is likely to result from a repeal of section 27(3) of the Crown Proceedings Act.

It particularly relates to matters that are subject to the Attorney-General's certificate: the prevention, investigation or detection of offences.

- 7.78 This option would address the concern about a gap in the ability of the Crown to seek to withhold information relating to the administration of justice if there is no longer the ability to use Attorney-General's certificates. The matters that a court would need to consider in deciding whether discovery should be made under section 70 in relation to the prevention, investigation, or detection of offences are matters that courts are commonly required to consider and determine. Therefore, it would seem to be appropriate that the courts should be able to consider these matters under section 70.

### **A more comprehensive public interest immunity framework**

#### *Option D: New statutory process for public interest immunity*

- 7.79 A more comprehensive approach might involve a security certificate preventing disclosure of information to the opposing party, but setting out a procedure for appointment of a security-cleared special advocate who can examine the contents of the information and act in the interests of the party who does not have full access to it. This would reduce potential unfairness to that party. While this might apply more broadly, it is perhaps most appropriate in situations involving national security.
- 7.80 This option could be broader. Along the lines of the Canadian or Australian approach, legislation could clearly set out the process by which the Crown would request public interest immunity and the court would consider it. It could involve notification to the Prime Minister or Attorney-General if it is likely that sensitive information would be disclosed, the Crown making a preliminary decision whether it wants the information withheld, and any decision to withhold being submitted to a court for determination. The grounds upon which a decision to withhold may be made would be set out in statute. These could be a balancing test like that currently under section 70 of the Evidence Act or something that gives greater weight to national security, as is the case in the Australian scheme.
- 7.81 In order to adopt such an approach, it would be necessary to decide:
- what the grounds for withholding sensitive information should be;
  - whether national security should be given greater weight in the decision;
  - which court should make the determination (either the trial court or an appeal court); and
  - whether the Crown should have a veto on the release of sensitive information, such that it could override a court's decision to disclose it.
- 7.82 The more elaborate process is only really needed if it is decided that the court is to have a role in determining these matters. It would be a more structured and formalised process than what occurs now, which would provide greater clarity for those involved.
- 7.83 A further step could be taken in allowing the court to decide that the information should be released in part or in summary form, or in closed proceedings. This would be a step towards allowing sensitive information to be used in civil proceedings in a restricted way, where the information may otherwise have been withheld completely.

#### *Option E: A special process for cases involving national security*

- 7.84 It is possible for claims for public interest immunity involving national security, defence or international relations to be distinguished from claims on other grounds because of the increased sensitivity and the special knowledge and expertise required to exercise judgement



- in these matters. Some would argue that a Crown objection to the release of material on these grounds should be conclusive or near conclusive, and should not be justiciable.
- 7.85 A less wide-ranging approach than the previous option would be to allow public interest immunity claims generally to be considered under section 70 of the Evidence Act (option B), but to establish a new framework for the particularly sensitive cases of national security, defence or international relations. Arguably these claims require that particular deference is shown to the government's wishes and therefore that the matter should not come before a court. However, given the desirability for accountability of government and protection of the right to justice, an alternative mechanism for reviewing the exercise of public interest immunity in those cases could be established.
- 7.86 One option is to give the Inspector-General of Intelligence and Security the power to review complaints about the exercise of public interest immunity. Under the Inspector-General of Intelligence and Security Act 1996, the Inspector-General's purpose is to assist ministers responsible for intelligence and security agencies with their oversight and to provide an independent reviewer of complaints.<sup>124</sup>
- 7.87 If the Inspector-General were given a role of reviewing complaints about the use of public interest immunity, then there is likely to be a need to add to the statutory functions of the Inspector-General.<sup>125</sup> While reviewing these complaints may well be within the expertise and knowledge of the Inspector-General, a question is raised about the constitutional appropriateness of the Inspector-General reviewing actions of a minister. The Inspector-General's current functions involve him or her reviewing the actions of an intelligence and security agency at the Minister's request or on his or her own motion, and reporting on these matters to the Minister.

## **A new process for using sensitive information in civil proceedings**

### *Option F: Closed material procedure permitting admission of classified evidence*

- 7.88 Although there is currently no pressing need for it in New Zealand, the consideration of the statutory context of public interest immunity presents an opportunity to look at introducing a new statutory scheme to allow sensitive information to be used in a protected way in civil proceedings. This goes beyond the law of public interest immunity as it potentially allows proceedings to continue to make use of sensitive information, whereas under public interest immunity this information would be completely excluded. To allow this to happen, statutory protections would be needed for how those court proceedings could operate. For instance, court proceedings involving sensitive information would not be able to be open to the public and may not be open to the litigant. Allowing the use of sensitive information in court proceedings, therefore, could come at the expense of elements of open justice and natural justice. However, arguably the mechanism could be set up in a way that ensures a fair hearing, consistent with natural justice.
- 7.89 This scheme could be based on the United Kingdom's Justice and Security Act 2013, which sets out a framework for the judge to allow elements of a civil case to be heard in closed proceedings, in addition to the open proceedings. The scheme involves security-cleared special advocates who can view the sensitive material and represent the interests of the party that does not have access to the information. The court must consider requiring a summary of the material to be provided to all excluded parties where it is possible to do so without damaging national security.

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124 Inspector-General of Intelligence and Security Act 1996, s 4.

125 As currently set out in the Inspector-General of Intelligence and Security Act 1996, s 11.

- 7.90 The United Kingdom Act has been controversial, particularly because the need for it arose in the context of claims against the government for its alleged role in the extraordinary rendition and subsequent torture of individuals. The Justice and Security Act is seen by some as undermining the right to a fair trial and principles of open justice and natural justice because the litigant is excluded from the proceedings.<sup>126</sup>
- 7.91 New Zealand does not have a similar context of individuals suing the government for such egregious human rights violations that are intrinsically linked to sensitive national security matters. Because there is no pressing desire for such processes at the moment, it may be that it is not considered appropriate or necessary to take the step of expanding the use of closed procedures in New Zealand. On the other hand, it may be useful to consider this issue in the context of the Crown Proceedings Act review in the current environment where there is no immediate pressure to introduce mechanisms allowing the use of sensitive information in court proceedings.
- 7.92 Modifications to the United Kingdom scheme have been suggested, which would soften some aspects of it. For instance, limitations on the scheme's use have been proposed such as requiring that the procedure can only be used as a last resort, and enhancing the right of review regarding the decision to use a closed material procedure. The development of such a general closed materials procedure would also require a degree of investment in an infrastructure for security clearing and supporting advocates.

## GENERAL DISCOVERY ISSUES

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### Non-party discovery

- 7.93 While the terms of section 27 clearly enable discovery in proceedings to which the Crown is a party or a third party, the position is less clear in respect of non-party discovery. Previously the High Court in *Johnston v Price Waterhouse* had found that the Crown was not amenable to non-party discovery, because the relevant rules came into being after the Act was passed. The Court in that case suggested that legislative amendment would be required to permit non-party discovery against the Crown.<sup>127</sup>
- 7.94 The Court has subsequently held that the Crown Proceedings Act is subject to the changes in the rules of civil procedure that introduced non-party discovery.<sup>128</sup> This was on the basis that section 27 should not be regarded as a code; the Crown Proceedings Act, through section 5, is subject to the Judicature Act 1908 and accordingly the High Court Rules, which fall within a schedule to that Act. Although this issue has been made clearer through the development of case law, the availability of non-party discovery against the Crown should be put beyond doubt in the new statute.

