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TE·AKA·MATUA·O·TE·TURE

Study Paper 10

MANDATORY ORDERS AGAINST THE CROWN
AND TIDYING JUDICIAL REVIEW

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Foreword

THE LAW COMMISSION agreed to a proposal by its President, Justice Baragwanath, to begin a project under his direction, to devise a solution to what all Commissioners agreed (and still agree) to be an untidiness in judicial review procedure. The mischief is that there are decisions (exercises of the prerogative for example) which may be subjected to judicial review, but to which the application for review procedure provided by the Judicature Amendment Act 1972 does not apply, because that Act is confined to exercises of *statutory* power.

As the project developed, however, it seemed to some Commissioners that what was being constructed was a very big bulldozer to squash a very small mole-hill. The President felt that the project was necessary as part of the exercise to confront the issue of whether coercive orders might be made against the Crown. Not all of his colleagues on the Commission agreed that this was an issue that it was sensible to spend time on, given the Crown's practice of heeding judicial declarations and the impossibility of effective enforcement if it did not. And there were other reservations, which seem unnecessary to particularise.

Moreover, it seems at least arguable that if contrary to this view the issue of whether a coercive order can be made against the Crown does have practical significance, any law change should (as should any other legislative intervention in the substantive law of judicial review) be preceded by a thoroughgoing inquiry into the constitutional significance of the shift in the boundary between judicial and executive power plus a law and economics examination of the effect (on commerce in particular) of the functioning of the existing law. It is by no means axiomatic that the public interest is served by an ever-widening power of judicial review of executive action.

The President, his term of office nearing expiry, was anxious that the work done on the project to date should not be wasted, and this anxiety was shared by his fellow Commissioners. To solve the differences in viewpoint the Commission has published the President's opinion as a study paper.

So to make it quite clear, the paper that follows is not a statement of the Commission's views. The paper must stand on its own feet as a work of legal scholarship, one (it seems appropriate to observe) by an author who at the bar had an extensive administrative law practice and whose wide reading and in depth knowledge of the subject commands the respect of public lawyers.

Preface

THIS STUDY PAPER records options for reform of the procedures for judicial review of administrative action. It contains the argument by the President of the Law Commission in favour of reform.

This Study Paper raises two broad issues for discussion. The first concerns an aspect of the status of the citizen in relation to the State in litigation: whether mandatory orders should become available against the Crown. The second issue relates to the procedures for judicial review of administrative action. These issues overlap when mandatory orders are sought on judicial review.

It became clear that to deal with the question of mandatory orders in the context of judicial review, we were also required to examine the statutory Crown immunity from mandatory orders provided by section 8(2) of the Judicature Amendment Act 1972 (JAA), itself derived from section 17 of the Crown Proceedings Act 1950 (CPA). That immunity is considered as an initial question in chapter 1.

The precept that the Sovereign can do no wrong is a relic of another age. But some of its baggage is still with us. In 1947 the United Kingdom Parliament reacted to the grossest injustices resulting from Crown immunities from suit by enacting the Crown Proceedings Act.¹ The New Zealand Crown Proceedings Act 1950 (CPA) (which, with minor exceptions, has remained unaltered ever since) essentially adopted the United Kingdom measure. While generally permitting the grant against the Crown in civil proceedings of relief available against a subject, section 17 prohibited the making of orders for injunction, specific performance, recovery of land and delivery of property against the Crown; only declaration was to be available. And (important to the later discussion of judicial proceedings) in relation to habeas corpus, mandamus, prohibition, or certiorari, and (since 1972) applications under the JAA to the extent that any relief sought is in the nature of mandamus, prohibition or certiorari, which is important to the later discussion of judicial review. So, save to the extent they are excluded by the JAA, the rules of the common law, including any Crown immunity, continue to apply and require consideration. Nevertheless when section 8 of the JAA introduced statutory procedures through judicial review for interim relief by way of prohibition or stay, it excluded Crown liability to any remedy other than declaration. The present law is complex; in some regards unclear and confusing.

The pressure for change has been reduced by the courts' ability to devise procedures that will do justice in most cases and, regarding the Crown's immunity from mandatory orders, by reason of the Crown's commendable practice of honouring declarations as to its liability. But that is no justification to avoid the need for reform.

¹ See Glanville Williams *Crown Proceedings* (Stevens & Sons Ltd, London, 1948); H Street, *Governmental Liability* (Cambridge University Press, Cambridge, 1953); PW Hogg and PJ Monahan *Liability of the Crown* (3rd ed, Carswell, Toronto, 2000).

Change has also been resisted on account of the substantive immunity of the Crown from various kinds of claim. Procedural reform requires consideration of this thorny topic. There is a tension between two important public interests: (1) that the Crown be able to perform its function of governing the country without undue interference from suit; (2) that the Crown be answerable to the law. The competing arguments are advanced at paragraphs 28–48.

The second question considered in this paper concerns the procedures for seeking judicial review of administrative action. The 1972 and 1977 amendments to the Judicature Act 1908, introducing a simple procedure for judicial review, revitalised the ancient processes derived from the common law prerogative writs. But a quarter century's development of the substantive common law has been more dynamic than could be accommodated within the statutory procedures. It has proved necessary in a variety of cases to revert to the old procedures, or to issue double proceedings, to avoid procedural error. While merely inconvenient for experienced administrative lawyers, for others, the Law Commission decided under section 5(1)(d) of its Act that this area of law warranted consideration, in discharge of its responsibility to advise how it can “be made as understandable and accessible as practicable”.

Procedures for judicial review applications are currently located within both the JAA and Part VII of the High Court Rules (HCR). The JAA provides a statutory basis for review, while the HCR allow claimants to resort to the common law of judicial review. When the JAA was introduced, it was thought that the common law procedures would wither away as people became familiar with the new statutory system.

The development of judicial review beyond the framework of the JAA has meant increased recourse to the common law procedures. The existence of a dual system of judicial review has led to inconsistencies of substance between the common law and statutory procedures. It is misleading to non-specialists.

The Law Commission therefore undertook to explore “tidying” the procedures for judicial review. This Study Paper proposes that the JAA be repealed and replaced with a skeletal Act which will retain the substantive elements of the current legislation. All the procedures for judicial review would be consolidated in the High Court Rules, redrafted to this effect.

In preparing this paper nearly three decades after the reform of 1972, the Law Commission sought the views of several of New Zealand's leading administrative lawyers – the Right Hon Justice Sir Kenneth Keith, who as a long-serving member of the Public and Administrative Law Reform Committee contributed notably to its work in this area, Professor Stuart Anderson and Associate Professor Andrew Beck of the University of Otago, Professor Michael Taggart and Janet McLean of the University of Auckland, Dr Rodney Harrison QC and Ailsa Duffy QC of Auckland, Associate Professor Philip Joseph of the University of Canterbury and Dr Graham Taylor, barrister of Wellington. All have greatly assisted the preparation of the present paper, whether or not they can identify their influence or agree with our proposals. The Rules Committee was also consulted. Grateful thanks are due to all of them.

1

Mandatory orders against the Crown: the issue and the options

1 THE ISSUE considered in this chapter is whether the current Crown immunity from mandatory orders² should remain. It is the subject of a difference of expert opinions.

2 There developed at common law a rule (the Crown immunity rule) which was long believed to have two limbs:

- (1) no mandatory order could be made against the Crown; and
- (2) nor could such order be made against Crown servants sued in an official capacity.

The theory was expressed that the King could do no wrong and could not be sued in his own courts. Accordingly it was said that any, let alone mandatory, relief granted as of right against Crown servants must relate to conduct in their private capacity, on the basis that by committing a wrong they had acted *ultra vires* their authority as officials.³

3 The second limb of the Crown immunity rule was later discredited. The present question is of the status of the first limb.

4 The combined effect of both limbs was grossly unfair. The Crown could and did commit wrongs. The worst effects of such a rule had been mitigated by the practice that the Crown would nominate as defendant an individual person to be sued, in a sense as its surrogate. But in November 1946 the Court of Appeal declined to act on the fiction that a nominated defendant was the occupier of Crown premises where the plaintiff had been injured while working for the Ministry of Supply.⁴ It was held that to be liable the nominated defendant must personally owe a duty to the plaintiff; since that was not the case the claim was dismissed. In the leading judgment, Scott LJ held

The defendant to the proceedings could not be the Ministry of Supply, which was the occupier of the factory, because that ministry, like every other government department, is simply in law the Crown, and in English law an action for tort, such as

² Under s 17 CPA and s 8 JAA.

³ See *Ex parte Factortame Limited* [1990] 2 AC 85, 145, cited by McCowan LJ (dissenting) in *M v Home Office* [1992] 1 QB 270 at 309.

⁴ *Royster v Cavey* [1947] 1 KB 204; see Cornford "Legal Remedies Against the Crown and its Officers" in M Sunkin and S Payne (eds) *The Nature of the Crown* (Oxford University Press, Oxford, 1999) 240.

an action for negligence or breach of statutory duty of this type, does not lie against the Crown.

- 5 The obvious injustice led to the Crown Proceedings Act 1947 (UK), virtually reproduced in the CPA. By section 3 the CPA exposed the Crown to liability as of right to claims in respect of:
- (a) the breach of any contract or trust;
 - (b) any wrong or injury for which the Crown is liable in tort under this Act or under any other Act which is binding on the Crown;
 - (c) any cause of action, in respect of which a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown, and for which there is not another equally convenient or more convenient remedy against the Crown;
 - (d) any cause of action, which is independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Crown if it were a private person of full age and capacity, and for which there is not another equally convenient or more convenient remedy against the Crown; and
 - (e) any other cause of action in respect of which a petition of right would lie against the Crown at common law or in respect of which relief would be granted against the Crown in equity.
- 6 But the 1950 reform was incomplete. First, section 17 of the CPA prohibited the making against the Crown of mandatory orders of injunction, specific performance, and recovery of land or property, limiting relief to declaration of the plaintiff's rights.⁵ By excluding from the ambit of the reform these classes of relief which are available in claims against a subject, Parliament expressed an unwillingness to treat the Crown as ever on terms of equality with the subject.
- 7 Secondly, the reform was limited to "civil proceedings". That term is defined by section 2:

'Civil proceedings' means any proceedings in any Court other than criminal proceedings; but does not include proceedings in relation to habeas corpus,

⁵ Section 17 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. [Emphasis added]

mandamus,⁶ prohibition, or certiorari [or proceedings by way of an application for review under Part I 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]:⁷

It is convenient to refer to proceedings that are neither “civil proceedings” nor “criminal proceedings” as “excepted proceedings”.

- 8 The result is that the supposed bar to mandatory orders against the Crown (as distinct from its servants alleged to be acting *ultra vires*) (paragraph 2 above), which the old common law had extended to mandamus,⁸ prohibition⁹ and certiorari,¹⁰ was maintained by the exception from the operation of the CPA provided by section 2 (despite cases to the contrary, mainstream authority suggests that habeas corpus, by contrast, lay against the Head of State).¹¹
- 9 The second limb of the Crown immunity theory – that a Crown servant’s liability to mandatory orders was based on *ultra vires* conduct – was demolished in *M v Home Office*.¹² The House of Lords held that the Home Secretary, although not personally at fault, was guilty *in his official capacity* of contempt of court for the defiance by an official of a mandatory injunction made against the Home Secretary requiring the return of a deportee. Moreover that order for injunction was held to have been validly made.

⁶ Save that by s 34(5) there was saved the discretion to grant relief by way of mandamus in cases in which such relief might have been granted before the commencement of the Act. There were two forms of mandamus: the prerogative writ and the statutory writ created by the Common Law Procedure Act 1854 (UK): *Armstrong v County of Wairarapa South* (1897) 16 NZLR 144. The former was issued for the performance of a public duty; the latter to enforce a duty owed to the plaintiff personally, in effect by mandatory injunction. Section 34(5) appears to relate to the former: [1962] NZLJ 113, 114. The prerogative writ procedure has now been subsumed within (r 623) of the HCR; no writ is now issued: Judicature Act 1908 s 89A. At common law the Crown as such was immune from mandamus: *R v Powell* (1841) 1 QB 352, 361; 113 ER 1166, 1170. Nor was the remedy available against a Crown servant if its effect would be to compel performance of an obligation owed by the Crown: *R v Lord Commissioner of the Treasury* (1872) LR 7 QB 387. But “where a duty was imposed by statute for the benefit of the public, upon a particular Minister, then even though he was under a duty to perform that duty in his official capacity, orders of mandamus were regularly granted against Ministers”: S De Smith, H Woolf and J Jowell *Judicial Review of Administration Action* (5th ed, Sweet and Maxwell, London, 1995), 217.

