# Administrative law reform 1953-1978

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*Administrative law has been extensively studied and reformed in the past twenty-five years. What powers can properly be conferred on public authorities? Who should exercise those powers — minister, department, court or tribunal? What procedures should they follow? What rights of appeal or review should those aggrieved by administrative decisions be able to invoke? Ken Keith considers some of the answers given to these questions in the past twenty-five years and comments on the methods of law reform that have developed over that period.*

## I. INTRODUCTORY REMARKS

The past twenty-five years are years of major change in our society, changes which have had significant reflections in the law.[1] My principal purpose is to trace some of the changes in public and administrative law.[2] That review will

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1 For a convenient survey of the period see Wards (ed.) *Thirteen Facets: The Silver Jubilee Essays surveying the New Elizabethan Age, a period of unprecedented change* (Wellington, 1978). In the present article I have attempted to avoid extensive duplication of the ground covered in my contribution (on "Constitutional Change") to that volume.

2 The emphasis on public law can be justified, inter alia, by reference to the interest of Professor McGechan, the founder of this Review, in that area of law and to the heavy involvement of Faculty members in that area: see the Appendix noting Faculty participation in law reform. For other surveys of the growth of administrative law see the articles contributed by McGechan, Aikman and others to the N.Z. Journal of Public Administration, Cooke "The Changing Face of Administrative Law" (1960) 36 N.Z.L.J. 128 and "Administrative Law: The Vanishing Sphinx [1975] N.Z.L.J. 529, Northey "Changing Face of Administrative Law" (1969) 3 N.Z.U.L.R. 426, and "A Decade of Change in Administrative Law" (1974) 6 N.Z.U.L.R. 25, and Aikman in Robson (ed.) *New Zealand: the Development of its Laws and Constitution* (2nd ed. London, 1967) chs 4 and 5.

Of course a great deal has been written on the role of the courts in controlling the administration in recent years; see especially de Smith *Judicial Review of Administrative Action* (3rd ed. London, 1973), Paterson *An Introduction to Administrative Law in New Zealand* (Wellington, 1967), Wade, *Administrative Law* (4th ed. Oxford, 1977), Whitmore and Aronson *Review of Administrative Action* (Sydney, 1978), and Griffith *The Politics of the Judiciary* (London, 1977). I have taken account of the balance of the literature in choosing my topics.

provide a basis for a brief, selective discussion of the methods of reform that have evolved over that period.

Public law is about the grant, exercise and control of state power. It is about the description of those powers — what powers have been conferred on the state and its many servants and agents, how are those powers to be exercised, what controls are there over that exercise, what rights of review and appeal can those aggrieved by decisions invoke? It is also about the evaluation of the answers to those questions, for centuries of constitutional debate and decision have provided a series of principles against which the answers — actual or proposed — can be tested. Thus, to take a recent example, the 1977 debate about the power of the Security Intelligence Service to intercept communications could and did invoke two basic constitutional principles: the great case of *Entick* v. *Carrington*[3] denied that a power to issue such warrants was vested in executive officers; but the principle of ministerial responsibility required, it was said, that the Minister in charge of the Service should take the relevant decisions and bear the political and legal responsibility.[4] The law and the lawyer clearly have a part to play in such evaluative argument and in the formulation of any legislation enacted to resolve it.

Indeed the two questions — the descriptive and the evaluative, the "is" and the "ought" — will often overlap. So courts considering whether official documents should be disclosed to the parties to litigation involving the government[5] or whether a minister may publish Cabinet confidences[6] will weigh some of the same factors as those weighed by committees considering the reform of official secrets legislation[7] or the publication of ministerial memoirs[8] and by ministers deciding what legislation should be enacted on such matters and what policies should be adopted in particular areas of government administration. Similarly — if more broadly — a legislator deciding whether a particular power of decision should be conferred on court or tribunal or minister, or a court determining the extent of its rights of appeal or Common Law review may have regard to some of the same factors — e.g. how important is the interest of the individual in issue, what is the nature of the question in dispute, who is best able to resolve such a question, what procedure is most apt . . . ?[9] The significance of the importance of the interest can be

3 (1765) 19 St. Tr. 1030.

4 Report of the Chief Ombudsman, *Security Intelligence Service* A.J.H.R. 1976 A 3A, p. 57. For a very useful discussion of the issues see Crowder "The Security Intelligence Service Amendment Act 1977 and the state power to intercept communications" (1978) 9 V.U.W.L.R. 145.

5 See e.g. *D.* v. *NSPCC* [1978] A.C. 171.

6 *Attorney-General* v. *Jonathan Cape Ltd.* [1976] Q.B. 752.

7 *Departmental Committee on Section 2 of the Official Secrets Act 1911* (Franks Committee, London, 1972, H.M.S.O., Cmnd. 5104).

8 *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (London, 1976, H.M.S.O., Cmnd. 6386).

9 For an attempt to analyse part of the law of judicial review under such headings see "The Courts and the Administration: a Change in Judicial Method" (1977) 7 N.Z.U.L.R. 325, and for appeal (with some comparisons with review) see "Appeals from Administrative Tribunals" (1969) 5 V.U.W.L.R. 123. For a direct invocation by a minister of a judge's narrow reading of his appellate power (by reference to his lack of expertise in the particular area of administration and policy) to justify the setting up of a tribunal rather than the using of a court see infra pp. 436-7.

illustrated by noting the answers given to the question: who is entitled to a hearing in price determination cases? The answers are those given by the courts, the legislature and a tribunal.

The Court of Appeal in 1956 decided that the Price Tribunal was obliged to give the New Zealand Licensed Victuallers Association a hearing before it fixed the price for beer sold for consumption off licensed premises.[10] The three judges in the majority based that obligation in part on the power of the Tribunal to affect "the rights or liberties of vendors of a particular class of goods to sell those goods".[11] "There can be no difference in principle", said one of them, "between the curtailment of a person's right to property and the curtailment of his rights to trade."[12] But, by contrast, consumers throughout New Zealand were in a very different position. "It is true that a consumer is an interested person; but he is interested as a member of the public" and as such he was not to be protected by the court's requiring the Tribunal to give him a fair hearing.[13]

Parliament addressed itself to the question in 1975 and 1976. In 1975 it permitted participation in pricing appeals, first, by those who had applied for the pricing decision in question and, second, by those who, "in the opinion of the Commerce Commission, [had] a substantial interest in the subject matter of the application" or in the decision.[14] The Commerce Commission decided that the Combined State Services Organisation could participate in an appeal relating to the price of bread.[15] It refused to limit the quoted phrase to pecuniary interest and gave it a wide reading in accordance with the purport and object of the Act as appearing both from its title and from the matters to be considered in pricing appeals. On appeal, the Supreme Court held, however, that the Organisation was not capable of coming within the scope of the provision.[16] At the time the legislature was already considering a revised set of provisions which would generally affirm the Commission's discretion and, more specifically, make it clear that consumer interests can participate in pricing appeals. Manufacturers, distributors and vendors have the right to appeal. The Commission can grant special leave to bulk purchasers. And "any person who in the opinion of the Commission represents a substantial number of consumers . . . who is granted special leave by the Commission . . . on the ground that the decision is of manifest importance to such consumers . . . " may appeal.[17] In addition the Commission has to allow to participate any person who in its opinion is either[18]

10 *New Zealand United Licensed Victuallers Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 167.

11 Ibid., 202 per Cooke J.; (with whom North and Turner JJ. agreed, ibid., 207, 209).

12 Turner J., ibid., 209.

13 Cooke J., ibid., 202.

14 Commerce Act 1975, ss. 99(2) and 101(1).

15 *Re Applications by CSSO and CARP* (1976) 1 N.Z.A.R. 49.

16 *Application of CSSO; N.Z. Association of Bakers Inc.* v. *Secretary of Trade and Industry,* unreported 9 August 1976, Wellington Registry, M.171/76, Wild C.J.

