



LAW COMMISSION
TE AKA MATUA O TE TURE

August 2008, Wellington, New Zealand | ISSUES PAPER 9

REVIEW OF PREROGATIVE WRITS





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The Law Commission is an independent, publicly funded, 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.

The Commissioners are:

Right Honourable Sir Geoffrey Palmer – *President*

Dr Warren Young – *Deputy President*

Emeritus Professor John Burrows QC

George Tanner QC

Val Sim

The General Manager of the Law Commission is Brigid Corcoran

The office of the Law Commission is at Level 19, HP Tower, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6001, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: com@lawcom.govt.nz

Internet: www.lawcom.govt.nz

Issues Paper/Law Commission, Wellington 2008

ISSN: 1178-2862 (Print)

ISSN: 1177-7877 (Online)

ISBN: 978-1-877316-50-0 (Print)

ISBN: 978-1-877316-51-7 (Online)

This paper may be cited as NZLC IP9

This report is also available on the Internet at the Law Commission's website: www.lawcom.govt.nz

FOREWORD

The Law Commission project on Prerogative Writs is a confined and narrow topic aimed at simplifying the law. It is not a project that involves any significant change to the substantive law relating to judicial review in New Zealand following the passage of the Judicature Amendment Act 1972.

The Commission acknowledges with gratitude the work of Dr Donald Mathieson QC, Special Counsel at the Parliamentary Counsel Office, in relation to this paper.

A handwritten signature in dark ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

Geoffrey Palmer
President

TERMS OF REFERENCE

The Commission is asked to consider the experience with judicial review since the enactment of the Judicature Amendment Act 1972 and report on

- (1) Whether there is a continued need for the prerogative writs alongside the procedure under Part 1 of the Act.
- (2) Any matters of judicial review procedure that could be considered for reform.

Call for submissions

Submissions or comments on this Issues Paper should be sent to the General Manager of the Law Commission by **30 September 2008**.

Law Commission

PO Box 2590

Wellington 6011

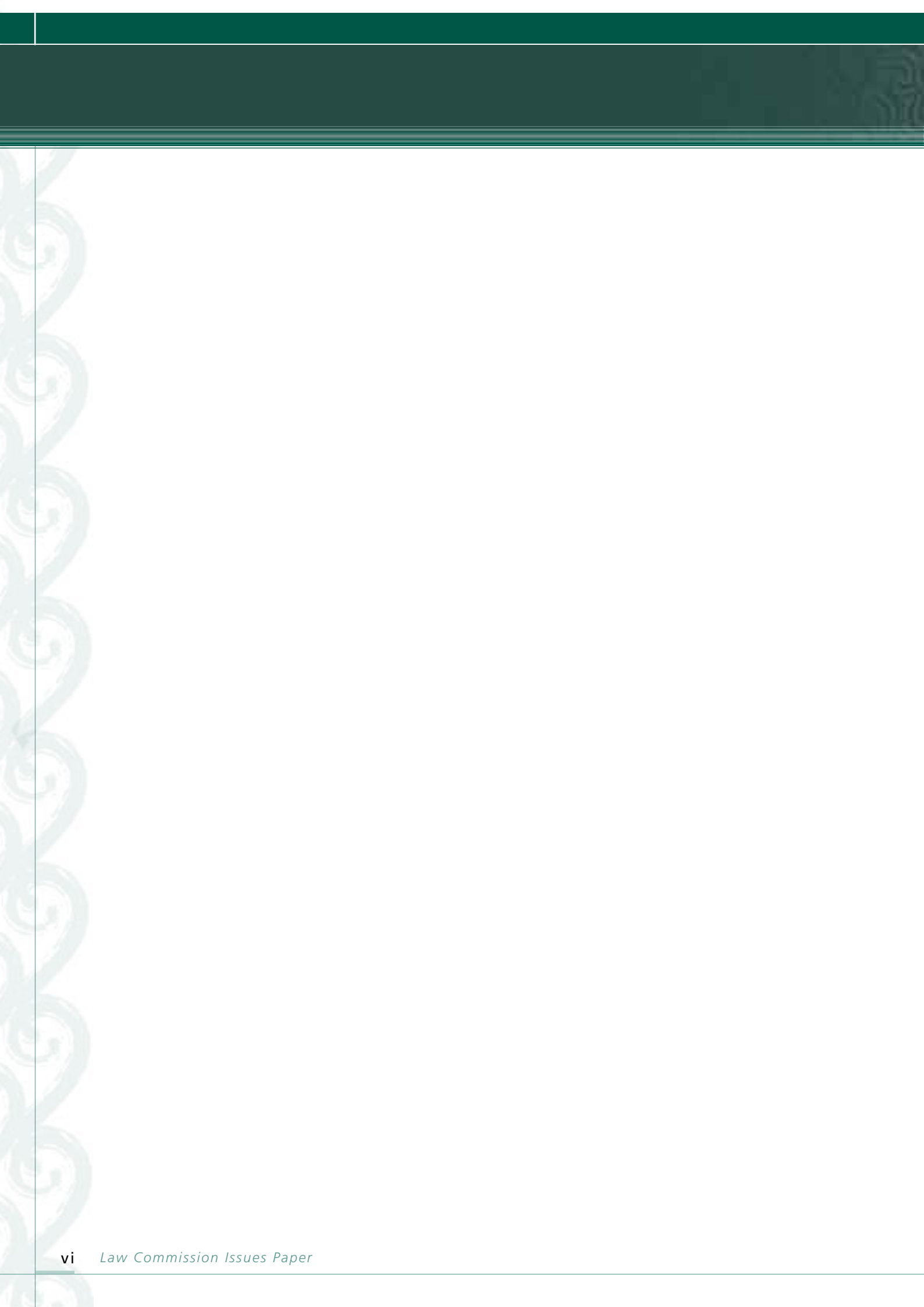
or by email to – writs@lawcom.govt.nz

Your submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

This Issues Paper is available from the Commission's website: www.lawcom.govt.nz

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 Commission will normally be made available on request and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.



Review of prerogative writs

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Introduction

THE SCOPE OF THIS PAPER

- 1 Judicial review is a keystone of our public law. By means of judicial review the High Court makes an important contribution to public administration. The decisions, and sometimes the actions, of Ministers of the Crown, statutory officers and statutory tribunals are usually reviewable by the High Court. Decisions made in the exercise of one of the prerogatives of the Crown are also reviewable. See, eg, *Burt v Governor-General* [1992] 3 NZLR 672 (CA). Section 27(2) of the NZ Bill of Rights Act 1990 provides:

Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

- 2 Some decisions are not reviewable, and there is a wide measure of agreement that they should not be. The line is often drawn by distinguishing between public law and private law. In the vast majority of cases what ranks as a public function, so that its lawfulness is a matter for public law exclusively, and what by contrast is a private function and regulated by private law is obvious and uncontroversial. But there are marginal cases where the line is difficult to draw. An example is *Electoral Commission v Cameron* [1997] 2 NZLR 421, where the decisions of an unincorporated board potentially had a major impact on the conduct of a general election. In that case the Court of Appeal held the Electoral Commission's decision to be reviewable.
- 3 For the last 35 years judicial review procedure has been dominated by Part 1 of the Judicature Amendment Act 1972. That Act has served New Zealand well. It set out a unified and simplified procedure for obtaining judicial review by the High Court. It did not attempt to state the grounds of judicial review. It therefore left open the possibility that those grounds would undergo modification as a result of judicial development. The procedure to be followed was prescribed. However, a basic feature of that procedure, namely that it should be commenced by filing a motion, was superseded by the procedure which was later set out in the High Court Rules. Rule 628(1) of the High Court Rules requires all applications for review under the 1972 Act to be commenced by notice of proceeding and statement of claim rather than by originating motion. In result, the procedural rules set out in the Judicature Amendment Act 1972 itself are misleading if read by themselves.