⁷ Passage in parenthesis added in 1972.

⁸ See for example *R v Powell* above, n 6.

⁹ Cornford “Legal Remedies Against the Crown and its Officers” in Sunkin and Payne above n 4, 242.

¹⁰ Above n 9.

¹¹ See PW Hogg *Liability of the Crown* (2nd ed, Law Book Company, Sydney, 1989) 38, and text at fn 115; D Clark and G McCoy *Habeas Corpus: Australia, New Zealand, the South Pacific* (The Federation Press, Sydney, 2000) 80–81 citing *Re Garvey, Gasparini’s Case* (1888) 6 NZLR 604 (SC); *Ex parte Bouvy* (1900) 18 NZLR 593 (CA) and *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] AC 459 (PC). In D Clark and G McCoy *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Clarendon Press, 2000), 94, they argue that:

... it would be a very odd result to say that a head of State with powers of detention was immune from review since this would in effect countenance unaccountable Executive detentions such as existed in England prior to the Habeas Corpus Acts. Such an argument has no place in a constitutional state.

¹² [1994] AC 377.

- 10 Since both mandatory injunction and contempt now lie against the Home Secretary in his official capacity, the very embodiment of the Crown's executive authority, it follows that the first limb of the old law – that the Crown is immune from mandatory orders – has itself gone. The Crown cannot perform any act or omission save by conduct of its officials. If they are liable in their official capacity to mandatory orders, what is left of the common law rule that such orders cannot be made against the Crown?
- 11 There is, however, difference both within the Commission and among experts as to the need for and desirability of submitting the Crown to such orders.
- 12 In 1972 the New Zealand Parliament, in enacting the JAA, added its endorsement of the Crown immunity rule. That measure introduced a procedure for obtaining orders for judicial review of the exercise of statutory powers. Section 8, which empowers the grant of interim relief, adopts the policy of section 17 of the CPA in prohibiting the grant of mandatory orders against the Crown and permitting only declarations.¹³ While unlike the CPA¹⁴ it does not specifically prohibit the grant of mandatory relief against Crown officers, since the Crown can only act by its officers, it is generally taken to prohibit mandatory relief against them as well.
- 13 The unsatisfactory consequences are that, at least since *M's case*:¹⁵
- (1) at common law mandatory orders can be made against Crown officials;
 - (2) there is debate whether such orders can be made against the Crown as distinct from its officials; and

¹³ It provides:

(1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:

(a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:

(b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:

(c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.

(2) *Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order,—*

(a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:

(b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

[Emphasis added]

¹⁴ Section 17(2).

¹⁵ Above n 12.

(3) in New Zealand, while recourse to the mandatory orders of the common law is available, in respect of conduct by an official that does not entail the exercise of a statutory power and so falls altogether outside the JAA, to give interim relief, it is probably not available in respect of conduct falling within the JAA.¹⁶

14 The present question is whether that law should now be changed.

15 The Law Commission is agreed that in today's New Zealand the Crown must in general be subject to the rule of law.¹⁷ It is also agreed that what Lord Templeman called "the Crown as monarch"¹⁸ should continue to retain its current immunity from suit in relation to the excepted proceedings. The difference of opinion concerns whether what Lord Templeman called "the Crown as executive"¹⁹ should maintain its immunity in relation to both the excepted proceedings and those falling within section 17 of the CPA. This paper focuses on the former; leaving the substance of the latter for consideration in a future review of the CPA. But in considering the principles it is necessary to bear it in mind.

LIABILITY OF THE CROWN

16 The Crown as monarch is the symbol of our nation, to whom are sworn oaths of allegiance by new citizens, the military, the judiciary and executive counsellors. It is personified by the Sovereign and by the Governor-General. No justification has been advanced to alter the immunities of the Crown as monarch. The position is altogether different in the case of the Crown as executive which for practical purposes in the present context is the State.

¹⁶ Section 6 JAA provides:

Where proceedings are commenced for a writ or order of or in the nature of mandamus, prohibition, or certiorari, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the proceedings shall be treated and disposed of as if they were an application for review.

There is a complication: s 8(2), which proscribes the making of mandatory orders against the Crown, deals only with interim relief. It could be argued that since the case of final relief is not mentioned, at that stage the common law to make mandatory orders against Crown officials remains unaffected by the JAA. But such approach is hardly consistent with the ordinary principle that in "filling gaps" in legislation the Court will apply by analogy such pointers to Parliament's presumed intention as may be available: *Northern Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530; *Ervin Warnink BV v J Tounend & Sons (Hull) Ltd* [1979] AC 731. Here the best pointer is s 8(2). A second complication is the doubt whether at common law interim declarations could be ordered at all. See paras 101–7 below.

¹⁷ Section 27(3) of the New Zealand Bill of Rights Act 1990 provides some analogy:

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

It is no more than analogous, because of their nature judicial review proceedings are available only against those exercising public authority and not against individuals acting in a private capacity.

¹⁸ In *M v Home Office*, above n 12, 395, where he observed:

The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown.

¹⁹ Above n 18.

17 The rule of law requires the State and its officials to be subject to the law. It follows that (except where there are specific public policy reasons for exemption) the continuing exceptions to that principle have no current justification and should be removed.

18 General Crown immunity from suit results from the ancient principle that the King can do no wrong.²⁰ Its continued justification is described by Cane:

The reasons for this are technical and constitutional. In theory the Crown is the applicant for every prerogative order; therefore, it would be incongruous if coercive relief were available against the Crown at its own suit. Furthermore, it is said that it would upset the constitutional balance between the courts and the executive if the Crown could be held in contempt of court for disobeying a prerogative order of prohibition or mandamus.²¹

19 Such notion of a general Crown immunity is an anachronism which should not have survived the development of Parliamentary democracy.²²

20 The general principle should cease to be that the Crown as executive, alias those exercising public authority, can do no wrong; history is replete with examples of abuse of state power.

21 It should instead be that of the inherent dignity of the individual, recognised by the Preambles of the Universal Declaration of Human Rights and the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, to all of which New Zealand has acceded. They are referred to in the long title of the Human Rights Act 1993, which is:

An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.

By section 3, that Act binds the Crown.

22 Likewise the long title of the New Zealand Bill of Rights Act 1990 provides that it is:

An Act—

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

which proclaims

²⁰ It originally meant that the King was not privileged to commit illegal acts but was later treated as conferring immunity from suit. See Hogg and Monahan, above n 1, 4–5 and 11.

²¹ P Cane *An Introduction to Administrative Law* (2nd ed, Clarendon Press, Oxford, 1992) 64.

²² It may be added for completeness that Crown immunity from suit quite properly remains, not only in relation to the Crown as monarch, but also in relation to the Crown as executive in respect of non-justiciable issues such as immigration policy and the conferment of honours. It may also exist by reason of a specific ouster clause enacted by Parliament to provide the protection necessary for the proper performance of state functions such as execution of a search warrant. But where an issue is justiciable and there is no necessity for immunity, it should be removed.

2 Rights affirmed

The rights and freedoms contained in this Bill of Rights are affirmed.

3 Application

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

- 23 These commitments and measures recognise that the role of the State, represented by the Crown, is to safeguard and promote the interests of its citizens – as individuals and as social groups. It has no other justification. That is the sole reason for the receipt of sovereign power. In many cases the interests of all subjects require Crown authority to dominate, plain examples being the cases of taxing and policing, although even there the Crown is subject to the law. But save to the extent that in serving its citizens’ needs the Crown requires to have superior powers or immunities, the status of citizens before the courts should be no less than that of the Crown as executive.²³ Of course the acid question is when the exception is to apply and what test of its existence is to be employed.
- 24 Parliament has pointed to equality, where practicable, as a goal by directing in section 28 of the Interpretation Act 1999 the preparation by 30 June 2001 of a report as to the presumption that the Crown is not bound by enactments and as to Crown criminal liability, save to the extent that the public interest in its ability to exercise sovereign power should require.²⁴
- 25 In developing the common law the judiciary has applied both section 3 of the New Zealand Bill of Rights Act 1990 and its underlying principles by applying the rule of law to all three limbs of the Crown – legislature,²⁵ judiciary²⁶ and the executive.
- 26 The executive is commonly the subject of proceedings for judicial review. In *Burt v Governor-General*²⁷ the Court of Appeal held that the mere fact that a decision has

²³ It may be argued that since the function of all state agents is to provide a public service to the community and its members, subject to such exceptions, the Crown as executive should be subordinate to the citizen..

²⁴ It was also expressed to be a goal of the Crown Proceedings Act 1947 (UK). See n 48 below.

²⁵ While recognising the supremacy of Parliamentary legislation, in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, the Court of Appeal observed that by virtue of the Bill of Rights:

... the Court ha[s] the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights ...

The inclusion of the legislature and the judiciary within the concept of “the Crown” represents an extension beyond its conventional sense of the executive: Hogg and Monahan, above n 1, 11.

²⁶ Accountability of the judiciary is secured by the appellate structure and other safeguards. They include the ultimate sanctions of removal from office: Constitution Act 1986 s 23; District Courts Act 1947 s 7 and the common law power to set aside for bias a decision at the highest level: *Re v Bow Street Magistrate, ex p Pinochet (No 2)* [2000] 2 AC 119.

²⁷ [1992] 3 NZLR 672. See also Hadfield “Judicial Review and the Prerogative Powers of the Crown” in Sunkin and Payne, above n 4, chapter 8.

been made under the royal prerogative does not exempt it from judicial review at common law.²⁸

- 27 Turning now to the question which divided the Law Commission, given the constitutional developments as to the role of the Crown and the accountability of Crown officials, is it necessary or desirable to take the final step of permitting mandatory orders against the Crown, as well as its officials?

FIRST OPTION: CHANGE

- 28 The argument for change is that the Crown's general immunity to mandatory orders is anachronistic and, in cases falling outside the exceptions noted in paragraph 31, should be removed. In his contribution to *The Nature of the Crown*, Loughlin argues:²⁹

At one level M may be viewed as a further stage in the process of recognition in law of the idea of government. Under the traditional approach, the status of the Crown was reconciled with the idea of the rule of law by asserting the essentially *personal* liability of officials. Recognising the artificiality of this process, M has set in place the framework of *official* liability for governmental action. ... [But] the Lords failed to develop further a legal concept of the State and to set in place a modern framework of official liability for governmental action. In retaining the distinction between the Crown and its servants, for example, they retained an ancient form, rooted in the idea that 'the King can do no wrong', which has little relevance to contemporary requirements and which sits uneasily with the judiciary's view that, in principle, the exercise of prerogative power is susceptible to review. Further, while the practical significance of this distinction may not be great today, since statutes generally confer responsibilities on Ministers rather than the Crown, there is, as Mark Gould has noted, 'nothing to prevent Parliament from adopting a form of words which confers duties directly on the Crown and using that formula more frequently than at present in order to avoid the very remedies made available in M'.³⁰ M is indicative of an attempt to refashion public law while retaining intact an unreconstructed core. [Emphasis in original]

- 29 In the same series Cornford advocates the view:³¹

. . . the time has come when it can be said that *officers of the Crown* are amenable to all of the remedies available in judicial review, whatever the source of the powers they exercise. The result of adopting this view³² . . . would be a complete system of

²⁸ The decision was applied by the English Divisional Court in *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349, setting aside the refusal to exercise the Royal Prerogative of mercy in favour of Bentley. Despite his execution in January 1953, on 30 June 1998 his appeal against conviction was subsequently belatedly allowed: *R v Bentley (deceased)* [1998] EWCA 3356. While under English practice that decision was made as against the Home Secretary rather than against the Crown in whose name the application for review was formally brought, its subject matter was the high Crown prerogative of pardon. It was in substance a mandatory – quashing – order against the Crown.