17 Commerce Act 1975, s. 99(2)) (as enacted by the Commerce Amendment Act 1976, s. 30(1)).

18 Commerce Act 1975, s. 14(1) (as enacted by the Commerce Amendment Act 1976, s. 8(1)). Category (a) participants are full parties. Category (b) have the right to cross-examine or make submissions only if the Commission agrees. So far, in its reported decisions, it always has. But the distinction goes to the point that the content of natural justice varies with the circumstances; e.g. *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118, and the cases cited infra n. 20.

(a) A person who justly ought to be heard; or
(b) A person whose appearance or representation will assist the Commission in its consideration of the subject matter of the proceedings.

The Commerce Commission has considered these new provisions in relation to an inquiry into collective pricing agreements operated by the Hotel Association of New Zealand.[19] In holding that the Association came within (a) it returned to the Common Law, as stated in the *Licensed Victuallers* case twenty years earlier, stressing that the Association's "rights" were affected. The paragraph was to be "interpreted so as to include within its ambit those who appear to be entitled to a hearing under the relevant common law rules of natural justice". Apart from anything else this holding is a nice illustration of the point that the legislature sometimes cannot (or does not) improve on the Common Law.[20] The CSSO applied under both paragraphs. The Commission concluded that the Organisation should be admitted under paragraph (b). It was satisfied that the Organisation would assist the Commission in the particular case. While the Examiner (like the Commission) was to take account of the interests of consumers, he had to balance them against other factors and he was not obliged to consult with consumers. A consumer organisation might therefore assist the Commission by enabling it to have the benefit of a direct expression of consumer views.

All three institutions — court, legislature and tribunal — have therefore been concerned to accord a procedural protection to what they see as an important interest — the right of the vendor to sell his goods. That right is not to be affected by a pricing order without the vendor being heard. Parliament and the tribunal have now extended similar recognition to the interest of consumers. In granting that recognition they have also stressed the utilitarian element: that appropriate consumer bodies will be able to inform the decision making process; the decision should be a better one.

## II. THE GRANT OF POWER — AND ITS REFUSAL

One obvious way of protecting the individual against the power of the state is the refusal to grant power. But it is not (or at least it has not been) common for that argument to be made in New Zealand. In general, extensive public power is tolerated, even welcomed. The government is seen as having very broad powers — and responsibilities — in the economy. It provides and administers a large welfare scheme. It employs about twenty percent of the work force. Areas of economic activity which elsewhere are in the hands of private ownership are here controlled by the government or a public corporation (coal mining, rail and air transport, some sea and road transport, broadcasting, energy generation and distribution, much major public works, some insurance, housing and hotels . . .). Its taxes comprise thirty-five percent of the national income. Certainly there is a growing and articulated concern about governmental power. It may be that the growth

19 *Re Applications by HANZ and CSSO* (1977) 1 N.Z.A.R. 236.
20 For other examples, which raise a question about the value of some codification efforts, see e.g. *Kanda* v. *Government of Malaysia* [1962] A.C. 322 (J.C.), *Munusamy* v. *Public Services Commission* [1967] 1 A.C. 348 (J.C.), *R.* v. *Randolph* [1966] S.C.R. 266, and *In Re the Royal Commission on the State Services* [1962] N.Z.L.R. 96 (C.A.).

to big government has ended, but, even if that is so, it will probably be a long time before the powers of government in many areas are significantly diminished. So to take a major example, it retains the power to make regulations on virtually any topic relating to the economy, a power stated in subjective and almost unchallengeable terms in the Economic Stabilisation Act 1948.[21]

That is not to say, however, that debates about the extent of government power do not sometimes arise. I have mentioned the S.I.S. controversy. The disposition of the funds becoming available under the Labour Government's superannuation scheme provides another recent example. A rather more diffuse concern about the extent of government by regulation led in 1962 to the stating by a Parliamentary Committee of some guidelines for the use of that power and to some improvements in detail.[22] It can hardly be said, however, that the executive has abandoned its power to deal with matters of principle by way of regulation in the economic area. The power has not been reduced to the subsidiary role envisaged by the Parliamentary Committee. It has in fact since been widened by the passing of the Civil Defence Act 1964 and the International Energy Act 1976. Nor — until very recently — has there been much public concern about the constitutional and political significance of this development.

Legislation confers on the government not only powers to regulate but also, of course, many discretions to make particular decisions affecting individuals. While an attempt has now been made to gather some of the information relevant to those powers, as yet there is no analysis of those powers nor any generally accepted statement of principles about their grant.[23] Such controversy as there has been — for instance over the powers of entry into private premises in the Narcotics Bill of 1965 and the Electricity Amendment Bill of 1976[24] — has by its very paucity tended to emphasise the general lack of concern about the grant of broad governmental powers. The major concern has been about the method of the exercise of the power and especially about the review of decisions affecting individuals. Who should have the power, what procedure should be followed, and what rights of review or of appeal (if any) should there be? They have been the questions rather than — should the power even be conferred?

The following discussion is selective. So far as the choice of decider is concerned, it focuses on the question: Minister, court or tribunal? So far as procedures are concerned, it notes various recent changes in the rules relating to participation in statutory powers of decision. That relates to the broader issue of openness in government. The discussion of remedies concerns the Ombudsman and the Administrative Division of the Supreme Court.

21 The Court of Appeal upheld the first set of wage stabilization regulations made in 1972 in *New Zealand Shop Employees Ind. Assn. of Workers* v. *Attorney-General* [1976] 2 N.Z.L.R. 521 but the judgment in *Auckland City Corporation* v. *Taylor* [1977] 2 N.Z.L.R. 413 striking down rent regulations supports the view that some of the later wage controls might have been invalid.

22 *Report of the Committee on Delegated Legislation,* A.J.H.R. 1962, I 12.

23 The Public and Administrative Law Reform Committee has the question on its agenda and some initial research has been undertaken; a Canadian study, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970* (1975) runs to 1025 pages and lists 14,885 powers.

24 See e.g. the 1976 Report of the Chief Ombudsman, pp. 10-13. One of the first results of the research mentioned in the preceding note will probably be in this area.

## III. MINISTER, COURT OR TRIBUNAL?

If power is to be conferred the next decision concerns the actor: who should have the power? Should the government have the power? Should it be given to an independent body? If so, a choice may have to be made between court and tribunal, that is between, on the one hand, the permanent magistracy and judiciary already exercising general jurisdiction over legal disputes and other matters and, on the other hand, a tribunal specially constituted for the purpose.

The lack of assembled data makes impossible an overall evaluation of the process of choice between Minister and an independent body as decider. A few instances can, however, be taken to give some indication of the factors that may bear on the choice and to provide some impression of the choices that have been made. In the first, the legislature deliberately preferred the executive to the courts. In the second, the courts have themselves developed the law to claim a power for themselves and to displace executive power of decision. And in the third and fourth cases the legislature has moved powers of decision from the executive to a court or tribunal.

The first — the Security Intelligence Service interception warrant issue — involves the preferring of ministerial to judicial decision. The two principal arguments were noted at the beginning of this article.[25] One other is worth some discussion here: the issue of such warrants, said the Chief Ombudsman, is essentially executive and not judicial business. He did not spell this argument out but he may well have had in mind the reluctance or even the refusal of the courts to review governmental decisions taken on broad public interest grounds in the area of defence and emergency. So Lord Radcliffe, in agreement with all his colleagues in the House of Lords,[26] had no doubt in 1964 that "The disposition, armament and direction of the defence forces of the State are matters decided upon by the Crown and are within its jurisdiction as the executive power of the State".[27] In particular, the issue whether "it would be beneficial for this country to give up nuclear armament [was] not justiciable in a court of law".[28]

> The question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes.[29]

The question was not one for the court or jury.