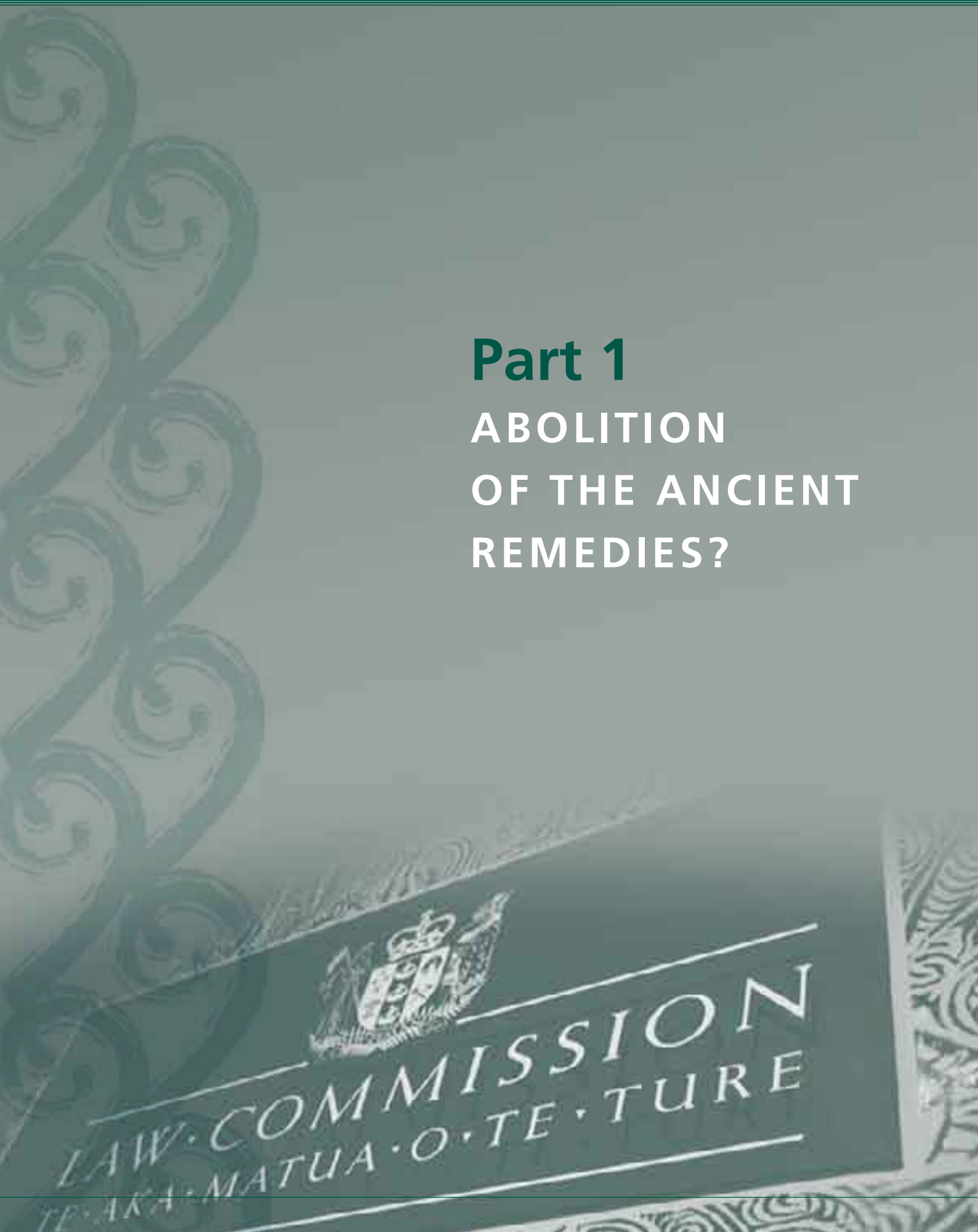
- 4 Before 1972 the English and New Zealand courts also granted what were often called “extraordinary remedies”. They would grant a prerogative writ when a decision was successfully challenged at common law. Later this became known as a prerogative order. These orders were called certiorari, prohibition and mandamus.
- 5 The Judicature Amendment Act 1972 was enacted in consequence of the recommendations of the Public and Administrative Law Reform Committee in its fourth report (1971). That committee recommended the retention of the old prerogative orders of certiorari, prohibition and mandamus, in case they still had useful roles to play. The Committee’s purpose was to avoid depriving an applicant of some relief not available under the new simplified procedure. It was believed that the prerogative orders would soon prove to be superfluous. At that point they could be abolished.
- 6 After 1972 however, it became quite common, as it still is, for proceedings to be framed under the 1972 Act and – as a usually unnecessary precaution – in the alternative as an application for a prerogative order. See, for example, *Dunne and Anderton v Canwest TV Works Ltd* 11/8/05, Ronald Young J, HC Wellington CIV-2005-495-1596.
- 7 In more recent years the old prerogative orders have come to show some continuing usefulness. Thus in *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 Lord Donaldson MR considered that reviewability extended beyond powers that were statutory, and that only those bodies whose power was based upon contract or consent were excluded from review.
- 8 The law as to judicial review procedure is presently quite complex and technical. The Law Commission considers that judicial review procedure should be stated as simply as is possible to accommodate the fact that judicial review is, and must continue to be, available against a wide variety of decision-makers, and in many different circumstances.
- 9 This Issues Paper is exclusively concerned with judicial review procedure. It is not intended to open up a debate about the grounds on which a remedy is obtainable upon a judicial review application. The Commission emphasises at the outset that it is not engaged in reconsidering important substantive questions about the circumstances in which the High Court may exercise its supervisory role. Nor is its present concern to examine the extent to which the Crown’s prerogative powers are reviewable, or to open up questions about the proper intensity of review.
- 10 This Issues Paper does not open up any discussion of the question whether mandatory orders should be obtainable against the Crown. While this may be a closely related question, it is not canvassed in this paper and submissions on it are not invited. In 2001 the Commission published Study Paper 10, *Mandatory Orders Against the Crown and Tidying Judicial Review*. As its Foreword makes clear, this was a statement of the President’s opinion, not of the Commission’s

views. That Study Paper set out the reasons for and against subjecting the Crown to mandatory orders. It concluded that mandatory orders against the Crown should be permitted, and that a new Judicature Amendment Act should empower the grant of injunctions against the Crown. This recommendation did not have the status of a Law Commission recommendation, and no further action has been taken on it by the Commission or by Parliament.

- 11 Another question which has been debated over many years, but is not discussed in this Issues Paper, is whether damages should be obtainable by someone who has suffered loss in consequence of invalid administrative action, simply relying on that invalidity.
- 12 The present law is clear: no such damages are claimable. The law was settled by the Court of Appeal in *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314.
- 13 If a claimant can establish a tort independent of the invalidity such as negligence, a claim is sustainable. But invalidity without the commission of a recognised tort will not lead to an award of damages. Reference may be made to the Public and Administrative Law Reform Committee's report, *Damages in Administrative Law* (1980). Once again, it is not intended to deal with this issue. The Commission is not proposing any change to the present law, while recognising its importance. No submissions on it are invited. In the situation where damages are claimable as a matter of substantive common law, the question arises whether the claim can be joined with a judicial review application. That is a different question and is discussed in paragraphs 2.2–2.6 below. A troublesome procedural difference makes this depend on whether the judicial review application is lodged under the 1972 Act or is brought at common law seeking an extraordinary remedy.
- 14 This Issues Paper has been prepared with several assumptions in mind. It will be useful to commence the discussion by making them explicit:
 - Judicial review is one of the most important tools for ensuring that the rule of law functions as a living reality.
 - If judicial review is to be effective in the 21st century it needs to be obtainable through a procedure which is efficient, uncomplicated by baggage from the past, and as easy as possible for lawyers and judges to operate and non-lawyers to understand.
 - The basic shape of judicial review procedure is sufficiently important to be determined by Parliament, as indeed was recognised when Parliament enacted the Judicature Amendment Act 1972 – an achievement on which the Commission now seeks to build.

Part 1

ABOLITION OF THE ANCIENT REMEDIES?



Part 1

Abolition of the ancient remedies?

1.1 The heading of Part 1 of the Judicature Amendment Act 1972 encapsulates its purpose, namely to introduce a “single procedure for the judicial review of the exercise of or failure to exercise a statutory power.”

1.2 “Statutory power” is defined in section 3 of that Act:

A power or right conferred by or under any Act [or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate]—

- (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
- (b) To exercise a statutory power of decision; or
- (c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or
- (d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; [or]
- (e) [To make any investigation or inquiry into the rights, powers, privileges, immunities, duties or liabilities of any person:]

The words in square brackets were added by the Judicature Amendment Act 1977.

1.3 “Statutory power of decision” is in turn defined as meaning:

A power or right conferred by or under any Act [, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate,] to make a decision deciding or prescribing or affecting]—

- (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
- (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

The square brackets show how this definition was also broadened by the 1977 amendment. Further reference is made to these two definitions in paragraphs 1.33–1.36.

1.4 Section 4(1) of the Act provides:

On an application ... which may be called an application for review, the High Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

1.5 Declarations and injunctions can be important public law remedies but they are not prerogative orders. They are discretionary remedies and their appropriateness turns on the circumstances of a particular case. In the Commission's view there is no doubt that they must continue to be available remedies that may be granted when appropriate, and in the area of public law as well as the area of private law.

1.6 Assume a public law case, however, in which the applicant (usually called "the plaintiff" in New Zealand High Court practice) has succeeded, and an injunction would be inappropriate, but the Judge has decided that a declaration of the applicant's rights would be an insufficient or otherwise ineffective remedy. In the classic case of a tribunal's decision beyond its jurisdiction, certiorari to quash would be granted at common law to set aside the tribunal's decision. It was (as it still is) a discretionary remedy.

1.7 Certiorari was often granted without an accompanying mandamus. At other times both remedies were granted, eg, if power was abused by a tribunal or authority. Thus, in *Board of Education v Rice* [1911] AC 179 the Board's decision was held to be *ultra vires* since they had addressed their minds to the wrong question: consequently it was quashed by certiorari and the Board was commanded by mandamus to determine the matter according to law, ie, within the limits indicated by the House of Lords. Mandamus "has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds" (Wade and Forsyth, *Administrative Law*, 9th ed, 615).

1.8 Prohibition developed alongside certiorari as part of the system of control imposed by the Court of King's Bench in England. It was a prospective, rather than a retrospective, remedy. "Primarily it lay to prohibit an inferior tribunal from doing something in excess of its jurisdiction" (Wade and Forsyth, above, 603). It too was (and still is) a discretionary remedy. It would not be granted "unless there was something left to prohibit".