²⁹ "The State, the Crown and the Law" in Sunkin and Payne, above n 4, 72–3.

³⁰ "M v Home Office: Government and the Judges" [1993] Public Law 968, 977.

³¹ Cornford "Legal Remedies Against the Crown and its Officers" in Sunkin and Payne above n 4, 265.

³² The passage omitted reads "... when taken together with the state of affairs produced by the Crown Proceedings Act 1947 (especially if it were amended so as to allow interim declarations) ..." The Commission's first proposed option is to go further and authorise interim orders, not just declarations, against the Crown.

remedies. ... *Proceedings against officers of the Crown would be proceedings against the Crown*; the doctrine that the King cannot be sued in his own courts would apply only to the Monarch in person and not to the Crown as a political entity; and the archaic and arcane distinction formerly employed by the courts in their efforts to hold the executive to account could be allowed to wither away. [Emphasis added]

- 30 The extent of Crown liability to mandatory order should conform with the policy of the substantive law, whether statute or common law. The policy that the Crown should have no greater privilege than the public it serves, unless a test of necessity is met, was recommended in the Commission's Report *Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick*.³³ Following Parliament's enactment of section 28 of the Interpretation Act 1999,³⁴ in *To Bind their Kings in Chains*³⁵ the Commission emphasised the practical need for certain of the Crown's immunities and advised against a simple reversal of the presumption in section 27 of the Interpretation Act 1999:

No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment.

Rather the Commission proposed that there should be adopted a practice that each proposed Bill should expressly state whether and to what extent the Crown is to be bound by the Bill and to the extent it is not, the reasons.

- 31 The view expressed in the first option³⁶ is that the time has come to limit the Crown's immunity to mandatory order in proceedings for judicial review. It should be confined to the overlapping classes of case where:

- (1) there is Crown immunity under the substantive law;
- (2) claims against the Crown are not justiciable;³⁷
- (3) the Court's discretion should be exercised in favour of immunity;³⁸ and

³³ NZLC R37, Wellington, 1997. Unless that test is met there is no good reason for special Crown immunity. The present paper does not address the difficult and important topic of when such immunity should exist. The essays of Professor (now Justice) PD Finn in chapter 6 of *Law and Government in Colonial Australia* (Oxford University Press, Melbourne, 1987) and Vol 2 *Essays on Law and Government: The Citizen and the State in the Courts* (Law Book Company, Sydney, 1995) contain a penetrating account of the Australian state legislative responses and their judicial interpretation (including *Farnell v Bowman* (1887) 12 App Cas 643, 648–50). He discusses three broad groupings of case law on civil proceedings involving the Crown:

- 1 "similar treatment" cases;
- 2 "differential treatment" cases;
- 3 "exceptional treatment" cases.

The discussion will be invaluable when the substantive issues fall to be argued.

³⁴ Para 24 above.

³⁵ NZLC SP6, Wellington, 2000.

³⁶ And by the majority of the experts whom we consulted and Professor Hogg above n 1, 38–39.

³⁷ See *Choudry v Attorney-General* [1999] 3 NZLR 399, 403. "The development of ... wider controls and the movement to more open government have, of course, been accompanied by balancing factors or limits, in particular in respect of matters of national security, an area which is often associated with defence and international relations. [13] Both Courts and legislatures have at times seen those areas as non-justiciable, or as barely justiciable, or as requiring judicial deference to ministerial exercises of discretion ...".

³⁸ See *R v North and East Devon Health Authority ex parte Coughlan* [2000] 2 WLR 622.

(4) in other cases the Crown should be liable to the same remedies as the subject. If that were done, procedural reform can readily follow. To permit Crown immunity to continue in other cases would be to concede the Crown's claim to dispense with the law that was abolished by the Bill of Rights 1688, now reprinted in the New Zealand statutes:³⁹

1 **No dispensing power** – That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal:

32 On these arguments, save in specific exceptional cases required by the public interest, the process of protecting the citizen from breach of the law should not be limited by excluding from the liability it imposes any emanation of the Crown as executive. That must include not only its officers, however exalted (as in M's case) but also the Crown itself. It must continue to apply to proceedings for habeas corpus, and extend to the applications for judicial review discussed in later chapters of this Paper and, in principle, to all other civil proceedings. The immunities at present provided by section 8(2) JAA⁴⁰ should be removed.

33 There are ready responses to the conventional arguments against this option, which include:

- (1) the need to maintain immunity of the Sovereign (the Crown as monarch) requires Crown immunity;
- (2) the court would pause before making mandatory orders against the Crown;
- (3) it is illogical that the Crown as executive would be ordered by the Crown as judiciary to perform some act;
- (4) the judiciary has no force of its own to compel the State to perform an act it refuses to do;
- (5) there is no practical need for change; and
- (6) the rule of law is sufficiently acknowledged by the making of declarations against the Crown and mandatory orders against officials, and their being honoured in each case.

34 As to (1), Sir William Wade in "The Crown, Ministers and Officials: Legal Status and Liability"⁴¹ rejects the argument that "the Crown" means anything other than "the Queen". It is, and always was, immune from legal process at common law. The immunity is tolerable because it does not extend to ministers and Crown officers. He argues that although:

The distinction between the Crown's immunity and its servants' non-immunity is, of course, highly artificial, [yet] in the system of remedies ... evolved from feudal origins ... it was indispensable for reconciling the immunity of the Crown with the rule of law ... the legal personalities of the Crown and of ministers should be kept distinct. Otherwise, the immunity of the Crown could not co-exist with the immunity of ministers.⁴²

³⁹ Reprinted Statutes Vol 30, 44.

⁴⁰ And in principle the proviso to section 17 of the CPA.

⁴¹ In Sunkin and Payne, above n 4, chapter 2.

⁴² Sunkin and Payne, above n 4, 26.

- 35 But that argument dissolves when the two modes of the Crown are separated as by Lord Templeman in *M's case*.⁴³ Since liability is confined by the current substantive law to the Crown as executive there is no reason to protect it from suit.
- 36 As to (2), the courts pause before making any mandatory order.⁴⁴ But such orders are already made against high officials, as in *M's case*. While some aspects of Crown conduct are non-justiciable, that is no reason to refrain from making mandatory orders in cases that are. The same response is made to claims that some Crown conduct warrants statutory protection. Parliament has already dealt with such cases.
- 37 As to (3), the purpose and effect of the CPA was to impose on the Crown, as executive, liability determined by the Crown, as judiciary. Claims against the Crown in tort and for breach of contract are commonplace. Almost the whole of judicial review is premised upon that division of roles.
- 38 As to (4), the fundament of the rule of law is not the power of the executive but the acceptance of the law by the citizenry. Mandatory orders are now made against the high officials who represent the Crown, not only in their personal capacity but as Crown servants. In *M's case* the finding of contempt of the Secretary of State was against him as official, not as an individual. There is no functional distinction between making such an order against the Crown official because of his status as such, and making such order against the Crown itself. The decision in *M's case* was meaningful even if the Crown might in theory, by exercise of State power, have been able to defy it, because it was unthinkable that the Crown, in whose name the official act was performed, would defy the law. What maintains the rule of law is not the fear of force but the ethos of society that the law must be obeyed. The symbolic significance of the Crown itself being seen to be answerable to the law would add respect for the rule of law. Its continued immunity is an anachronism that has outlived its usefulness. As observed by Lord Millet in *R v Health Society, ex parte Imperial Tobacco Company*:⁴⁵

This raised an important constitutional issue concerning the relationship between the executive and the judiciary. The relevant constitutional doctrine is encapsulated in a passage from Dworkin's *Law's Empire* (1998), p 9:

The rule of law requires that state coercion shall always be backed by law. The state's force must not be used or withheld, no matter how useful that would be to the ends in view, no matter how beneficial those ends, except as licensed or required by law – ie by *valid* legislation or decisions of the courts having the effect of making law.

It is the responsibility of the judges to ensure that this principle is observed and to inquire into the validity of any law which is invoked by the state to support its actions.

- 39 As to (5), there can be practical advantage in permitting direct action against the Crown as State rather than against a particular officer. If, for example, there is in effect an injunction against one Crown official, there would be no breach of the present law if another Crown officer, in ignorance of that order, acted

⁴³ Above n 12. See also above para 9.

⁴⁴ [1998] AC 1.

⁴⁵ [2000] 1 WLR 127, 142.

inconsistently with it. There is no such excuse available if an order is made against a company: it becomes its business to ensure compliance by all its staff. The same principle should apply to the Crown.⁴⁶

- 40 More fundamentally, if the whereabouts of a person taken into custody of the Crown is unknown, the Crown, and not just the Commissioner of Police or the Chief Executive of the Department of Corrections, should respond to habeas corpus.
- 41 As to (6), the Crown as executive should set an example to its citizens and strengthen the ethos of the rule of law by submitting to it.
- 42 It is finally to be observed that the exclusion of mandatory orders in the Crown Proceedings Act 1947 (UK) was not the wish of the Government but had been insisted upon by departmental officials (whose opinion may be that recorded in paragraph 48 below). The Lord Chancellor had expected that the point would be tidied in amending legislation. In the Second Reading debate Mr JSC Reid MP,⁴⁷ shortly to be appointed direct to the Appellate Committee of the House of Lords, challenged the change of Scots law and expressed his own view so it could receive attention when the amending legislation came to be introduced. Consideration of it is half a century overdue.⁴⁸

⁴⁶ See FW Maitland “The Crown as Corporation” (1901) 17 LQR 131.

⁴⁷ See Lord Blake and CS Nicholls *The Dictionary of National Biography 1971–1980* (Oxford University Press, Oxford, 1986), 712.

⁴⁸ I was rather surprised that one of the points which the Attorney-General took, in commending the Bill, was that it made for the equality of all before the law. I should have thought that with regard to a great many of these provisions the Bill does the exact opposite, as I shall seek to show ... I do not know what the law of England is, but I know of nothing in the law of Scotland which prevents the subject obtaining an interdict against a servant of the Crown, including any Minister. I have never heard of any reason why that rule should be altered. It is easy to think up theoretical questions which might arise if there were an unreasonable judge on the bench. The only possible reason for altering that rule, if it is intended to alter it, for Scotland – I am a little doubtful about it – is that the Government are not prepared to trust those who are entrusted with jurisdiction in these matters to act reasonably. I see no reason whatever for taking away a right of that kind from the subject. We have got through two wars without this alteration, or the other alterations to which I am coming.

The existing rules did not cause trouble in what we hope will prove to have been the most disturbed period of our history. Are we really looking forward to a period in future when protection for the Executive, which has not been necessary in the past, is going to be necessary? Were that the view of the Government it would throw a pretty lurid light upon their anticipations. But, of course, it is not the view of the Government at all. The fact is – as was admitted by the Lord Chancellor in another place – that those Members of the Government who have been preparing the introduction of this Bill have just been overruled by the Service Departments. I can quite understand that the Cabinet, being taken up with a great number of other matters, have not the time to resolve these difficulties. Therefore, the Lord Chancellor just had to acquiesce, as he very frankly admitted, in a most unsatisfactory position. I should like to read to the House what the Lord Chancellor said in another place, particularly with regard to Clause 10. He said on the Second Reading:

Let me be quite frank. This Clause, together with Clause 7, is one of the Clauses I have been pressed, and, indeed, compelled by the Service Departments to insert, in order to overcome the misgivings, or, if you like, the reluctance; which they feel, and have traditionally felt, about the introduction of the Bill.

On Committee stage he said:

The short and long of it is that I am under an obligation, either to get this Clause as it is, or to withdraw my Bill.