While in general acknowledging jurisdiction to intervene, the courts have shown a similar reluctance to review actions taken by governments under broad powers to meet emergencies.[30]

Even in *Conway* v. *Rimmer*,[31] in which the House of Lords reclaimed from ministers its power to rule on ministerial claims that evidence should not be disclosed because of the public interest in its confidentiality, the Law Lords

25 Supra p. 428 and nn. 3 and 4.
26 *Chandler* v. *D.P.P.* [1964] A.C. 763.
27 Ibid., 796.
28 Ibid., 797.
29 Ibid., 798-799.
30 E.g. *Liversidge* v. *Anderson* [1942] A.C. 206, *Hewett* v. *Fielder* [1951] N.Z.L.R. 755 (Full Court), *Ningkan* v. *Government of Malaysia* [1970] A.C. 379, *Dean* v. *Attorney-General of Queensland* [1971] Qd. R. 391, *McEldowney* v. *Forde* [1971] A.C. 632, and the *Shop Employees* case, supra n. 21.
31 [1968] A.C. 910.

acknowledged that in some cases the ministerial view would be conclusive or virtually so: decisions concerning the disclosure of Cabinet and defence documents are such cases. The Committee of Privy Counsellors on Ministerial Memoirs, under the chairmanship of Lord Radcliffe, similarly preferred political to judicial determination of disputes about the publication of any future Crossman diaries.

> The relevant considerations are political and administrative, and if enforcement is to be looked for at all they must either be applied according to a general received rule, such as an arbitrary time limit, or according to the opinions of persons whose experience has made them more intimately familiar with the field.[32]

The same issue of ministerial or court determination of disclosure disputes arises in any recasting of the Official Secrets Act 1951 or in any freedom of information legislation.

The third and fourth cases involve a legislative preference for decision making by tribunal or court rather than by Minister or departmental official. They concern the Commerce Commission and immigration. In both cases governmental power has been reduced.

The Commerce Act 1975 regulates (a) trade practices, (b) monopolies, mergers and takeovers, and (c) prices. In its original form it gave the powers of decision in the three areas respectively to

(a) the Commerce Commission (with a right of appeal to the Supreme Court);

(b) the Minister of Trade and Industry who was to be advised by the Commission (with a right of appeal to an appeal authority which also could only advise the Minister); and

(c) either the Secretary of Trade and Industry (with a right of appeal to the Commission) or the Commission.

This pattern was consistent with the pre-1975 law.[33] It recognised

(a) the responsibility of the government to make decisions in the merger and monopoly areas;

(b) the inappropriateness of court involvement in the pricing area; and

(c) the limitation of the court's role in trade practices to an appellate one (which has not in fact been invoked since it was created in 1971).

In 1975 the opposition party in Parliament argued strongly for rights of appeal and for the reduction of the powers of the Minister and the Department. In 1976, in accordance with that position and a report prepared by a representative committee, that party, now in government, promoted legislation which, first, removed the final power of the Minister and Department over mergers and required pricing decisions to be taken at first instance by the Secretary and, secondly, introduced a comprehensive right of appeal in each of the two areas — to the Supreme Court in the case of mergers and to the Commission in pricing cases. A right of appeal — if possible to the Supreme Court — was seen as an important matter of principle. As yet there is no experience of this enhanced judicial role. Earlier experience would cast doubts on it.[34]

The immigration law shows a similar recent movement of power from Minister

32 Report cited supra n. 8, para. 66.
33 See e.g. Robson, op. cit., ch. 8.
34 See infra pp. 436-437.

to court and tribunal, but for different reasons. Before 1977 the Minister had the power to deport

(a) prohibited immigrants (someone without a current entry permit);

(b) immigrants convicted of certain offences in some cases within a prescribed period;

(c) alien immigrants if their remaining in New Zealand was not conducive to the public good.

The legislation created no rights of appeal or other remedies against the ministerial powers. Furthermore, the courts had shown no disposition to restrict these raw executive powers: they did not require the Minister to comply with natural justice[35] nor did they review the substance of the decisions.[36] The interest of the person subject to deportation proceedings was to be protected only by ministerial discretion and the political process (including — from 1962 — the Ombudsman). But did the law properly evaluate such an interest? Should not a distinction be drawn between the various immigration and deportation powers? The International Covenant on Civil and Political Rights signed by New Zealand but not yet binding on it and the law elsewhere in the Commonwealth suggested both that a distinction could be drawn, and a change in the legislation. Thus article 13 of the Covenant provides[37]

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

In response, in part, to such considerations the Immigration Act 1964 was amended in 1977 and 1978. The deportation law now distinguishes between the situations of four categories of people:

(a) the prohibited immigrant; i.e. someone who never had a valid entry permit or whose permit is no longer valid (either through effluxion of time or following cancellation);

(b) immigrants convicted of certain offences within certain periods of residence;

(c) persons (other than New Zealand citizens) who, in the view of the Minister, have been involved in stated ways in terrorism;

(d) persons (other than New Zealand citizens) whose continued presence, in the view of the Minister, constitutes a threat to national security.

Those in category (a) are automatically deported following conviction, subject however to the right to appeal to the Minister for an order that they not be deported. The Minister can make that order if he is satisfied that because of exceptional circumstances of a humanitarian nature the deportation would be unduly harsh or unjust.[38] The Minister has a discretion to deport those in categories (b) and (c). They have a right of appeal, in the former case, to the Deportation

35 *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86.

36 *Tobias* v. *May* [1976] 1 N.Z.L.R. 509.

37 See infra pp. 447-448 as to the growing significance of international standards for domestic law.

38 Immigration Act 1964, s. 20 and s. 20A (as enacted in 1977).

Review Tribunal (consisting of a barrister or solicitor of five years standing and two other members)[39] and, in the latter, to the Supreme Court.[40] The Tribunal may quash the order if it is satisfied that the deportation would be unduly harsh or unjust and that it would not be contrary to the public interest for the person to remain in New Zealand. The legislation spells out specific matters concerning the applicant that the Tribunal is to consider.[41] The Supreme Court is given no guidelines for dealing with the terrorism appeals except that it is to determine the matter as if the deportation order had been made in the exercise of a discretion.[42] Persons within category (d) are deported by an Order in Council made by the Governor-General.[43] The legislation gives no remedy to such persons. That silence, the scheme of the legislation, the nature of the power and the traditional attitude of the courts to ministerial deportation powers all combine to suggest that the courts would not control the exercise of the power.[44]

In practical terms the change is a small one. Only a handful of the deportations made each year come within categories (b) and (c). The remedy available to those in (a) was in practice available before 1977 and was supplemented for a period in 1976 and 1977 by a committee set up to consider those who had signed an overstayers' register. Moreover, the government retains an unreviewable and unappealable discretion to deport for national security reasons. And the appellate powers of the Tribunal and the Supreme Court may in practice be restricted.[45] But the legislation does nevertheless involve a significant acceptance of the principle that some migration decisions can be taken by a body independent of government. The matter is not always for unfettered executive discretion. This presumably reflects a balance of an assessment of the importance of the deportation decisions to the individual, his ability to contribute to the decision, the comparative ability and procedures of court and tribunal[46] and the reserved discretion of the government.

A particular power is to be conferred either on a court or on a tribunal. How is that choice to be made? We have already noted the choices made in the commerce and deportation areas. Other choices — and the reasons for them — will

39 Ibid., ss. 22(1) and 22B-D (as enacted in 1978).

40 Ibid., ss. 22(3) and 22G (as enacted in 1978).

41 Ibid., s. 22D. The Tribunal has the power to state a case for the opinion of the Supreme Court on a question of law, s. 22E, and there is a right of appeal on questions of law to the Supreme Court from any determination of the Tribunal, s. 22F.

42 Ibid., s. 22G(3).

43 Ibid., s. 22(2).

44 In addition to the cases cited in nn. 35 and 36 and the cases cited in them, see *R.* v. *Secretary of State for Home Affairs ex parte Hosenball* [1977] 1 W.L.R. 766, D.C. and C.A.