### Further issues in discovery against the Crown

- 7.95 Other areas of uncertainty arise from section 27 as to when the Crown is subject to the discovery obligation. First, there is a question as to whether the party against whom discovery is sought is in fact part of the Crown. The second issue relates to whether it is possible to obtain discovery against one part of the Crown when the particular party to the proceedings is a different part.

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126 John Jackson "Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?" [2013] Public Law 720.

127 *Johnston v Price Waterhouse* (2000) 14 PRNZ 575 (HC) at [7].

128 *Goodship v Minister of Fisheries* [2006] NZAR 360 (HC) at [22]. See High Court Rules 1985, rr 301 and 302 (see current rr 8.20 and 8.21).

- 7.96 In *Berryman v Solicitor-General (Berryman)*,<sup>129</sup> the question arose whether under section 27(1)(b) the court had jurisdiction to order discovery against the New Zealand Defence Force of materials relating to an Army Court of Inquiry. The proceedings were against the Solicitor-General. The plaintiffs in that case claimed that for the purposes of discovery under section 27, it was sufficient that one branch of the government was a party to the proceeding, and the Solicitor-General formed part of the government, so the requirements in section 27 were satisfied. The Defence Force argued that it was not a party to the proceedings, so fell outside the scope of section 27.<sup>130</sup> The parties were agreed that the Defence Force formed part of the Crown, but the proceedings had been issued against the Solicitor-General. Accordingly the key issues were whether the Solicitor-General was part of the Crown and whether discovery could be obtained from the Defence Force, notwithstanding that they were not specifically named as a party to the proceeding.
- 7.97 Associate Judge Gendall took the view that the Solicitor-General, as the Government's chief legal advisor, was a part of the Crown. The Solicitor-General was a party to the proceedings and so the Crown, including all of its constituent parts, was a party. The plaintiffs were entitled to seek discovery against the Defence Force because it was simply a different part of the same single entity that was the Crown.<sup>131</sup> The Judge noted general trends towards greater openness between parties in legal proceedings.<sup>132</sup> In further support of his position the Judge relied on section 14(2) of the Act, which enables a plaintiff to sue the Attorney-General if there is doubt as to the appropriate department or officer to name. He considered that Parliament cannot have intended in those circumstances for a plaintiff to be entitled to very limited discovery from the Attorney-General only.<sup>133</sup>
- 7.98 On review of the decision, Wild J held that the Associate Judge had been incorrect to find that the Solicitor-General was a party to the proceedings on the basis that the Solicitor-General was part of the Crown, which was to be considered a single, indivisible entity. Wild J disagreed with this reasoning, finding that "[t]he plaintiff's entitlement to discovery, if any, will depend on the manifestation(s) in which the plaintiff has sued the Crown".<sup>134</sup> On Wild J's analysis the Solicitor-General was not acting as a part of the Crown in the particular capacity in which he was being sued, namely exercising statutory functions under the Coroners Act 1988. The Court considered these powers were quasi-judicial and were properly to be discharged independently of the Crown, so the Solicitor-General was not part of the Crown in exercising them. The Crown was not a party and discovery was therefore not available against the Defence Force under the terms of section 27.
- 7.99 These decisions demonstrate a lack of conceptual clarity about what roles comprise part of the Crown for the purposes of discovery. They also demonstrate some degree of misunderstanding about the correct approach when discovery orders are sought against a different part of the Crown than that named as a party to the proceedings. It is clear in our view that if one part of the Crown is a party to the proceedings then discovery can be ordered against another part of the Crown. We prefer the approach taken by the Associate Judge on this issue.
- 7.100 Whether a party falls within the ambit of the Crown in the first place will turn on how the term is defined. In some circumstances, such as those encountered in *Berryman*, it seems to

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129 *Berryman v Solicitor-General* HC Wellington CIV-2003-485-1041, 17 December 2004.

130 The Defence Force also submitted that ordering discovery would contravene the rule that evidence at a military court of enquiry was not admissible against any person in any other proceedings.

131 At [46].

132 At [48].

133 At [49].

134 *Berryman v Solicitor-General* [2006] NZAR 360 (HC) at [22].

us that the Solicitor-General will almost certainly be acting as part of the Crown. As discussed elsewhere,<sup>135</sup> the definition we propose for the term “Crown employee” addresses this type of problem as it is broad and includes any “other office holder of a department”. This would seem clearly to cover the Solicitor-General, regardless of the particular capacity in which the Solicitor is acting.

- 7.101 An approach that considers certain parties to be arguably outside the definition of the Crown and, therefore, not subject to discovery orders against the Crown seems to us to be unnecessarily complex and less conceptually coherent. We consider that the better approach is for parties to be treated as falling within the Crown through a broad definition, but to provide appropriate limits on discovery through other mechanisms. In the case of the Solicitor-General acting in a quasi-judicial role, there would be room for argument that documents should be protected under grounds such as legal professional privilege or public interest immunity. It is accepted that Crown actors carry out various sensitive functions and it is sometimes necessary to prevent disclosure of documents. However, it is preferable to address this in a specific regime that takes into account appropriate considerations, rather than preventing the material being potentially subject to discovery at all.

### What this Act would not affect

- 7.102 Courts remain in control of the discovery process, which would be administered in accordance with the normal rules. Similarly, nothing here is intended to affect the normal rules relating to evidence in administrative review proceedings and, in particular, whether ministers can be compelled to give oral evidence.

#### QUESTIONS

- Q10 What should the balance be between allowing the executive to make a conclusive statement that information is subject to public interest immunity and allowing the courts to consider these matters?
- Q11 Should the interest of national security be approached differently to other interests?
- Q12 Is there a need for a new mechanism to provide procedural safeguards for the use of sensitive information?
- Q13 How could proceedings operate in order to make the sensitive information available to the court but to protect the confidentiality of that information, including the identities of intelligence officials?
- Q14 Does the use of a special advocate to represent the interests of the excluded party provide sufficient protection of that party’s interests?
- Q15 Do you agree that the availability of non-party discovery against the Crown should be confirmed in the new statute?
- Q16 Should there be a broad definition of the Crown for the purposes of discovery?

135 See cl 4.

**Part 2**  
**DRAFT BILL**  
**AND**  
**COMMENTARY**



LAW COMMISSION  
TE AKA MATUA O TE TURE

# Chapter 8

## Crown Civil Proceedings Bill and commentary

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### INTRODUCTION

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- 8.1 Below we set out clauses of a draft Crown Civil Proceedings Bill together with commentary explaining the background to the proposed approach of each clause, where it is helpful to do so.
- 8.2 The Bill is divided into three parts:
- Part 1 – Preliminary provisions;
  - Part 2 – Substantive matters; and
  - Part 3 – Procedure and execution.
- 8.3 Clauses of the Bill have been drafted to cover most of our proposals. However, in some instances, where we have not yet determined a policy preference, we present alternative clauses as options. Furthermore, in relation to a couple of issues, no draft is included because we are some way from determining the approach to be taken and we consider that attempting to formulate a draft clause in those circumstances would detract from consideration of the issues.
- 8.4 We also discuss some provisions of the current Crown Proceedings Act 1950 that we propose not to continue in new legislation and the reasons for this.
- 8.5 The Bill is a work in progress and is intended for the purpose of eliciting constructive feedback. Accordingly, we welcome comment on any clause or aspect of the draft Bill.