1.9 Under section 4(1) the unified relief available (still assuming that neither declaration nor injunction is appropriate) is relief "that the applicant would be entitled to in any one or more of" the named extraordinary remedies.

1.10 The exact scope of each of these remedies was debatable, and the textbooks record several fine distinctions. These problems continue in modern English law. In England judicial review proceedings must be used when the claimant is

seeking the remedies listed in rule 54.2 of the Civil Procedure Rules, formerly known as the prerogative orders – mandatory orders (corresponding with mandamus), prohibiting orders (corresponding with prohibition), and quashing orders (corresponding with certiorari). An example of uncertainty about the exact scope of certiorari is whether every legal “act” implies a “decision” to do that act. Does a refusal by a local authority to act under statutory powers imply a decision by that authority not to act, so that certiorari will be available – as Lord Diplock held to be the case in *R v Inland Revenue Commissioners ex p Rossminster Ltd* [1980] AC 952?

- 1.11 In New Zealand, the nature of the relief obtainable under the “single procedure” in section 4 is confined to what the applicant “would be entitled to in... certiorari”, and similarly when a prohibiting or mandating (ie, duty-enforcing) order is sought. Theoretically an unsuccessful defendant (ie, the respondent to an application for review) could argue that although the impugned decision was an exercise of “statutory power” as defined, nevertheless the relief desired by the plaintiff would not have been obtainable by way of certiorari at common law and so is not obtainable under section 4(1). In the particular case used as an example, this argument would involve contending (as do Wade and Forsyth at 613–614) that Lord Diplock’s expansion of the scope of certiorari in his *Rossminster* remarks was wrong in principle, or need not be followed in this country, or both.
- 1.12 In the Commission’s tentative opinion that kind of technical argument, whether accepted or rejected, has no place in the modern New Zealand courtroom. The exact scope of any of the extraordinary remedies depends on historical research and the extent to which modern courts have developed the ancient remedies. The correct answers may, however, bear little relationship to what the law should be. Public law cases are usually difficult enough to run without adding the complication of technical doubt about the remedies that the Court can lawfully grant. In no New Zealand case known to the Commission has this kind of technical argument been raised, let alone decided in the defendant’s favour. The time has come to formally rule it out of order – in the interests of legal simplicity, elegance of legal formulation, certainty for litigants, and the saving of expense in terms of court time and litigation costs.
- 1.13 Eliminating the extraordinary remedies would end the present practice of seeking one or more extraordinary remedies at the same time as an appropriate remedy under the Judicature Amendment Act 1972 is sought. This makes a statement of claim more complex and hard for a lay litigant to understand.
- 1.14 Eliminating the extraordinary remedies would also remove the need to refer to the prerogative writs/orders in the many New Zealand statutes which oust or modify the High Court’s review jurisdiction. A long list could be given. The Immigration Act 1987 is an example. Section 146A lays down a rule (subject to the High Court’s power to allow extra time in special circumstances) that “review proceedings” in respect of a “statutory power of decision” must be commenced within 3 months from the date of that decision; and in section 2 “review proceedings” is defined as follows:

Review proceedings means proceedings—

- (a) By way of an application for review under the Judicature Amendment Act 1972; or
- (b) By way of an application for certiorari, mandamus, or prohibition; or
- (c) By way of an application for a declaratory judgment.

- 1.15 Eliminating the possibility of seeking or obtaining an extraordinary remedy would also end the present need to provide procedural rules for prerogative order applications (including orders “in the nature of mandamus, prohibition or certiorari” to quote section 4(1) of the 1972 Act again).
- 1.16 At present, an applicant seeking an extraordinary remedy must comply with Part 7 of the High Court Rules. Rules 622 to 627B were substituted, as from 1 February 1998, by rule 14 of the High Court Amendment Rules 1997 (SR 1997/350). In the Commission’s present opinion these rules in Part 7 should be eliminated because they introduce further complexity into review procedure. If the extraordinary remedies are finally abolished, as the Commission recommends, they of course become unnecessary.
- 1.17 Rules 627 and 627A prescribe special rules about removal from a public office – what is sometimes called a *quo warranto* proceeding. Strictly speaking, a *quo warranto* proceeding does not seek a traditional extraordinary remedy, but it is alike in having had a long history and a significant function. The flexible remedy of declaration, which is available under the Judicature Amendment Act 1972 (coupled in an extreme case with a remedy by way of injunction) suffices, in the Commission’s view, to cope with removal proceedings – which are brought very rarely in modern times.
- 1.18 The commentary in *McGechan on Procedure* on rule 627 indicates that resort may need to be had to the “former practice in *quo warranto*”, referring to Short and Mellor, *The Practice of the Crown Office* (2nd ed, 1908) – a true blast from the past. Any remedy obtainable under rule 627 at the present day can equally be obtained by either a review of the appointment of the person, claiming to set it aside because it was *ultra vires* for some reason, or in proceedings for an appropriate declaration, and without the complication of having to decide who exactly ranks as a “public officer”. Any problems connected with the death, resignation or removal of a party should be dealt with by the appropriate general rules of the High Court and not by the special rule contained in rule 627A. Rules 627 and 627A are something of a distraction in the present context and may now be laid to one side.
- 1.19 Rule 624 (injunctions) is also unnecessary. The Court’s general jurisdiction to grant injunctions is sufficient. Rule 624 is of narrow scope, and there is room for technical argument as to its correct interpretation. The Commission’s view is that if an injunction is sought against a defendant based on a public law cause of action the ordinary principles and the available discretions are amply sufficient to enable the Court to grant an appropriately worded injunction. The Commission would, however, be pleased to hear of any cases where the existence of rule 624 proved to be vital.

- 1.20 All the other rules collectively receive several pages of commentary in *McGechan on Procedure*. Rule 628 of the High Court Rules is an example. It provides:

628 Procedure

- (1) Every application for the assistance of the Court under this Part, and every application for review under Part 1 of the Judicature Amendment Act 1972 shall (notwithstanding section 4 of that Act) be commenced by statement of claim and notice of proceeding in accordance with Part 2 of these rules.
 - (2) In the case of an application for review, the backing sheet shall state that it is an application for review.
 - (3) Where relief is claimed under this Part, the statement of claim may claim more than one of the remedies referred to in this Part and may claim any other relief (including damages) to which the plaintiff may be entitled.
 - (4) The procedure prescribed in Part 1 of the Judicature Amendment Act 1972 shall apply, subject to these rules, to applications for review under that Part.
 - (5) Section 9 of the Judicature Amendment Act 1972 shall apply in respect of an application for review under Part 1 of that Act as if the reference to a motion were a reference to a notice of proceeding filed in accordance with these rules.
 - (6) Subject to subclause (7), every proceeding to which this Part applies shall continue as provided in Part 4 unless some other substantial relief is claimed or the Court otherwise orders, in which case it shall continue as an ordinary proceeding.
 - (7) In an application for review under Part 1 of the Judicature Amendment Act 1972, a Judge may exercise the powers conferred by section 10 of that Act.
- 1.21 Rule 628 abundantly illustrates the complications that follow from the parallel procedural tracks for judicial review permitted under the present law. Non-lawyers are likely to find it unintelligible. When the rule is read along with the Judicature Amendment Act 1972, the following odd features become apparent.
- (1) Both the Act and the rule prescribe a portion of judicial review procedure, whereas a single statement of the whole would be preferable if possible (as the Commission tentatively thinks it is).
 - (2) Rule 628 is not confined to the extraordinary remedies, which would at least keep the two tracks formally distinct, but also deals with the procedure for the more frequent type of judicial review, namely by way of application for review under the 1972 Act.
 - (3) Section 4 embodies Parliament's intention in 1972 that applications under that Act should be launched by motion and supported or opposed by affidavit evidence. Rule 628, made by the Governor-General in Council on the recommendation of the Rules Committee under section 51C of the Judicature Act 1908, in effect repeals this and makes judicial review conform with the notice of proceeding and statement of claim procedure which is compulsory for ordinary actions in the High Court. The Commission believes that it is indeed preferable that a statement of claim complying with the relevant procedural requirements should be filed. But section 4, if read by itself, is a trap for the unwary.
 - (4) Damages are not obtainable as additional relief on an application for review under the Judicature Amendment Act 1972. Under rule 628(3) they may be claimed as additional relief in an application for an extraordinary remedy. This distinction lacks any possible justifying rationale. Whether a damages claim should be able to be joined in, and considered along with the

judicial review application which lies at its base, is further explored in paras 2.2–2.6 below.

- 1.22 The Commission is aware that a major simplification of Part 7 is proposed in the new High Court Rules, which are expected to come into force during 2009 – as a new Second Schedule to the Judicature Act 1908.

- 1.23 Part 30 of the proposed new Rules, annexed in the Appendices, eliminates most of the present Part 7. “Extraordinary remedy” is given a wide definition in proposed rule 30.3, thus including declarations, injunctions and orders for removal from public office. Proposed rule 30.3(1) preserves the two separate procedural tracks but aligns the procedure by providing:

An application for judicial review under Part 1 of the Judicature Amendment Act 1972 and an application for an extraordinary remedy must be commenced by statement of claim and notice of proceeding in accordance with Part 5 of the rules.

