Wayne C Eagleson

The Attorney-General and the Public Interest: Political Independence - Reality or Myth?

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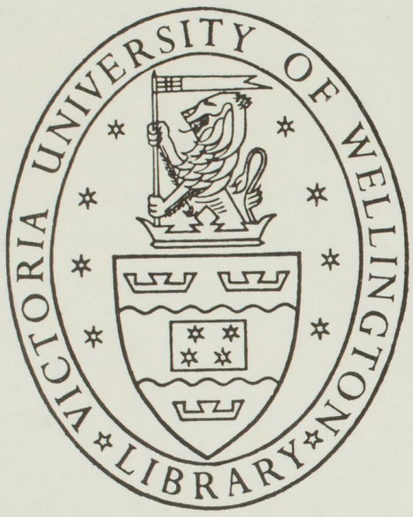
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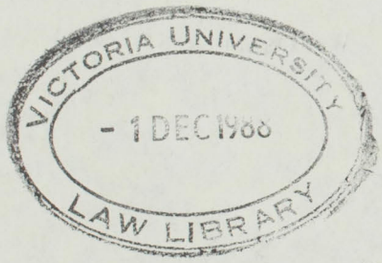
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INTRODUCTION

The office of Attorney-General in New Zealand is occupied by a Member of Parliament who is also a senior Minister in the government of the day, and acts as the Crown's chief legal advisor. In carrying out that role the Attorney-General advises Cabinet of the implications of proposed policy initiatives and explains the effect of judicial decisions where they are likely to impact upon matters under consideration by Cabinet. (1)

In addition to the functions of an advisory nature, the Attorney-General is also responsible for the exercise of discretionary powers of prosecution under a number of statutes. The exercise of these statutory powers has, on occasion, caused problems both in New Zealand and elsewhere with allegations of improper political considerations influencing decisions of the Attorney-General.

This paper seeks to consider the extent to which Attorney-General's in New Zealand have resisted the temptation to consider their political fortunes to be synonyomous with the "public interest" in exercising the responsibilities of their office.

Where the Attorney-General gives into the temptation and takes into account partisan political considerations in arriving at a decision, there exists a breach of the rule of law which in turn undermines the integrity of the legal system. While the concept of the rule of law lends itself to an extremely wide range of interpretations, it is nonetheless fundamental to the New Zealand constitution. (2)

de Smith considered that the concept of the rule of law implied

> 1) That the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law.
>
> 2) The law should conform to certain minimum standards, both substantive and procedural. (3)

It is central to the concept of the rule of law that "... like should be treated alike and unfair discrimination must not be sanctioned by law". (4) The Attorney-General must not, therefore, make decisions upon the basis of considerations other than those

relevant to determining the strength of the possible case against the individual and whether the "public interest" warrents the prosecution proceeding.

This paper will outline the historical development of the office of Attorney-General, highlighting the increasing politicisation that occurred over time and the difficulties that resulted in terms of the exercise of statutory powers of prosecution.

Secondly, the paper will analyse the functions of the modern day Attorney-General, determining which functions are no longer appropriate for a political officer to exercise. Reference will be made to case studies that illustrate the problems that have arisen periodically.

Thirdly, the extent to which the courts have been prepared to review the Attorney-General's exercise of his discretionary powers will be addressed.

The paper will then outline a number of possible options for reform of the office of Attorney-General in New Zealand. It will be the writer's submission that, although many of the problems inherent in the office arise from its political role, removal of the Attorney-General from either Cabinet or the political process altogether is neither desirable or necessary.

To remove the Attorney-General from the political process would substantially negate the very reason for the existence of the office; namely to act as the chief legal advisor to the government of the day. If the Attorney-General was reduced to the status of a mere advisor, it would affect the forcefulness with which he/she could offer advice, especially on those issues with a substantial political content.

The law making process is inextricably intertwined with politics, indeed legislation is often a codification of community standards and attitudes as represented through elected Members of Parliament. Considerations of public policy and political expediency are twin factors in the determination of the content of that legislation, along with the more technical requirements of government in modern society.

Political considerations that may be legitimate for the government to take into account when determining policy will not be permissible when it comes to the application of a power of prosecution by the Attorney-General in particular instances if they are

> Anything savouring of personal advancement, protection or sympathy felt by an Attorney-General, or which relates to the political fortunes of his party and the government in power. (5)

To conclude the paper, the writer adopts the proposal of Professor John Griffith (6) and Mr Jack Hodder (7) that an office entitled Advocate-General be created, with the responsibility of exercising both the civil law functions of the Attorney-General and the powers of prosecution contained in various statutes.

THE OFFICE OF ATTORNEY-GENERAL: - HISTORICAL DEVELOPMENT

A sketch of the development of the office of Attorney-General through history is necessary for an understanding of the nature of the wide ranging functions that fall to the modern day Attorney-General.

The evolution of the office from simply the King's representative in those cases where the Crown had an interest to a law officer with both important political and legal functions occurred gradually over a period of centuries. The historical sketch that follows highlights in particular the process by which the Attorney-General became the chief legal advisor of the elected government from a background of being the servant of the monarch.

This change in the nature of the office of Attorney-General, and the functions attached to the office, brought with it inevitable conflict. On the one hand the Attorney-General has a constitutional obligation to exercise his/her discretion in a non-partisan fashion while at the same time having responsibilities to the government in which he/she serves.

Historical Sketch

The first attorney to undertake the function of representing the King in litigation before the courts was Lawrence del Brok in 1243. (8) del Brok acted for the Crown in actions to recover rents and lands, and guard the Kings right to present churches, among many others. In addition, there existed an overriding duty of the King's Justice's to watch over the sovereign's interests and to assert his rights in any matter

involving a usurpation of the King's privileges. (9) At this stage in British history judicial independence was not the fundamental part of the legal system it is today.

The foundations of the modern office of Attorney-General came with the accession to the throne of Henry IV in September 1399. A single King's Attorney with a right of audience in all royal courts replaced the spasmodic appointment of a number of attorney's each appearing in different courts, (10) although the actual use of the title "Attorney-General" did not begin until the appointment of John Herbert to the office in 1461. (11)

During this period the Attorney-General served in the House of Lords rather than the House of Commons, refecting the original conception of the law officers as legal advisors and servants to the sovereign. The Attorney-General acted as advisor and attended deliberations of the House of Lords when called upon to do so, but did not enjoy any real responsibility for their Lordship's decisions. (12) Since 1700, however, the Attorney-General has not attended the Lords, instead taking a seat in the House of Commons along with his junior law officer, the Solicitor-General. (13)

Notwithstanding their new role as members of the House of Commons, successive Attorney's-General continued to practice at the bar and derive most of their income from that source. Even as early as 1616, during the term of Sir Francis Bacon, the office was considered to be worth six thousand pounds per annum, almost all of which came from representing private litigants. (14) Clearly the prestige of the office increased markedly the ability of its holder to charge high fees. At that time the Attorney-General's salary was just over eighty pounds , just 1% of his overall salary. (15)

Given this huge disparity it was inevitable that conflict between private and public commitments would arise, and this was reflected in the reluctance of Attorney's-General to see the office placed on the same terms as that of full time, salaried Minister's of the Crown. But it was not until the nineteenth century that increasing pressure began to be exerted in the House of Commons to secure more of the time and energies of the Attorney-General. (16) In 1894 the Gladstone government finally forbade the Attorney-General from engaging in private practice, although court appearances in contentious cases involving the Crown were still obligatory. (17)

The law officers objected to this prohibition fiercely. A memorandum to Cabinet from Lord Halsbury, Lord Chancellor, on behalf of the Attorney-General and Solicitor-General (18) made the point in the following terms:

> It makes Law Officers merely political officials; it puts them under an arrangement the acceptance of which with any other client would undoubtedly be a gross breach of professional rule, and would undoubtedly be punished by their being disbarred. (19)

The Lord Chancellor's memorandum reflects the law officers' opinion that their offices could not be considered analogous with those of their ministerial colleagues. They continued to remain barristers in private practice, and as such took on work from a variety of sources in addition to the crown work they had responsibility for. The Attorney-General and Solicitor-General at that time considered themselves above politics, notwithstanding their membership of the House of Commons.

The protest was to no avail, however, and Gladstone won the battle to make the law officers accountable to his government and the House of Commons on a full time basis.