### CROWN CIVIL PROCEEDINGS BILL PART 1 – PRELIMINARY PROVISIONS

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#### Clause 1 – Title

##### 1 Title

This Act is the Crown Civil Proceedings Act 201X.

##### Commentary

In our view it is best to set out in the title of this Act what properly falls within the scope of the Bill. The Bill, like the current 1950 Act does not deal with judicial review proceedings or criminal proceedings. The Act enables civil proceedings by and against the Crown and the title should reflect that.

#### Clause 2 – Commencement

##### 2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

## Clause 3 – Purpose

### 3 Purpose

The purpose of this Act is to restate, clarify, and reform the law about civil proceedings involving the Crown, including by—

- (a) providing that the Crown may sue and be sued;
- (b) promoting executive accountability; and
- (c) making civil proceedings involving the Crown as similar as possible to other civil proceedings.

### Commentary

This short purpose statement confirms that, rather than being revolutionary, the Bill restates, clarifies and only partially reforms the current law. The primary purpose of the Bill remains to give the Crown sufficient personality to sue and be sued, and to enact as far as possible the equality principle. We have added executive accountability to these traditional purposes of Crown proceedings statutes, to reflect the changes that we are recommending to the way in which settlements and judgments are to be paid, and disclosed.

## Clause 4 – Definitions

### *Civil proceedings*

### 4 Interpretation

- (1) In this Act, unless the context otherwise requires,—
- civil proceedings** means any proceedings in any court (including proceedings for monetary or declaratory relief for a breach of the New Zealand Bill of Rights Act 1990), except for—
- (a) criminal proceedings; and
  - (b) proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari, or proceedings by way of an application for review under Part 1 of the Judicature Amendment Act 1972 to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari

### Commentary

As discussed, the intention of this definition of civil proceedings is to differentiate the coverage of this Bill from criminal proceedings and proceedings for judicial review. The definition is inclusive of claims for compensation or applications for declaration of breaches of the New Zealand Bill of Rights Act 1990 (NZBORA), which means that monetary claims against the Crown will be dealt with in the same way.<sup>136</sup>

### *Court*

**court** means—

- (a) the Supreme Court, the Court of Appeal, the High Court, or a District Court; or
- (b) any of the following specialist courts: the Disputes Tribunal, the Employment Court, the Environment Court, the Māori Appellate Court, and the Māori Land Court; or
- (c) for the purposes of this Act, the Human Rights Review Tribunal

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136 See ch 4.

## Commentary

This provision restricts the application of the Bill to traditional courts. It does not apply to most tribunals. A number of tribunals are administrative in nature, or determine obligations under particular statutes. It would add little, and create confusion, to style these as civil proceedings.

Most of the legislation establishing the jurisdiction of tribunals that decide on civil matters where the Crown may be a party does not include provisions establishing the legal personality of the Crown to be a party to those proceedings.<sup>137</sup> This appears not to have been an issue under the present law. In a couple of special cases reference is made to the Crown Proceedings Act in legislation that establishes tribunals.<sup>138</sup> Proceedings in the Disputes Tribunal may involve the Crown. The Disputes Tribunal Act 1988 makes it clear that that Act does not restrict the Crown Proceedings Act and the definition of “court” in the Crown Proceedings Act explicitly includes the Disputes Tribunal. Rather than a blanket rule of including tribunals within the definition of court, it seems to us better that in future individual statutes that establish tribunals specify not just that an Act binds the Crown, but whether proceedings brought before a tribunal ought to be considered as “crown civil proceedings” when they involve the Crown.

A difficult case is the Human Rights Review Tribunal under Part 1A of the Human Rights Act 1993. That Act refers to proceedings before the Tribunal that arise from complaints as “civil proceedings”.<sup>139</sup> The Tribunal has interpreted section 95 of the Human Rights Act to permit mandatory orders and interim declarations against the Crown in Part 1A cases where government policy or practice is impugned.<sup>140</sup> The Tribunal does not consider claims under Part 1A of the Human Rights Act to be “civil proceedings” as defined by section 2 of the Crown Proceedings Act,<sup>141</sup> and so the limitations on available remedies created by section 17 of the Crown Proceedings Act are not applicable.<sup>142</sup>

It is our preliminary view that proceedings before the Tribunal are best characterised as civil proceedings, and should accordingly be subject to the Act. The general civil remedies are available. The key distinction that was at issue in *IDEA Services Ltd v Attorney-General*, the inability to give interim relief under the Crown Proceedings Act, is being removed by the proposed Crown Civil Proceedings Bill. It might be argued that the ability to make declarations about the incompatibility of statutes is more akin to judicial review, but the existence of the other remedies for a complaint makes the application of this Act desirable.

### *Crown, crown employee and department*

**Crown** means the Crown in right of New Zealand, which is Ministers of the Crown and departments

**Crown employee** means a person employed by a department (whether paid by salary, wages, or otherwise), or a member, chief executive, or other office holder of a department, but does not include—

(a) an independent contractor; or

137 For instance, the Weathertight Homes Tribunal under the Weathertight Homes Resolution Services Act 2006; the Tenancy Tribunal under the Residential Tenancies Act 1986; and the Alcohol Licensing Authority under the Sale and Supply of Alcohol Act 2012.

138 Section 65 of the Copyright Act 1994 provides that where the Crown infringes copyright, proceedings lie against the Crown under the Crown Proceedings Act, rather than before the Copyright Tribunal.

139 Human Rights Act 1993, s 92B.

140 *IDEA Services Ltd v Attorney-General* [2013] NZHRRT 24 at [35] [*IDEA Services*].

141 Section 2 defines civil proceedings as “any proceedings in any court other than criminal proceedings; but does not include proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari or proceedings by way of an application for review under Part 1 of the Judicature Amendment Act 1972 to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari”.

142 *IDEA Services*, above n 140, at [46.1].



- (b) for the avoidance of doubt, the Governor-General or any Judge, District Court Judge, Justice of the Peace, Community Magistrate, or other person with responsibilities of a judicial nature

**department** means—

- (a) a department specified in Schedule 1 of the State Sector Act 1988;
- (b) the New Zealand Defence Force (within the meaning of that term in section 11(1) of the Defence Act 1990);
- (c) the New Zealand Police (within the meaning of that term in section 7 of the Policing Act 2008); or
- (d) the New Zealand Security Intelligence Service (within the meaning of that term in section 3 of the New Zealand Security Intelligence Service Act 1969)

### Commentary

These definitions are intended to reflect the restructuring of the central government since the 1980s. Central government can be divided into the Crown and a plethora of other entities which, although part of the central government, are not constitutionally considered to be the Crown, such as bodies corporate that are Crown entities and state owned enterprises. Because these entities have their own corporate identity, it is unnecessary to use the Crown Proceedings Act to ensure they have sufficient legal identity to be sued. Crown entities are bodies corporate under the Crown Entities Act 2004, while state owned enterprises have legal personality under the Companies Act 1993.<sup>143</sup> This is consistent with a number of cases that have made it clear that the Crown Proceedings Act does not apply to proceedings involving Crown entities.<sup>144</sup>

In contrast, New Zealand departments do not have a distinct legal personality that would enable them to sue or to be sued in their own right.