45 For the Tribunal the test is in part that the deportation would be *unduly* harsh or unjust, and the injunction to the court that it determine the appeal as if from the exercise of a discretion is presumably intended to limit the court's role to discovering errors of principle, such as mistakes of interpretation; see e.g. *Robson* v. *Hicks Smith Ltd.* [1965] N.Z.L.R. 1113, 1115 and 1120; *Secretary for Justice* v. *Taylor* [1978] 1 N.Z.L.R. 252, 255. But the absence of a full hearing, record and, possibly, statement of reasons at the original, ministerial level of decision may persuade the court to see its powers more broadly.

46 The choice in this case between court and tribunal is a curious one: the court would appear to be the more appropriate body to determine the conviction cases (the factors to be weighed are those typically relevant to sentencing), while the terrorism issues might be more appropriate for a special, expert tribunal.

now be reviewed. The choice between court and tribunal has been one of the major areas of debate in administrative law in the past fifteen or twenty years. For some time during and after the Second World War the tendency was strongly in the direction of setting up new tribunals to deal with matters both originally and on appeal.[47] In many cases the tribunals were established to resolve issues newly or recently subjected to regulation — the licensing of motor spirits distribution,[48] of air services[49] and of pharmacies[50] provide examples — but, in other cases, areas of jurisdiction that had formerly been committed to the courts were removed from them and placed in the hands of new tribunals. So the Trade Practices Commission (and Appeal Authority),[51] the Shops and Offices Exemptions Tribunal,[52] the Indecent Publications Tribunal[53] and the Taxation Board of Review[54] were established between 1958 and 1962. When the reasons for the choice were debated they were generally those which had been identified in recent reports (especially the Franks Committee in Britain in 1958).[55]

The special knowledge of the members of the tribunal has often been a major factor. So the five members of the Indecent Publications Tribunal are to include two with special qualifications in the field of literature or education.[56] Similarly the Minister of Trade and Industry in recommending members for the Commerce Commission is to have regard not only to their personal attributes but also to their knowledge of or experience in trade, industry, economics, accountancy, commercial law, public administration, or consumer affairs.[57] This point can also be made negatively. The courts are sometimes seen as not having the relevant expertise. Dissatisfaction with their interpretation and application of indecent publications legislation was clearly a factor in their displacement by the new tribunal.[58] This was probably also true in the trade practices area and indeed the judges themselves demonstrated a reluctance to become involved. Thus in a passage quoted by the Minister in charge of the Trade Practices Bill in 1958, Finlay J. (in hearing a motor spirits licensing appeal) declared that[59]

47 See a Survey by the Department of Justice, *The Citizen and Power: Administrative Tribunals* (Wellington, 1965), and Aikman in Robson (ed.), op. cit., 154-177 ("Administrative Tribunals") on both of which I draw heavily for the first half of the period under review.

48 Motor Spirits Distribution Act 1953.

49 Air Services Licensing Act 1951. The International Air Services Licensing Act 1947 provides a nice contrasting example of a choice between tribunal and Minister: the foreign relations aspect of the licensing of international air services clearly makes it inapt to confer this jurisdiction — at least in full — on an independent tribunal. Cp. the confusion that has arisen in the United Kingdom and in the United States from the involvement of independent tribunals in the area: e.g. *Laker Airways Ltd.* v. *Department of Trade* [1977] Q.B. 643, C.A.; and *Chicago and Southern Air Lines Inc.* v. *Waterman Steamship Corporation* 333 U.S. 103 (1948).

50 Pharmacy Amendment Act 1954.

51 Trade Practices Act 1958.

52 Shops and Offices Amendment Act 1958.

53 Indecent Publications Act 1963.

54 Inland Revenue Department Amendment Act 1960.

55 Cmnd. 218 (1958).

56 Indecent Publications Act 1963, s. 3(2)(b).

57 Commerce Act 1975, s. 3(6).

58 And see the Full Court in the *Robson* case supra n. 45.

59 *Central Taxi Depot (Rotorua) Ltd.* v. *N.Z. Retail Motor Trade Association* [1959] N.Z.L.R. 1167, 1168, quoted by Hon. P. N. Holloway M.P., N.Z. Parliamentary debates Vol. 318, 1958: 2130. Note however that Finlay J. did allow the appeal. He found an error of principle in the way the Act had been interpreted.

> None of the regular Courts of the country can have the special knowledge required and must always feel under some disability in determining questions in which policy and discretion are involved.

The Minister continued[60]

> in this type of administrative tribunal there must always be elements of policy and discretion, and I do not believe that the Supreme Court would welcome appeals being made to it on the administrative side of such work.

A single tribunal may not only bring greater expertise. It may also develop and apply the policy of the Act with greater uniformity — especially if the legislation states broad criteria. This may not be so if the power is in the hands of many magistrates or judges. This was a reason for the displacement of the Magistrates' Courts by the Shops and Offices Exemptions Tribunal.[61] This argument was also to be made in relation to appeals from administrative tribunals.[62]

A third advantage of tribunals concerns their reponsiveness to changing conditions. Courts are bound by precedent. Tribunals are not. They can respond more freely to changes in society. Indeed — to return to the first point — they may also feel that they are more qualified to respond. This argument was clearly an important factor in the establishment of the Indecent Publications Tribunal in 1963; its statute permits the reconsideration of a book three or more years after its initial consideration.[63]

A fourth set of advantages concerns tribunals' alleged "cheapness, accessibility, freedom from technicality, expedition . . .". This is part of the list set out by the United Kingdom Franks Committee of those "characteristics which often give [tribunals] advantages over the Courts".[64] Such arguments are made in relation to particular tribunals. All, except the second, apply for example to the Indecent Publications Tribunal. The general force of the argument is indeed recognised for the courts, in the provision of the Supreme Court (Administrative Division) Rules 1969 quoted later.

The arguments about the relative role of court and tribunal became more intense in the mid and late 1960s — especially in relation to appellate jurisdiction. One result is something of a tendency back to the court, especially on appeal.[65] But several new tribunals have been established. The above arguments clearly continue to have considerable force. Once again, some of the tribunals administer new jurisdictions — broadcasting (the grant of broadcasting licences and related matters),[66] commerce (taking over the Trade Practices and Prices Commission but going beyond it), accident compensation (again taking over existing law but going far beyond it), and social security.[67] But in other cases a tribunal has been established to take over jurisdiction formerly exercised in the courts. So Small Claims Tribunals and Motor Vehicle Dealers Tribunals now deal with matters that Magistrates' Courts would previously have heard. And if the conciliation processes

60 These attitudes clearly changed in the 1960s: see the 1971 amendment transferring the jurisdiction of the Appeal Authority to the Supreme Court, and the 1975 Act to the same effect. On appeals, see infra pp. 441-445.

61 N.Z. Parliamentary debates Vol. 320, 1959: 1262.

62 Infra pp. 442-443.

63 Indecent Publications Act 1963, s. 20.

64 Report, supra n. 55, para. 38.

65 Infra pp. 442-445.

66 Broadcasting Acts 1968, 1973 and 1976.

67 Social Security Amendment Act 1973.

established in the Race Relations Act 1971 and the Human Rights Commission Act 1977 (in recognition of the fact that court or tribunal adversary processes alone were inadequate) fails, the next step is to an Equal Opportunities Tribunal, and not to the courts. The 1971 Act in fact originally conferred that jurisdiction on the Supreme Court, but in 1977 the view was taken that for reasons of expertise and of the sensitive treatment of the issues a special tribunal should be established.

These decisions must, however, be seen in a broader context. The courts are not now displaced to the degree that they once were. In the first place, as we shall next note, the protection once automatically given to administrative tribunals against judicial review by strong privative clauses is no longer as frequently accorded. Secondly, they are now more willing to review the validity of administrative action. And, thirdly, as we shall also see, rights of appeal from tribunals to the courts are now more frequently granted. Moreover, it is significant that the Human Rights Commission Bill was amended in the course of its passage to enable a potential plaintiff before the Equal Opportunities Tribunal who is seeking damages in excess of $3000 (the current maximum in the Magistrates' Court) to go directly to the Supreme Court. That change — along with the conferral of enhanced rights of appeal — was made in partial response to arguments that it was constitutionally improper for a tribunal to be established with such extensive powers traditionally exercisable only in the regular courts.