It is quite obvious he did not think much of this Clause, because he said:

SECOND OPTION – RETAIN THE STATUS QUO

- 43 The alternative option is to retain the status quo – that the historical justification for refusing mandatory orders against the Crown should remain for the reasons summarised in the following five paragraphs.
- 44 Coercive orders are enforced by the State (which is what ‘the Crown’ essentially means in the present context) either by imprisonment or by sequestration (confiscation of assets). The reason why a court may not make a coercive order against the State is that it is unenforceable. The State cannot be imprisoned, and the incongruity or absurdity of the State punishing the State by confiscating the State’s assets is obvious. Historically these practical common-sense considerations have prevailed over rhetoric about the Crown owing the same duty to obey the law as its subjects do.
- 45 In practice a claimant is adequately protected by a declaration of right or by order against the official. In *M*’s case in which a Home Secretary was held to be in contempt of court, the contempt seems to have been the result of muddle rather than contumacy. Moreover, a suitable result was achieved by suing the Secretary of State rather than the Crown.
- 46 Because in the overwhelming majority of cases the determinative power is vested in a minister or other officer against whom the coercive order can be made, and because in the few other cases a declaration of rights suffices, the citizen is already adequately protected.
- 47 In practical terms, just how would the enforcement of a coercive order against the Crown work, and if the answer is that it is sufficient to rely on the moral authority of such an order, then how does this differ from the entitlement to a declaration of right that already exists?
- 48 Justification for the current immunity of the Crown from mandatory orders remains that stated by the United Kingdom Treasury Solicitor in 1952:

No doubt the principle underlying this provision is that in times of national emergency the Crown may be compelled to take, at the shortest possible notice and with the certainty that its operations will not be interrupted by the courts, measures which may be thought to infringe the rights or alleged rights of the subject. In such a case the appropriate course is for the Government of the day to ask Parliament to validate what it has done and no doubt Parliament will in those cases decide how far the acts of the Crown were justified in the circumstances. If Parliament approves of what has been done and ratifies it by retrospective legislation, it will also no doubt provide compensation for the persons aggrieved. The freedom of the Executive to meet a crisis by action of this kind would be fettered if it were open to the subject to obtain an interim injunction restraining the Crown from doing what it thought necessary in the public interest.⁴⁹

I hope that in due course the nervousness of the Service Departments will be allayed. It is not unlikely that we shall find we have some odds and ends to gather up, and, probably, that will lead to amending legislation.

If that is the Estimate of the noble and learned Lord I do not seek to dissent from his view. If my remarks cannot receive attention today – and it is quite obvious from what the noble and learned Lord said that they cannot – then I hope that, being on record, they may perhaps receive attention when this amending legislation comes to be introduced.

⁴⁹ Sir Thomas Barnes “The Crown Proceedings Act 1947” (1948) 26 Canadian Bar Review 387, 395.

Judicial review: the problems

Background

49 THE COURTS have increasingly asserted a right to review government decisions and other decisions seen as having a public content.⁵⁰ Judicial review in New Zealand derived from the English common law prerogative writs and the public law manifestations of provisions for declaratory and injunctive relief. These remedies were received into New Zealand law. But the complicated procedural rules which governed them were a major obstacle to litigants. Deficiencies in these processes led to the enactment of the JAA(72) and the Judicature Amendment Act 1977 (JAA(77)) to simplify the procedure. The legislation was based on a draft Bill prepared by the Public and Administrative Law Committee (in turn based upon the Judicial Review Procedure Act 1971 of Ontario).⁵¹ The Act provided for a single action, known as an application for review, which would enable applicants to claim any relief that they would have been entitled to in proceedings for mandamus,⁵² certiorari,⁵³ declaration,⁵⁴ prohibition⁵⁵ or injunction.⁵⁶ The action had to relate to the exercise, refusal to exercise, proposed or purported exercise of a statutory power.⁵⁷

⁵⁰ *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 (natural justice); *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 149 (jurisdiction); *Burt v Governor-General of New Zealand*, above n 27 (review of Crown prerogative conduct); *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) (judicial review of private organisation exercising public functions); and *Peters v Davison* [1999] 2 NZLR 164 (CA) (review of a Royal Commission for error of law).

⁵¹ The JAA was proposed in the fourth report of the Public Administrative Law Reform Committee in January 1971, building on JF Northey "An Additional Remedy in Administrative Law" [1970] NZLJ 202, 208 and GS Orr *Administrative Justice in New Zealand* (Government Printer, Wellington, 1964) chapter 15.

⁵² An order for mandamus allows the High Court to compel an inferior court, tribunal or a person to perform a public duty. (R 623, HCR).

⁵³ An application for certiorari allows the High Court to review all or part of a determination made by an inferior court, a tribunal, a person exercising a statutory or prerogative power, or a person exercising a power that affects the public interest. The court may make an order for certiorari (the quashing of the decision reviewed) or any other order it thinks fit. (R 626, HCR).

⁵⁴ Declarations are the subject of the Declaratory Judgments Act 1908, which "extends beyond judicial review to provide for declarations of the law applicable to any situation, namely, where 'any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, ... regulation, ... bylaw, ... deed, will, document of title, ... agreement made or evidenced by writing, ... memorandum or articles of association, ... or any instrument prescribing the powers of any body corporate,' or where 'any person claims to have acquired a right' under such statute, etc, or where any person 'is in any other manner interested in the construction or validity of such statute etc'." (GDS Taylor, *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) 46, citing s 3 of the Declaratory Judgments Act 1908).

50 The JAA was not intended to bring about significant substantive change, but rather to simplify the procedures for applying for relief and to extend the nature of the relief that could be granted. In its fifth report the Public and Administrative Law Reform Committee⁵⁸ stated:

The proposed bill to introduce the new remedy effects procedural changes only and does not attempt, as it might have done, to codify the grounds of an application or to enumerate the tribunals to which the new procedures apply or in any other way to alter (except to the extent noted below) the remedy that may be granted on such an application. The exception relates to the Court's power to refer a matter back to the tribunal for further consideration and decision, and to validate a decision defective in form or because of technical irregularity. A review of the grounds for an application will form part of our future programme.

The JAA did not abolish the old remedies which continued as an alternative to the new application for review, although it was expected that the old actions would wither away as practitioners became used to the new proceedings.⁵⁹

51 Parliament refrained from attempting to codify the substantive law. It has allowed the High Court to exercise its general jurisdiction under section 16 of the Judicature Act 1908:

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

For the most part procedures are settled by rules made by the Rules Committee under section 51C of the Judicature Act 1908. They include the rules made under Part VII, known as the "extraordinary remedies", providing as to the exercise of the ancient procedures of certiorari, mandamus, quo warranto and the power of injunction. Flexibility is maintained by rule 9 of the HCR.⁶⁰

52 The statutory procedure for judicial review has been highly successful. It has allowed New Zealand to compete with, and in many respects surpass, comparable jurisdictions in the provision of effective and acceptable processes for judicial review. There has been a revolution in appreciation by those who exercise public functions of the need when doing so to comply with the law; we do not doubt that

⁵⁵ The High Court may, on an application to prohibit an inferior court, tribunal or person from exercising a jurisdiction that the court, tribunal, or person is not by law empowered to exercise, make an order for prohibition prohibiting such exercise of jurisdiction. (R 625, HCR).

⁵⁶ The powers of injunction as expressed in r 624 allow the court to restrain an inferior court, tribunal or person from a threatened or actual breach, continuation of a breach, or further breach of a duty of the court, tribunal, or person. These powers are distinct from and do not encompass the court's equitable jurisdiction to award an injunction.

⁵⁷ Section 4(1) JAA.

⁵⁸ *Administrative Tribunals: Constitution, Procedure and Appeals* (Government Printer, Wellington, 1972) 7.

⁵⁹ See fourth report of the Public and Administrative Law Committee *Administrative Tribunals: Constitution, Procedure and Appeals* (Government Printer, Wellington, 1971) para 26.

⁶⁰ **Cases not provided for**— if any case arises for which no form of procedure is prescribed by any Act or rule or regulation or by these rules, the Court shall dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case, or, if there are no such rules, in such manner as the Court thinks best calculated to promote the ends of justice.

that has been significantly influenced by the efficient and accessible procedures of the JAA(72) and JAA(77), as well as other reforms, including the Official Information Act 1982 and the legislation effecting state sector reforms.

- 53 But it has too often been necessary to have recourse to the extraordinary remedies.⁶¹ The continuation for nearly three decades of a split jurisdiction for judicial review is unacceptable. The present reference was initiated to review the procedure.

The problems

- 54 Problems with the JAA became apparent soon after its enactment. The restriction of applications for review to the exercise, refusal to exercise, or proposed or purported exercise of a *statutory power*⁶² excluded a number of situations in which relief could be obtained under the common law.⁶³ In an attempt to resolve these problems, the JAA(77) was passed extending the definition of “statutory power”. Fortunately, again no attempt was made to achieve codification.⁶⁴

- 55 In most cases of judicial review the JAA can be employed as the mechanism by which to bring proceedings. But because it is limited to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, in a significant number of cases it cannot. In some cases, determining whether the JAA or the common law procedures should be used can be problematic and confusing. For example:

- The statutory remedy does not cover decisions made by the Crown in the exercise of the prerogative.⁶⁵ In *Burt v Governor-General* the applicant had been tried and convicted for murder. His application to appeal the conviction was dismissed by the Court of Appeal, and the Governor-General declined his petition to exercise the prerogative of mercy and grant a full pardon. The applicant applied for judicial review of the Governor-General’s decision. The Court of Appeal held that while the exercise of a prerogative power was not a “statutory power of decision”,⁶⁶ in the right circumstances it could be subject to judicial review:⁶⁷

... the claim that the Courts should be prepared to review a refusal to exercise the prerogative of mercy, at least to the extent of ensuring that elementary standards of fair procedure have been followed, cannot by any means be brushed aside as

⁶¹ See discussion at paragraphs 54–59 for some examples.

⁶² Section 4(1).

⁶³ The problems were identified in the eighth report of the Public Administrative Law Reform Committee September 1975 which appended a draft Bill.

⁶⁴ Notwithstanding the enactment of legislation such effect in Australia (Administrative Decisions (Judicial Review) Act 1977) and the Federal jurisdiction of the United States of America (Administrative Procedure Act 1946 5 USC s 706 and the Revised United States Model State Procedure Act 1961).

⁶⁵ See *Burt v Governor-General* above n 27. This distinction was always understood, but the Rt Hon Justice Sir Kenneth Keith advises that it was not considered to be a problem because of the availability of other remedies, and the limited occasions when difficulties would arise.

⁶⁶ *Burt v Governor-General* above n 27, 675.

⁶⁷ *Burt v Governor-General* above n 27, 681. This decision was applied by the English Divisional Court in *Regina v Secretary of State for the Home Department, ex parte Bentley* above n 28.

absurd, extreme or contrary to principle. For example, it is obvious that allegations in a petition, unless patently wrong, should be adequately and independently investigated by someone not associated with the prosecution: the Court could at least check that this has happened.

- It can be unclear whether the statutory remedy covers decisions by non-statutory bodies. In *Finnigan v New Zealand Rugby Football Union Inc*⁶⁸ the applicants sought a declaration that the Football Union was acting ultra vires by deciding to accept the invitation of the South African Rugby Board for a New Zealand representative rugby tour of South Africa. The applicants also sought an injunction to prevent implementation of the decision. The Football Union challenged the standing of the applicants to make such application. While accepting that judicial review was available, Cooke P found it unnecessary to declare whether it was available under the common law or the JAA, stating:⁶⁹

While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power – although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.

- Similarly, in establishing that Royal Commissions of Inquiry are subject to judicial review under the common law where their findings may have the effect of damaging a person's reputation,⁷⁰ the Privy Council did not determine whether the JAA might also apply:⁷¹

As jurisdiction exists at common law we do not find it necessary to determine some of the difficult issues which arise in relation to the Act. In particular we express no opinion on the much debated question of whether the words "rights" in the definitions of "statutory power" and "statutory power of decision" in s 3 of the Judicature Amendment Act 1972 are wide enough to include the findings of a Commission of Inquiry the effect of which is to damage reputation or expose a person to risk of prosecution.

56 The problem of the statutory limits of the JAA has increased as the scope of the common law remedy has expanded. As a consequence, the statutory based "application for review" has not supplanted the common law actions as was

⁶⁸ [1985] 2 NZLR 159 (CA).