For the sake of completeness, three bodies that are not listed in the State Sector Act as departments are expressly included here: the New Zealand Defence Force, New Zealand Police Force, which is described by the Policing Act 2008 as an instrument of the Crown,<sup>145</sup> and the New Zealand Security Intelligence Service. This is not a change from the current legal position but it would clarify that they are subject to the Act.

This definition of the “Crown” would not include “the courts”.

The 1950 Act talks of crown “servants” and “officers”.<sup>146</sup> In light of the terminology of the State Sector Act, we have used the more modern “employees of government departments” as an umbrella term, but included within it “chief executives”, “office holders” and “members” to cover particular circumstances. In particular, the actions of a statutory office holder who is also an employee will be covered, as will the actions of members of the New Zealand Defence Force, even though members of the Defence Force are not, for other purposes, employees.

*Why the Crown and not “state”?*

The Crown Proceedings Act, like earlier New Zealand statutes, was mostly concerned with distinguishing the New Zealand Crown from the United Kingdom or Imperial Crown. The 1871,

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143 Companies Act 1993, ss 15–16.

144 See Crown Entities Act, s 15.

145 Policing Act 2008, s 7.

146 Crown Proceedings Act 1950, s 2:

**officer**, in relation to the Crown, includes any servant of the Sovereign, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown; and a member of the New Zealand armed forces; but does not include the Governor-General, or any Judge, District Court Judge, Justice of the Peace, Community Magistrate, or other judicial officer: ...

**servant**, in relation to the Crown, means any servant of the Sovereign, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown, and a member of the New Zealand armed forces; but does not include the Governor-General, or any Judge, District Court Judge, Justice of the Peace, Community Magistrate, or other judicial officer:

1877 and 1908 Acts all used variants of “claims against her or his Majesty within the colony of New Zealand”. Crown proceedings statutes in other jurisdictions often distinguish between the particular Crown which is being made subject to the liability. For example, Canadian statutes expressly state that the particular Act applies to the province in question, in the case of the federal Canadian statutes.

Such a distinction is not necessary in New Zealand in 2014. The more relevant distinction is between those parts of the central government that make up the Crown and are subject to the Crown Proceedings Act, and those organisations that are outside the Crown, and have their own legal personality.

The term “Crown” in our system of government is often used as shorthand for the central government. The use of the word Crown rather than “government” or “state” is a reflection of our constitutional history but also the relative reluctance of lawyers in the common law to give legal personality to the central government or to the departments that largely make it up.<sup>147</sup>

We have made a deliberate choice not to use terms such as “the government” or “the state”.<sup>148</sup>

The Crown may be an amorphous term, but it is one that has been long used and continues to be used across the New Zealand statute book. Using a phrase such as “the Government of New Zealand” or “state”, might risk opening up a debate that might be academically interesting but that would ultimately distract from the emphasis of this project, which is on providing a workable procedural tool by which the Crown can take part in civil proceedings. However, what we do propose is that the definition of the Crown in the Crown Proceedings Act is made clearer so as to better guide potential litigants.

We are mindful of the observations by Elias CJ in *Attorney-General v Chapman (Chapman)* (dissenting) that in the context of NZBORA, the term Crown is arguably too narrow because it only includes the Executive, but we consider that our task is only part of defining that liability.<sup>149</sup>

It may be that what we are proposing is to treat the Crown as a subset of a wider version of the state. It would not include, for instance, the courts. Nor would it include agencies that are not part of the central government and that are constituted as Crown entities or are otherwise not government departments. It would not include local government, even though it is an important part of the way that New Zealand governs itself.

### *New Zealand*

**New Zealand** means the land and the waters enclosed by the outer limits of the territorial sea of New Zealand (as described in section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977).

### **Commentary**

This definition is designed to make it clear that the new statute will apply only to the actions of the New Zealand Government.

147 See generally Martin Loughlin “The State, the Crown, and the Law” in Maurice Sunkin and Sebastian Payne (eds) *The nature of the Crown; A legal and political analysis* (Oxford University Press, Oxford, 1999) 33. See also the use of the word “state” in the judgment of Sedley LJ in *Home Office v Mohammed* [2011] EWCA Civ 351, [2011] 1 WLR 2862.

148 Compare the approach of David Cohen “Thinking about the State: Law Reform and the Crown in Canada” (1986) 24 Osgoode Hall LJ 379.

149 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [14].

The Realm of New Zealand includes not only New Zealand but also the self-governing states of the Cook Islands and Niue, Tokelau and the Ross Dependency.<sup>150</sup> The Interpretation Act, nevertheless, excludes the Cook Islands, Niue and the Ross Dependency from the definition of New Zealand.<sup>151</sup>

Currently, section 35(2) of the Crown Proceedings Act provides that nothing in the Act shall:

- (b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of the Sovereign's Government in New Zealand, or affect proceedings against the Crown in respect of any such alleged liability as aforesaid;

This section was inherited from the United Kingdom Crown Proceedings Act 1947, where it was designed to exclude liability in the United Kingdom for actions committed by colonial governments. It seems to us that rather than relying on the Interpretation Act 1999 to flesh out the definition, it should be explicitly stated in the Crown Proceedings Act that it applies to the Crown in right of New Zealand, excluding the self-governing countries of the Cook Islands, Niue and its dependency Tokelau. The Cook Islands has its own law concerning Crown proceedings within its territory,<sup>152</sup> as does Niue as a result of having adopted the Crown Proceedings Act.<sup>153</sup> New Zealand has no power to legislate for either country. There is no Crown Proceedings Act in relation to Tokelau, and the application of the 1950 Act to Tokelau is excluded by the way in which New Zealand is defined by the Interpretation Act.<sup>154</sup> While New Zealand has the capacity to legislate for Tokelau, the convention has been that New Zealand does not do so, and would not do so without Tokelauan consent.

### Counterclaim

#### 4 Interpretation

...

- (2) Unless the context otherwise requires, a reference to civil proceedings against the Crown includes a set-off or counterclaim against the Crown, and a reference to civil proceedings by the Crown includes a set-off or counterclaim by the Crown.

### Clause 5 – Binding the Crown

#### 5 Act binds the Crown

This Act binds the Crown.

## CROWN CIVIL PROCEEDINGS BILL PART 2 – SUBSTANTIVE MATTERS

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### Clause 6 – Coverage of the Act

#### 6 The Crown may sue and be sued in civil proceedings

Subject to this Part, the Crown may sue and be sued in civil proceedings in the same way as any other person.

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150 See Letters Patent Constituting the Office of Governor-General of New Zealand 1983, cl 1.

151 Interpretation Act 1999, s 29:

**New Zealand** or similar words referring to New Zealand, when used as a territorial description, mean the islands and territories within the Realm of New Zealand; but do not include the self-governing state of the Cook Islands, the self-governing State of Niue, Tokelau, or the Ross Dependency:

152 The Cook Island Act 1915, s 350 extended the Crown Proceedings Act to the Cook Islands with amendments. The Crown Proceedings Act is still in force.