When establishing a tribunal, Parliament in the first part of the period under review also routinely moved to protect the tribunal and its decisions from judicial review. To that end, it included a privative clause, no doubt again in recognition of the reasons for taking the power from, or not giving it to, the courts. So, except in those cases (comparatively few) in which Parliament conferred a right of appeal against their decisions, almost all of the forty tribunals established or continued by legislation enacted between 1945 and 1964 were accorded such protection.[68] But by the 1960s there was a reaction, a reaction parallelled by the courts' own increasing efforts to control administrative power. In 1958 the Franks Committee in the United Kingdom had recommended the repeal of privative clauses (and the conferral of extensive rights of appeal).[69] The British Parliament had responded the following year.[70] In New Zealand the Justice Department in 1965 suggested that "unless special circumstances apply there should be no limitation on the Supreme Court's power to exercise the jurisdiction contained in the prerogative writs".[71] And in 1973 the Public and Administrative Law Reform Committee concluded similarly for the following reasons[72]

> (i) In the absence of a right of appeal, a proper distribution of functions between court and tribunal should be based on their comparative contribution, the former should be concerned with questions of law and of procedure, the latter with matters of fact, discretion, and policy. A tribunal should not be able to violate the law with impunity.
> (ii) The distinction between errors going to jurisdiction and other errors is often a difficult one to apply and may turn on accidents of drafting.
> (iii) The courts are in any event moving to remove this difficulty by deciding that all errors of law are jurisdictional.

68 See *The Citizen and Power*, op. cit., 48.
69 Cmnd. 218 (1958).
70 Tribunals and Inquiries Act 1958, s. 11 (see now the Act of 1971, s. 14).
71 Op. cit., 49.
72 Sixth Report, para. 43.

(iv) The law of judicial review is gaining at the moment a greater coherence based on a broad power of the courts to correct all errors of law. Removal of privative clauses would assist this rational growth.
(v) The legislature is tending towards limiting the use of privative clauses, and, where they are used, their scope.
(vi) Technical, harmless errors could be dealt with by more specific rules, some of which already exist.

The legislature has in general accepted the force of this reasoning.[73]

## IV. PARTICIPATION IN THE EXERCISE OF PUBLIC POWER

My specific concern is narrower than the heading: it is with the right of the individual to participate in official proceedings that lead to decisions that may detrimentally affect his legally recognised interests. That right, usually encompassed under the heading of natural justice or the right to be heard, should however be seen in a broader context. Participation in the public life of the community, in accordance with the electoral system, the law relating to speech, the law concerning access to information, the very diverse provisions for advisory and decision making bodies, . . . — such participation is of the essence of democracy.[74] In the course of the period under review, various aspects of the rights of participation have been the subject of major debate and decision. Some of the rights have been seriously threatened at times. Others have been strengthened. And in some areas — for instance, access to governmental information[75] — the debate is intense and likely to lead to further changes.

The introduction of a tribunal or a court as the decision maker brings with it procedural protection for those affected or involved, a procedural protection to which they may well not have been entitled were the power still exercised by the executive.[76] They will now be entitled to be heard by the tribunal or court. But the detail of that right will often be a matter of dispute. Does the right to a fair hearing require an oral hearing (or will a hearing on the papers be adequate), a public hearing, the right to counsel, the right to cross examine, or the right to reasons for the decision? The legislature, the courts and the tribunals have increasingly been concerned with these questions. While they accept that there are certain principles[77] and that some procedural rules will recur in a great number of tribunals, there has been a reluctance to impose a single detailed, comprehensive procedural code on all the tribunals. Such a code might not do justice to the diverse reasons that led to the setting up of separate special tribunals. Some apparently irrelevant procedural detail might be a necessary feature of the jurisdiction.

73 E.g. Broadcasting Act 1973, s. 84(4), Rent Appeal Act 1973, s. 13(1), Plant Varieties Act 1973, ss. 28-30, Tobacco Growing Industry Act 1974, s. 36(5), Local Government Act 1974, s. 23(5) proviso, New Zealand Superannuation Act 1974, s. 79(6), Small Claims Tribunal Act 1976, s. 37. The industrial legislation might be seen as an exception, Industrial Relations Act 1973, s. 48(6) (as enacted in 1977). But that strong privative clause must be read in the light of the right to appeal on questions of law to the Court of Appeal, s. 62A(1) (enacted in 1977).

74 For a brief survey, see Keith, op. cit., n. 1, 22-27.

75 See supra nn. 5-8.

76 See e.g. the immigration cases, supra pp. 433-435.

77 See those recommended by the Public and Administrative Law Reform Committee in its Sixth Report and the working paper prepared for the Committee, Keith *A Code of Procedure for Administrative Tribunals?* (Auckland, 1973).

The courts have also been increasingly concerned with the procedures followed by those exercising public power. After a period of decline — never fully recognised in New Zealand[78]— the principles of natural justice have been reinvigorated. That development has been extensively discussed.[79] Only one feature of it need be noted. The cases now appear to require a careful weighing of the interests of the individual and of the statutory scheme. While the court has long "supplied the omission of the legislature"[80] by insisting on natural justice to protect certain rights and interests, it will also acknowledge, as appropriate, those cases where the legislature has addressed itself to the procedure to be followed or has, in other ways, indicated that further procedural safeguards should not be read into the statute.[81]

The legislature has extended participation in another way — by admitting to the statutory hearing procedure those who, under the Common Law or earlier legislation, were not so admitted. We have already noted the Commerce Commission case.[82] The Town and Country Planning Act 1977 also appears to provide for wider participation than did the 1953 Act. All those who can represent some relevant aspect of the public interest can be heard.[83] The earlier law often required a showing that the objector be specially affected. The water and soil conservation legislation also provides for broad rights of objection.

The question of participation has arisen in yet another context: once an administrative decision is taken, who is entitled to challenge it in the courts? Who has standing? The courts have oscillated between two views of their role: do they merely protect the plaintiff's rights or do they go further and focus on the alleged wrongdoing of the public official? While there are several indications of a greater liberality in the grant of standing — a liberality supported by the relevant legislation — the courts' position is by no means clear. Accordingly, legislation to clarify and consolidate the liberal trend has been proposed.[84]

## V. APPEAL AND REVIEW

Public power can be controlled after the event, by the exercise of rights of appeal and review. The two most significant steps in this area were the establishment of the office of Ombudsman in 1962 and the establishment of the Administrative Division of the Supreme Court in 1968. The review powers of the courts have also been extended and simplified in the period under review by the efforts of

78 See e.g. the *Licenced Victuallers* case, supra n. 10.

79 See especially Cooke "Natural Justice — Right to a Hearing" [1954] Camb. L.J. 14, Mathieson "Executive Decisions and Audi Alteram Partem" [1974] N.Z.L.J. 277, Mullan "Fairness: the New Natural Justice" (1975) 25 U.T.L.J. 289; and Taylor "Fairness and Natural Justice — Distinct Concepts or Mere Semantics?" (1977) 3 Mon. L.R. 191.

80 *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180, 194.