⁶⁹ Above n 68, 159.

⁷⁰ Note that the court has jurisdiction to determine whether a commission's terms of reference are lawful (*Cock v Attorney-General* (1909) 28 NZLR 405 (CA)), to determine whether a commission is acting within its terms of reference (*Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 (CA)), may intervene to ensure that the requirements of natural justice are met (*Re Royal Commission on State Services* [1962] NZLR 96, 117 (CA); *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA)) and may review an alleged error of law where it materially affects a matter of substance relating to a finding on one of the terms of reference (*Peters v Davison* above n 50, 189).

⁷¹ *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 258 (CA). Note however, that the statutory remedy is available where a Royal Commission's order for costs is being reviewed – the ability of a Royal Commission to award costs is conferred by section 11 of the Commissions of Inquiry Act 1908, and is therefore a statutory power (*Re Erebus Royal Commission*; *Air New Zealand Ltd v Mahon* [1983] NZLR 662, 669 (PC)).

expected. Recourse has been required to the extraordinary remedies in Part VII of the HCR⁷² instead of to the JAA, or both have been offered in the alternative.

- 57 Section 6 and rule 628 effect a limited linking of the procedures for the extraordinary remedies to those for the statutory application for review. Section 6 provides that:

[w]here proceedings are commenced for a writ or order of or in the nature of mandamus, prohibition, or certiorari, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the proceedings shall be treated and disposed of as if they were an application for review.

Rule 628 provides:

- (a) The procedure prescribed in Part I of the Judicature Amendment Act 1972 shall apply, subject to these rules, to applications for review under that Part.
- (b) Section 9 of the Judicature Amendment Act 1972 shall apply in respect of an application for review under Part I of that Act as if the reference to a motion were a reference to a notice of proceeding filed in accordance with these rules.
- (c) In an application for review under Part I of the Judicature Amendment Act 1972, a Judge may exercise the powers conferred by section 10 of that Act.

Rule 628 provides some but limited direction for practitioners attempting to navigate the dual procedures for judicial review.

- 58 In addition to its jurisdiction under section 16 of the Judicature Act 1908⁷³ and under the JAA, the court may have recourse, in respect of claims at public law, to the statutory jurisdiction under the Declaratory Judgments Act 1908. The Declaratory Judgments Act 1908 extends beyond judicial review.⁷⁴
- 59 While the range of overlapping options and their underlying concepts is well understood by specialists, in other hands it is, at best, awkward and potentially confusing and therefore productive of injustice. The need for reform has been repeatedly proclaimed.⁷⁵

⁷² As updated in 1997. They are reproduced in appendix B.

⁷³ Described in the preface to this Paper.

⁷⁴ Section 3 Declaratory Judgments Act 1908.

⁷⁵ See for example, D Mullen "Judicial Review of Administrative Action" [1975] NZLJ 154; JA Smillie, "The Judicature Amendment Act 1977" [1978] NZLJ 232; RE Harrison QC "Reform of the Judicature Amendment Act 1972" (1995) 434 Lawtalk 11; M Taggart "Introduction to Judicial Review in New Zealand" [1997] JR 236.

3 Options for reform

THE OPTIONS CONSIDERED

- 60 **A**T PRESENT THE JAA is made up of both substantive law⁷⁶ and procedural provisions.⁷⁷ The HCR contain further procedural rules,⁷⁸ and regulate the procedures for the old common law remedies. Whilst the JAA is relatively straightforward, access to the common law remedies is via a more convoluted route.
- 61 At first sight the simple course is to amplify the Judicature Act 1908 to the minimum extent necessary for that purpose and leave the detailed rules within the HCR. But after careful thought and the advice of our expert consultants that course is not proposed.
- 62 The following options have been considered:
- (1) Codification by statute of the substantive and procedural law of judicial review.
 - (2) By way of variant, setting out in an amendment to the JAA the substantive law as to judicial review and providing in the HCR for the procedures.
 - (3) Refer in general terms in a statute or rules to the different causes of action recognised by the former writs, a practice seen in various forms in different jurisdictions.
 - (4) Recognise that the substantive law is essentially judge made and to refrain from codification, providing for legislation only when considering the minimum required and leaving procedure to be dealt with in the HCR. This could be achieved by substituting for the procedural provisions in the JAA and the HCR a single procedure applying to all situations other than appeals where the High Court has the power to set aside decisions.
- 63 Each is discussed in turn. After careful consideration of the issues by the expert consultants, the preference expressed in this Paper is for the fourth option.

⁷⁶ See ss 4 and 5.

⁷⁷ See ss 9 and 10.

⁷⁸ See r 628.

OPTION 1 – CODIFICATION

64 In its twelfth report the Public and Administrative Law Reform Committee recorded that it had been considering the option of codification. It recited the logical arguments in favour of this course:⁷⁹

First, because it would clarify the law and thereby make it more accessible to members of the public and their legal advisers; or

Second because it would change the balance of the law in some appropriate way, for instance by increasing (or decreasing) the extent of judicial review.

The Committee however pointed out that:⁸⁰

Far from clarifying the law, legislation might have the opposite effect. First, while the statute would probably in large part restate the law, in some degree it would not. But it will probably not be clear of every provision whether it merely restates the law or effects some change in it . . . Secondly, the particular drafting might introduce linguistic arguments not available (or not so readily available) under the present law.

65 In preparing this Paper an attempt at codification was made, to see whether it was practicable. That was done by seeking to update the JAA, although recognising the possible need for a residual provision in the HCR to deal with any cases that future experience might show had been omitted. The reasons for making that attempt were:

- (a) the constitutional importance of the procedure; and
- (b) the fact that it is so well known that it might be of advantage not to sacrifice the benefits of the present regime in an attempt to secure symmetry.

66 Some of the present difficulty derives from the limited scope of the JAA. As noted in the preface, this has resulted in the continued use in many cases of the common law procedures for review, a situation not expected in 1972. The limitation of judicial review to cases of exercise of a statutory power is drastically out of line with the present common law. It has been the subject of continued criticism and calls for reform.⁸¹

67 Early in the consultation process it was suggested that an application for review might be defined in terms of the review of “the performance of, proposed performance of, or refusal to perform a public function, power or duty”. This suggestion was reconsidered in view of the limitation of the study paper to “tidying” the procedures of judicial review; it was argued by some that amending the legislation in this manner might alter the substantive law of judicial review.

68 The draft proposal was that the legislation should provide for applications for review in respect of a “reviewable power”. “Reviewable power” would then be defined as embracing the present “statutory power of decision” as well as proceedings enforceable through the exercise of mandamus, prohibition, certiorari, declaration or injunction. Remedies would be set out in the legislation that

⁷⁹ Twelfth report of the Public Administrative Law Reform Committee (Government Printer, September 1978) 21.

⁸⁰ Above n 79, 23.

⁸¹ See above n 75.

encompass the current statutory and the traditional common law remedies. This would encourage applications to be made within the purview of the JAA, rather than resorting to the prerogative writs.

69 But insuperable difficulty was encountered in identifying what should be added to “statutory power”.

70 The option of using the general term “public function” to incorporate both “public interest” and “public duty”, which appear in the definitions of certiorari in rule 626 and mandamus in rule 623, was seen by some experts as broadening inappropriately the jurisdiction of the court; they preferred refining the extension to “power to perform a public duty”. Others considered that such formulation would be too narrow and repeat the experience of 1972 and 1977.

71 As was pointed out by the Public and Administrative Law Reform Committee in their twelfth report, there is a limitless range of administrative powers and situations which it is impracticable to express in legislation with the degree of specificity that would be useful. This Paper reproduces the following statement from that report:⁸²

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

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

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

Different interests subject to the power: personal liberty, reputation, property, trade, profession, interest created by statute . . . ;

Different formulations of the power: subjective or objective; bare or limited by purpose or by relevant considerations;

Different safeguards on the exercise of the power: explicit procedural safeguards, rights of appeal, rights of review . . . ;

Different contexts in which the power is exercised: emergency, routine

72 It is doubtful whether the most prescient legislator could have provided for such cases as *R v Panel on Takeovers and Mergers ex parte Datafin plc*,⁸³ *Electoral Commission v Cameron*,⁸⁴ *Peters v Davison*⁸⁵ and *Royal Australasian College of Surgeons v Phipps*.⁸⁶ No doubt the future will require further developments of the procedures for review.

⁸² Above n 79, 25.

⁸³ [1987] QB 815 (CA).

⁸⁴ Above n 50.

⁸⁵ Above n 50.

⁸⁶ [1999] 3 NZLR 1 (CA).

OPTION 2 – SET OUT THE SUBSTANTIVE LAW OF JUDICIAL REVIEW IN A JUDICATURE AMENDMENT ACT

- 73 This option is impracticable, as it would suffer from the same defects identified above in the discussion of option 1. Any attempt at codification carries the risk of unintentionally altering the substance, or freezing further development, of the law of judicial review.

OPTION 3 – REFER IN GENERAL TERMS IN A STATUTE OR RULES TO THE CAUSES OF ACTION RECOGNISED BY THE WRITS

- 74 This is the course adopted in England.⁸⁷ But section 31 of the English Supreme Court Act 1981 does not elucidate what is meant by the orders of mandamus, prohibition and certiorari and unlawful acting in an office, to which they refer. Nor does Part 54 of the Rules of the Supreme Court⁸⁸ cast light on the question. To answer it one must look at the standard texts of administrative law.
- 75 English practice has been bedevilled by the unhappy attempt in *O'Reilly v Mackman*⁸⁹ to establish impermeable barriers between public law proceedings usually commenced by application for judicial review, and private law proceedings. The attempt resulted from the differences between their respective procedures (leave being required to commence a proceeding for judicial review, private law claims being usually brought as of right), different forums (judicial review being brought in the Crown Office List and private law claims elsewhere), and the differences in substantive law. Wade subsequently claimed that:⁹⁰

The courts held that there must now be a dichotomy between public and private law, with mutually exclusive procedures – a retrogressive step which substituted new anomalies for the old ones and which caused great uncertainty and cost much time and money to litigants.

He later described those problems as being a serious setback to administrative law, causing many meritorious cases to fail merely because of the wrong choice of action.⁹¹

- 76 In *Dennis Rye Pension Fund v Sheffield CC*⁹² Lord Woolf MR sought to restore order by directing the court to look at the practical consequences of the choice to be made, rather than just technical questions between public and private rights. Ready transfer from one forum to another was one of the techniques proposed. More recently in *Boddington v British Transport Police*⁹³ the House of Lords has held that a defendant may raise in a criminal prosecution the contention that a bylaw or administrative act undertaken pursuant to it is ultra vires and unlawful. The

⁸⁷ Appendix C of this Paper reproduces sections 29–31 of the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court.

⁸⁸ As appearing in the 2000 edition of the Rules of the Supreme Court (UK).

⁸⁹ [1983] 2 AC 237 (HL).

⁹⁰ HWR Wade *Administrative Law* (8th edition, Oxford University Press, Oxford, 2000) 552.

⁹¹ Wade, above n 90, 678.

⁹² [1998] 1 WLR 840; [1997] 4 All ER 747 (CA).

⁹³ [1999] 2 AC 143 (HL).

challenge was to the vires of by-laws prohibiting the smoking of cigarettes in a railway carriage.⁹⁴

- 77 The unhappy English experience demonstrates the need to avoid unnecessary attempts at prescription, something facilitated by the unitary jurisdiction of the New Zealand High Court, each judge of which may exercise both judicial review and private law jurisdiction.
- 78 The reference in section 31 to the orders of certiorari, mandamus, prohibition, declaration and injunction directs the focus of enquiry to the ancient history of their genesis. The common law of judicial review no longer requires such a prop and may be allowed to stand on its own feet. The English model is not recommended.

OPTION 4 – RECOGNISE THAT SUBSTANTIVE LAW IS JUDGE MADE, LEGISLATE TO THE EXTENT THAT THE STATUTES HAVE TO BE MODIFIED, AND LEAVE PROCEDURES IN THE HIGH COURT RULES

- 79 This is considered the best option.