153 The Niue Act 1966, s 321 extended the Crown Proceedings Act to Niue with amendments. The Crown Proceedings Act is still in force in Niue with further amendments.

154 The Tokelau Act 1948, s 6 deals with New Zealand Acts in force in Tokelau. The Crown Proceedings Act has never been extended to Tokelau.

## Commentary

This provision enacts the principle of equality that is at the heart of the Bill, that the Crown can sue and be sued as if it had the legal capacity of others. We have drafted the provision to make this effect clear. It should be noted, however, that the intention of the provision is enabling rather than restrictive. The provision should not be read as requiring the same obligation to be owed by someone other than the Crown or the Crown's employee.

The provision is of similar effect to that currently in section 3 of the Crown Proceedings Act. It sets out in detail what claims can be brought, the intention being to cover all claims that can be brought against private individuals. We have chosen to avoid the "laundry list" approach of the current section 3, preferring a general enabling provision. The result is somewhat less technical and more directly focused on the policy that it is designed to acknowledge, that the Crown can be sued. We have, for instance, replaced the rather convoluted and somewhat confusing phrase "cause of action" with a simple statement in clause 6 that the Crown can be "sued in the same way as any other person". Our draft provision seeks to bring this provision in accordance with the language used in New South Wales and British Columbia.<sup>155</sup>

A specific tort provision, like section 6(1) of the current Act, is no longer needed. The provision we have included will incorporate statutory duties placed on the Crown, as well as vicarious liability for the actions of employees, to the extent such vicarious liability remains relevant.

## Clause 7 – Direct liability

### 7 Direct liability of the Crown

- (1) A court may find the Crown itself liable in civil proceedings.
- (2) Subsection (1) applies—
  - (a) whether or not a court would be able to find another defendant liable; and
  - (b) despite any immunity from liability of relevant Ministers or Crown employees (and for the purpose of determining whether the Crown is liable, the court must disregard the immunity).

## Commentary

This provision would make the Crown directly liable in the same way as any other person for obligations that are owed directly. It can be compared with section 6 of the current Act. See Chapter 3 for discussion.

## Clause 8 – Crown's other rights

### 8 The Crown's other rights in civil proceedings

- (1) Nothing in section 6 interferes with or restricts any special power or authority vested in the Crown or in any person on its behalf.
- (2) The Crown may take advantage of a statutory provision of general application (for example, a statutory defence) even if not named in the provision.

## Commentary

This provision is carried over from the 1950 Act. The purpose is to leave the Crown in the same position as if it were another party to litigation. It makes sense, therefore, that the Crown can benefit from the statutory protections that are enjoyed by others. Section 8(1), however, recognises

<sup>155</sup> The New South Wales Crown Proceedings Act 1988 provides in s 5(3) that "Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject." The British Columbian Crown Proceedings Act RSBC 1996 provides in s 2(c) that subject to that Act "the government is subject to all the liabilities to which it would be liable if it were a person".

that statutes or prerogatives give the Crown, and its employees, numerous powers that others do not enjoy. This Bill should not be read as somehow stripping away or modifying those rights. Nor, of course, ought it affect the different obligations that the Crown, or its employees, are under. Rather, the Bill is designed to give the ability to take civil proceedings against Crown.

## Clause 9 – Remedies

8.6 There are several alternative options in relation to clause 9. The first pair of alternative options (options (a) and (b)) relate to the question of whether the Bill should retain different treatment for the Crown by providing for different remedies. The third option (option (c)) relates to the question of whether to retain the in rem exclusion.

### *Option (a): Retaining different treatment for the Crown*

#### **9 Remedies against the Crown**

- (1) Except as provided in this section, a court may grant any remedy in civil proceedings against the Crown.
- (2) If the public interest requires, a court may make a declaratory order about any party's rights or entitlements instead of ordering any of the following against the Crown:
  - (a) an injunction;
  - (b) an attachment;
  - (c) specific performance;
  - (d) the conveyance of land or property.
- (3) A court must not make an order against a Minister, department, or Crown employee if the effect of the order is to circumvent subsection (2).

### *Option (b): Removing different treatment for the Crown*

#### **9 Remedies against the Crown**

- (1) A court may grant any remedy in civil proceedings against the Crown.

#### **Commentary**

Clause 9(1) would create the same default position for both options, namely that the same remedies may be granted against the Crown as might be awarded against private individuals. The intention of this provision is to be enabling, so that the Crown is at least subject to the remedies that other litigants might be. The provision ought not, for instance, to prevent the award of public law compensation on the basis that it, arguably, cannot be awarded against private parties. Nor should the provision be taken as preventing remedies that are otherwise peculiar to the Crown being awarded, if such a remedy might otherwise survive. We note that most of those remedies will be superseded by this provision or have already been abolished.

The two alternatives are provided in deference to the discussion in Chapter 5 that there may be circumstances in which some remedies are inappropriate, especially those that involve the transfer of property or the compelling of certain actions. In option (a), injunctions, attachment, specific performance, or the conveyance of land or property might be denied on the grounds of public interest. This seems to us a much more tailored ground for disparate treatment than the broad exemption of the Crown from such remedies. It would assist the Crown in seeking not have to have an order made that might otherwise have been made against a private individual. In option (b), remedies would simply be considered as they are in other cases.

*Option (c): Retaining an in rem exclusion***9 Remedies against the Crown**

- (4) Despite section 6 and subsection (1), this Act does not—
- (a) authorise in rem proceedings against the Crown; or
  - (b) authorise the arrest, detention, or sale of any Crown property; or
  - (c) give any lien on any Crown property.
- (5) If, at the time of filing proceedings in rem, a plaintiff reasonably believed that the relevant property was not Crown property, but it was Crown property, the court may order that the proceedings continue on terms that the court thinks just.
- (6) In subsections (4) and (5), Crown property means a ship (which includes every description of vessel used in navigation that is not propelled by oars), an aircraft, cargo, or other property belonging to the Crown.

**Commentary**

Despite the numbering of the subsections in our draft of option (c) above, this option could be adopted in combination with either option (a) or (b). It retains the exception excluding in rem proceedings, currently in section 28 of the Act. Under this option the Crown's ships or aircraft, most of which would be New Zealand Defence Force property, would not be subject to arrest or any of the other consequences of in rem proceedings.

**Clause 10 – Contribution and indemnity****10 Contribution and indemnity**

The same rules about contribution and indemnity apply to the Crown as apply to any other person.

**Commentary**

This provision replicates section 8 of the Act. It is included simply out of caution, as almost certainly the common law position that contribution or indemnity could not be sought against the Crown would itself be abrogated by general provision in clause 6.

**Clause 11 – Protection of Crown employees**

- 8.7 There are two options for clause 11 of the Bill regarding the protection of Crown employees from civil proceedings. The first provides an immunity for Crown employees (option (a)); the second an indemnity (option (b)). These options reflect the discussion in Chapter 6. Both alternatives contain an option to include ministers along with other Crown employees as qualifying for the immunity or indemnity.