81 E.g. *Whangarei High Schools Board* v. *Furnell* [1971] N.Z.L.R. 782, C.A., affirmed [1973] A.C. 660, J.C.

82 Supra pp. 429-430.

83 Section 2(3)(d).

84 Public and Administrative Law Reform Committee, *Standing in Administrative Law* (11th report, 1978).

the courts themselves,[85] by the introduction of a single application for review,[86] and by the less frequent use of privative clauses limiting powers of review.[87] It was, however, the limits of the powers of judicial review and of the procedures followed by the courts that were among the reasons for the introduction of the Ombudsman.[88] These reasons and advantages, only dimly perceived at the time and barely articulated, have become clearer in practice. So the courts could not concern themselves with the merits of the decisions; the Ombudsmen can. The courts were limited to the issues as pleaded; the Ombudsmen can develop new ones. The courts did not have the same freedom to search through the administrator's files; the Ombudsmen have extensive inquisitorial powers. The courts in general were concerned with the particular case; the Ombudsmen can look to wider issues of policy and administration, especially as their experience builds up; so they have considered recovery of payments made by mistake, education and other bonds, public works questions, prison administration, and the right of entry on to private property. While the Ombudsmen's remedies are only recommendatory and not coercive like the courts', the Ombudsmen have a wider and more flexible range available. In a general sense, they can open up the administrative process. The office has clearly been very important. Just to take one measure, it has received 16,000 complaints, of which nearly 2000 have been held to be justified or have been sustained.

The success of the office is also to be seen, first, in the use of Sir Guy Powles, the first Ombudsman, in other inquiries (conditions at Paremoremo prison, scientology, and the Security Intelligence Service); secondly, in the extension of its jurisdiction (which was originally limited to central government) to hospital and education boards in 1968 and to the remainder of local government in 1976; and thirdly, in the remarkable spread of the institution to more than forty other English-speaking jurisdictions.

That office was, however, not concerned with one large part of the system of central government. It barely touched on the tribunal area. Remedies against the decisions of tribunals were the subject of an extensive debate throughout the later 1960s.

The 1965 Justice Department survey showed that a haphazard situation had developed so far as appeals from tribunals were concerned. Appeals lay to the Supreme Court, to the Magistrates' Courts, to magistrates or a barrister sitting alone or with assessors (often nominated by the two antagonists), or to a special statutory appeal authority. To this list can now be added the Administrative Division

85 See especially *Ridge* v. *Baldwin* [1964] A.C. 40; *Conway* v. *Rimmer* [1968] A.C. 910; *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

86 Judicature Amendment Act 1972, as amended in 1977; see the 4th, 5th and 8th reports of the Public and Administrative Law Reform Committee, Northey (1974) 6 N.Z.U.L.R. 25, Mullan [1975] N.Z.L.J. 154, and Smillie [1978] N.Z.L.J. 232.

87 Supra pp. 438-439.

88 See especially Hill *The Model Ombudsman* (Princeton, 1976) and see also the articles, listed in his bibliography, pp. 387-393, by Aikman, Davis, Gellhorn, Northey, Paterson, Powles and Sawer and the 1974 Conference proceedings. They provide the evidence for the broad propositions stated in the remainder of this paragraph. Even with Hill's excellent book, there is still much work to be done on the practice of the Ombudsmen; for a useful contribution see J. K. Crawshaw, *The Ombudsmen and the Courts* (1977, LL.M. Constitutional Law Research paper, V.U.W.).

of the Supreme Court which since 1968 has taken over jurisdiction from all four categories of bodies and has had new jurisdiction conferred on it as well.

The 1968 decision to establish the Administrative Division of the Supreme Court was seen as an important and basic one. It was the first attempt to bring some system into the appeal structures. It was taken in the context of the growth of the powers of the courts to control administrative action after a period during which the legislature and the courts themselves had reduced those powers. And the decision provided a set of reasons and principles which were intended to have continuing significance as measures of the operation and success of the Division. Those reasons — essentially provided by the Public and Administrative Law Reform Committee in its report which proposed the establishment of the Division[89] — first concerned the unsatisfactory nature of the existing law. That law was inconsistent, complex, apparently unplanned or possibly the result of different plans at different times; there was "a bewildering variety of appeal rights (or lack of them), of types of appellate bodies, of constitutions, procedures and jurisdiction". Related to that point were (a) the fact that the status of the appeal bodies was not readily understood, and (b) resulting difficulties about recruitment. The seriousness of these points was greatly accentuated by the importance of many of the matters dealt with by these appeal tribunals:[90]

> Appeals from administrative tribunals raise issues of first class importance in modern society. So far as humanly possible, they should be dealt with, and manifestly be seen to be dealt with, by a court of appropriate stature both in fact and in theory.

Such matters should be dealt with by a recognised body of accepted authority in the society. The Attorney-General, in introducing the Bill setting up the Division, made the same point[91]

> The creation of the division will . . . return the Supreme Court to its rightful place in our constitutional system by ensuring its direct involvement in some of the most important judicial questions to be decided. In the past the Supreme Court has been bypassed. Now it will once again become the centre of our judicial system. The Bill embodies perhaps the most important change to be proposed in the history of New Zealand's judicial system.

But if the present system was unsatisfactory, what changes should be made? Did their importance suggest that appeals should go to the Supreme Court? The Committee thought not: the principal disadvantages centred on the questions of expertise and of specialisation.[92]

> While the value of special knowledge and experience can be exaggerated in this context, we have no doubt that real advantages are to be gained by ensuring that administrative appeals are dealt with by a limited number of judges specialising inter alia in the field of administrative appeals. This would make for consistency of judicial policy and approach and for the ready acquisition of skill and experience in dealing with the problems of administrative law. It would also make for economy of effort.

89 First report (1968). The Division was established by the Judicature Amendment Act 1968; see Wild (1972) 22 U.T.L.J. 258, Northey (1969) 7 Alberta L.R. 62, (1974) 6 N.Z.U.L.R. 25, and (1977) 15 Alberta L.R. 186.

90 Report of Special Committee of New Zealand Law Society (1965).

91 N.Z. Parliamentary debates Vol. 356, 1968: 1067.

92 *First Report of the Public and Administrative Law Reform Committee* (Wellington, 1968), para. 33.

But this argument, when taken with the unsatisfactory features of the existing situation, did not persuade the Committee (or rather its majority) to propose a single specialist administrative court, separate from the Supreme Court but intended to have in its field a status akin to that of the Supreme Court. Such a body, it was said, would have its own disadvantages: its status would tend in fact to be inferior to that of the Supreme Court; its relations with the Supreme Court would create problems; and it would be undesirable for appeals to be dealt with by one body and the various applications for judicial review by another (for the Committee could not envisage that the latter jurisdiction, "which goes to the very root of our constitutional system and is a valued protection of the rights of citizens, should be taken away from the Supreme Court and vested in a new type of court"). Having found the existing situation unsatisfactory and not being prepared to propose either that a new single administrative court be established or that the Supreme Court be given the jurisdiction, the Committee attempted to steer a middle course. By proposing a separate division of the Supreme Court it intended on the one hand to gain the advantages of the members of that court dealing with these important justiciable issues, and of its status, constitution and procedures, while, on the other hand, it aimed at avoiding the disadvantages of the lack of expertise and specialisation by conferring the jurisdiction on a limited number of judges. On this latter point it made clear that the members "should have a full appreciation of the need to give effect to the economic and social policies that the legislation was designed to implement" and that in appropriate cases lay members or assessors should be appointed; it also proposed that the judges should be assigned by the Governor-General. This final suggestion — probably modelled on the power to appoint members of the Court of Appeal — was not acted on, the power being given instead to the Chief Justice. This meant that in the first seven years of its operation almost half the membership of the Supreme Court had served in the division, with the result — especially when taken with the other major departure from the Committee's proposals (considered later) — that there has not been the amount of specialisation and the growth of expertise which the Committee had probably envisaged. The Committee made further proposals designed to meet other possible disadvantages of using the Supreme Court: judges should specialise within the Division so that the virtue of consistency is not lost, the proceedings should not be more expensive than proceedings before the appeal bodies being replaced, nor the atmosphere more formal. On the latter two points a provision of the Administrative Division Rules can be quoted:[93] "These rules shall be so construed as to secure the just, speedy and inexpensive determination of any proceedings".