Professor Anderson's proposal

- 80 Professor Anderson has proposed a simple and elegant reform. It is to distinguish among:
- rules which reverse old common law rules concerning the substance of judicial review, which might appear in a schedule to an amending Act;⁹⁵
 - the substantive rules of judicial review, which are judge made, and do not require mention in a statute (unless they are to be changed – the Commission has not undertaken such task);
 - rules which tell litigants how to apply for an exercise of the powers of the court, which are essential elements of the procedural statute or rules; and
 - rules which tell judges and officials how to process such an application. These too are vital elements of the procedural statute or rules.⁹⁶

Substantive law in the JAA, procedure in the High Court Rules

- 81 Professor Anderson's argument, with which most of our other advisers agree, is persuasive.⁹⁷ It is that there is simply no need for the procedural rules to describe the qualifications needed to be a defendant any more than in respect of a plaintiff's

⁹⁴ Compare cases in which Parliament has precluded such challenges: *R v Wicks* [1998] AC 92 (HL) where an enforcement notice under town planning legislation was held not to be capable of challenge in criminal proceedings but only via the elaborate appellate code. See to like effect the New Zealand Resource Management Act 1991 s 296.

⁹⁵ Examples are subsections (2), (2A), (5), (5A), (5B), (5C) and (6) of s 4 and s 5 of the JAA.

⁹⁶ Submission to the New Zealand Law Commission, December 1998.

⁹⁷ Associate Professor Philip Joseph and Professor Taggart both supported the approach suggested by Professor Anderson, with Associate Professor Joseph making similar suggestions. Associate Professor Andrew Beck also made useful comments along the lines of the proposal mooted by Professor Anderson.

standing. If a company is liable to judicial review, it is because of its functions and not because it is a company. The matter is one of substantive law, in the present context better left to development by the judiciary.

- 82 But the parts of the JAA that change the old common law rules should be re-expressed as part of the body of the JAA, rather than being set out in a schedule, as proposed by Professor Anderson – these are important rules of substance.
- 83 The substantive law would be discerned, as is predominantly the case at present, from the law reports containing the decisions which created it, except to the extent necessary to remove anomaly and to maintain essential elements of the JAA where the common law is or may be inadequate.⁹⁸ Those essential elements are:
- section 4(2), which provides that where an applicant is entitled to a declaration that the decision is unauthorised or invalid, the Court may simply set aside the decision;
 - section 4(2A), which provides that the fact that a decision-maker was not under a duty to act judicially shall not be a bar to relief;⁹⁹
 - sections 4(5), (5A), (5B), (5C) and (6) which set out the Court’s powers to give directions; and
 - section 5, which provides that where the sole ground for relief is a defect in form or a technical irregularity that is not accompanied by a substantial wrong or miscarriage of justice, the Court may make an order validating the decision.

The substantive provisions relating to the liability of the Crown should be re-expressed – this issue is discussed in more detail below.

- 84 Procedural provisions would appear in the HCR.¹⁰⁰

The Crown: interim and final injunctions

- 85 Chapter 1 contains the arguments in favour of subjecting the Crown to mandatory orders.
- 86 To summarise, at common law there has always been jurisdiction to order injunctive relief against Crown servants.¹⁰¹ In principle parallel relief should have been available in terms of the prerogative writs.¹⁰² Further, interim injunctive relief ought also to have been available against the Crown as executive.
- 87 Until *M v Home Office*¹⁰³ the distinction between the differing functions of the Crown had been obscured. Many common law decisions asserted, erroneously, that

⁹⁸ See appendix A for the proposed Judicature Amendment Act 2001.

⁹⁹ While it may be powerfully argued that the common law has itself swept away the condition that the decision-maker must have acted judicially, it is desirable to put the point beyond argument.

¹⁰⁰ To be drafted by the Rules Committee.

¹⁰¹ *Nireaha Tamaki v Baker* (1900) NZ PCC 1; [1901] AC 561 (PC); *Park v Minister of Education* [1922] NZLR 1208 (SC); Hogg and Monahan above, n 1, 31; Wade, (1991) 107 LQR 4; *M v Home Office* above n 12. As to the different senses of “Crown” see *Sue v Hill* (1999) 73 ALJR 1016, 1032–1035, paras 83–94 (HC).

¹⁰² See *Nireaha Tamaki v Baker* and *Park v Minister of Education* above n 101.

¹⁰³ See discussion above, para 9.

injunctions and other coercive orders such as specific performance, mandamus and discovery, were unavailable against the Crown in its capacity as executive.¹⁰⁴

88 Likewise, high authority rejected the grant of interim declaratory relief against the Crown – see paragraphs 101–107 below.

89 The New Zealand Parliament reacted to the perceived problem by enacting section 8(2) of the JAA, which provides:

Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order:

(a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:

(b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

90 Rule 627B of the HCR provides in general terms for the making of interim orders. It is proposed that Parliament repeal section 8(2) and specifically empower the grant of injunctions against the Crown.

91 In 1991 Professor Sir William Wade presented an irresistible argument in favour of a common law power to issue interim injunctions against the Crown.¹⁰⁵ He observed that there has always been such power at common law, but argued that the judiciary had lost its way in applying that power. In the United Kingdom this reasoning was adopted by the Law Lords in *M v Home Office*.¹⁰⁶ In *M v Home Office* Lord Templeman made the famous observation:¹⁰⁷

The argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.

92 As to the present context, in its report *Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick*¹⁰⁸ the Law Commission expressed the view that:¹⁰⁹

The Crown and other public bodies should have no power or immunity beyond those of the citizen, except to the extent necessary to allow its public functions to be duly performed. Anything more would impact adversely upon the rights of the citizen; anything less would impair the efficiency of government by inhibiting public officials in the proper performance of their functions.

¹⁰⁴ See Hogg, above n 101, 31.

¹⁰⁵ Above n 101, criticising *R v Secretary of State for Transport, ex parte Factortame Ltd* above n 3 (HL).

¹⁰⁶ Above para 9.

¹⁰⁷ Above n 12, 395.

¹⁰⁸ Above n 33.

¹⁰⁹ Above n 33, para 30. For a full discussion of this recommendation, see paras 19–33 of that report.

- 93 If the argument in chapter 1 for subjecting the Crown in its capacity as executive to judicial review is accepted, section 8(2) of the JAA, which empowers the courts to make interim orders of prohibition, is expressed over-narrowly.
- 94 As noted in paragraph 12, section 8(2) derives from the CPA which was enacted to consolidate the law relating to private actions by and against the Crown.¹¹⁰ Section 17 of the CPA¹¹¹ (which provides that in civil proceedings against the Crown the court shall not grant an injunction or specific performance, but shall instead make a declaration) does not apply to the prerogative writs which provide a public law remedy. Nor does it apply to proceedings for judicial review under the JAA to the extent that relief sought is in the nature of mandamus, prohibition or certiorari.¹¹²
- 95 The New Zealand position in relation to injunctions and the Crown has developed thus:
- at common law, jurisdiction existed to order relief against the servants of the Crown as executive (paragraph 2 above). *M v Home Office* decides that such relief extends to mandatory orders against high officers of state sued in their capacity (paragraph 9 above);
 - by excluding proceedings in relation to the prerogative writs from the definition of civil proceedings in section 2(1) the CPA carefully left untouched the common law in relation to such writs; and
 - thus the court's powers to make mandatory orders against Crown servants by way of the prerogative writs (now orders under Part VII of the HCR) were not restricted.
- 96 But¹¹³ section 8 of the JAA¹¹⁴, which authorised interim prohibiting or staying orders, prohibits making of such orders against the Crown in relation to the exercise of statutory powers. Only a declaration may be made.
- 97 The JAA does not state whether "Crown" includes "Crown servants"; it has generally been taken that it does.
- 98 Sections 6 and 7 of the JAA provide that:
- where proceedings commenced for mandamus, prohibition or certiorari are in relation to the exercise¹¹⁵ of a statutory power the Court must¹¹⁶ treat and dispose of the proceedings as if they were an application for review; and
 - where the proceedings seek declaration or injunction or both in relation to the exercise of a statutory power the Court may¹¹⁷ direct that the proceedings be treated and disposed of as if they were an application for review.

¹¹⁰ Long Title, CPA.

¹¹¹ Reproduced at footnote 5.

¹¹² See definition of "civil proceedings", s 2 CPA.

¹¹³ As noted in para 12 above.

¹¹⁴ Read with s 6.

¹¹⁵ Or refusal to exercise, or proposed or purported exercise.

¹¹⁶ If they are proceedings for or in the nature of mandamus, prohibition, or certiorari.

¹¹⁷ Where the proceedings are for declaration or injunction the Court must consider whether it is appropriate to treat the proceedings as an application for review.

- 99 The illogical result is that:
- In the case of applications for interim relief in relation to the exercise of a statutory power, where the Crown (probably including a Crown servant) is a respondent to an application for review, the combined effect of sections 6 and 8 is that the Court has no power to make a mandatory order against Crown servants, but may only make a declaration.
 - Orders for mandamus, prohibition or certiorari in relation to the exercise of non-statutory powers are made outside the JAA under the common law and, at least since *M v Home Office*, may be made against Crown servants in their official capacity (paragraph 9 above).
 - In the case of final orders for mandamus, prohibition or certiorari in relation to the exercise of statutory power:
 - (1) the Court must deal with the proceedings as if they were an application for review; but
 - (2) while there is no explicit limitation upon the Court's common law power to make against Crown servants what are in effect injunctive orders at public law, by analogy with section 8 it is likely that no such order can be made (see footnote 13 above).
 - In the case of applications for final declaration or injunction at public law, the judge may choose whether to have the proceedings dealt with under the JAA or not. It would seem to follow from *M v Home Office* that the Court may elect at common law to order an injunction against a Crown servant (even though, by section 17 of the CPA,¹¹⁸ it may not do so at private law. It is as yet unclear whether a New Zealand court may at common law make an interim declaration: paragraphs 101–107 below).
 - In the case of such applications in relation to the exercise of non-statutory power the common law or the Declaratory Judgments Act 1908 are employed.¹¹⁹
- 100 The most logical option is to repeal section 8(2), leaving the procedure in rule 627B of the HCR to govern all interim orders. The proposed new section 8 provides for the making of injunctions against the Crown: whether that formulation is adopted will depend on which of the options in chapter 1 is selected.

Interim declarations

- 101 The English judges were loath to develop the common law by making interim declarations, on the basis that a court always adjudicates definitively. The apprehension was that it could and should not make a declaratory decision in sense N on an interim basis and in sense non N at substantive trial.¹²⁰

¹¹⁸ In a claim to enforce a duty owed to the plaintiff personally. See n 5 above.

¹¹⁹ See *Dyson v A-G* [1911] 1 KB 410; *Ng v Minister of Immigration (No 2)* [1980] 2 NZLR 289; *BNZ Finance Ltd v Holland* [1996] 3 NZLR 534 (CA).

¹²⁰ See *Reg v IRC ex parte Rosminster* [1980] AC 952 (HL).

- 102 Such approach is mechanistic and wrong, for the reasons stated by Zamir and Woolf in *The Declaratory Judgment*.¹²¹
- 103 Interim relief is awarded on the balance of convenience rather than entailing an assessment of rights. Interim declaratory relief is likely to have little to do with substantive rights.
- 104 The courts are not limited to declaring private rights; they can also declare public rights.
- 105 Zamir and Woolf suggest that change would be difficult to classify as procedural and so legislation is required. The author is inclined to disagree, preferring the

¹²¹ (2nd ed, Sweet & Maxwell, London, 1993) paras 3.096–8.

3.096 The courts justify their refusal to grant interim declarations on two different grounds. The first is that they only have power to award “declarations of right”, *i.e.* to declare legal rights. They contend that rights in this context must mean final legal rights, it being undoubtedly illogical to suggest that a person’s legal rights might be X one day and Y the next. However, this is only true if it is assumed that the only thing that a declaration can declare is parties’ private rights. *American Cyanamid v Ethican* [1975] AC 396 decided that in granting interlocutory injunctive relief the courts are primarily concerned with the “balance of convenience” rather than parties’ “prima facie rights”. Furthermore, the courts are not limited to declaring parties’ private rights: they can also declare their public rights and even declare whether the government has made an error of law in drafting circulars or guidance. As the Law Commission [of England and Wales] have suggested, there would appear, therefore, to be no reason in principle why the courts should not have the power to declare, not the rights of the parties, but either the terms on which they would have granted an interim injunction if the dispute had been between subjects or the basis upon which the parties should conduct their activities until further order.