The workload, it seems, remained considerable even after the ability of the Attorney-General to engage in private practice was withdrawn. Sir Patrick Hastings, Attorney-General in 1924 during the first Labour government in the United Kingdom described his workload in these terms:

> My day began at seven o'clock in the morning and I rarely got to bed before five the next morning. The day was spent in one long rush between the Law Courts, government departments and the House of Commons. The night, or rather the early morning was needed in order to get ready for the next day. Nothing that I began was I ever allowed to finish and nothing was ever finished until something else was begun. Being an Attorney-General, as it was in those days, is my idea of hell. (20)

While the establishment of a permanent Law Officers department in 1893 had lessened some of the burden, the number of staff remained very small until 1931 when the law officers voluntarily reduced their salaries in exchange for more staff. (21) The creation of the department was of great constitutional significance,

however. It occurred in the context of the growth in the functions of the state, which made necessary the development of government agencies staffed by permanent officials with a high degree of specialised and technical knowledge. (22)

It had not come sooner because of the traditional attitude that the Attorney-General was counsel appointed to be the chief legal advisor of the Crown who, when able, was free to engage in private practice alongside government work. The creation of a separate department, along with the prohibition of private practice that followed in 1894, was a reflection of the growing view among particularly members of the House of Commons that the Attorney-General was the servant of the people's representatives and should be readily available to advise on legal matters as they arose. As the legislation coming before Parliament became more voluminous and complex the demand for the services of the Attorney-General grew accordingly.

Status as the government's chief legal advisor did not, however, bring with it a Cabinet position in the United Kingdom as compared to New Zealand where the Attorney-General is always a member of Cabinet.

Successive governments in the United Kingdom doubted the constitutional propriety of combining in the office of Attorney-General responsibility, on the one hand, for deliberating upon matters across the purview of government, and on the other his absolute independence from Cabinet direction regarding the institution or withdrawal of criminal proceedings. But while no British Attorney-General since Sir Douglas Hogg, 1924-1928, has been accorded a position in Cabinet, there has been a recognition of the need to keep the Attorney-General fully informed of Cabinet deliberations. (23) Accordingly the Attorney-General is a member of Cabinet committees, has access to relevant papers and attends full Cabinet meetings to advise upon legal and constitutional issues. (24)

It has been argued that the distinction between attendance at Cabinet meetings to advise and actual membership of Cabinet with a voice in the determination of government policies recognises the importance of preserving the independence and detachment necessary for the proper discharge of the Attorney-General's responsibilities.(25) In the writer's submission this distinction has developed more on the grounds of historical precedent, given the United Kingdom perception of the

Attorney-General as a legal advisor rather than a Minister of the Crown with full policy responsibilities, than upon grounds of principle.

The existence or otherwise of Cabinet membership for the Attorney-General does not in itself shape the attitudes of the Attorney-General in exercising his/her functions, particularly since in the United Kingdom the Attorney-General is informed of Cabinet decisions and often asked for advice prior to their implementation.

New Zealand

Upon acquiring sovereignty of New Zealand the Crown received those prerogatives which

> unless limited by Act of an Imperial Parliament or by an Act of the General Assembly made under the powers of some Act of the Imperial Parliament are the same as in England. (26)

It was, therefore, as a prerogative officer that the first Attorney-General was appointed in 1840. Until the establishment of responsible government in New Zealand in 1856 the Attorney General was one of three officials which under the Governor comprised the Executive Council of the colony. (27) The practice of political appointments to the office began in 1856, with the Attorney-General sitting in either the House of Representatives or the Legislative Council and serving in the Ministry. (28)

In 1866 Parliament took the radical step of changing the office of Attorney-General to a permanent, non-political appointment with the same status and independence of a Supreme Court judge. The Attorney-General was specifically excluded from membership of either House of Parliament and of the Executive Council under the Attorney-General's Act passed that year. The change occurred as a result of doubts among the political decision makers over the proper role of the Attorney-General and the constitutional arrangements that should exist to ensure the fulfillment of his independent functions. (29)

This experiment with a non-political Attorney-General lasted just ten years, (30) and in 1876 an Act was passed providing that the tenure of the office was to be at the

pleasure of the Governor and that the appointee was free to be a Member of Parliament.

In practice all Attorney's-General since 1876 have been Members Of Parliament and of the Executive Council. It has been customary practice for the Attorney-General to also hold the position of Minister of Justice, although there have been exceptions to this practice. (31) The office reverted back to its original prerogative nature upon the passage of the Civil List Act 1920, under which the Governor-General appoints the Attorney-General on the Prime Minister's advice.

Traditionally the Attorney-General has been a member of the bar, indeed in its history in New Zealand only one layman has held the office. The then Prime Minister, Rt Hon G W Forbes MP, was also Attorney-General between 1933 and 1935. During the period when Mr Forbes was Attorney-General, an anonymous contributor to the New Zealand Law Journal criticised the appointment of a layman to the office saying that as a result this country lagged behind in law reform and necessary legislation. (32) It is difficult to imagine a situation where this would occur again, particularly given the number of Members of Parliament presently holding legal qualifications. (33)

The Functions of the Attorney-General

The modern day Attorney-General is essentially a creature of party politics and this is reflected in both many of the functions that now fall to the holder of the office and the method of his selection.

In the two party political system that currently is the norm in New Zealand, it is self-evident that the Attorney-General will either be a member of the Labour or National parties. If, as is currently the case, the Attorney-General is part of a Labour government, he owes his position in Cabinet to his caucus colleagues who elected him there. (34) The actual portfolios are determined by the Prime Minister who has total discretion in this regard.

The need for an independent law officer may well be one factor that caucus takes into consideration when determining the composition of Cabinet, but given the nature of party politics it is safe to say that more weight would be placed upon

prospective Cabinet Ministers ability to be an effective advocate for the political agenda of the government, with the aim being its re-election.

Selection of Cabinet under a National government is left entirely in the hands of the Prime Minister, both in terms of its composition and the allocation of portfolios. (35) While the same political realities will inevitably be considered by the Prime Minister, the fact of his sole discretion makes it more conceivable that an Attorney-General could be selected on merits that are not solely political.

The office of Attorney-General entails a wide range of functions, of both a political and legal nature. Between the exercise of his powers relating to the conduct of prosecutions and the advocacy in Parliament of the policies of his government, the Attorney-General maintains an important position in the government of the day.

In New Zealand it is usual practice for many of the legal powers vested in the Attorney-General to be exercised by the Solicitor-General. (36) The legal basis for this practice is s4 Acts Interpretation Act 1924 which provides that the functions of the Attorney-General may be exercised by the Solicitor-General, who is a public servant and the permanent head of the Crown Law Office. But while in practice the Solicitor-General exercises control of criminal proceedings in most situations, the ultimate responsibility remains with the Attorney General as the principal Law Officer.

The Attorney-General has the power to present an indictment where a person has been committed for trial, shared with the Crown Prosecutor or the informant in the case of a private prosecution. (37) The Attorney-General may also present an indictment where there has been no committal. (38) While the Attorney-General does not have power to initiate summary proceedings, he does have the power to stay such proceedings. (39) It is principally this power that has seen questions raised as to the level of independence with which it is exercised, as will be discussed below. (40) Another function of the Attorney-General that has potential for abuse is the discretion provided under a number of statutes to determine whether or not a prosecution should proceed.

<u>The Attorney-General's Discretion to Consent to Prosecutions</u>

While the provision of such a discretion is best justified on the grounds that the statutes relate to matters which impact upon the public interest, there are no uniform guidelines as to when this discretion should be conferred.

In response to a parliamentary question, the Attorney-General, Rt Hon Geoffrey Palmer, listed the following statutes as requiring his consent before a prosecution can be taken. (41)

Armed Forces Discipline Act 1971, s74(4)
Antartica Act 1960, s3
Companies Act 1955, s322
Crimes Act 1961, ss 100, 101, 104, 105, 105A, 123, 124, 230, and 400
Flags Emblems and Names Protection Act 1981, ss 11, 12, 13, 14, and 15
The Geneva Conventions Act 1958, s3
All prosecutions under the Indecent Publications Act 1963
Race Relations Act 1971, ss 24 and 25
All prosecutions under the Secret Commissions Act 1910
All prosecutions under the Submarine Cables and Pipelines Protection Act 1966
Video Recordings Act 1987 - all prosecutions, except those under ss 13, 14, 67, 68 and under any regulations.

The statutes contained in this answer, however, do not constitute a complete list. The following statutes also require the consent of the Attorney-General before a prosecution can be brought:

Crimes (Internationally Protected Persons and Hostages) Act 1980, s14
Aviation Crimes Act, s18
Summary Offences Act 1981, ss 20, and 20A
New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987, s15

And there may well be others.

The incompleteness of the Attorney-General's answer reflects the lack of readily available guidelines or precedents to determine when this discretion should be included in a statute, other than for the broad reason that it is necessary to protect

the "public interest". As one commentator has noted, "the suspicion arises that in some instances precedent was followed rather blindly". (42)

Three distinct categories can be drawn, however, from the statutes referred to above.

The first category comprises those statutes which impose limits in one way or another upon either freedom of speech or expression. Examples include the Indecent Publications Act 1963 and the Race Relations Act 1971. Given the prevailing view in democractic societies that these fundamental freedoms should have limits placed upon them only where there is some greater public interest to protect, it is appropriate that the Attorney-General has the power to prevent prosecutions that are either frivolous or constitute an attempt to unreasonably gag free speech or expression.