Part 5 is the part which will contain the rules identifying the proper office of the court; specifying the format of court documents; laying down the main pleading rules; the rules for the contents of statements of claim; rules about the authority of solicitors to act; appearances; security for costs; and e-filing.

- 1.24 The Commission welcomes the simplification of the statement of judicial review procedure that the introduction of Part 30 will produce. Rule 30.4 will make it clear that if an applicant for (say) an order in the nature of mandamus seeks an interim order in advance of the main hearing, that applicant must, if so ordered, file an undertaking to pay damages to the party against whom the interim order is directed. This means that there will be no difference between the 1972 Act, which deals with interim orders in section 8, and extraordinary remedies so far as interim relief is concerned. Rule 627B, unlike section 8, presently confers an unfettered discretion and says nothing about conditions precedent to the exercise of the Court’s jurisdiction. Conversely, under rule 627B the application “must file a signed undertaking”, whereas section 8 is silent about undertakings and is interpreted as enabling the Court to insist on an undertaking only when such is just and appropriate. The Commission, recognising that practical circumstances vary widely, records that it prefers the more flexible approach that has developed under section 8.

- 1.25 The Commission, however, is tentatively of the opinion that a more extensive reform is desirable. This would be achieved by enacting a new Judicature Amendment Act in place of the 1972 Act. This would:

- Eliminate the extraordinary remedies as such, and, along with that, the need for the new Part 30.
- Provide for the additional range which orders in the nature of mandamus, certiorari and prohibition presently offer by suitable expansion of the 1972 language.
- Where appropriate, transfer procedural rules to a single place, namely the (revised) High Court Rules, which would give greater flexibility as those rules could more readily be changed, if necessary, through the Rules Committee process.
- Ensure that the general shape, and reach, of the remedy of judicial review is nevertheless authorised by Parliament in the light of today’s conditions and

present social requirements. Judicial review of any kind is costly in terms of time and money, and on some occasions causes delay in implementing significant government decisions. It is proper, in the Commission's view, that Parliament should debate and decide the procedure that must be observed when challenging decisions which sometimes determine matters which will affect the lives of many citizens, eg, the validity of statutory regulations or a decision refusing visas to an entire sporting team.

- 1.26 The granting of an extraordinary remedy is an aspect of the High Court's inherent (ie, other than legislation-based) jurisdiction. That jurisdiction stems from section 16 of the Judicature Act 1908, which provides:

The Court shall continue to have all the jurisdiction which it had on the coming into force of this Act and all judicial jurisdiction which may be necessary to administer the law of New Zealand.

- 1.27 The inherent jurisdiction "permeates all proceedings and is able to fill any gaps left by the rules" (*McGechan on Procedure*, J 16.06). It is unwise and unnecessary to seek to define the scope of the High Court's inherent jurisdiction: *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA). In *Zaoui v Attorney-General* [2005] 1 NZLR 577 the Supreme Court made it clear that both the substantive and procedural inherent jurisdiction can be displaced by legislation (see paras 36–38). Thus the inherent jurisdiction to grant one of the extraordinary remedies was in large measure superseded by the Judicature Amendment Act 1972.
- 1.28 The Commission has of course no intention of proposing an amendment to section 16 of the Judicature Act 1908. But it does not accept any notion of an inalienable inherent jurisdiction residing in the High Court.
- 1.29 Probably few would advocate a return to a non-statutory regime where judicial review procedure is solely determined by judicial precedent and slowly evolves by incremental extension. On the other hand, the Commission is anxious to preserve the ability of courts to develop public law incrementally. The future may well see presently unknown kinds of challenge to decisions or actions of Ministers, tribunals, authorities and officials. But the possibility of novel extension of the range of judicial review, and the possibility that the grounds of review may be broadened or narrowed, are compatible with a clearly laid down procedure for seeking judicial relief, free of anomalies which cannot be rationally justified but only explained historically.
- 1.30 The Commission undertook research to ascertain whether there was any case between 1972 and the present day in which the availability of an extraordinary remedy enabled justice to be done where the absence of such a remedy would have caused an injustice, ie, a public law error was exposed but nothing could be done about it. The result of that research was that there are remarkably few cases, reported or unreported, since the date when the Judicature Amendment Act 1972 came into force, which could be quoted as examples of the need for residual recourse to one of the extraordinary remedies.
- 1.31 One recent example of such a case is *Templeton v Kapiti Coast District Council* 7/12/07, HC Wellington, in which Mackenzie J first held that no contract between the parties had been concluded for the purchase of a section. But "the only reason why the contract was not executed so as to become legally binding

was the refusal to undertake the purely administrative task of executing the contract” (para 31). Was it appropriate to make an order for mandamus under rule 623? Mackenzie J expressly recognised that this would be equivalent to specific performance, but of a contract that had not come into existence. A council committee’s decision to rescind the sale of the land had been earlier set aside under section 4(2) of the Judicature Amendment Act 1972. The learned Judge granted mandamus directing the Council to transfer the land to Mr Templeton.

- 1.32 Nevertheless there is some difference in the ground covered by judicial review under the Judicature Amendment Act 1972 and that covered by the prerogative writs. The Commission has no desire to leave any wrong unremedied in which an extraordinary remedy is presently available. The question is how best to achieve this. There are two possible approaches.

Option 1 – Replace the definition of statutory power with a definition based on public functions

- 1.33 In the original 1972 Act the unified procedure in section 4 was to apply only to the exercise of a “statutory power” as defined by section 3. The definition opened, as it still does, by referring to “a power or right conferred by or under any Act” to do various things including “(b) to exercise a statutory power of decision”. To be such, a power or right must decide, or prescribe, or affect:

- (a) The rights, powers, privileges, immunities, duties or liabilities of any person; or
- (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

- 1.34 From 1972 to 1977 the new unified procedure was, accordingly, applicable to exercises of public power conferred by statute or subordinate legislation. It was appropriate that the leading concept used to define the scope of judicial review under the 1972 Act should be “statutory power”. The new procedure was not available in relation to the exercise of non-statutory powers, for example by domestic bodies deriving their powers from a club’s constitution or otherwise by contract. Their decisions were nevertheless amenable to declarations and injunctions. Nor was it available to challenge exercises of the prerogative powers of the Crown.

- 1.35 The Judicature Amendment Act 1977 expanded the definition of “statutory power” to include a power or right conferred “by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate” and it added a fifth kind of power, namely a power or right “(e) to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person”.

- 1.36 It can be seen that the language of “statutory power” was now misleading. In the event, comparatively little use of judicial review has been attempted in relation to decisions by boards of directors of companies and other corporate decisions. The Commission certainly has no wish to abolish or reduce reviewability in this area.

- 1.37 In more recent years the old prerogative orders have come to show some continuing usefulness. Thus in *R v Panel on Take-overs and Merger, ex parte Datafin plc* [1987] QB 815 at least Lord Donaldson MR considered reviewability extended beyond powers that were statutory, and that only those bodies whose power was based upon contract or consent were excluded from review. The panel was a self-regulating unincorporated association which devised and operated the city code on take-overs and mergers; it was “performing a public duty”, and it was subject to public law remedies. In *Electoral Commission v Cameron* [1997] 2 NZLR 421 the Court of Appeal agreed that decisions of an unincorporated board (constituted under the rules of an incorporated society) were reviewable. The Court (especially Gault P at 429) relied on the references to “unincorporated” bodies and to “rules or bylaws” in section 3 of the Judicature Amendment Act 1972. The *Datafin* case was mentioned without disapproval.
- 1.38 In *Peters v Davison* [1999] 2 NZLR 164 the Court of Appeal held that the reports of commissions of inquiry may be judicially reviewed for error of law. In *Royal Australian College of Surgeons v Phipps* [1999] 3 NZLR 1 the Court of Appeal held that in some situations a combination of statutory (or here corporate) and contractual powers may be the subject of judicial review.
- 1.39 In *Mercury Energy Ltd v Electricity Corporation of NZ Ltd* [1994] 2 NZLR 385, the Privy Council held that the Corporation’s decisions were amenable to review both under the 1972 Act and the common law. The Privy Council referred to the public nature of the Corporation, and the public nature and effects of those of its decisions which were made in the public interest.
- 1.40 Judicial review is a public law remedy. It would be widely accepted, the Commission thinks, that it should be available in relation to the widest possible range of public functions, but unavailable in respect of private functions, certainly when a private law remedy is available. That is the case, for instance, when a member claims that his or her sporting club, an unincorporated society, has made a decision which breaches the rules. Those rules are treated as constituting a contract between that member and other members: the member can almost always obtain relief by way of declaration or injunction or both. The difficult task is to differentiate public from private by a formula which will reduce the scope for argument in the borderland area between them. If a social or sporting club is incorporated, as many are, its decisions are judicially reviewable. This has been the case since 1977.
- 1.41 At the same time the Commission thinks there is a reasonably strong argument that the reviewability of the exercise “of any prerogative or other reviewable function of the Crown” should be expressly stated. This would admittedly leave room for argument as to whether the exercise of a non-statutory, non-prerogative power is “reviewable” as a matter of law (if indeed it is justiciable, a different issue). The complexity of public administration today involves a variety of decisions by different varieties of Crown entity, subject to varied degrees of control by the Crown. Thus the Crown Entities Act 2004 recognises five different kinds of “Crown entity” – statutory entities (subdivided into Crown agents, autonomous Crown entities and independent Crown entities); Crown entity companies; Crown entity subsidiaries; school boards of trustees; and tertiary education institutions. The Commission thinks it would be hazardous to assert that the decisions of each kind of Crown entity are reviewable or unreviewable

when the entity is other than a body corporate (which most are). In short, there is still room for debate in some cases, but no need to have two complementary judicial review tracks in order to cope with the complexities, especially when the two tracks have puzzling procedural differences.