3.097 The second ground on which the courts justify their refusal to grant interim declarations is that it is doubtful whether it is desirable for there to be such relief. It is sometimes contended that such relief should not be available as “the state’s decisions must be respected unless and until they are shown to be wrong. Judges neither govern nor administer the state: they adjudicate when required to do so”. But not all cases against the Crown involve issues of public interest. Even where they do, there would appear to be no reason why the courts should not make such an interim declaration, provided that a prima facie case can be established and that the balance of convenience, which in this context might also involve consideration of the public interest, justifies the granting of relief. Moreover, the freedom of the Crown will not be fettered even theoretically as a declaration has no coercive force. Further, since *Conway v Rimmer* [1968] AC 910 – where it was held the courts have a discretion to decide whether or not the public interest, when balanced against the interests of litigants in a fair trial, requires that documents should be disclosed – the courts have become accustomed to making judgments between conflicting public interests. A similar balancing exercise also has to be conducted when the courts have to determine whether to grant interlocutory relief against the Crown when a party is asserting a right under European Community law or whether to grant a stay on an application for judicial review. There would seem to be no reason therefore why, paying due regard to the views of the Crown, the courts should not decide whether or not the balance of convenience requires that an interim declaration be granted.

3.098 In view of the *Rossminster* [[1980] AC 952] and *International General Electric* [[1962] Ch 784] decisions, it is unlikely that they will ever hold that they have power to grant interim declarations in private law civil proceedings. Since it would be difficult to classify the change which is needed as being procedural and therefore one which could be made by altering the Rules of the Supreme Court, it is necessarily to the legislature that one has to look for such a remedy. Other jurisdictions, however, have not regarded it as so obvious that an interim declaration is an animal unknown to the law. In Israel, for example, the Supreme Court in *Yotvin Engineers and Construction Ltd v State of Israel*, CA 144/79344 1980 PD (2) 344 after reviewing the then English authorities, concluded that there was power to grant an interim declaration.

view expressed by the Supreme Court of Israel in *Yotvin Engineers and Construction Ltd v State of Israel*.¹²² It is to the opposite effect from the English case *Rossminster*¹²³ and is described by Zamir and Woolf as “very convincing”. The Supreme Court researched the origins of the English law and found that the Chancery Division traditionally made both interim and final injunctions. By their very nature interim orders were not final; rather they could be re-examined by the Chancellor before they were finalised.¹²⁴

- 106 The New Zealand judiciary might, in exercise of their power to develop the common law, especially by analogy with statute law, choose to reject the English¹²⁵ authority. The legal maxim *omne majus continet in se minus*, that “the greater includes the less”, would justify such course.¹²⁶
- 107 The express power in section 8(1) of the JAA to make interim orders¹²⁷ provides sufficient clarification in the area of judicial review. This power will be retained in the redrafted rules.

Directions

- 108 Section 4 of the JAA provides:
- (5) ... on an application for review ... the Court if it is satisfied that the applicant is entitled to relief ..., may ... direct any person whose act or omission is the subject-matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates. In giving any such direction the Court shall—
 - (a) Advise the person of its reasons for so doing; and
 - (b) Give to him such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
 - (5A) If the Court gives a direction under subsection (5) of this section it may make any order that it could make by way of interim order under section 8 of this Act, and that section shall apply accordingly, so far as it is applicable and with all necessary modifications.
 - (5B) Where any matter is referred back to any person under subsection (5) of this section, that person shall have jurisdiction to reconsider and determine the matter in accordance with the Court’s direction notwithstanding anything in any other enactment.
 - (5C) Where any matter is referred back to any person under subsection (5) of this section, the act or omission that is to be reconsidered shall, subject to any interim order made by the Court under subsection (5A) of this section, continue to have effect according to its tenor unless and until it is revoked or amended by that person.

¹²² Above n 121, CA 144/79 (1980) reproduced in the appendix to Zamir and Woolf, 301.

¹²³ Above n 120.

¹²⁴ Zamir and Woolf, above n 121, 305–306.

¹²⁵ Above n 120.

¹²⁶ See Francis Bennion *Statutory Interpretation* (3rd ed, London, Butterworths, 1997) 25–26, 429–431. The maxim was applied by Richardson J in *Goldsboro v Walker* [1993] 1 NZLR 394, 404 (CA).

¹²⁷ As in rule 627B of the HCR.

- (6) In reconsidering any matter referred back to him under subsection (5) of this section the person to whom it is so referred shall have regard to the Court's reasons for giving the direction and to the Court's directions.

- 109 These provisions go beyond the authority of the common law and can therefore be classified as substantive. They should be retained in an amended JAA.
- 110 Of particular note is the phrase “notwithstanding anything in any other enactment”. As demonstrated in *Hauraki Catchment Board v Andrews*¹²⁸ it can be of value to permit a reconsideration by the decision-maker which would otherwise have been impermissible. This provision should be retained in new legislation.

Judicial review and other claims

- 111 Rule 628(3) sensibly provides—
- 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.
- 112 While a damages claim may accompany a claim for relief under Part VII of the HCR, it has been held that this is not permitted in a judicial review application made under the JAA.¹²⁹ That creates an unfortunate inconsistency between the common law prerogative writs and the statutory application for review.
- 113 This power to permit damages claims to be pleaded in judicial review proceedings is a useful one, even if not commonly required. It will often be convenient to conduct such a case in stages – first the judicial review and then the damages proceeding (whether at common law or under the principle of *Baigent's case*)¹³⁰ with appropriate directions as to pleadings and other matters. The proposals outlined in this Paper will remove this distinction.

CONCLUSION

- 114 If the option to permit mandatory orders against the Crown is adopted, the current procedural confusion would be resolved by replacing the JAA by a new Judicature Amendment Act 2001, which would empower the grant of injunctions against the Crown,¹³¹ retain sections 4(2), (2A), (5), (5A), (5B), (5C), (6) and section 5, and re-draft Part VII of the HCR. This course has the advantage of removing unnecessary duplication in respect of both substantive law and procedural rules, and expressing what must remain in plain language and a more concise form.
- 115 The constitutional importance of this reform requires that the effect of the amendment be apparent. That is achieved by a recital in the new section 4(2) that the common law power of the courts to exercise their jurisdiction of judicial review is not affected by the reform.

¹²⁸ [1987] 1 NZLR 445 (CA). See also *New Zealand Wool Board v Commissioner of Inland Revenue* (1999) 19 NZTC 15,082 (HC) (reversed in *Commissioner of Inland Revenue v New Zealand Wool Board* (1999) 19 NZTC 15,476 (CA)) and Public and Administrative Law Reform Committee report 8, above n 63, 21.

¹²⁹ *Manson v New Zealand Meat Workers Union* [1990] 3 NZLR 615 (HC).

¹³⁰ [1994] 3 NZLR 667 (CA).

¹³¹ See paras 16–42 above.

- 116 Enactment of the consequential amendments to the HCR as a schedule to the Judicature Amendment Act 2001 will avoid any issue as to their validity. The drafting of these amendments will be a matter for the Rules Committee and Chief Parliamentary Counsel, who were consulted in the preparation of this Paper.
- 117 A draft of the proposed JAA is attached as appendix A.
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APPENDIX A

Judicature Amendment Bill

Government Bill

Contents

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Judicature Amendment Act 2001.
- (2) In this Act, the Judicature Act 1908 is called “the principal Act”.

2 Commencement

This Act comes into force on [insert date].

3 Act to bind the Crown

This Act binds the Crown.

4 Purpose

- (1) The purpose of this Act is to reform the law relating to the procedure for judicial review and to repeal Part I of the Judicature Amendment Act 1972.
- (2) This Act does not limit any power which the Court has under any law with respect to applications for review.

5 Certain rules relating to applications for review

- (1) Where on an application for review the applicant is entitled to an order declaring that a decision is unauthorised or otherwise invalid, the Court may, instead of making that declaration, set aside the decision.
- (2) Despite any rule of law to the contrary, it is not a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the respondent was not under a duty to act judicially. This subsection is not to be construed as enlarging or modifying the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition.

COMMENTARY

Section 3

- C1 *Section 3* provides that the Act will bind the Crown.

Section 4

- C2 *Section 4(1)* sets out the purpose of the Act. The purpose of the Act is to repeal the Judicature Amendment Act 1972 and to reform the law of judicial review. This legislation will replace the judicial review provisions of the JAA 1972. It does not address the sections of Part II of the JAA 1972 that are still in force.¹³²
- C3 *Section 4(2)* provides that the common law powers of the Courts to exercise their jurisdiction of judicial review will not be affected by the new Act.¹³³

Section 5

- C4 *Section 5(1)* restates the current section 4(2) in plain English.
- C5 *Section 5(2)* restates the current section 4(2A) in plain English.

¹³² Sections 18, 19(1) and parts of the First and Second Schedule.

¹³³ See discussion at para 64.

6 Directions

- (1) On an application for review the Court, if it is satisfied that the applicant is entitled to relief, may, in addition to or instead of granting any other relief, direct the respondent to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates. In giving any such direction the Court must—
 - (a) advise the respondent of its reasons for so doing; and
 - (b) give to the respondent such directions as the Court thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
- (2) If the Court gives a direction under subsection (1), it may also make an interim order.
- (3) Where any matter is referred back to the respondent, the respondent has jurisdiction to reconsider and determine the matter in accordance with the Court's direction despite anything in any other enactment.
- (4) Where any matter is referred back to the respondent, the act or omission that is to be reconsidered, subject to any interim order made by the Court, continues to have effect according to its tenor unless and until it is revoked or amended by the respondent.
- (5) In reconsidering any matter referred back under subsection (1), the respondent must have regard to the Court's reasons for giving the direction and to the Court's directions.

7 Defects in form, or technical irregularities

- On an application for review, if the sole ground of relief established is a defect in form or a technical irregularity, and the Court finds that no substantial wrong or miscarriage of justice has occurred, the Court may
- (a) refuse relief; and
 - (b) if the decision has already been made, make an order validating the decision, despite the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

Section 6

- C6 *Section 6* restates the current section 4(5), 4(5A), 4(5B), 4(5C) and 4(6) in plain English. This section sets out the Court's powers to give directions.

Section 7

- C7 *Section 7* restates the power that the Court currently has under section 5 to validate a decision where there is a defect in form or a technical irregularity, but the Court finds no substantial wrong has occurred.

8 Remedies against the Crown

To avoid any doubt, the Court may make any order (including an interim order) against the Crown that it may make against any other respondent in respect of an application for review or an application for mandamus, injunction, prohibition, or certiorari.

9 Principal Act amended

- (1) Section 26J(4)(b) of the principal Act is amended by omitting the words “under section 4(1) of the Judicature Amendment Act 1972”.
- (2) Section 56N of the principal Act is amended by omitting the words “under Part I of the Judicature Amendment Act 1972” and substituting the words “by the High Court”.

10 Other enactments amended

The enactments specified in Schedule 1 are amended in the manner indicated in that schedule.

11 Repeals

The enactments specified in Schedule 2 are repealed.

Section 8

- C8 *Section 8* provides that the Court may make any order against the Crown. It does not include the Sovereign in her private capacity (see Crown Proceedings Act 1950 section 35(1)). Nor does the (procedural) reform alter any substantive Crown immunity, any principle of nonjusticiability, or the grounds on which the Court will exercise the discretion against granting relief (paragraph 31 above). We propose that in the new Act all orders, including mandatory orders, and whether interim or permanent, should be available against the Crown.

Section 9

- C9 *Section 9* provides for the consequential amendments that must be made to the principal Act as a result of the new Act.

Section 10

- C10 *Section 10* sets out amendments that, as a consequence of this Act, must be made to other legislation. Note that no amendment is proposed regarding the Employment Contracts Act 1991 in light of its repeal by the Employment Relations Act 2000.