This discretion has the potential to bring with it controversy, as evidenced by the recent remarks of Mrs Hana Jackson "kill a white before you die and become a hero". (43) There was considerable public debate over whether Mrs Jackson should be prosecuted for inciting racial disharmony under s25 Race Relations Act 1971, which requires the consent of the Attorney-General. While it turned out in this particular situation that the matter turned upon another issue, (44) it is not difficult to see how in such a case where public feelings are running high that the Attorney-General may be tempted to equate the public interest with the interests of his political party.

The fact that no statutory guidelines exist for the exercise of this discretion compounds this potential problem.

The second category comprises those statutes which relate to New Zealand's obligations at international law. Examples include the Antartica Act 1960, Geneva Conventions Act 1958 and the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987. Given that the control of a nation's foreign affairs rests squarely with the government, it is inappropriate for private citizens to seek to enforce alleged breaches of the law in this area without the consent of the government.

But that does not necessarily mean that the Attorney-General alone ought to be vested with final responsibility for prosecutions. There is a strong argument to suggest that Cabinet as a whole should make those decisions, particularly where it is

likely that they will impact on New Zealand's foreign relations. An example of this would be if another country sailed into our harbours a nuclear powered and armed vessel thereby breaching s6 of the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1988. Decision over whether a prosecution is to be attempted is surely, in this instance, a major policy decision with wide ramifications for our foreign relations. It would not, therefore, be appropriate to leave matters of this magnitude to be decided by one member of Cabinet, not even the Attorney-General.

The prosecution of the two French agents responsible for the bombing of the Rainbow Warrior, Marfart and Prieur, may also fall into this category because of its implications for this country's relationship with France. As it turned out, prosecution of the two agents under the Crimes Act 1961 was left to the Solicitor-General. The Attorney-General, Mr Palmer, was not involved because of his direction that the Solicitor-General would deal with matters of criminal law unless the Solicitor-General specifically referred a case to him. (45) No such referral was made in this case.

Mr Palmer rejected criticism that he should have made the decision because of the possible ramifications for trade with France on the grounds that :

> If the decisions are to be made by the Attorney-General in this class of case, the allegation of political interference will often be irresistable in the mind of the public. (46)

Mr Palmer's predecessor as Attorney-General, Hon Jim McLay MP, was among those who felt that he should have exercised his discretion rather than the Solicitor-General "because it was undoubtedly politically controversial". (47) In the writer's submission, the Attorney-General should have exercised the discretion personally, not simply because the matter was politically controversial, but because of the potentially serious implications for New Zealand's trade and diplomatic relations with France that surrounded the conduct of the affair.

While Attorney-General, Mr McLay instituted a working relationship with the Solicitor-General whereby all politically controversial matters were to be referred him for action. The standard test used for defining when a situation was "politically controversial" developed by Mr McLay was whether or not he "might be called up to answer for the matter in Parliament or perhaps in the media". (48)

This constitutes a fundamental difference in the conception of how the powers of the Attorney-General should be exercised. While Mr McLay adopted the standard practice of leaving the day to day administration of the criminal law to the Solicitor-General, his readiness to involve himself in those cases with a political flavour indicates a more "hands on" attitude than that of Mr Palmer. It also indicates an acknowledgment that the statutory powers of the Attorney-General, which traditionally have been unreviewable by the courts, bring with them accountability to Parliament whether or not the exercise of those powers is delegated to the Solicitor-General.

In the case of the Rainbow Warrior bombing, it was only after the two agents had gone through the judicial process that Cabinet asserted its overriding interest in the matter and negotiated a re-settlement package with the French government.

The third category comprises those statutes which have broad domestic security implications. Examples include the Secret Commissions Act 1910 and the Armed Forces Discipline Act 1971. Again it is proper for the government of the day, through the Attorney-General, to retain control of such a sensitive area of New Zealand law.

New Zealand is not unique in its failure to have established guidelines for the conferment of the discretion to prosecute in statutes. Some years ago the Home Office in Great Britain acknowledged that

> there does not seem to have been a firmly established policy, closely adhered to over the years, governing decisions by Parliament whether to include a restriction on the bringing of prosecutions in a new statute, and whether to place the control with the Director of Public Prosecutions or the Attorney-General. (49)

The Home Office did, however, identify five main reasons for the use of the statutory discretion:

> a) to secure consistency of practice in bringing prosecutions, for instance where it is not possible to define the offence very precisely, so that the law

goes wider than the mischief aimed at or is open to a variety of interpretations.

> b) to prevent abuse, or the bringing of law into disrepute, for example with the kind of offence which might otherwise result in vexatious prosecutions or the institution of proceedings in trivial cases.
>
> c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible of statutory definition.
>
> d) to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial such as race relations or censorship.
>
> e) to ensure that decisions on prosecutions take account of important considerations of public policy or of a political or international charactar. (50)

The Home Office considered that while the last two grounds would be appropriate for the intervention of the Attorney-General, the others ought to be solely the domain of the Director of Public Prosecution. (51)

There is an apparent paradox underlying the Attorney-General's functions, since he must both ensure that decisions on prosecutions take account of important considerations of public policy while at the same time remaining impervious to partisan political influences. A former United Kingdom Attorney-General, Mr Samuel Silkin, QC, acknowledged this and suggested that the exercise of his discretion to prosecute required a common sense judgment balancing "different goods and different evils, conflicting rights, freedoms, duties, responsibilities and public interests". (52)

Mr Silkin was of the view that:

> If I make my decisions on a party political basis, I deserve all the criticism which I am likely to receive. But if I ignore political considerations in the widest sense of that term then I am failing in my responsibilities and courting disaster. (53)

Therefore the public policy content of the Attorney-General's decision gives it an unavoidably political complexion, for better or worse.

In acting independently the Attorney-General still has to reach a conclusion on the public interest in each particular case, and in doing so his thinking is sure to be coloured by not only his personal beliefs but also the perceptions of society that shape those views. Pressure may not be deliberately applied to the Attorney-General by his colleagues, but the more pervasive influence of his political and philosophical beliefs, which are harder for the public to identify, may come to distort the Attorney-General's view of Parliament's intention in enacting the discretion that he has to exercise.

The Attorney-General's Power to Stay Proceedings

In New Zealand the power of the Attorney-General to enter a stay of proceedings is statutory, rather than the prerogative power enjoyed in the past. (54)

While the power to stay proceedings does not apply to summary proceedings per se, (55) it has been extended to criminal proceedings in the District Court by way of amendment to the Summary Proceedings Act 1957. (56) This power has been used on a number of occasions to stay proceedings in circumstances where the suspicion of improper political considerations influencing the Attorney-General in making his decision has existed.

Before examining the New Zealand cases, however, it is necessary to look at two important precedents, from both the United Kingdom and Australia that have been instrumental in determining the guidelines that now restrain the Attorney-General's use of the power to stay proceedings.

The Campbell Case

The most influential precedent in terms of its effect throughout the Commonwealth occurred during the term of office of the first Labour government in the United Kingdom in 1924.

While it was the withdrawal of one particular prosecution, and the subsequent events that followed, that brought down the Ramsey MacDonald government,

involvement of the Cabinet in the administration of the criminal law went somewhat wider and was of great constitutional significance in that government's term of office.

Although it was not revealed until after the change of government, the MacDonald Cabinet at its meeting on 6 August 1924 had given an express direction that no political prosecution should be directed by the Attorney-General without the sanction of Cabinet. (57) The effect of such a general directive was to place the Attorney-General, Sir Patrick Hastings, in a position of subservience to the executive in all matters falling within the scope of the direction.

The directive was a result of the controversy that followed the institution then withdrawal of a prosecution against John Ross Campbell, the Acting Editor of the Workers Weekly magazine. The magazine, which described itself as the official organ of the Communist Party of Great Britain, published an article urging the armed forces not to turn their guns on fellow workers from their own country, but to "turn their weapons on their oppressors". (58)

Upon the request of the Director of Public Prosecutions, the Attorney-General considered the matter and gave the necessary consent to a prosecution under the Incitement to Mutiny Act 1797.

The prosecution was subsequently raised in the House of Commons and proved to be particularly unpopular with the government backbenchers, many of whom shared the view of Mr Campbell that the armed forces should not be used to break up industrial disputes. Similarly, the prosecution was unpopular with the Prime Minister, Ramsey MacDonald, who wanted the prosecution withdrawn. (59)

After pressure had been bought to bear upon the Attorney-General by the Cabinet, the prosecution was withdrawn. There followed a heated debate over the constitutionality of this pressure, which was perceived to be motivated by political considerations.

Aside from the abhorrence in which the general direction from Cabinet was held in, the case was also controversial because the public interest had not been considered at all, and if it was the government considered its own political interests to be

paramount. There had, after all, been previous occasions where prosecutions had been withdrawn after wide consultation with, and perhaps pressure from Cabinet.