1.42 A possible formulation for the new definition is set out below.

power means—

- (1) A power or right conferred or a duty imposed by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate—
 - (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
 - (b) To decide or prescribe or affect the rights, powers, privileges, immunities, duties, or liabilities of any person; or the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether that person is legally entitled to it or not;
 - (c) To require a person to do or refrain from doing any act or thing that, but for such requirement, that person would not be required by law to do or refrain from doing; or
 - (d) To do any act or thing that would, but for the power or right or duty, be a breach of the legal rights of a person; or
 - (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of a person;
 - (f) and includes—
 - (g) The exercise of any prerogative or other reviewable function of the Crown; and
 - (h) The performance by an unincorporated body of any public function which relates to or affects the interests of the public or a section of the public (whether or not the interests of an individual person are also affected).

1.43 The formulation substitutes “power” for “statutory power” and “statutory power of decision”, thus rectifying the nomenclature problem. First, it would make it clear that the exercise of the prerogative is amenable to review. Secondly, it would emphasise the public function of a particular authority/tribunal/person as opposed to its exact constitution or method of acting or decision-making. Recourse to one of the prerogative orders would be unnecessary. The ghosts from the past would be relegated to legal history.

1.44 If a body formed for any purpose, commercial or otherwise, is incorporated under any Act its decisions would, at least theoretically, be reviewable. If a body is unincorporated, however, it would have to be shown that a decision or action was made in the performance “of any public function which relates to or affects the interests of the public or a section of the public (whether or not the interests of an individual person are also affected)”. This would follow the lead given in *Electoral Commission v Cameron* (para 1.37 above). It would be open to the High Court in marginal cases to examine the significance of the function when classifying it as a “public function” or a “private function”. The High Court would also be entitled to look at, amongst other things, the number of people affected by the defendant’s activities, the way in which people were appointed (or elected) to it, its funding (whether from taxation or otherwise) and whether

it can be called to account by the Auditor-General or by a Minister of the Crown or a public official. Such accountability would strongly favour classifying the defendant's particular function as a "public" one.

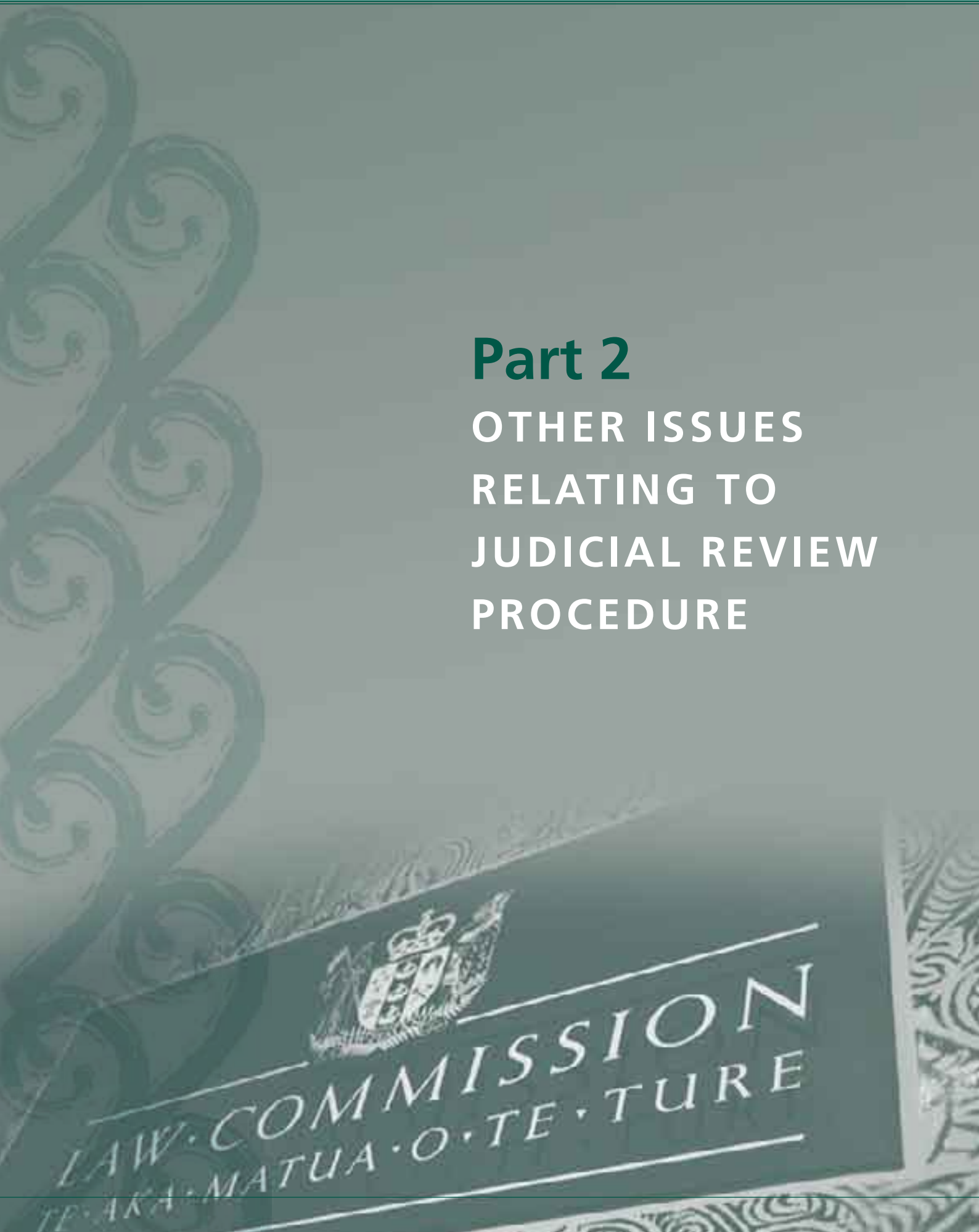
Option 2 – A simple statutory reference to judicial review

- 1.45 Another possible approach would be to provide a statutory procedure for applications for judicial review without stating what decisions or actions are reviewable or the grounds on which they might be reviewed. This would avoid having to define "power" and instead rely simply on the term "judicial review" to identify the scope of the procedure. As already noted, the terms "statutory power" and "statutory power of decision" were themselves extended in 1977 to include references to the constitution or other instrument of incorporation, rules, or bylaws of a body corporate and the term "power" was also extended to include a power or right to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.
- 1.46 Decisions of the courts since the Judicature Amendment Act 1972 have pushed the boundaries of the statutory language in order to cover situations perhaps not envisaged by the original language of the 1972 Act. The Commission has pointed to the difficulties inherent in distinguishing between public and private functions and to the complexity of modern public administration. Judicial review is now a sufficiently well recognised and discrete area of the law that it may be appropriate to simply use that term without attempting to define its ambit. Section 31 of the Supreme Court Act 1981 (UK) use the term "judicial review" without defining it. Other legislation refers to particular branches of the law without attempting to define their reach. For example, section 4(1)(a) of the Limitation Act 1950 requires actions "founded on simple contract or on tort" to be brought within 6 years from the date on which the cause of action accrued.
- 1.47 The 1972 Act is in essence a procedural statute designed to provide an effective procedure for challenging administrative action. Retaining the prerogative writs was designed to protect against any limitation inherent in the judicial review procedure introduced by the Act. Judicial review in its broadest sense has been the result of judicial development. There is an argument for saying that this development should be allowed to continue without Parliament having to attempt to capture it in a procedural statute at any given point in time.
- 1.48 The Law Commission would welcome comments on the question whether the statute should simply provide a procedure for judicial review without relying on a definition of power. A new Act would not define the term "power". The kinds of decision or actions that are subject to review are well enough settled and could be left to further judicial development in appropriate cases.
- 1.49 The Commission invites submissions on the following questions which go to the merits of the proposals in the previous paragraphs:
 - (1) Is it desirable to define the scope of judicial review?
 - (2) Do the advantages of a statutory formulation in terms of clarity and predictability outweigh the disadvantages (some reduction of the Court's freedom of manoeuvre)? If not, would a simple statutory reference to judicial review be sufficient?