To repeat, the Committee aimed to retain the advantages of the existing system — especially those of expertise and specialisation — while adding advantages it thought crucial "namely the greater consistency, coherence and authority an Administrative Division would bring".

The second main difference between the proposal and the 1968 legislation

93 Supreme Court (Administrative Division) Rules 1969, r. 4. Such surveys as have been made indicate expeditious despatch of the business, Wild and Northey op. cit., supra, n. 89.

concerns the jurisdiction of the Division. The Committee clearly envisaged that from the outset extensive jurisdiction would be conferred on the Division. This was required by the two objectives of, first, creating greater consistency by conferring several of the powers scattered through a great mixture of institutions in one body and, secondly, establishing a small body of judges which would build up and add to its expertise and the members of which would specialise. Moreover in the same report it suggested that several large areas of jurisdiction be conferred. And it had reached its general conclusions after reviewing several major areas of appellate jurisdiction. The statute establishing the Division does not however confer any jurisdiction at all. It merely enables the conferral of power by later statutes. In fact, in 1968 the Division was made the appellate body in three significant areas — but in one — liquor licensing — it merely replaced the Supreme Court; in the second — land valuation — the powers were in fact being exercised by a Supreme Court judge; and the third — broadcasting licensing — was being newly created and was significant in general importance rather than in numbers of cases. The Division was not however given jurisdiction, as recommended, in respect of road transport licensing or town and country planning,[94] areas which are both important and productive of much appellate work. Accordingly, the work load of the Division has, from the outset, been light, never amounting to more than ten percent of the civil cases coming to a hearing in the Supreme Court. With four — or about one-fifth — of the Supreme Court judges assigned at any time as members of the Division they are not, even when the applications for review are added,[95] spending more than a small proportion of their time on administrative law cases.

The limited character of the 1968 legislative response to the proposals and the subsequent development and operation of the Division and its jurisdiction can therefore be tentatively seen as putting in question at least two of the original objectives. First, the appeal arrangements are not obviously more consistent and coherent that those of 1968. While it is true that more than 30 statutes now confer jurisdiction on the Division 10 create new jurisdictions, 7 merely transferred jurisdiction from the Supreme Court, 3 from authorities who were in fact Supreme Court judges, while most of the remainder generate no or very few cases in practice. Moreover all the four categories of appeal bodies in existence in 1968 continue and to them is added a fifth. Secondly, in at least two important areas, matters of great significance to the individual and the community and, in the view of the Committee, apt for the Division's consideration have not been brought within its jurisdiction. Any reluctance on the part of interested departments to recommend the conferring of jurisdiction might be fostered by the failure to achieve a third objective — the establishment of a truly separate Division building up its own expertise and specialisation in administrative law. At this point the views of the member of the committee who opposed the establishment of the

94 In 1971 the Division was given jurisdiction as appeals on points of law from the Planning Appeal Boards (now the Planning Tribunals). The Committee had recommended a wider right of appeal. See also Cooke J. [1975] N.Z.L.J. 529.

95 By a direction of the Chief Justice, made in 1975, applications for review made against bodies whose decisions can be appealed to the Division are to be heard by the Division, [1975] 2 N.Z.L.R. 345.

Division and called for the setting up a separate Administrative Court can be recalled:[96]

> [An Administrative Division of the Supreme Court] will inevitably take on the colour of the Supreme Court substantially as it now exists. Yet the widely acknowledged unsuitability of Courts such as the Supreme Court as an appellate body from administrative tribunals has been the main reason over the years for setting up special courts and other appellate authorities both here and throughout the Commonwealth.

He thought that there would be (a) over judicialisation, (b) a too passive approach to implementing social, economic or industrial policy, (c) a loss of impartiality resulting from involvement in controversial value judgments, (d) loss of informality, (e) lack of specialisation and (f) loss of flexibility. These predictions have not yet all been tested in detail.[97] Indeed, because of the limited number of cases some of them — especially (a), (b), and (c) — cannot be properly tested. But that very fact gives support to (e). And, in more a general sense, it must be concluded that the expectations of those responsible for the setting up of the Division have not yet been fulfilled.

## V. LAW REFORM METHODS AND INFLUENCES

The growing interest in the reform of administrative law coincided with an examination of methods and institutions of law reform.[98] It is accordingly not surprising that when new law reform institutions were established administrative law reform was high on the agenda. But reforms were, of course, instituted before then by way of the normal political-departmental method. So, in part in the context of the debates about the constitution in the early 1950s,[99] the National Party in the 1960 election campaign undertook to introduce a citizens' appeal body, to review delegated legislation, and to introduce a Bill of Rights on the Canadian model. These promises were implemented by the introduction in 1961 and the passing in 1962 of the Ombudsman legislation;[1] by a change in drafting practice, the setting up of a Committee which proposed further changes, including a change in parliamentary practice, and the passing of the Regulations Amendment Act 1962;[2] and by the introduction — and no more — of a Bill of Rights, a measure which received very little support. Much the same process can be seen at work in the passing in 1971 of the Race Relations Act, in the amendment of the Ombudsman legislation and in the 1976-77 enactment of the human rights commission law. In each case there was a political commitment; in each the regular processes of departmental preparation, consultation and briefing of Parliamentary Counsel were followed.

At the same time, however, law reform bodies were proposing changes, in part

96 Op. cit., appendix para. 1.
97 See the studies by Wild and Northey, op. cit. supra, n. 89.
98 See Robson, op. cit., 492-502.
99 For a survey see Northey "The New Zealand Constitution" in Northey (ed.) *The A. G. Davis Essays in Law* (London, 1965).
1 For a brief account of the drafting see 1975 *Report of the Ombudsman,* 13.
2 Report cited supra n. 22.

at least, independently of government policy.[3] The accident compensation legislation was a most spectacular result of the Royal Commission process. The work of the Public and Administrative Law Reform Committee has been more piecemeal. It has certainly been less spectacular. It has resulted in

(a) the establishment of the Administrative Division of the Supreme Court and the conferral of some jurisdiction on it;

(b) the creation of a new remedy for judicial review;

(c) the making of some changes relating to delegated legislation;

(d) a greater attention to the procedures to be included in the legislation establishing administrative tribunals; and

(a) changes in many specific administrative statutes in the interests of the better constitution of tribunals, fairer procedure, and proper appeal and review rights.

There are several characteristics of this process which are worth noting. From the outset the Committee has been chary of large schemes of reform. It has claimed to be pragmatic.[4] While it has stated some principles — especially in proposing the Administrative Division — it has founded them on an examination of existing experience and, when considering their application, has been sensitive to the need to recognise the particular nature of the power in question. This has sometimes meant — as with tribunal procedure — that it has held back from proposing legislation of general application.

That is a second characteristic of the reform process. A reform body can reach conclusions which can be used, as appropriate, by those drafting or implementing specific legislation in the future. A specific Bill need not be the result of its labours. The report might also be directed at the courts for it is clear — in administrative law as elsewhere — that some reforms are better effected by courts than by legislators.[5]

A third point to note is that the Public and Administrative Law Reform Committee might itself sometimes be concerned with the specific implementation of its earlier general proposals. Usually it will not be. The relevant department and the draftsman will have these general principles in view. But the Committee will sometimes become involved.[6]

The diversity of sources of reform ideas is a fourth characteristic. The debates in the early 1960s about second chambers, bills of rights and written constitutions drew on English, American, Canadian and Western Samoan material (the last because New Zealand had just had a substantial hand in the drafting of a Western Samoan constitution which included a Bill of Rights). The magisterial Beveridge report on national insurance together with much North American criticism of the tort action were very important in submissions made to the Woodhouse Com-

3 This work, it should be noted, was very considerably assisted by the work of departmental officers, e.g. *Citizen and Power,* op. cit.; Orr *Report on Administrative Justice in New Zealand* (Wellington, 1964).