In R v Rees (60) proceedings were instituted in February 1916 against a trade union official for attempting to impede and delay the production of war material, an offence under the Defence of the Realm Act 1914. The Attorney-General consulted with the Minister of Munitions, who handled negotiations with the union involved and the prosecutions were subsequently withdrawn after a settlement was agreed to by both parties. Such a settlement, which allowed normal production of necessary war materials to resume, was obviously in the public interest and overrode fears of political partisanship affecting the exercise of the Attorney-General's discretion. This can be contrasted with the Campbell case where condemnation of the governments actions was universal and where no public interest was served in withdrawing the prosecution.

The opposition Conservative and Liberal parties subsequently combined forces in the House of Commons to pass a motion setting up a Select Committee to inquire into the whole affair. The government obtained a dissolution of Parliament and lost the subsequent election. (61)

The general direction at the centre of the controversy was quickly rescinded by the incoming Baldwin government, which condemned it in harsh terms;

> Such an intrusion, in the opinion of the government, was unconstitutional, subversive of the administration of justice and derogatory to the office of Attorney-General (62)

The Campbell case led to a crystallisation of the modern rule that decisions to commence or discontinue prosecutions are for the Attorney-General alone. While he may consult with his colleagues, the Cabinet should not instruct him as to a particular course of action.

As this rule as subsequently developed, however, there have been rare but significant occasions where the combined political might of the Attorney-General's parliamentary colleagues ensured the rule's breach. One such occasion, the resignation of Australian Attorney-General Robert Ellicott in 1977, highlights the strength of the rule and illustrates the likely consequences of its breach.

The Resignation of Robert Ellicott

As with the controversy in the United Kingdom over the Campbell case, the resignation of Robert Ellicott, Australian Attorney-General in 1977, was precipitated by a criminal prosecution with considerable political overtones. Unlike Sir Patrick Hastings, the Attorney-General at the time of the Campbell case, Mr Ellicott chose to resign rather than continue as part of a government that had sought to improperly influence the exercise of his independent discretion over criminal prosecutions.

The prosecution at the centre of the controversy began with the laying of an information by a private citizen against Gough Whitlam, Prime Minister between 1972-1975, the then Senator Lionel Murphy who had held the office of Attorney-General in that period, and a number of other Ministers in that administration.

The information charged the defendants with conspiracy to effect an unlawful purpose under s86 of the Commonwealth Crimes Act. The alleged unlawful purpose was deceiving the Governor-General into approving a loan of $4000 million for "temporary purposes" when in fact it was for twenty years and designed to meet the long term energy needs of the government. (63)

The consent of the Attorney-General, who had taken office just one month previously, was then sought to his taking over the proceedings. Prior to deciding whether or not to give his consent, Mr Ellicott sought further information from the Solicitor-General, his department, officials of Treasury and the Executive Council. Treasury refused to provide the evidence requested on the grounds that it related to the previous Labour administration and consequently should not be handed over. (64)

Having failed to obtain the documents necessary to reach a decision, Mr Ellicott sought the release of the documents from Cabinet. The Cabinet rejected the Attorney-General's request invoking Crown Privilege. Some time after the resignation of Mr Ellicott, the High Court subsequently ordered the release of all the documents, save one, upon application of the private prosecutor, thereby rejecting the Cabinet's assertion that the principle of Crown privilege was applicable. (65)

This ruling of the court was particularly significant as previously special privilege had been accorded documents such as Cabinet minutes, papers and other documents recording top level government decision making.

The decision of the High Court was similar to that of the Supreme Court of the United States over the Watergate scandal. The Special Prosecutor, Archibald Cox, had sought access to relevant tapes of President Nixon's discussions with officials only to be refused on the grounds of executive privilege. The Supreme Court rejected the President's assertion of privilege saying "... The generalised assertion of privilege must yield to the demonstrated specific need for evidence in a pending criminal trial". (66)

In turning down the request for access to relevant documents the Cabinet implicitly rejected the Attorney-General's view that;

> There is no place where the criminal law does not run, even in the Executive Council, nor can any convention that a government should not look into the affairs of a previous government prevent inquiry for the purposes of enforcing the criminal law. (67)

But the intervention of the Cabinet did not end with simply a refusal of access to evidence. At its meeting on 26 July 1988 the Cabinet urged the Attorney-General to take over the prosecution for the purpose of terminating it. (68) After taking advice of counsel, however, the Attorney-General decided against taking over the prosecutions.

Some weeks later, on 6 September 1977, Mr Ellicott resigned his office as Attorney-General. In his letter of resignation to the Prime Minister, Hon Malcolm Fraser MP, Mr Ellicott said he was resigning;

> because decisions and actions which you and the Cabinet have recently made and taken have impeded and in my opinion have constituted an attempt to direct or control the exercise by me as Attorney-General of my discretion in relation to the criminal proceedings in Sankey v Whitlam and Others. In the circumstances I feel that I have no other course but to resign my office. I regard it as vital to our system of government that the Attorney-General's discretion in criminal matters remain completely independent. (69)

By denying the Attorney-General access to the documents in the government's possession and at the same time counselling the termination of embarrassing criminal proceedings, it can scarcely be wondered that the Attorney-General perceived the Cabinet's action as a direct interference with his independent discretion. In this case the embarrassment to the government was not lessened because the Minister's at the centre of the proceedings were their political opponents. The political interest the Cabinet sought to protect was a substantial one; namely that there should not be created an undesirable precedent for the over zealous scrutinising of the records of the past government in the light of the law.

It had seemed that the Prime Minister and Attorney-General were at one over the principles governing the exercise of the discretion. The Prime Minister did not question the extent of the discretion, but he did insist that;

> It is, nevertheless, proper for the Attorney-General to consult with and have regard to the views of his colleagues, even though the responsibility for the eventual decision to prosecute or not rests with the Attorney-General, and with the Attorney-General alone. (70)

But it was in the application of the principle that the rift arose.

Nor was the Prime Minister alone in his interpretation of the exercise of the Attorney-General's discretion. An editorial in the Australian Law Journal, for example, considered that since the nature of the criminal proceedings was inseparably connected with politics, Cabinet and not the Attorney-General was the best judge of the public interest. (71) The editorial went on to express doubt as to whether the principles considered so fundamental by Mr Ellicott were ever designed to extend to criminal proceedings of this type. (72)

This writer disagrees strongly with that opinion. The principle of the absolute independence of the Attorney-General in the exercise of discretionary powers was developed to prevent exactly what the Fraser Cabinet was trying to achieve in this case; namely a decision as to whether or not a prosecution should proceed being made on improper political grounds. The Attorney-General, by virtue of his duty to act in a politically impartial manner, is best qualified to determine the public interest in cases such as these and decide upon the most appropriate course of action

accordingly. The Attorney-General may of course consult with his colleagues, indeed in a case with political overtones he would be foolish not to, but in the end the decision must be his alone.

The issue is not whether the Attorney-General makes the correct decision, even presuming there is such a thing, in a particular case. Rather, the established existence of the Attorney-General's discretion in the conduct of the criminal law exists to give the public confidence in the continued integrity of the administration of that law, notwithstanding changes of government.

Robert Ellicott has been the only Attorney-General in the Commonwealth to resign because of government interference in the exercise of his discretion. His resignation highlighted to not only the Australian politicians and members of the public, but also to Law Officers throughout the Commonwealth, the constant need to reinforce the independence of the Attorney-General by exemplifying the integrity of the holders of the office.

While the administration of the criminal law by successive Attorney's-General in New Zealand has not seen the dramatic controversy that has surrounded their counterparts in Australia and the United Kingdom, there have been occasions when the appearance of political impartiality has been in doubt.

The Attorney-General's Decision to Stay Proceedings Brought under the Superannuation Act 1974

In December 1975 the Prime Minister of the newly elected government, Hon R D Muldoon MP, publicly announced that when Parliament next sat it would pass retrospective legislation to repeal the Superannuation Act 1974. Accordingly, Mr Muldoon purported to suspend the operation of the superannuation scheme and advised employers not to make the deductions from their employees salaries as required under the Act.

This was subsequently declared by Wild CJ in Fitzgerald v Muldoon (73) to be contrary to the Bill of Rights 1688 which provides that Parliament makes the laws and it is only Parliament that can repeal those laws.

Mr Muldoon's actions were also attacked on another front. A number of private prosecutions were brought against the Ford Motor Company for failing to make the deductions required by the Act.

On 1 April 1976 the Attorney-General, Hon P I Wilkinson MP, announced that he had entered stays of these proceedings under s77A Summary Proceedings Act 1957. (74) The decision to enter a stay of proceedings was based upon the reliance that virtually everyone in the community had placed upon the Prime Minister's statement purporting to suspend the operation of the scheme.