- (3) Assuming a definition is desirable:
- (a) Should the actions/decisions of all bodies corporate be reviewable, and if not, on what basis should a distinction be drawn between bodies corporate whose actions/decisions can be reviewed, and those which cannot?
 - (b) Should the actions/decisions of some unincorporated bodies be reviewable? If so, is the criterion tentatively proposed by the Commission an acceptable one?
 - (c) Assuming that exercises of the Crown's prerogative are not barred from being reviewed, should reviewability extend still further? If so, what formula would best express the permitted extension?
 - (d) How important is it to attain clarity as to what actions/decisions are amenable to review? Should marginal cases be just left to be argued by appeal to analogous earlier judicial decisions?
 - (e) Do the remedies of mandamus, certiorari and prohibition, and orders "in the nature of" them, serve any significant modern purpose? And if the answer to that question is "yes", what is that purpose, and is it sufficient to justify retaining them into the future, despite the tentative views expressed in this Issues Paper?

Part 2

OTHER ISSUES RELATING TO JUDICIAL REVIEW PROCEDURE



Part 2

Other issues relating to judicial review procedure

- 2.1 If the prerogative writs are to be abolished, it makes sense to consider whether there are other procedural reforms that may be desirable, particularly in those areas where there are currently procedural differences between Part 1 applications and applications for prerogative writs. In particular it is worth considering the following issues relating to judicial review procedure.

DAMAGES

- 2.2 The High Court has no power to award damages when an application for judicial review is brought: see, eg, *Swaab v Medical Council of New Zealand* 23/6/2000, Doogue J, HC Wellington CP 149/99 at para 57; *McGechan on Procedure* JA 4.07. By contrast, an application under Part 7 may seek damages: rule 628(3). One case in which damages was thus sought is *Henry v Devereaux* 8/4/2003, HC Auckland, CP 351/02.
- 2.3 Very often, no damages are available against the defendant, even if claimed, because while the outcome of a successful application for review is frequently a decision that the defendant's determination was invalid, there is no right to damages simply because a determination was invalid without more. See *Takaro Properties Ltd (in rec) v Rowling* [1978] 2 NZLR 314 (CA). When a plaintiff can point, for instance, to a tort having been committed, damages are obtainable; the invalidity of exercise of a statutory power of decision may conceivably remove a justification that would otherwise exist.
- 2.4 There is no obvious reason why damages should be freely claimable when an extraordinary remedy is sought, but never available when the more frequently used application for review under the 1972 Act is brought.
- 2.5 There are sound reasons for the rule precluding damages claims being dealt with in a judicial review proceeding. The causes of action are different, and even in those cases where a tort can be readily established there may be extensive evidence required to establish the measure of damages.

- 2.6 The Part 1 procedure is designed to be both convenient and expeditious. The ordinary rules of civil procedure deliberately do not apply. Nevertheless there may be some cases where it would be both efficient and convenient to deal with damages claims at the same time. Cases involving Bill of Rights arguments are a possible example. Accordingly views are sought on whether it would be appropriate to provide a limited exception to the rule against damages claims being heard with judicial review proceedings. For example the Court could have power to direct the proceedings be heard together where the parties consent and dealing with the proceedings at the same time would not unduly delay the hearing or is otherwise in the interests of justice.

EVIDENCE

- 2.7 Evidence in support of an application for judicial review, or in opposition to it, is given by affidavit. The same is true of an application brought under Part 7 of the High Court Rules.
- 2.8 The major issue relates to cross-examination. Cross-examination was not permitted as of right in judicial review proceedings at common law. This is also the case with applications for review under the Judicature Amendment Act 1972. The leading authority is *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650, where the Court of Appeal held that the rule of practice to that effect is founded in the nature of judicial review itself and the provisions of section 10 of the 1972 Act. Rule 508 (the general rule entitling an opponent to give notice that a deponent be produced for cross-examination) was probably not intended to alter the settled practice.
- 2.9 *McGechan on Procedure* comprehensively sets out the position under Part 7 at HR 628.03:

The issue of whether cross-examination, which is not permitted as of right in proceedings for judicial review under the Judicature Amendment Act 1972 (see JA9.07), is available in proceedings under Part 7 was determined recently in a series of High Court and Court of Appeal decisions. The “special cases” provisions in Part 4 apply to Part 7 proceedings by virtue of rr 449(a) and 628(6) (see HR628.02(2)). Part 4 includes r 455(1)(b), which allows evidence to be given by affidavit, in accordance with rr 507–519. Rule 508 permits a party to serve a notice compelling a deponent who has sworn an affidavit to be cross-examined. It is therefore possible, on the face of it, to have cross-examination in a Part 7 (*sic*) that is proceeding in the nature of judicial review.

- 2.10 However, as with proceedings under the 1972 Act, cross-examination is not available as of right in Part 7 proceedings: *White v Wilson* [2004] 1 NZLR 201; (2003) 16 PRNZ 890 (CA), at para 16. A rule 508 notice compels a party to decide whether to submit the deponent to cross-examination, or not to use that affidavit in evidence. If the decision is to withhold the affidavit, so avoiding cross-examination, the protagonist may then seek special leave to produce the evidence: rule 508(3). When considering whether to allow such evidence the Court will base its decision on factors including the practice against cross-

examination in judicial review proceedings, and the potential prejudice to the party unable to cross-examine: *White v Wilson* [2004] 1 NZLR 201; (2003) 16 PRNZ 890 (CA), at para 20.

- 2.11 The net result is that a party seeking the right to cross-examine a deponent in Part 7 proceedings will face the same challenges as a party following the 1972 Act path. This is clear from the second Court of Appeal judgment in the *White v Wilson* saga, where it was held that Part 7 proceedings are akin to judicial review proceedings under the 1972 Act and that the nature of the jurisdiction being exercised is the same: *Wilson v White* [2005] 1 NZLR 189; (2004) 17 PRNZ 270 (CA), at para 23. The criteria found in cases decided under the 1972 Act, such as *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650; (1997) 10 PRNZ 405; [1997] NZAR 322 (CA), will therefore apply in practice notwithstanding rule 508. Accordingly cross-examination will only be allowed in Part 7 proceedings where the interests of justice require it.
- 2.12 The result of this obviously rather technical reasoning is that a nearly identical approach is taken by the courts in each of the two review pathways, but there is no counterpart of rule 508(3) in proceedings under the 1972 Act, so there is an element of doubt as to whether the tendering party could ask the Court to grant special leave to read the affidavit of a non-produced deponent. If there is a different legal answer it should, in the Commission's view be eliminated as such a difference would lack any policy justification.
- 2.13 The Commission's view is that the current approach to cross-examination under the Judicature Amendment Act 1972 is entirely appropriate, but would be interested in views on whether any change is required.

LOCATION OF THE PROCEDURAL RULES

- 2.14 Should whatever procedural rules are decided on be contained in a statute, or transferred to the High Court Rules where they would be more readily alterable?
- 2.15 The Commission's provisional view is that the law as to the general scope of judicial review should be contained in statute. That was the view of the Public and Administrative Law Reform Committee in its Fourth Report (1971). The argument here is that judicial review, and the possibility of it, is of the highest importance in curbing excesses of power and rectifying legal (as opposed to factual) mistakes, and that the scope of that power should be decided by the democratically elected Parliament. Looking at the issue another way, in Australia the grounds of review were codified in the Administrative Decisions (Judicial Review) Act 1977 (see section 5). New Zealand has not followed suit, and the Commission thinks wisely, because much of the subsequent Australian case law has consisted of grappling with the general words of the 1977 Act. The point, however, is that when in 1972 (and 1977) Parliament elected *not* to attempt to codify the grounds of review it took authority over a central design feature of our judicial review structure.
- 2.16 The Public and Administrative Law Reform Committee also chose to include several procedural provisions in its proposed Judicature Amendment Bill. Section 9 of the 1972 Act therefore contains several rules which one would normally expect to find in rules of court, as well as the potentially misleading section 9(1)

requiring a “motion accompanied by a statement of claim” – a jump in the wrong direction. Section 10(1) empowers the calling of a procedural conference. In terms this seems to require an application for an order to hold a conference, followed subsequently by the conference itself. In practice the two steps were soon conflated into one.

- 2.17 It seems clear that Parliament’s intention in prescribing the procedure in statute, rather than rules, was to distinguish judicial review procedure from that which applied to other civil proceedings. The concern was to ensure that judicial review proceedings are dealt with in a manner that is tailored to the individual circumstances of the case.
- 2.18 Under section 6 of the 1972 Act proceedings commenced seeking mandamus, prohibition or certiorari in relation to the exercise of a statutory power “shall be treated and disposed of as if they were an application for review”. This rule supports the dominance of the 1972 Act over the old prerogative orders, and can be characterised as going to the scope or reach of statute-based judicial review – as opposed to procedural rules governing the procedure to be followed within that allotted scope or reach. The same point can be made in respect of section 7, which gives the Court a discretion to treat proceedings for a declaration or injunction in relation to a statutory power as an application for review.
- 2.19 There are some reasons for suggesting that the more detailed rules should be withdrawn from the overarching statute, and relocated in rules of court. First, they are not more significant than other rules of Court. Initiation of changes to those rules is entrusted to the Rules Committee under section 51C of the Judicature Act 1908. Secondly, if they are to be subsequently altered as other Court procedure evolves, this should be able to be accomplished without troubling Parliament on such matters of practical detail. However, if that approach was adopted, it would seem desirable that there be some statutory signal that ensures the current flexibility in the procedure is retained.
- 2.20 Accordingly the Law Commission seeks views on whether rules such as those in sections 9 and 10 of the 1972 Act should remain expressed in statutory form or should be dealt with under the High Court Rules. If the latter, should there be some express statutory provision to ensure that judicial review procedure remains a discrete and flexible procedure rather than being governed by the ordinary civil procedure rules?
- 2.21 The Commission would also be interested in views on whether any change is necessary to judicial review procedure. For example, the Commission would be interested to learn whether readers consider that in practice enough of the challenged decision-maker’s previous record is placed before the High Court and, if not, whether the solution lies in changing section 10(2)(f) or otherwise.