*Option (a): Immunity of Crown employees***11 Immunity for [Ministers and] certain Crown employees**

- (1) [Ministers and] non-State Sector Act employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.
- (2) In subsection (1), non-State Sector Act employees means Crown employees who are members of departments that are not specified in Schedule 1 of the State Sector Act 1988 (namely, the New Zealand Defence Force, the New Zealand Police, and the New Zealand Security Intelligence Service).
- (3) See also section 86 of the State Sector Act 1988.

## Commentary

This option reinforces and adds to the immunity currently in section 86 of the State Sector Act 1988. The immunity in section 86 would continue to apply to Crown employees as it does now. There is a cross-reference in sub-clause (3) to section 86 to direct the reader and provide greater clarity. This clause in the Bill would extend the immunity to non-State Sector Act employees, as defined in sub-clause (2), so that all parties coming within the definition of “Crown employee” under the Bill would be covered by the immunity. The departments referred to in sub-clause (2) are aligned with the departments as defined in clause 4.

This immunity would protect from liability Crown employees who have acted (or omitted to act) in good faith in the performance of their duties, by preventing legal proceedings from being taken against those employees. This means that a person whose acts are protected by this immunity cannot be sued or made financially liable for harm resulting from their actions.

The immunity and indemnity options are the same in scope in that they both cover only actions and omissions carried out in good faith in performance (or intended performance) of duties. It is not intended that either option would protect employees acting other than in good faith or acting outside the scope of their employment.

### *Option (b): Indemnity of Crown employees*

#### **11 Indemnity for [Ministers and] Crown employees**

- (1) The Crown must indemnify [Ministers and] Crown employees for costs and damages in civil proceedings relating to good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.
- (2) The indemnity must be paid by the department or departments that are involved with the subject matter of the civil proceedings.
- (3) The Attorney-General must, as soon as practicable after the end of each financial year,—
  - (a) prepare a statement itemising all indemnities paid under this section in that financial year; and
  - (b) ensure that the statement is audited by the Auditor-General; and
  - (c) present the statement to Parliament.
- (4) The statement must disclose personal information only in accordance with the Privacy Act 1993 and must not disclose information that is subject to an obligation of confidentiality [or public interest immunity].

#### **12 Consequential amendment to State Sector Act 1988**

- (1) This section amends the State Sector Act 1988.
- (2) Repeal section 86.

## Commentary

As discussed in Chapter 6, the indemnity proposed in option (b) is a mandatory indemnity for Crown employees for good faith actions in pursuance of their duties. It would be possible to bring legal proceedings against an individual Crown employee, but the Crown would be required to pay legal costs and any damages resulting from the proceedings, for actions covered by this clause. This type of indemnity would provide greater certainty of protection compared with the general position in relation to indemnities at present, which require the approval of the Minister of Finance.

An important feature of this indemnity clause is that it mandates that the indemnity must be paid by the individual department involved with the proceedings, instead of being met out of the consolidated fund. This furthers the aim of increasing departments' accountability.<sup>156</sup>

A further key requirement of this clause is that the Attorney-General prepare an annual statement to be presented to Parliament, itemising all indemnities paid in that year. This would provide information about settlements by departments, to increase accountability and transparency and make this information more accessible to the public.<sup>157</sup>

Under the indemnity option, section 86 of the State Sector Act would be repealed, because this indemnity would provide the relevant protection for all Crown employees.

## Clauses 13 and 14 – Application to judicial acts

### 13 Crown immune from tortious liability in relation to judicial process

The Crown is immune from liability in tort for a person's actions or omissions in the discharge or purported discharge of the person's responsibilities in connection with the execution of judicial process.

### 14 Amendment to Constitution Act 1986

- (1) This section amends the Constitution Act 1986.
- (2) Before section 23, insert:

**“23AA Crown immune from tortious liability in relation to judicial responsibilities**

The Crown is immune from liability in tort for a person's actions or omissions in the discharge or purported discharge of the person's responsibilities of a judicial nature.”

### Commentary

The current Act provides in section 6(5), on its face, a wide immunity for the Crown based on torts committed by those in the judicial process. The immunity provided by section 6(5) is, however, not complete. Section 6(5) does not grant an immunity to individual judges or officers, and their immunity relies on them being able to establish immunity at common law or through statute. The Law Commission's recommendation in the 1997 report to give District Court judges the same immunity as High Court judges was adopted.<sup>158</sup> The immunity of other judicial officers, such as registrars, remains subject to case law.

The draft clause essentially preserves this current law, as one of the principles behind this review is not to alter the underlying Crown liability regime. The draft provision would prevent tort actions in relation to judicial actions or omissions as now. However, we think that whether or not actions might be brought against the government for breaches of NZBORA by judges should be left to the courts. In 2011, the Supreme Court held by majority in *Chapman* that the Crown could not be liable to provide compensation under NZBORA for breaches of the act by judges.<sup>159</sup> In the event that this decision was ever overturned and such NZBORA actions allowed, the draft Bill would clearly recognise such proceedings as civil proceedings.

This immunity, in so far as it applies to judges, sits strangely in the Crown Proceedings Act. Courts are expressly excluded from the definition of “Crown”, and judges are expressly excluded from the definition of “Crown employees”. It is a provision that really emphasises the separation of the

<sup>156</sup> See ch 6.

<sup>157</sup> See ch 6 for further discussion of the proposed procedure.

<sup>158</sup> See District Courts Act 1947, s 119. See also Law Commission *Crown Liability and Judicial Immunity: A response to Baigent's Case and Harvey v Derrick* (NZLC R37, 1997).

<sup>159</sup> *Attorney-General v Chapman*, above n 149. The majority (McGrath and William Young JJ, and Sir Thomas Gault) was concerned about the effect that making the Crown responsible for actions of the judiciary might have on judicial independence. The minority (Elias CJ and Anderson J) emphasises that the accountability of the New Zealand state for breaches of NZBORA could not be limited simply because the alleged breach concerned a judicial action. It is possible to argue that the decision leaves New Zealand at risk of not providing sufficient remedy for breaches of NZBORA.



executive and those exercising judicial authority. We have, therefore, suggested in the Bill that the Crown immunity, in so far it applies to those who exercise responsibilities of a judicial nature, be in the Constitution Act 1986. The category of those who act in the execution of a judicial process, which is a wider category than those who exercise responsibilities of a judicial nature (primarily judges), includes those who are covered by the Crown Civil Proceedings Bill (for example, police officers or bailiffs) and the immunity should properly be in the proposed new statute.

## **CROWN CIVIL PROCEEDINGS BILL PART 3 – PROCEDURE AND EXECUTION**

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### **Clause 15 – Same procedure**

#### **15 Same procedural rules apply to the Crown as to any other person**

Subject to this Part, the same rules of civil procedure apply to the Crown as apply to any other person.

### **Clause 16 – Security for costs**

#### **16 The Crown is not required to give security for costs**

The Crown is not required to give security for the costs of any other party in civil proceedings.

#### **Commentary**

This clause carries over the prohibition in section 18. It is not conceivable that the Crown would not be able to satisfy a cost award, and an application for security would have little utility.