The Attorney-General considered that to permit the private prosecutions to proceed could cause chaotic results in the administration of justice. (75) He also did not believe that either the public interest or the interests of justice would be served by allowing the deductions under the Act to continue in force until Parliament met to repeal it, as the deductions would then have to be repaid. (76)

The Attorney-General concluded his explanation by claiming that:

> The danger in a controversy of this nature is that the factor of common sense can get overlooked - particularly when the arguments become too theoretical or hypothetical. We cannot run a government by theory and hypothesis. (77)

This explanation found favour with many, including the Auckland District Law Society which, while objecting to the government's handling of the wider issue of suspending the scheme, did not criticise the actions of the Attorney-General. (78) Constitutionally, however, the action of the Attorney-General in entering a stay of proceedings was of doubtful validity given the judgment in Fitzgerald v Muldoon that the original act by the Prime Minister was unlawful. What is more, if the matter was of such urgency, the Prime Minister could have called Parliament together to pass the necessary legislation much earlier than 22 June 1976 when it was eventually summoned.

The lack of urgency evident in the time the government took in actually passing the legislation is illustrative of the prevailing feeling that the matter was a fait accompli even before Parliament sat. That feeling existed because under the two party system existing in New Zealand it was reasonable to assume that the legislation would be passed by Parliament.

No doubt this was a major factor considered by the Attorney-General in coming to his decision. But the competing principle of public interest that should have been considered is that the law of the land be upheld. The writer's view is that protecting the integrity of the law, and the process by which it is passed, is of more importance then a so called "common sense" solution.

To claim that the government's strength of numbers in Parliament gives it the right to suspend the operation of the law as and when it thinks fit would be to implicitly reject the constitutional gains made by the predecessors of todays politicians as far back as 1688 when the Bill of Rights was introduced. In a democracy such as New Zealand, where no government enjoys the political support of all its citizens, the success of the system depends in large part upon an acceptance of the legitimacy of the law making process by its citizens. If legislation passed by Parliament in the prescribed manner was overturned regularly by executive decree, the legitimacy of the system would be tainted in the eyes of many.

While there would have been administrative difficulties caused by the repayment of deductions later made unnecessary by retrospective legislation, in the writer's submission such difficulties would have been preferable to the Attorney-General's use of his discretion to stay proceedings in this way.

Would the Attorney-General have acted in the same way if the Prime Minister himself had been the subject of a private prosecution for his actions in the matter ? It was of course possible that the Prime Minister could have faced a prosecution under s66 Crimes Act 1961 for being a party to the substantive offence. (79) If such a situation had arisen, an already politically loaded prosecution would have become more embarrassing to the government and left the Attorney-General with an unenviable set of options. Certainly it would be difficult to give an absolute guarantee that the Attorney-General would exercise his discretion impartially, and this would undermine the integrity of the office in much the same way that it did in the United Kingdom at the time of the Campbell case.

<u>The Attorney-General's Decision to Stay Proceedings Brought under the Trespass Act 1968: The Bastion Point Controversy</u>

Of less constitutional significance, but nevertheless of much political importance, was the decision of the Attorney-General in August 1978 to issue a stay of proceedings in respect of one hundred and seventy prosecutions under the Trespass Act 1968 brought against protesters allegedly trespassing on Crown owned land at Bastion Point.

The Attorney-General, Mr Wilkinson, announced his decision after fifty of the protesters had been convicted by the courts but not given any penalty. He based his decision on two grounds; namely the "interests of justice" and the "public interest". (80) Justifying his decision on the grounds that it was in the interests of justice, the Attorney-General pointed out that the legal issues were clear and that, given the nature of the trespass and the fact that no penalty had been imposed upon those already prosecuted, it was not unfair to stay the prosecutions. Mr Wilkinson said that "had penalties been imposed the situation would have been different", (81) which indicates the importance that he attached to that point.

The public interest, said the Attorney-General, would not be served by continuing with the outstanding prosecutions because of the likely result of the cases and the remaining time that would be taken to deal with them. (82) The Attorney-General's view that prosecutions had " degenerated into a farce, without meaning other than to clog up the courts for another eight months" (83) was also a factor in the decision to enter the stay of prosecutions. To allow the prosecutions to proceed would leave open the future possibility of organised attempts to undermine the court system by provoking mass arrest situations leading to mass prosecutions, which in turn would clog up the resources of the courts. (84)

It is not unreasonable for the Attorney-General to take such a factor into account when exercising his discretion to enter a stay of proceedings. As the principal Law Officer the Attorney-General does have a responsibility to act with the best interests of the court system firmly in mind, and on occasion those interests will best be served by not prosecuting clear breaches of the criminal law. It is important, however, that in carrying out that responsibility party political considerations are not taken into account.

The difficulty apparent from the Bastion Point controversy arises from the fact that Cabinet, while not a party to the actual decision to enter a stay of proceedings, was intimately involved prior to that action being taken by the Attorney-General. The

decision to invoke the Trespass Act to clear the protesters from the land was taken by Cabinet as a matter of policy. The prosecutions subsequently turned out badly and, arguably, became a political embarrassment to the government. Accordingly the public interest that the Attorney-General relied upon in exercising his discretion coincided with the political advantage of the government. Even the appearance of using the justice system for political gains is damaging to the system's integrity, and that of the office of Attorney-General.

Solicitor-General v Broadcasting Corporation of New Zealand. (85)

The most recent occasion upon which the political independence of the Attorney-General was called into question arose from the contempt of court charges laid against John Banks MP in December 1986. (86)

The Solicitor-General issued two sets of proceedings for contempt of court. The first was against Mr Banks and the Broadcasting Corporation of New Zealand, and the second was against Mr Banks and Wellington Newspapers. The Crown alleged that in the course of a nation-wide talkback programme and an article published by Wellington Newspapers, Mr Banks had made statements implying that three individuals, then the subject of separate criminal proceedings for murder, had previous convictions. The Solicitor-General contended that the making and publication of such statements before trial was likely and calculated to prejudice the trials of the three accused. (87)

The actual merits of the charges, which were eventually dismissed by Davison CJ, are not at issue in this paper's discussion of the case. Rather, it is the repeated allegations made by senior members of the Opposition that the Attorney-General, Mr Palmer, initiated the prosecution and that he did so motivated by party political considerations. These allegations were at all times denied by both the Attorney-General and the Solicitor-General, Mr Paul Neazor QC.

There is no question that the proceedings arose in the context of a widespread public debate on law and order issues in the latter part of 1986. Crimes of violence were increasing at a rapid rate, with a number of particularly vicious murders highlighting to the public the magnitude of the problem. Mr Banks, as the Opposition Spokesman on Police, took a major part in the debate as did Mr Palmer in his role as Minister of Justice, and considered that the penalties for persons

convicted of crimes of violence were inadequate, and held Mr Palmer responsible for this state of affairs.

It was his view that Mr Palmer was "...the weakest Minister of Justice the House has ever seen". (88) Mr Palmer held a similar lack of respect for his opponent's abilities, stating in Parliament that "I think his speeches are vicious and demented". (89)

Claims by Mr Banks and his caucus colleagues that the prosecutions were instituted upon improper political grounds had as their genesis two factors; one an affidavit sworn by a member of the Attorney-General's staff, the second a number of earlier public comments by the Prime Minister that the Opposition considered to be at least as capable of constituting a contempt of court as those made by Mr Banks but were not the subject of contempt charges.

Ms Jillian King, Executive Assistant (Media) to the Attorney-General, said in her affidavit that following discussions with the Attorney-General

> I was directed to advise the Solicitor-General of the Media Statement and, at his request, sent a copy to him. (90)

In response to questioning in the House, the Attorney-General said that he had

> ... a standing agreement with the Solicitor-General that any statements made by members of Parliament that may amount to contempt are to be dealt with by him and not by me. Therefore I would refer to him all material of such a nature that came across my desk. (91)

This declaration by the Attorney-General of his independence in these matters failed to satisfy Paul East MP, Opposition Shadow Attorney-General, who claimed that the Attorney-General had referred to the Solicitor-General only two Press Statements, both from Mr Banks. (92) Mr East was unhappy that contempt proceedings had been brought against Mr Banks while no such action had been taken with respect to comments made in 1984 by the Prime Minister.

Mr Lange had described Peter Fulcher, who at that time was in the process of being extradited from Australia to face serious drug charges in this country, as "a criminal who was the top heavy wholesale drug dealer in New Zealand. He is a thug." (93)

Subsequently Mr Fulcher wrote to Mr East complaining that he could not get a fair trial in New Zealand in light of the Prime Minister's comments. (94)

The Attorney-General's motives were also publicly questioned by Mr Lange's predecessor as Prime Minister, Rt Hon Sir Robert Muldoon, who, in referring to the Fulcher and Banks cases claimed that

> Mr Palmer now has a duty to publicly explain why he took this attitude in the two cases as clearly the immediate conclusion is that his motivation in each case rather than the proper exercise of his Ministerial duty. (95)

The Attorney-General denied the allegations of impropriety, saying that it would be quite wrong for him to make decisions of that type relating to his political colleagues. (96) The Attorney-General was defended by his fellow Law Officer, the Solicitor-General, in subsequent corrospondence with Sir Robert Muldoon.