4 Both the majority and minority made that claim in the first report (para. 39 of majority and para. 2 of minority)!

5 See e.g. the references in n. 330 of Keith, op. cit., supra n. 77.

6 This continuing role differentiates the Committee from other law reform committees and gives it some of the characteristics of the U.K. Council on Tribunals, see Keith, op. cit. supra n. 77, 49-51.

mission. Scandinavia had a major influence on the Ombudsman proposals. And developments in the United Kingdom, Australia, and Canada have been of importance in the formulation of proposals for tribunal procedures, and for the review of, and appeal against, administrative decisions.

A further source is the growing set of international treaty obligations and standards affecting New Zealand. The old colonial-imperial links and restraints had, in essence, disappeared by 1953.[7] Throughout the next twenty-five years many of the laws distinguishing between the Commonwealth and the rest of the world were repealed.[8] But there has been a parallel and rapid growth of international restraints of non-Commonwealth origins. So the processes of decolonization in the South Pacific were under international scrutiny and subject to international standards.[9]

International trade and financial relations are governed by a set of treaties which have been implemented by legislation.[10] The same is true of international civil aviation,[11] and of maritime communications.[12] Other uses of the sea and seabed are the subject of international treaty and domestic statute.[13] Still other provisions of international law with domestic parallels concern jurisdiction over crimes of international concern.[14] Many aspects of labour conditions are regulated by legislation based on international labour conventions. Indeed New Zealand's position under ILO conventions relating to workers' compensation was one of the factors in the setting up of the Woodhouse Commission. And then there are the very important human rights instruments adopted, principally but not solely, within

7 For the main developments in the preceding one hundred years, see Beaglehole (ed.), *New Zealand and the Statute of Westminster* (Wellington, 1944); see also Northey, op. cit., supra n. 99. For a brief note of the removal of the remaining imperial restraints, see Keith, op. cit., supra n. 1, 10-11.

8 Ibid., 13-15.

9 See the various legislative steps which culminated in the Western Samoa Act 1961, the Cook Islands Constitution Act 1964 and the Niue Constitution Act 1974; generally see Aikman "Recent Constitutional Developments in the South West Pacific" in *New Zealand Official Yearbook 1968,* 1104 and "Constitutional Development in New Zealand Island Territories and in Western Samoa" in Ross (ed.) *New Zealand's Record in the Pacific Islands in the Twentieth Century* (Auckland, 1969) 308.

10 E.g. the Customs Act 1966 and the related tariff and orders, General Agreement on the Tariffs and Trade Act 1948, New Zealand and Australian Free Trade Agreement Act 1965, and International Finance Agreements Act 1961.

11 E.g. International Air Services Licensing Act 1947, Civil Aviation Act 1964 (and the regulations made under it), Carriage by Air Act 1967, Aviation Crimes Act 1972.

12 E.g. Shipping and Seamen Act 1952 (and the regulations made under it).

13 E.g. Continental Shelf Act 1964, Submarine Cables and Pipelines Protection Act 1966 and Territorial Sea and Exclusive Economic Zone Act 1977.

14 E.g. Geneva Conventions Act 1958, Crimes Act 1961, ss. 8 and 400, Aviation Crimes Act 1972.
International standards are also being seen as relevant to the judicial role, see *Police* v. *Hicks* [1974] 1 N.Z.L.R. 763 (interpretation of the Criminal Justice Act 1954 by reference to the Single Convention on Narcotic Drugs 1961), *Van Gorkom* v. *Attorney-General* [1977] 1 N.Z.L.R. 535 (use of United Nations declarations relating to sex discrimination), and *Brookes* v. *King-Ansell* (1977) 14 M.C.D. 212 (interpretation of the Race Relations Act 1971 by reference to the International Convention on the Elimination of All Forms of Racial Discrimination), affirmed, *King-Ansell* v. *Police,* unreported, 27 June 1978, Auckland Registry 1577/77, Mills J.

the United Nations. New Zealand had taken various steps to implement some of the more specific ones in statutes such as the Crimes Act 1961. It was in 1971 that it took the major step of giving effect to the International Convention on the Elimination of All Forms of Racial Discrimination 1965 by the passing of the Race Relation Act. It thereby subjected itself not just to international rules applicable to its relations with its citizens and inhabitants, but also, for the first time, to a form of international supervision. It is obliged to report to an international Committee on the Elimination of Racial Discrimination, a Committee which can evaluate the steps it has taken to implement the Convention. The enactment of the Human Rights Commission Act in 1977 and the work of the Commission should be major moves towards the implementation of the much more comprehensive International Covenants on Human Rights. So the title of the Act (as amended in the course of the Bill's passage) stresses the international context —

> An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights.

And the Commission is to report to the Prime Minister upon:[15]

> (a) Any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights:
> (b) The desirability of the acceptance by New Zealand of any international instrument on human rights:
> (c) The implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government which the Commission considers may affect human rights.

As the Secretary for Justice says[16]

> There has thus been brought into our constitutional system the somewhat novel and potentially salutary concept of a "human rights audit" before a measure is adopted or a Bill introduced into Parliament.

The New Zealand approach to the reform of administrative law can be contrasted with that adopted in Australia where in the past three years a most impressive slate of major reforms has been introduced at the federal level.[17] An Ombudsman has been appointed. An Administrative Appeal Tribunal with jurisdiction over many areas of government administration has been set up. The Federal Court has been presented with a lengthy statement, in the Administrative Decisions (Judicial Review) Act, of the grounds for review of administrative action. An Administrative Review Council has the task of overseeing the whole enterprise. And legislation on tribunal procedure and freedom of information is expected!

It is too early to evaluate the two approaches. One interesting test of the Australian legislation will be to determine just how comprehensive it is in the end: how many jurisdictions of those proposed will not in fact be included within the

15 Section 6(1).
16 *Report of the Department of Justice for the Year ended 31 March 1978,* App. J.H.R. 1978 E.5, p.3.
17 The legislation is the Administrative Appeals Tribunal Act 1975, Ombudsman Act 1976 and Administrative Decisions (Judicial Review) Act 1977. For a discussion of it and its origins see Taylor "The New Administrative Law" (1977) 51 A.L.J. 807.

power of the Tribunal; how many administrative discretions will be excluded from the scope of the Judicial Review Act; how will the exceptions to the freedom of information legislation be cast . . . ? What is clear is that the Australians have provided us with a rich experiment from which we should be able to learn. We should be able to learn how to approach more closely the objective Milton stated more than 300 years ago, early in the English Civil War:[18]

> For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth — that let no man in the world expect; but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bond of civil liberty attained that wise men look for.

## APPENDIX

This issue of the review does not attempt a history of the Faculty, but the subject matter of the article by the Rt. Hon. Mr Justice Richardson and of this one perhaps justifies a brief note of the Faculty's involvement in law reform:

Standing law reform committees: nine members of the Faculty have served or are serving on the five committees established since 1966.

Ad hoc governmental committees: members of the Faculty have served or are serving on the Committee on Flammable Products, the Committee on Defamation, the Committee to Reform the Gaming Law and the Committee on Official Information.

International law reform: one member of the Faculty was New Zealand's representative on the United Nations Human Rights Commission from 1968 to 1970 and has been a member of the United Nations International Law Commission since 1971; he and one other member have been involved in a diplomatic conference convened to codify international law.

Constitution making: two members of the Faculty have been or are constitutional advisers in the new countries in the Pacific; two have also been involved in commercial law reform there and another has a major part in the revision of the laws of Mauritius.

Five members made submissions to the parliamentary committees set up in the early 1960s to consider delegated legislation, a written constitution, second chambers and the proposed Bill of Rights. Four gave evidence to the Royal Commission on Compensation for Injury by Accident (the Woodhouse Commission) in 1967 and another has been extensively involved in the subsequent development of the proposals made by that Commission and in parallel activities in Australia.

Further relevant information is provided by the series, V.U.W. Vice-Chancellor's Report for 1974 and later years (Wellington, 1975- ).

18 *Areopagitica* (1644).