### **Clause 17 – Ability to create rules**

#### **17 Rules about the Crown’s participation in civil proceedings, etc**

##### **(1) The Governor-General may, by Order in Council, make rules for**

- (a) providing for the Crown’s participation in civil proceedings;
- (b) in civil proceedings by the Crown for the recovery of taxes, duties, or penalties, providing that the defendant is not entitled to a set-off or counterclaim;
- (c) in other civil proceedings by the Crown, providing that the defendant is not entitled to a set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties, or penalties;
- (d) in proceedings by or against the Crown, providing that the defendant is not entitled, without the court’s leave, to a set-off or counterclaim if the subject matter of the set-off or counterclaim does not relate to the subject matter of the proceedings;
- (e) providing that the Crown is not entitled to a set-off or counterclaim without the court’s leave.

##### **(2) A provision in another Act that empowers rules about civil proceedings also empowers rules for the purposes listed in subsection (1).**

#### **Commentary**

This clause continues the power to create court rules that restrict the operation of set-off and counterclaim. It carries over the existing provision for rules set out in section 30(2) of the Act, with modernised and simplified language.

Existing paragraphs (a) to (d) of section 30(1) were considered unnecessary to include specifically, as new clause 17(1)(a), providing for the Crown’s participation in civil proceedings, is broad enough to encompass these procedural matters. Existing section 30(1)(e), covering set-off or counterclaim in proceedings involving taxes, duties or penalties, has been divided into paragraphs (b) and (c)

in the new clause, to aid clarity. Existing section 30(1)(f), which restricts set-off and counterclaim where the subject matter is unrelated, is reflected in new paragraph (d). Existing paragraphs (g) and (h), covering the Crown's entitlement to set-off or counterclaim, have been simplified into new paragraph (e).

The rules provided for under section 30(2) of the Act are currently manifested in rule 5.61 of the High Court Rules. There are two general principles to the rule: first, that set-offs and counterclaims are not available in respect of taxes (the tax rule);<sup>160</sup> and second, that set-offs and counterclaims are not generally available unless they properly concern the subject matter of the proceedings (the subject matter rule).<sup>161</sup> The intention is that these two rules would be preserved under new legislation.

## Clause 18 – Party names in the proceedings

### 18 Attorney-General correct party in civil proceedings against and by the Crown

- (1) Civil proceedings against the Crown—
  - (a) must name the Attorney-General as the defendant on behalf of the Crown; and
  - (b) subject to any other enactment, must be served on the Attorney-General at the Crown Law Office.
- (2) Subject to any other Act, civil proceedings by the Crown must be in the name of the Attorney-General as the plaintiff on behalf of the Crown.

#### Commentary

This provision removes the uncertainty currently created by section 14 of the Act, which provides that the defendant should be a government department if that department has sufficient personality to be sued. Section 14, which was taken directly from the 1947 United Kingdom Act, does not properly describe the New Zealand position where no department has sufficient personality to be sued.

In our view it is simpler to make the Attorney-General the nominal defendant and plaintiff in all actions for and against the Crown, at least where statutes do not provide for another person to fulfil that role, such as the Commissioner of Inland Revenue or the Comptroller of Customs. The provision would permit, but would not require, the addition of other defendants, for instance, a statutory office holder, if the defendant so wished.

## Clause 19 – Attorney-General's ability to intervene

### 19 Intervention by the Crown

The Attorney-General on behalf of the Crown may seek a court's leave to intervene in any civil proceedings affecting the public interest.

#### Commentary

This provision is purely enabling. It leaves to the discretion of the court whether or not it is appropriate to allow the Crown to intervene.

<sup>160</sup> For example, the tax rule was applied in *Commissioner of Inland Revenue v Wright* [2013] NZHC 476 where the receivers of a company in liquidation sought compensation for compulsory takings under the Public Works Act 1981. The Court held that once a company falls to be liquidated the rules of set-off are governed by s 310 of the Companies Act 1993 (at [39]).

<sup>161</sup> For example, the subject matter rule was considered in *J C Mitten Ltd (in liq) v Attorney-General* [1961] NZLR 628 (SC) where the Court gave leave for set-off in relation to financial relationships with the Ministry of Works and the New Zealand Forest Service.

## Clause 20 – Crown’s obligation to give discovery

- 8.8 The Bill will include a provision on the Crown’s obligation to give discovery to replace section 27 of the Act. Provision in statute is necessary to enable discovery against the Crown.<sup>162</sup> This is because at common law, the Crown could not be required to give discovery of documents at all when it was a party to a suit.<sup>163</sup> The requirement of the Crown to give discovery as if it were a private party remains an important one; indeed, addressing this issue was one of the major reasons for the enactment of the original Crown Proceedings Act 1947 in the United Kingdom.
- 8.9 However, because the significant issue of public interest immunity is still to be considered, as discussed in Chapter 7, we do not present a draft provision here. The Bill will continue to provide a statutory basis for enabling discovery against the Crown. The general principle from section 27 that the Crown is subject to the same discovery requirements as any other person will be retained. The new provision will be aimed at simplifying and clarifying the rules governing proceedings involving the Crown. It will make it clear that the ordinary rules of civil procedure are relevant and applicable to the Crown.

## Clause 21 – Execution against the Crown

### 21 Execution against the Crown

- (1) A judgment against the Crown must be satisfied by the department or departments that are most directly involved with the subject matter of the civil proceedings.
- (2) A department must include a statement within its annual report under section 43 of the Public Finance Act 1989 for a particular financial year itemising any amounts paid by the department in that financial year for the purpose of—
  - (a) settling an existing or prospective civil proceeding against the Crown; and
  - (b) satisfying a judgment against the Crown.
- (3) The statement must disclose personal information only in accordance with the Privacy Act 1993 and must not disclose information that is subject to an obligation of confidentiality [or public interest immunity].

### Commentary

The Act provides in section 24 for a separate regime for the satisfaction of judgments against the Crown. Rather than proceeding to execution in the usual way, the Act contemplates the issuing of a certificate, the presentation of which enables the Governor-General to pay the amount without a further appropriation.

While this is similar to the position in Victoria, other comparable jurisdictions, including the United Kingdom, the other Australian states and the Canadian provinces, make the satisfaction of judgment mandatory.<sup>164</sup>

There are three issues with this provision: whether satisfaction should be mandatory; whether it should involve the Governor-General; and whether the Act ought to contain a permanent legislative appropriation. The current procedure, which, in form, appears to make compliance with judgment optional, reflects both important constitutional history and the principle that the Crown should not be forced to pay public funds, or to part with its property, without the consent of Parliament.

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162 *Bird v Auckland District Land Registrar* [1952] NZLR 462 (SC) at 466.

163 Harry Street “Crown Proceedings Act, 1947” (1949) 11 Mod L Rev 129 at 140.

164 See P Hogg and P J Monahan *Liability of the Crown* (3rd ed, Carswell, Scarborough, 2001) at [3.1].

**Clause 22 – Personal liability of the Sovereign****22 Savings**

For the avoidance of doubt, nothing in this Act applies to or authorises proceedings by or against the Sovereign in the Sovereign’s private capacity.