The Solicitor-General expressed his regret to Sir Robert that he and Mr Banks had publicly suggested that the proceedings were motivated "... by some notion of party political influence or advantage...". (97) In concluding his letter, Mr Neazor said that he was

> well aware of the need to tread an impartial and non-political line in the case of the Law Officers' powers... (98)

Yet the allegations of political partisanship on the part of the Attorney-General did not subside even after the receipt of the Solicitor-General's letter. Mr Banks continued to regard the prosecution as a "sinister, government funded charge" while the Leader of the Opposition, Hon Jim Bolger MP, accused the Attorney-General of conducting a vendetta against Mr Banks. (99)

The reluctance of senior members of the Opposition to accept the Attorney-General's protestations of political independence illustrates the difficulties of a member of Cabinet serving as Attorney-General.

The General Election was scheduled for August 1987, just a few weeks after the charges were heard in court. The Opposition considered that the proceedings were an effort to gag Mr Banks, whom they considered had conducted "... a very upfront

campaign against violence which had shown the Minister of Justice to be ineffectual..." (100) Such allegations could not have occurred had the Attorney-General been a non-political civil servant, as is the case with the Solicitor-General.

When the Attorney-General is also Deputy Prime Minister, as is the case with Mr Palmer, the possibility of Opposition members and others in the community doubting his integrity becomes even greater because that person is closely identified with the government's policies and its campaign for eventual re-election.

Relator Actions

The role of the Attorney-General as guardian of the public interest is not limited to the exercise of his discretion to prosecute at criminal law. The Attorney-General is also vested with sole authority to uphold and enforce public rights by virtue of the royal prerogative.

At common law it has traditionally been considered that no individual has standing to sue for a declaration or injunction to prevent public wrong unless he can show either that his own private rights will be interfered with or that he will suffer special damage peculiar to himself. (101) A private citizen without such standing may seek permission from the Attorney-General to bring a relator action. The Attorney-General has standing to obtain either an injunction or a declaration in any case affecting the public at large and the relator action is a means by which the private citizen may "borrow" his superior standing. (102) Once the Attorney-General's consent has been obtained, the relator usually has a free hand to conduct the proceedings even though in theory the control rests with the Attorney-General. (103)

While relator actions are now of less significance since the move towards more relaxed rules of locus standi, (104) they remain an important part of the powers enjoyed by the holder of the Attorney-General's office. In New Zealand no controversy has arisen over the exercise of the Attorney-General's discretion as to whether or not consent should be granted to enable a private citizen to conduct a relator action. Cooke J, as he then was, speaking extra-judicially in 1975 said that in his experience the Attorney-General's consent was

> readily and promptly granted if the papers were in order and there was something akin to a prima facie case. (105)

That is not to say, however, that in the future such controversy could not occur, as it did in Great Britain a little over ten years ago.

Gouriet v Union of Post Office Workers (106)

The decision of the House of Lords in Gouriet is of enormous importance in any consideration of the constitutional role of the Attorney-General, the exercise of his discretion with respect to relator actions, and the availability of judicial review of that discretion.

Much comment has been passed on their Lordships' judgments, mostly critical of the conservative approach adopted. (107)

The facts of the case can be stated quite briefly. In January 1977, the Union of Post Office Workers (UPW) executive decided to call upon their members not to handle mail destined for South Africa, which would constitute an offence under the Post Office Act. The decision was broadcast over television and Mr Gouriet applied through his solicitor to the Attorney-General for a relator action against the UPW for an injunction restraining them from soliciting or procuring any person wilfully to delay any mail to South Africa. A few hours later the Attorney-General refused to give his consent, giving no reasons other than that he had considered all the circumstances including the public interest.

Mr Gouriet then issued a writ in his own name against the UPW. At first instance it was rejected, only to be subsequently upheld by the Court of Appeal. Finally, the House of Lords rejected the application for an injunction.

The Court of Appeal, led by Lord Denning MR, adopted an innovative approach to the traditional requirement that the Attorney-General's consent be granted before a relator action can be brought. While the Court of Appeal accepted that it had no jurisdiction over the Attorney-General's exercise of his discretion, it considered that other interests should be taken into account. (108)

In the view of Lawton LJ

> The problem still remains, however, whether after the Attorney-General's refusal to consent to a relator action, the plaintiff is without rights of any kind to try and get the criminal law enforced when its breach will deprive him and all other persons in the realm of their right to use the facilities provided by the Post Office. (109)

This concern prompted the court to relax the requirements of locus standi and allow the action to proceed, notwithstanding the Attorney-General's refusal to consent to the action. This residual category created by the Court of Appeal, whereby individuals with a real interest in the matter at issue could bring an action without the consent of the Attorney-General, resulted from that court's disenchanment with the existing law and the probable consequences of applying it to Mr Gouriet.

It was Lord Denning's view that

> ...If the contention of the Attorney-General is correct, it means he is the final arbiter as to whether the law should be enforced or not. If he does not act himself - or refuses to give his consent to his name being used - then the law will not be enforced. If one Attorney-General after another does this, if each in his turn declines to take action against those who break the law - then the law becomes a dead letter. (110)

The House of Lords unanimously rejected the reasoning of the Court of Appeal and re-affirmed the traditional doctrine that a plaintiff seeking to bring a relator action must first obtain the Attorney-General's consent. Lord Wilberforce confirmed that it was the exclusive right of the Attorney-General to represent the public interest and said that "the decisions as to the public interest...are not such as the courts are fitted to take". (111)

The Attorney-General may be called upon to make decisions which bring with them a risk of political criticism, and these are outside the range of discretionary problems which the courts can resolve. (112) Their Lordship's considered that the problem with opening up such a possibility was that it involves proceeding upon the basis that the Attorney-General is in no better position than any other citizen to decide what is best in the public interest. Lord Edmund Davies adopted the reasoning of Pearce LJ in Attorney-General v Harris (113); namely that

> the Attorney-General frequently has sources of information not generally available and must bear in mind considerations which may be undervalued when one considers injury to the public merely in terms of immediate injury. (114)

Accordingly, the appropriate remedy for a person aggrieved by the Attorney-General's decision lay in the political arena and not with the courts. (115)

Lord Fraser of Tullybelton justified excluding the Attorney-General's exercise of his discretion from the perview of the courts on the grounds that

> ...his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest (116)

It is the submission of the writer that such a view is no longer tenable given the realities of modern party politics.

A former United Kingdom Attorney-General, Lord Shawcross, accurately explained the effect of their Lordships decision in Gouriet when he noted

> The fact is that we have moved away from Dicey's age of reasoned democracy into the age of power. Responsibility to Parliament means in practice responsibility to the party commanding the majority there, which is the party to which the Attorney-General must belong.(117)

Gouriet illustrates the type of problem that can arise. The fact that the Attorney-General refused to give his reasons for withholding his consent increased the suspicions of those who considered that he may have been acting in the interests of his party rather than the public.

Such suspicions were fueled further by the news media's portrayal of the case as a confrontation between the Labour government, represented by the Attorney-General, and a right wing pressure group represented by Mr Gouriet.

The essentially political nature of the Attorney-General's office is in itself sufficient reason for requiring that he not be the sole and final arbiter of what constitutes the "public interest".

The question of whether the Attorney-General's exercise of his various powers, in regard to both relator actions and the conduct of criminal proceedings, is subject to judicial review is , therefore, of considerable importance.

The Attorney-General and Judicial Review

It has traditionally been considered that the Courts cannot examine a decision by the Attorney-General to grant or refuse his consent for a relator action to proceed. In London County Council v Attorney-General (118) the Earl of Halsbury L C held that it is for the Attorney-General alone to decide how to exercise his discretion with respect to relator actions. (119) If the Attorney-General made a mistake in the exercise of his discretion, His Lordship considered that

> ... it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of Law to intervene ? (120)

The reasoning in London County Council was expressly upheld by the House of Lords in Gouriet, which, while not in the form of an application for judicial review of a decision of the Attorney-General, contains a number of clear statements to the effect that the exercise of Attorney-General's discretion was not subject to judicial review. Their Lordships opinions were based upon the distinction between public and private law, which Lord Wilberforce explained in the following terms;

> It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to deal with the assertion of those rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out. (121)

As yet the New Zealand Court of Appeal has not been confronted with an application either to review the exercise of the Attorney-General's discretion to give consent to the bringing of a relator action or to allow the plaintiff to proceed without the Attorney-General's consent, as was asked of the court in Gouriet. Nor has the Court of Appeal had occasion to consider the Attorney-General's discretion to enter a stay of proceedings or institute criminal proceedings.

When the Court of Appeal does hear a case on this point, it is to be hoped that the court will recognise that there are different categories of decision made by the Attorney-General and that those categories are differentiated by the nature and source of the authority given to the Attorney-General.

In relation to the criminal law, the Attorney-General's discretion is governed by statute, while the discretion to grant consent for a relator action to proceed remains part of the prerogative. It may be that "authorities as to the reviewability of one category may not necessarily be applicable to another". (122)

An applicant seeking judicial review of a decision of the Attorney-General founded on the royal prerogative would, it seems, have more difficulty than one seeking review under the Judicature Amendment Act 1972 on the basis of the Attorney-General's decision made pursuant to a statutory power.