A LIMITATION PERIOD?

- 2.22 Judicial review is an important way of promoting good administration. Conversely, if judicial review is permitted by acceding to applications filed long after the action or decision which is challenged, this will tend to work against good administration. Wade and Forsyth put it this way in *Administrative Law* (9th ed) at 658:

Good administration requires that important decisions, on which many other decisions and actions will depend, should not be able to be set aside long after the event by a successful application or claim for judicial review. For this reason the question of whether there has been “undue delay” in the bringing of a claim has long been important in applying for judicial review.

- 2.23 In the United Kingdom the fundamental provisions are sections 31(6) and (7) of the Supreme Court Act 1981 which are in the following terms:

- (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
 - (a) leave for the making of the application; or
 - (b) any relief sought on the application,
 if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
- (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

- 2.24 These provisions are supplemented by rule 54.5 of the Civil Procedure Rules which is in the following terms:

- (1) The claim form must be filed—
 - (a) promptly; and
 - (b) in any event not later than 3 months after the grounds to make the claim first arose.
- (2) The time limit in this rule may not be extended by agreement between the parties.
- (3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.

- 2.25 The claim must be made “promptly” which means that in appropriate cases there may be “undue delay” even when brought within the 3-month limit. These cases are, primarily, those where a successful claim would cause “substantial hardship” or “prejudice the rights” of “any person” or would be “detrimental to good administration”. But the House of Lords has said that the possibility of “undue delay” within the 3-month limit may be “productive of unnecessary uncertainty and practical difficulty”: *R (Burkett) v Hammersmith & Fulham LBC* [2002] 1 WLR 1593.

- 2.26 In New Zealand there has never been a universal cut-off date, similar to that now found in rule 54.5. The Courts here have instead acknowledged that they have, and must exercise, a discretion to refuse relief to an otherwise successful applicant for judicial review if the applicant has been guilty of unjustified delay in bringing the application, if that delay has been relied on by the decision-maker or other persons, or if other people have been otherwise prejudiced. In determining whether delay was “unjustified” or “undue” or “inexcusable” – the terminology employed has not been altogether consistent – the Courts have examined all the circumstances that caused the delay and their objective reasonableness.

- 2.27 It is useful to note the point recently emphasised by the High Court of Australia in *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14 (18 April 2007). The Court was examining the constitutional validity of section 486A of the Migration Act 1958 (Cth). This purported to deny to the Court any competency to make an order allowing the making of an application for a prerogative order outside a mandatory time limit, reckoned from the time of the actual notification of the decision in question. At para 56 the Court said:

In *Plaintiff S157/2002* [(2003) 211CLR 476, 494] Gleeson C J emphasised in relation to the former section 486A that the time of the notification of a decision “may be very different from the time when a person becomes aware of the circumstances giving rise to a possible challenge to the decision”. His Honour went on to instance the discovery, after the expiry of a time limit fixed by reference to the time of notification, that the decision had been procured by a corrupt inducement. What was there said is applicable to the present operation of section 486A. Likewise the plight of an applicant where the circumstances giving rise to actual or apprehended bias are unknown and unknowable whilst the section 486A timescale is in operation but later become known to the applicant.

The fixing upon the time of the notification of the decision as the basis of the limitation structure provided by section 486A does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit. The present case where the plaintiff was one day late, apparently by reason of a failure on the part of his migration adviser, is an example.

- 2.28 An applicant may delay filing that applicant’s originating court documents for various reasons. The reason might of course be the negligence or dilatoriness of the applicant’s solicitor. But other reasons include the following possibilities:

- The applicant, aggrieved by a decision and determined to get it changed, has been diligently pursuing an alternative to litigation, eg, correspondence with the decision-maker or representations to a Minister of the Crown.
- The applicant has been pursuing matters of fact, possible deponents, or investigating circumstances not revealed by the decision, eg, the facts that would prove that the applicant’s suspicion of bias was well-founded.
- The applicant has received promises to relieve the applicant’s practical position, but they have not been implemented, though the applicant has relied on them or at least been lulled into a false sense of security.
- The applicant has few financial resources and has been obliged, without fault on the applicant’s part, to wait for a decision on a legal aid application.
- The delay has been caused by the defendant not co-operating with an applicant’s reasonable requests for information.
- Unsuccessful settlement negotiations have occupied considerable time.

- 2.29 In New Zealand a leading case is *Turner v Allison* [1971] NZLR 833. At 850–1 Turner J said:

In *R v Stafford Justices* [1940] 2 KB 33 the English Court of Appeal had to consider the refusal of a Divisional Court, in the exercise of its discretion, to issue a writ of certiorari for the purpose of quashing an application to divert a public highway under the Highways Act 1835. The Justices granted a certificate on 3 January 1938, and thereafter builders proceeded with their operations in reliance on the certificate,

erecting houses so as to encroach on the old footpath. The local authority became aware of the position on or before 26 November 1938; but it was not until 31 March – over four months later – that the proceedings were begun. The Divisional Court held that the delay was too long, and that in the circumstances it disentitled the local authority to the relief claimed. On appeal Sir Wilfrid Greene said at page 46:

“Quite apart from what had happened before that, it seems to me that that delay of five [sic] months before applying to the Court is, in the circumstances, quite unwarrantable. I cannot see what justification there can be and what special privilege a local authority has got to take longer over urgent operations than anybody else. If, in November, the position was realised by the competent officer of the Council, a position which was realised after a considerable period had already elapsed and operations were going on, it was at that time that quick and speedy application for relief was obviously called for, instead of which five months’ delay took place before the application was launched. I should have considered myself that that circumstance alone was one which ought to prevent the Court from granting any relief on the facts of the case; but it is not necessary to rely on that alone. The delay, looking at the delay by itself, must in my judgment be carried back, not to November 1938, but to January of that year, when the full facts as at the date of the granting of the certificate were known to Council through their surveyor. That delay is a very long one, but in the interval the Council had, by their conduct, encouraged and permitted the builders to do something which, if the old highway had never been stopped up, was entirely illegal. So long as the old highway remains open, the builders have no right whatsoever to build houses across it, and the effect of taking any step which will open up that highway again will be to put the builders in the position of having illegally obstructed the old footpath by building houses upon it, which incidentally we are told they have sold to purchasers. The position would be really a ridiculous one, if this Court, at this stage, and in the light of what has happened, were to take a course which would result in reopening that old footpath as a public highway, with all the consequences which flow from its status as a public highway.”

I have not failed to notice that the period of delay was four months, not five months as the learned Master of the Rolls stated it; but it does not seem to me to alter the principle expounded in the decision. It may be thought that the facts which gave rise to his observations bear some resemblance to those of the present case.

One other authority will suffice – *R v Aston University Senate* [1969] 2 QB 538; [1969] 2 All ER 964. That was a decision of a Divisional Court consisting of Lord Parker C J, and Donaldson and Blain J J, the last part of the headnote of which reads:

“... that accordingly there had been a breach of natural justice. But that inasmuch as prerogative orders were discretionary remedies and should not be made available to those who slept upon their rights the applicants by their inaction between December 1967 and July 1968 had forfeited any claim to relief.”

- 2.30 Against that background, the Commission poses the question whether a limitation period should be enacted. No limitation period is prescribed in the Judicature Amendment Act 1972, no doubt in reliance on the fact that the High Court would continue to exercise the discretion recognised in *Turner v Allison*. If a limitation period were prescribed, questions would immediately arise as to the appropriate length of that period, and whether a discretion to extend the stipulated period should be exercisable, and, if so, on what grounds.