**Commentary**

Section 35(1) of the Crown Proceedings Act states that the Act does not authorise actions against the Queen in her personal capacity. This privilege has not been extended to the Governor-General as her representative. The provision in the United Kingdom Act on which this provision is based was clearly a concession to the personal prerogatives of the monarch. While the rule of law might be said to require that the sovereign acting in her personal capacity ought to be subject to the same legal procedures as her subjects, it is unlikely that the privilege has much practical importance given the reality that the Sovereign is unlikely to incur legal obligations in New Zealand that are similar to those incurred by private citizens. The dividing line between what is done by the Queen in her official capacity and what is done in her personal capacity is not necessarily clear. It might be that properly considered certain prerogatives remain personal rather than official, but the reality is that their exercise is in no way equivalent to the actions of a private person.

**Clause 23 – Transitional arrangements**

- 8.10 The Bill will need to deal with transition from the Crown Proceedings Act to the new Act, but these provisions have yet to be drafted. The key matter for consideration will be whether proceedings on foot at the time that the new Act enters into force should be considered under the new Act or the old.

**Clause 24 – Repeal of the Crown Proceedings Act****24 Crown Proceedings Act 1950 repealed**

The Crown Proceedings Act 1950 (1950 No 54) is repealed.

**Clauses 25 and 26 – Amendments to other enactments****25 Amendments consequential on repeal of section 5(2) of Crown Proceedings Act 1950**

Amend the enactments specified in Schedule 1 as set out in that schedule.

**26 Consequential amendments to other enactments**

Amend the enactments specified in Schedule 2 as set out in that schedule  
[Schedules not yet drafted]

**MATTERS NOT TO BE COVERED IN THE NEW ACT**

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**Other Crowns**

- 8.11 Section 35(2)(c) of the current Act provides that nothing in the Act should “affect any proceedings by the Crown otherwise than in right of the Sovereign’s Government in New Zealand”.
- 8.12 This provision, in our view, is no longer necessary. It was added to the United Kingdom Act to prevent possible actions in relation to colonial activities that had been conducted by colonial governments. In this it has only been partially effective.<sup>165</sup> Actions by and against the Crown

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<sup>165</sup> See *Mutua v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB).

in right of other jurisdictions ought to be governed by the same principles that relate to suits against other foreign countries.

### **Section 9 of the Crown Proceedings Act**

- 8.13 Currently section 9 of the Act addresses two military-related matters. Subsections 9(1), (2) and (2A) provide a bar against proceedings for compensation or damages in relation to a member of the armed forces who has received assistance under the War Pensions Act 1954 due to a service-related disablement or death. Subsection 9(3) is a limited provision that deals with damage caused by military aircraft.

#### *Bar against proceedings for compensation or damages*

- 8.14 The recently introduced Veterans Support Bill,<sup>166</sup> which would replace the War Pensions Act, has replicated section 9(1), (2) and (2A) in clause 265, and will repeal the old Crown Proceedings Act provisions. Therefore, we have not included these provisions, despite their importance, in our draft Crown Civil Proceedings Bill.

#### *Damage caused by military aircraft*

- 8.15 Section 9(3) of the Crown Proceedings Act applies section 97 of the Civil Aviation Act 1990 to any claim against the Crown relating to damage, loss or injury sustained through the use of a service aircraft. Section 97 of the Civil Aviation Act has two main effects: first, it creates immunity to claims of nuisance or trespass relating to the use of aircraft if certain conditions are met; and second it creates strict liability for claims of material damage or loss relating to the use of aircraft.
- 8.16 The terms of section 9(3) of the Crown Proceedings Act mean that section 97 of the Civil Aviation Act will apply as if the Civil Aviation Act applies to the New Zealand Defence Force. Section 3 of the Civil Aviation Act means that that Act does not apply to the New Zealand Defence Force unless it is expressly stated in legislation that it does apply. Section 9(3) also makes it clear that all conditions (the applicable provisions and rules under the Civil Aviation Act) are deemed to have been complied with.
- 8.17 The effect of the interaction of these two sections is that the Crown effectively has automatic immunity to claims of nuisance or trespass relating to the use of service aircraft and the Crown is subject to strict liability in relation to material damage or loss relating to the use of service aircraft.
- 8.18 The placement of this provision in the Crown Proceedings Act is somewhat out of place. The only real connection it has with the rest of section 9 is the link to the armed forces, and this is to be removed once the Veterans' Support Bill comes into force. We consider that this provision might be better placed in the Civil Aviation Act.

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166 Veterans' Support Bill 2013 (158-2).

# Appendix A

## Questions for submitters

### QUESTIONS

#### CHAPTER 3 – TORT LAW AND CROWN LIABILITY

- Q1 Do you agree with the approach of making it possible for the Crown to be directly liable in tort? Do you foresee any difficulties with this approach?
- Q2 What is the best approach to take with existing provisions in other Acts that provide Crown employees with immunity if section 6(4) of the Crown Proceedings Act is repealed?
- Q3 Would repealing section 6(2) of the Crown Proceedings Act create any problems?

#### CHAPTER 4 – RELATIONSHIP TO PUBLIC LAW

- Q4 Should compensation claims under the New Zealand Bill of Rights Act 1990 come within the proposed Crown Civil Proceedings Bill?

#### CHAPTER 5 – COMPULSORY ENFORCEMENT

- Q5 Should the Crown be subject to compulsory enforcement remedies?

#### CHAPTER 6 – ACCOUNTABILITY OF THE CROWN

- Q6 Do you agree that the Crown proceedings legislation should clarify that a department must meet judgments for compensation from its own appropriation? Do you foresee any problems with this approach?
- Q7 Do you think that the government should be required to disclose the amount of money spent on settlements made in contemplation of litigation?
- Q8 Do you prefer the option of an immunity or an indemnity from legal suit for Crown employees?
- Q9 Should ministers be in the same position as Crown employees with regard to an immunity or indemnity from legal suit?

## CHAPTER 7 – DISCLOSURE AND PUBLIC INTEREST IMMUNITY

- Q10 What should the balance be between allowing the executive to make a conclusive statement that information is subject to public interest immunity and allowing the courts to consider these matters?
- Q11 Should the interest of national security be approached differently to other interests?
- Q12 Is there a need for a new mechanism to provide procedural safeguards for the use of sensitive information?
- Q13 How could proceedings operate in order to make the sensitive information available to the court but to protect the confidentiality of that information, including the identities of intelligence officials?
- Q14 Does the use of a special advocate to represent the interests of the excluded party provide sufficient protection of that party's interests?
- Q15 Do you agree that the availability of non-party discovery against the Crown should be confirmed in the new statute?
- Q16 Should there be a broad definition of the Crown for the purposes of discovery?

## CHAPTER 8 – CROWN CIVIL PROCEEDINGS BILL AND COMMENTARY

For each clause of the draft Bill:

- Do you agree with the policy and drafting of the provision?
- How could the clause be improved?

Please identify which clause of the draft Bill you are commenting on.

# Appendix B

## Consultation

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The Law Commission has consulted with the following during the preparation of this Paper:

- Stuart Anderson
- David Collins QC
- Crown Law Office
- Department of Prime Minister and Cabinet
- Tony Ellis
- Rodney Harrison QC
- Brian Henry
- Inland Revenue
- Philip Joseph
- Sir Kenneth Keith QC
- Janet McLean
- Ministry of Justice
- New Zealand Defence Force
- New Zealand Security Intelligence Service
- Paul Rishworth
- Parliamentary Counsel Office
- Davey Salmon and Isaac Hikaka
- State Services Commission
- Graham Taylor
- The Treasury