The House of Lords, now differently constituted from that which was prepared to accept that the royal prerogative could be subjected to judicial review in CCSU v Minister for Civil Service (123), has turned away from what has been termed the "expansionist" approach. (124) The current wisdom of their Lordships is to leave discretionary decisions to the appropriate administrative tribunal or decision maker, with recourse to judicial review only in exceptional circumstances. (125)

Whether the New Zealand Court of Appeal will follow suit remains to be seen. There have, however, been a number of relevant cases before the High Court in recent years that shed some light on the approach likely to be taken by the Court of Appeal in respect to the powers of the Attorney-General.

In Daemar v Gilliard (126) McMullin J had to consider four applications for judicial review of the decision of the Solicitor-General to enter a stay of prosecutions in

respect of several informations laid by the applicant. McMullin J decided that the decision to enter a stay of proceedings was not the exercise or purported exercise of a statutory power and declined the applications. (127) His Honour cited a number of authorities, including Gouriet, in support of the proposition that the powers and duties of the Attorney-General are not subject to review.

The persuasive value of Daemar was subsequently doubted by O'Regan J in Tindal v Muldoon and Others (128) who considered that McMullin J had not fully appreciated the effect of the Judicature Amendment Act 1977. Notwithstanding that point, O'Regan J agreed with McMullin's J view that the plaintiff would not be entitled to relief in proceedings for mandamus, prohibition, certiorari, declaration or injunction, nor did he find it necessary to consider whether the decision to stay proceedings constituted the exercise of a statutory power. (129) His Honour was content to rely on the established principle that if the Attorney-General's actions are to be questioned, it must be in Parliament and not the courts. (130)

In the writer's submission, such a principle, while supported by authority, is outdated and should be dispensed with. Given that decisions of other Ministers of the Crown may be subject to judicial review, (131) there is no logical reason why actions of the Attorney-General should not be subject to the same scrutiny. Regretfully that can not be said to be the position at New Zealand law.

In Slipper Island Resort Ltd v Minister of Works and Development (132) it was held that a prerogative power is not a statutory power and therefore cannot be brought under the terms of the Judicature Amendment Act. This extended to the actions or conduct of the Attorney-General in providing advice to the Governor-General, where the Governor-General was exercising a prerogative power.

This dicta was approved recently by Greig J in Burt v Governor-General (133) where the plaintiff sought judicial review of the Governor-General's decision to decline to exercise the prerogative of mercy (134). Greig J was prepared to accept that it could be argued that when the Executive Council advises the Governor-General on the action he should take pursuant to a statutory authority, that constitutes an exercise of statutory power and is therefore reviewable.

As the sole reference in this case was to the Attorney-General, not the Executive Council, Greig J was not prepared to consider that argument, and turned down the

application on the basis that the prerogative of mercy "... is a unique, extra-legal, extra-judicial and extraordinary power that cannot be subject to court revision". (135) None of those points could be used, however, to justify a refusal to review the exercise of the Attorney-General's discretion to prosecute, which is statutory based. (136) But there would appear little likelihood of movement away from the principles outlined by the House of Lords in Gouriet, unless a particularly meritorious case reaches the Court of Appeal and persuades that court to acknowledge the possibility of review, even if only in exceptional circumstances.

The current Attorney-General, Mr Palmer, is "content to leave to the courts" (137) the question of whether judicial review should be extended over decisions of the Attorney-General, which rules out any possibility of further amendment to the Judicature Amendment Act 1972 to specifically allow review of any or all of the Attorney-General's powers.

There is, however, another option, at least in regard to relator actions. The need for judicial review would be obviated to a considerable extent if individual members were able to bring an action without the Attorney-General's consent, upon application to the court.

The writer favours this indirect method of reviewing the Attorney-General's discretion in respect of relator actions was proposed by Lord Denning in Gouriet, which is discussed in more detail below.

The Office of Attorney-General: Options for Reform

While there are any number of possibilities, reform options fall into one of two categories; those that alter the functions and powers of the Attorney-General and those that go to the actual nature of the office itself.

Reform of the Functions and Powers of the Attorney-General

The traditional role of the Attorney-General as the guardian of the public interest in respect to relator actions has come increasingly under attack in recent years, with Gouriet being the outstanding example.

In the writer's submission it is inappropriate to entrust the protection of the public interest to any one official, even the Attorney-General who by definition is a partisan member of the government of the day. If the Attorney-General is to have a role in relator actions, it should not be that of final arbiter as to whether or not an action may proceed.

This view received judicial approval for the first time in McWhirter v Independent Broadcasting Authority (138) through the person of Lord Denning who in an obiter comment expressed the opinion that an individual member of the public could apply for an injunction

> ...in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly. (139)

Some years later, Lord Denning in Gouriet went so far as to say that any member of the public who is adversely affected should, upon application to the court, be able to proceed without the Attorney-General's consent. (140)

The Law Commission of British Columbia in its 1981 Report "Civil Litigation in the Public Interest" (141) considered Gouriet and rejected the House of Lords judgment with respect to the all powerful role of the Attorney-General. The Commission concluded, inter alia, that any member of the public should have the right to bring proceedings in respect of an alleged violation a public right protected by statute. (142) Under the Commission's recommendation, if the Attorney-General refused to grant consent the individual applicant could bring proceedings in his own name upon obtaining the consent of the court. That consent would be given unless the court held that there was not a justiciable issue to be tried. (143) The Attorney-General would, however, have the right at all times to intervene in the proceedings or to be joined as a party of record, and therefore would still have the opportunity to present to the court issues that might not otherwise be drawn to its attention. (144)

This recommendation illustrates the recognition by the Commission that the Attorney-General has a continuing role in public interest litigation, although it was not prepared to accept that the conduct of relator actions should remain exclusively the prerogative of the Attorney-General.

The Commission was of the view that its recommendation would ensure that

> his decision not to participate will not give rise to any suggestion that this decision has prevented any otherwise meritorious case being brought before the courts.(145)

The Commission's preparedness to allow a relaxation of the rules of locus standi to the point that any member of the public could bring a relator action upon application to the court goes further than Lawton LJ went in Gouriet. While Lawton LJ was also not of a mind to accept that the Attorney-General is the sole arbiter of what the public interest is in civil litigation, he considered that it will "only be in the rare case... that the court will allow a plaintiff to proceed". (146)

Lawton LJ envisaged that the courts would deny relief to

> busy bodies, mischief makers and anybody who was not likely to be personally affected by the threatened criminal acts.(147)

The court would not have discretion to refuse relief to applicants on those grounds if the British Columbian recommendation was adopted. Permission to proceed independently of the Attorney-General's consent could only be withheld if the matter at issue was not justiciable. (148)

In the writer's submission the different approaches taken by Lawton LJ on one hand and the Law Commission on the other are both unsatisfactory. The ideal solution would be somewhere between the two options, so that members of the public with a genuine interest in the matter could seek relief through civil litigation with the courts retaining discretion to refuse consent to potential plaintiffs where the application is vexatious or in bad faith. There should be no requirement, however, that the applicant be directly affected by the threatened breach of the criminal law. Everyone in society has an interest in seeing that the rule of law is upheld, whether they are affected directly by its breach in a particular instance or not, and accordingly should be able to seek its enforcement.

The policy arguments adopted by the Law Commission of British Columbia also apply to the role of the Attorney-General in the administration of the criminal law.

Their applicability is, in fact, of more importance given that parties to proceedings at criminal law may stand to lose their liberty if convicted and certainly their good reputation.

In 1979 the House of Commons in Great Britain had before it the Consent to Prosecutions Bill, which sought to transfer from the Attorney-General to the Director of Public Prosecutions discretion to consent to prosecutions contained in other enactments. (149) The Bill failed to get past a first reading and the Attorney-General in Great Britain remains ultimately responsible for the exercise of discretionary powers to prosecute prescribed by statute.

The British Parliament has, however, moved in at least one instance to remove from the Attorney-General absolute discretion with respect to consenting to prosecutions. s7 of the Contempt of Court Act 1981 provides that proceedings may be instituted only on the consent of the Attorney-General or on the motion of the court. By providing individual members of the public with the residual right to act even where the Attorney-General has refused to do so, Parliament implicitly accepted the principle behind the innovation of the Court of Appeal in Gouriet. That this step was taken in an Act codifying the common law of contempt reflects the policy nature of that area of the law.