Section 11

- C11 *Section 11* sets out the enactments that, as a consequence of this Act, must be repealed.

Schedule 1

Other enactments amended

Armed Forces Discipline Act 1971 (RS Vol 23 p 33)

Omit from section 143 the words “be liable to review by any court under the Judicature Amendment Act 1972” and substitute the words “an application for review”.

Casino Control Act 1990 (1990 No 62)

Omit from section 98(a) the words “of that decision under Part I of the Judicature Amendment Act 1972” and substitute the words “by the High Court of that decision”.

Children, Young Persons, and Their Families Act 1989 (1989 No 24)

Omit from paragraph (a) of the definition of “review proceedings” in section 207B the words “under the Judicature Amendment Act 1972” and substitute the words “by the High Court”.

Crown Proceedings Act 1950 (RS Vol 38, p 441)

Omit from the definition of “civil proceedings” in section 2(1) the words “under Part I of the Judicature Amendment Act 1972” and substitute the words “by the High Court”.

Flags, Emblems, and Names Protection Act 1981 (1981 No 47)

Repeal section 20A(5) and substitute :

“(5) A decision of the New Zealand Olympic Committee Incorporated under this section may be the subject of an application for review by the High Court.”

Immigration Act 1987 (RS Vol 33 p 163)

Omit from paragraph (a) of the definition of “review proceedings” in section 2(1) the words “under the Judicature Amendment Act 1972” and substitute the words “by the High Court”.

Omit from section 146A(1) the words “Any review proceedings in respect of a statutory power of decision” and substitute the words “An application for review by the High Court in respect of any decision”.

Repeal section 146A(3).

International War Crimes Tribunals Act 1995 (RS Vol 41 p 577)

Omit from section 39 the words “under Part I of the Judicature Amendment Act 1972” and substitute the words “by the High Court”.

Local Government Official Information and Meetings Act 1987 (RS Vol 35 p 347)

Repeal section 9(1)(b) and substitute:

“(b) Any application for review by the High Court of any decision under this Act; —”.

Repeal section 32(4) and substitute:

“(4) Nothing in this section prevents the High Court from making an interim order in respect of an application for review or effect being given to that interim order.”

Repeal section 37(a) and substitute:

“(a) May not make an application for review by the High Court of that decision; and”

New Zealand Security Intelligence Service Act 1969 (RS Vol 21 p 559)

Omit from section 4A(6)(b) the words “judicial review under Part I of the Judicature Amendment Act 1972” and substitute the words “an application for review by the High Court.”

Official Information Act 1982 (RS Vol 35 p 403)

Repeal section 11(1)(b) and substitute:

“(b) Any application for review by the High Court of any decision under this Act;”.

Repeal section 32(5) and substitute:

“(5) Nothing in this section prevents the High Court from making an interim order in respect of an application for review or effect being given to that interim order.”

Repeal section 34(a) and substitute:

“(a) May not make an application for review by the High Court of that decision; and”

Privacy Act 1993 (1993 No 28)

Repeal section 119 (1)(b) and substitute:

“(b) Any application for review by the High Court of any decision under this Act; —”.

Rating Powers Act 1988 (1988 No 97)

Omit from section 150C(2)(b) the words “review by the High Court under section 4 of the Judicature Amendment Act 1972,” and substitute the words “an application for review by the High Court”.

Resource Management Act 1991 (RS Vol 32 p 131)

Omit from section 296(a) the words “under Part I of the Judicature Amendment Act 1972” and substitute the words “by the High Court”.

Sale of Liquor Act 1989 (1989 No 63)

Omit from section 148(a) the words “under Part I of the Judicature Amendment Act 1972” and substitute the words “by the High Court”.

Serious Fraud Office Act 1990 (1990 No 51)

Omit from section 21(3) the words “under section 8 of the Judicature Amendment Act 1972” and substitute the words “with respect to an application for review by the High Court”.

Schedule 2

Enactments repealed

Employment Contracts Act 1991 (1991 No 22)
Section 163

Judicature Amendment Act 1972 (RS Vol 40 p 327)
Part I

Judicature Amendment Act 1977 (RS Vol 40 p 327)
Sections 10 to 14

Judicature Amendment Act 1991 (RS Vol 40 p 327)
Section 7

APPENDIX B

High Court Rules – Part VII

Extraordinary remedies

623 Mandamus

- (1) This rule applies when an application is made to the Court to compel—
 - (a) An inferior court; or
 - (b) A tribunal; or
 - (c) A person—to perform a public duty of the court, tribunal, or person.
- (2) This rule does not apply if the duty is to—
 - (a) Pay a sum of money for the non-payment of which a writ of sale may be issued; or
 - (b) Perform an act for the non-performance of which a writ of arrest may be issued.
- (3) When this rule applies, the Court may make an order for mandamus ordering the court, tribunal, or person to perform the public duty.
- (4) No proceeding may be commenced against a court, tribunal, or person for anything done to comply with an order for mandamus.

624 Injunction

- (1) This rule applies when an application is made to the Court to restrain—
 - (a) An inferior court; or
 - (b) A tribunal; or
 - (c) A person—from a threatened or actual breach, continuation of a breach, or further breach of a duty of the court, tribunal, or person.
- (2) When this rule applies, the Court may make an order for injunction restraining a threatened or actual breach, continuation of a breach, or further breach of the duty.
- (3) This rule does not affect the power of the Court to grant the equitable remedy of injunction in a case that does not come within this rule.

625 Prohibition

- (1) This rule applies when an application is made to the Court to prohibit—
 - (a) An inferior court; or
 - (b) A tribunal; or
 - (c) A person—from exercising a jurisdiction that the court, tribunal, or person is not by law empowered to exercise.
- (2) When this rule applies, the Court may make an order for prohibition prohibiting the exercise of the jurisdiction.

626 Certiorari

- (1) This rule applies when an application is made to the Court to review all or part of a determination of—
 - (a) An inferior court; or
 - (b) A tribunal; or
 - (c) A person exercising a statutory or prerogative power; or
 - (d) A person exercising a power that affects the public interest.
- (2) When this rule applies, the Court may do 1 or both of the following:
 - (a) Make an order for certiorari;
 - (b) Make any other order that the Court thinks just.

627 Removal from office

When an application is made to the Court to remove a person from a public office, or to try the right of a person to hold a public office, the Court may—

- (a) Order that the person be removed from the office; or
- (b) Declare who is entitled to hold the office; or
- (c) Make both an order under paragraph (a) and a declaration under paragraph (b).

627B Interim orders

- (1) When an application is made under this Part, the Court may make interim orders on such terms and conditions as the Court thinks fit.
- (2) An applicant who applies for an interim order must file a signed undertaking in the terms stated in subclause (3).
- (3) Those terms are 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.
- (4) The undertaking must be referred to in the order and is part of it.

628 Procedure

- (1) Every application for the assistance of the Court under this Part, and every application for review under Part I 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 II 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 I 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 I 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 IV 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 I of the Judicature Amendment Act 1972, a Judge may exercise the powers conferred by section 10 of that Act.

APPENDIX C

Other jurisdictions

AUSTRALIA

The Australian Administrative Decisions (Judicial Review) Act 1977 sets out in sections 5 and 6 some 9 grounds of review, namely

5. Applications for review of decisions

- (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds—
- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
 - (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
 - (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
 - (d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;
 - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
 - (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
 - (g) that the decision was induced or affected by fraud;
 - (h) that there was no evidence or other material to justify the making of the decision.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to—
- (a) taking an irrelevant consideration into account in the exercise of a power;
 - (b) failing to take a relevant consideration into account in the exercise of a power;
 - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
 - (d) an exercise of a discretionary power in bad faith;
 - (e) an exercise of a personal discretionary power at the direction or behest of another person;
 - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
 - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
 - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
 - (j) any other exercise of a power in a way that constitutes abuse of the power.

CANADA

The Canadian Federal Court Act 1970 provides by section 28(1):

Notwithstanding section 18 or the provisions of any other Act, the court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ENGLAND – 1938

The English Administration of Justice (Miscellaneous Provisions) Act 1938 simply provided by sections 7–9:

7.

- (1) The prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the High Court.
- (2) In any case where the High Court would, but for the provisions of the last foregoing subsection, have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court or any division thereof for any purpose, the Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.
- (3) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari.
- (4) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to any right of appeal therefrom.
- (5) In any enactment references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

8.

The power of the High Court under any enactment to require justices of the peace or a judge or officer of a county court to do any act relating to the duties of their respective offices, or to require any court of summary jurisdiction or court of quarter sessions to state a case for the opinion of the court, in any case where immediately before the commencement of this Act the Court had by virtue of any enactment jurisdiction to make a rule absolute or to make an order, as the case may be, for any of those purposes, shall be exercisable by order of mandamus.

9.

- (1) Informations in the nature of quo warranto are hereby abolished.
- (2) In any case where any person acts in an office in which he is not entitled to act and an information in the nature of quo warranto would, but for the provisions of

the last foregoing subsection, have lain against him, the High Court may grant an injunction restraining him from so acting and may (if the case so requires) declare the office to be vacant.

- (3) No proceedings for an injunction under this section shall be taken by a person who would not immediately before the commencement of this Act have been entitled to apply for an information in the nature of quo warranto.

ENGLAND – 1981

The English Supreme Court Act 1981 currently provides by sections 29–31:

29 Orders of mandamus, prohibition and certiorari

- (1) The High Court shall have jurisdiction to make orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act.
- (2) Every such order shall be final, subject to any right of appeal therefrom.
- (3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.
- (4) The power of the High Court under any enactment to require justices of the peace or a judge or officer of a country court to do any act relating to the duties of their respective offices, or to require a magistrates' court to state a case for the opinion of the High Court, in any case where the High Court formerly had by virtue of any enactment jurisdiction to make a rule absolute, or an order, for any of those purposes, shall be exercisable by order of mandamus.
- (5) In any enactment—
 - (a) references to a writ of mandamus, of prohibition or of certiorari shall be read as references to the corresponding order; and
 - (b) references to the issue or award of any such writ shall be read as references to the making of the corresponding order.

30 Injunctions to restrain certain persons from acting in offices in which they are not entitled to act

- (1) Where a person not entitled to do so acts in an office to which this section applies, the High Court may—
 - (a) grant an injunction restraining him from so acting; and
 - (b) if the case so requires, declare the office to be vacant.
- (2) This section applies to any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter.

31 Application for judicial review

- (1) An application to the High Court for one or more of the following forms of relief, namely—
 - (a) an order of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction under subsection (2); or
 - (c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies;shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

- (2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—
 - (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;
 - (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
 - (c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.
- (3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.
- (4) On an application for judicial review the High Court may award damages to the applicant if—
 - (a) he has joined with his application a claim for damages arising from any matter to which the application relates; and
 - (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.
- (5) If, on an application for judicial review seeking an order of certiorari, the High Court quashes the decision to which the application relates, the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court.
- (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.

Order 53 of the Rules of the Supreme Court (as appearing in the 1999 White Book) provides:

1. Cases appropriate for application for judicial review

- (1) An application for—
 - (a) an order of mandamus, prohibition or certiorari, or
 - (b) an injunction under section 30 of the Act restraining a person from acting in any office in which he is not entitled to act,
 shall be made by way of an application for judicial review in accordance with the provisions of this Order.
- (2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to—
 - (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,

- (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
 - (c) all the circumstances of the case,
- it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

2. Joinder of claims for relief

On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3. Grant of leave to apply for judicial review

- (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule ...

4. Delay in applying for relief

- (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
- (2) Where the relief sought is an order of certiorari in respect of any judgment, order conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
- (3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

5. [Prescribes mode of applying]

6. [Provides as to affidavits]

7. Claim for damages

- (1) On an application for judicial review the Court may, subject to paragraph (2) award damages to the applicant if—
 - (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and
 - (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
- (2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

8. [Provides as to interlocutory applications]

9. Hearing of application for judicial review

- (4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

- (5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may instead of refusing the application, order the proceedings to continue as if they had been begun by writ ...
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