- 2.31 The Commission has issued several papers canvassing possible changes to the law of limitations. In *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) the Commission, at para 100, stated there were “good reasons for a general statute”. It recognised several exceptions to that general application, however. Thus “the defences in this Act” would not apply to “... a claim that is or could be brought in an application for review under the Judicature Amendment Act 1972” (page 153).
- 2.32 The recommendations in the Commission’s subsequent paper (NZLC R61, 2000) did not propose to apply limitation defences to judicial review. The Commission’s most recently published paper on this subject is *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16). A new Act is proposed, which would apply to specified claims or causes of action. Generally, the start date of a limitation period would be the date of the act or omission on which the claim is based – but there are exceptions. The primary limitation period would generally be 6 years (but in certain cases would be 1 or 2 years). The start date for an extension to the limitation period would generally be the date the plaintiff first acquires knowledge of relevant matters (but there will be exceptions). There would be an ultimate limitation period of 15 years, and the start date for it would (usually) be the date of the act or omission on which the claim is based. Unless the new Act applies a limitation period to a claim, or another Act prescribes a limitation period, there would be no limitation period for that claim.
- 2.33 At para 38 NZLC MP16 states:
- Judicial review.** NZLC R6 recommended that claims for judicial review be excluded from a new limitation act. In principle the same should apply to the remedies of mandamus, certiorari and prohibition, and to the public law remedy of injunction. They should not be included.
- 2.34 The present issue is whether the current law should remain on the ground that it is sufficient to deal with delay, or whether there should be a cut-off date as in the United Kingdom, or as found, for example, in section 486A of the Migration Act 1958 (Cth) which the High Court of Australia held to be relevantly invalid in the *Bodrudazza* case, para 2.27 above.
- 2.35 The major advantage of (say) a special 3 months cut-off for judicial review (whether or not extraordinary remedies survive after the present debate) would be that Ministers, officials, authorities, tribunals and any others exercising statutory powers would have either an absolute or a *prima facie* right to be free from review after the prescribed time had elapsed. They could proceed on the basis that the decision was now unchallengeable, and could be implemented without residual legal fear.
- 2.36 The disadvantages would be:
- (1) The period chosen as the primary period (subject, that is, to possible discretionary extension) would have to be on a “one size fits all” basis. In truth, judicial review cases vary hugely. In some, the application should be able to be brought within 2 weeks, as all the facts are known, especially when it is claimed there was jurisdictional error or error of law. In others, the stipulated period would turn out to be too short because of the complexity of the case or the investigations that reasonably have to be undertaken.

- (2) The grounds of discretionary extension would need to be stated to enhance consistency, but their wording would be difficult (compare the complexities of the English position summarised at paras 2.23–2.25 above), and many cases would be litigated on strike-out applications in advance of the substantive review, with arguments about the meaning of the chosen criteria, and their application to the particular circumstances.
 - (3) A Court is entitled to be much more confident in handling a delay plus prejudice argument at the end of a case, when it has been decided:
 - (a) what the facts are; and
 - (b) whether the claim made is correct; and
 - (c) everything bearing on whether delay was undue/unjustified/excusable has been revealed, and an opportunity for full argument afforded.
 - (4) If a time limit is prescribed, it is a very difficult policy issue whether it should be made to run from the date of the decision/action (or its notification), or the date when an alleged vitiating factor was reasonably discoverable. If the latter seems fairer, as it may well be, the ascertainment of the start date will often be a matter of great difficulty.
 - (5) The High Court may end up considering very much the same range of exculpatory material as at present, absorbing much the same amount of judicial time, but overlaid by issues about the meaning of the words in the new statutory formula, and the jurisprudence considering them (compare, for example, the emergence of a morass of decisions on section 8 of the Judicature Amendment Act 1972 regulating interim orders).
- 2.37 The Commission is presently unpersuaded that the present law is inadequate. It is inclined to think that the disadvantages of a statutory limitation period, whether 3 months, 6 months or a year, outweigh the single major advantage, with little increase in certainty for would-be claimants. But it welcomes submissions on the matters which have just been discussed.
- 2.38 The Commission seeks views on the following matters of procedure:
- (1) Should the Court have the ability to hear damages claims at the same time as judicial review and if so, in what circumstances?
 - (2) Should the procedural provisions in sections 9 and 10 of the Act be moved to the High Court Rules? If so, is there a mechanism for ensuring the procedure for judicial review remains tailored to the individual case?
 - (3) Should there be a limitation period in judicial review cases?
 - (4) Are there any other matters relating to judicial procedure that could usefully be addressed?

Appendices



Appendix

Proposed new rules

Part 30: Judicial review

30.1 Crown Proceeding Act 1950 not affected

This Part does not limit or affect the Crown Proceedings Act 1950.

Compare: 1908 No 89 Schedule 2 r 622

30.2 Definition

In this Part **extraordinary remedy** means—

- (a) An order of mandamus, prohibition, or *certiorari*;
- (b) A declaration or injunction in relation to the breach, threatened breach, continuation of a breach, or further breach of a duty of a court, tribunal, or person exercising public functions; or
- (c) An order removing a person from public office or a declaration as to the right of a person to hold a public office.

Compare: 1908 No 89 Schedule 2 rr 623–627A

30.3 Procedure

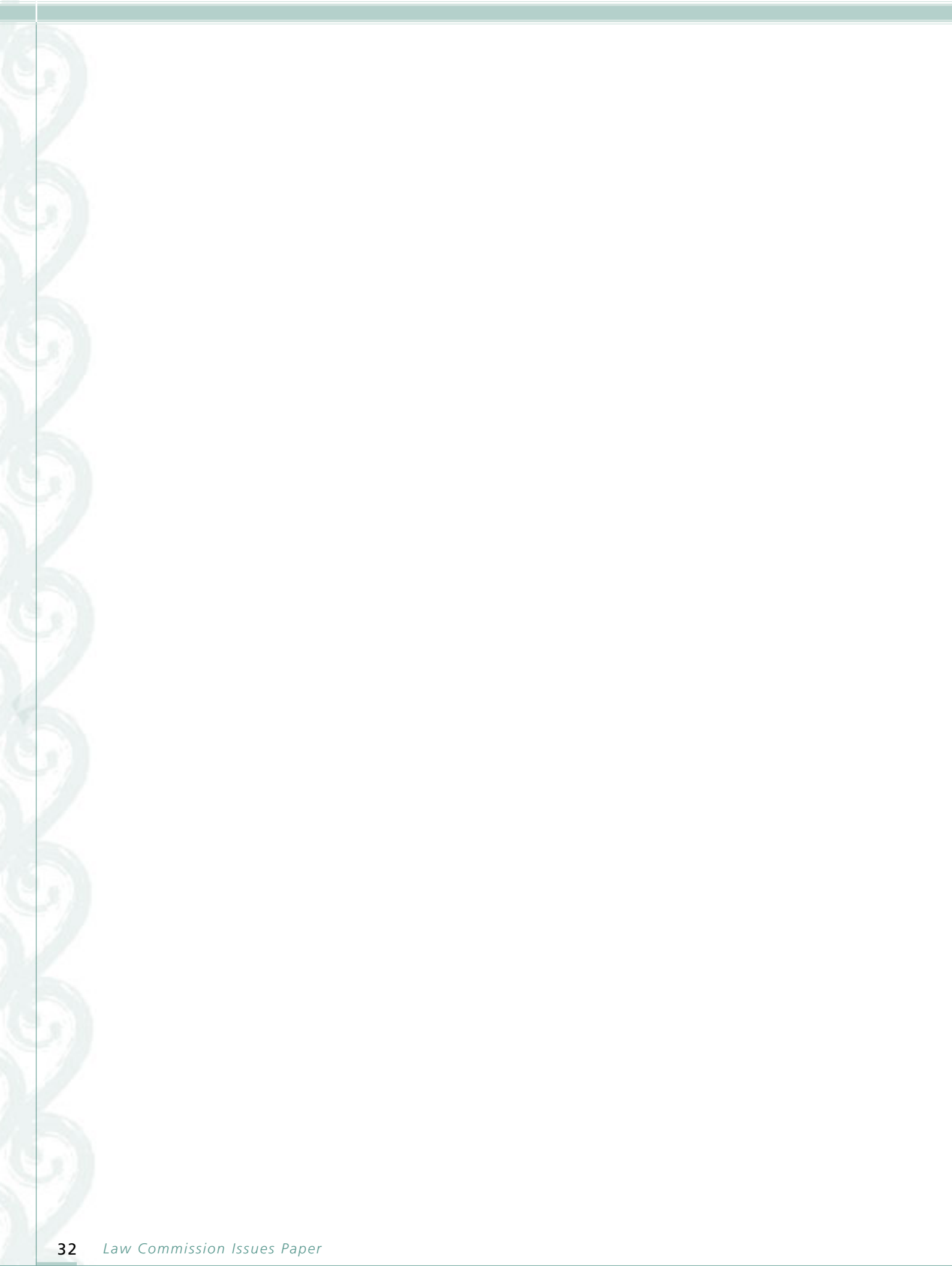
- (1) An application for judicial review under Part 1 of the Judicature Amendment Act 1972 and an application for an extraordinary remedy must be commenced by statement of claim and notice of proceeding in accordance with Part 5 of the rules.
- (2) The heading of an application for review under Part 1 of the Judicature Amendment Act 1972 must state that it is an application for review.
- (3) A statement of claim seeking an extraordinary remedy may claim more than 1 of those remedies and may claim any other relief (including damages) to which the plaintiff may be entitled.
- (4) Section 9 of the Judicature Amendment Act 1972 applies in respect of an application for review under Part 1 of that Act as if the reference to a motion were a reference to a notice of proceeding filed in accordance with the rules.

Compare: 1908 No 89 Schedule 2 r 628

30.4 Interim orders

- (1) When an application is made for an extraordinary remedy under this Part, the Court may make an interim order on whatever terms and conditions the Court thinks just.
- (2) An applicant who applies for an interim order must, if ordered by the Court, file a signed undertaking to the effect that the applicant will abide by any order that the Court may make in respect of damages—
 - (a) That are sustained by any other party through the making of the interim order; and
 - (b) That the court decides the applicant ought to pay.
- (3) The undertaking must be referred to in the order and is part of it.

Compare: 1908 No 89 Schedule 2 r 627B





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