As Davison CJ noted in Solicitor-General v Broadcasting Corporation of New Zealand

> The law of contempt is founded entirely on public policy and public policy requires the balancing of interests that may conflict. In the realm of contempt there is, on the one hand, the right of an accused person to a fair trial by the Courts and not to have that trial prejudiced from outside sources. On the other hand, the public's right to know, freedom of speech and the freedom of the Press should not be limited to any greater extent than is necessary. (150)

It is therefore not appropriate to rely only upon the Attorney-General, an elected politician, to determine when proceedings should be brought. The court should also have a role to play, upon application from a member of the public. Had a similar statutory provision existed in New Zealand, the Prime Minister, Mr Lange, may well have faced privately laid proceedings for criminal contempt of court for his

comment that Peter Fulcher, against whom serious drug charges were pending, was "a criminal who was the top heavy wholesale drug dealer in New Zealand. He is a thug". (151)

Fulcher himself complained that

> As a direct result of our Prime Minister's outbursts I now find it an impossibility to find a jury in New Zealand that has not been swayed by this tirade... (152)

The decision of the law officers not to commence proceedings ensured that a prosecution could not be made. As previously discussed, (153) the Opposition's allegation that the Attorney-General did not bring proceedings against his Prime Minister because of partisan political considerations, while charges were subsequently laid against Mr Banks for comments of a similar nature, would have the effect of undermining the integrity of the office of Attorney-General and therefore that of the legal system as a whole.

Had provision existed for a private prosecution to be brought with the consent of the court, the Attorney-General's role would have been less pivotal and accordingly less open to attack.

Problems such as those illustrated by the Banks case would not occur at all if the Attorney-General did not have ultimate responsibility for the administration of the criminal law in particular cases. If the Solicitor-General, a senior civil servant, was to have the final responsibility for entering and withdrawing prosecutions in constitutional theory as well as in the usual course of things, public confidence in the legal system would be strengthened in the knowledge that the law was not open to abuse on improper political grounds. The Attorney-General would continue to maintain a supervisory role over the legal system, particularly as regards the appointment of the judiciary and the operation of the courts.

Reform of the Structure of the Office of Attorney-General

There are three options for reform of the structure of the office of Attorney-General that warrant consideration in the New Zealand context.

They are:

1) The removal of the Attorney-General from the political process by providing that the office is to be held only by non-members of Parliament.

2) The continuance of the Attorney-General as an elected member of the government of the day, but with the removal of membership of Cabinet from that office.

3) The abolition of the office of Attorney-General, to be replaced by an Advocate-General with responsibility to protect the public interest in civil litigation.

A Non-Political Attorney-General ?

New Zealand is one of few Commonwealth nations that have, at some point in time, selected Attorney's-General from outside the ranks of politicians. In 1866 the Attorney-General's Act was passed providing that the office of Attorney-General was to be a non-political appointment with the same status and independence of a member of the judiciary. While this experiment lasted just ten years, it nevertheless is a precedent that could again be considered.

Arguably the rationale for having an Attorney-General not directly involved in party politics is even more compelling now then it was in 1866, when strong party discipline and coherence was not the feature of politics that it is today. Taking the office of Attorney-General outside the political arena would give the enforcement of the rights of the public and the rule of law the appearance, as well as the reality, of detachment from partisan political considerations.

A number of Commonwealth countries have already adopted this reform, including Malaysia, India, Kenya, Singapore and Malta. (154)

Under such a reform, the Attorney-General could be accountable to Parliament through the Minister of Justice, who already holds responsibility for a wide range of functions related to the operation of the legal system, such as law reform, the prison system, and the commercial law. It is implicit in this reform option that particular

exercises of the Attorney-General's discretion to institute or withdraw criminal proceedings would not be subject to the scrutiny of Parliament.

The Attorney-General Outside Cabinet ?

The United Kingdom practice of not according the Attorney-General membership of Cabinet has not been adopted in New Zealand, with the Attorney-General continuing to play a full part in Cabinet decision making. There have been, however, suggestions from academic commentators that New Zealand would benefit by removing Cabinet rank from the holder of the office of Attorney-General. (155)

Professor Brookfield, noting that as a member of Cabinet the Attorney-General shares in the collective responsibility for decisions of that body, considered that

> the easily made change of excluding the Attorney-General from the Cabinet, so that he ceases to be so closely involved in Cabinet policies and decisions, would be a clear, if modest, benefit to his office and the administration of justice...(156)

Recent holders of the office in New Zealand, however, are unanimous in the view that the Attorney-General should remain within Cabinet. Hon Jim McLay, Attorney-General in the National government between 1978 and 1984, was of the opinion that

> the blunt truth of the matter is that it is essential that there be, seated at the Cabinet table, a person with legal knowledge who can alert his/her colleagues as to any legal issues that might arise from a decision that they are contemplating. Such a person must have full Cabinet status if he/she is to argue such a view, rather than simply present advice as an outsider. (157)

The current Attorney-General, Mr Palmer, cites another advantage of having the Attorney-General in Cabinet; namely

> he can explain the effect of judicial decisions to his colleagues. He can advise on practical implications of those decisions. He can ensure that the Cabinet respects the independence of the judiciary. (158)

An Advocate-General for New Zealand ?

The most radical reform that has been publicly suggested is the abolition of the office of Attorney-General combined with the appointment of an Advocate-General, a permanent non-political law officer with the status of a High Court judge.

While this idea was raised most recently by Jack Hodder at the 1987 New Zealand Law Conference,(159) its genesis was an article published in 1985 by Professor John Griffith. (160)

Professor Griffith considered the approach of the House of Lords in a number of cases where the courts were asked to review government actions, and concluded that the public was not well served by the judicial process. One particular fault of the adversary nature of litigation is that the courts do not actively seek the truth through its own research into the particular matters at issue.

To address this problem Professor Griffith recommended

> the appointment of a public officer whose responsibility it would be to act as an Advocate-General, to present such evidence as he considered necessary in the public interest, and generally to draw the attention of the court to place those matters affecting the public interest which he considered the court should take into account. (161)

The principal motivation behind this recommendation was to provide a means whereby judges, as they are required to make policy decisions in the public interest, could equip themselves with all the relevant information. Mr Hodder argues that the logical conclusion of accepting the case for an Advocate-General is the abolition of the office of Attorney-General, (162) with the Advocate-General also taking over the civil law functions of the Attorney-General, such as deciding upon applications for relator actions. The Attorney-General's criminal law functions could be transferred either to the Solicitor-General, or to the Advocate-General if it is considered preferable that both functions be combined.

Conclusions

The position of Attorney-General in New Zealand is important in terms of the high standing of the office politically, but more particularly because of the all powerful role enjoyed by the holder of the office under both statute and the prerogative. The exercise of these powers is not without controversy, in the main because of the political hat also worn by the Attorney-General and the resulting cynicism that may arise as to his motives when citing the "public interest" as justification for his actions.

Is it appropriate, therefore, to remove the Attorney-General from the political process altogether ?

The writer is unconvinced that such a radical reform is either desirable or necessary. The Attorney-General's political role can cause problems because of the particular functions that have traditionally fallen to the office, although a distinction does need to be drawn between the different types of prosecution powers. Where an offence is created in a statute which relates to New Zealand's international law obligations, for example, the government clearly has a legitimate right to intervene in the process. The conduct of foreign affairs is, after all, a fundamental function of any government. But there is no reason to leave the exercise of the discretion in such cases to the Attorney-General alone. Such decisions should be made by Cabinet, upon the advice of the Attorney-General.

While also of a highly policy nature, the exercise of a prosecutorial discretion in statutes that seek to limit free speech, for example the Race Relations Act 1971, is not appropriate for the sole determination of either the Attorney-General or Cabinet as a whole. In a democratic society differences of opinion and philosophy are inevitable and even healthy, however, there is substantial agreement that there must be some limits on the freedom of speech on the grounds of public policy. There may be, for example, limits designed to promote racial harmony and tolerance, or the rights of women by limiting the availability of pornography.

The limits placed upon freedom of expression determined by statute bring with them inevitable controversy and debate. That is a legitimate part of the political process. If members of the public consider the government's attempt to draw the line between the competing interests of free speech and, for example, the need to promote better race relations to be wrong, they can exercise a protest by voting against the government at the subsequent election.

While it is the government's role to determine policy on such matters, it is not appropriate for its chief legal advisor to determine its applicability to criminal proceedings in particular cases. The writer is attracted to the idea of the appointment of an Advocate-General, whose responsibility would be to determine the "public interest" and exercise the discretion to prosecute accordingly. The case for an Advocate-General to exercise the civil law functions of the Attorney-General is also compelling, particularly the discretion to determine whether consent will be granted for a relator action to proceed.

The Advocate-General should not simply be an appendage of either the Department of Justice or the Crown Law Office. The position should be created by separate Act of Parliament, the most relevant precedent being the Ombudsmen Act 1975. The appointment would be made on a bi-partisan basis, and accountability to Parliament would be through the Speaker by way of annual reports.

In the writer's submission, the creation of an Advocate-General to exercise the discretionary powers currently the responsibility of the Attorney-General, both civil and criminal in nature, would obviate the need for further reform. The Attorney-General should continue to remain a political appointment, and as the government's chief legal advisor it is appropriate that he/she remain a member of Cabinet. It is interesting to note that the two countries where the Attorney-General does not hold Cabinet rank, the United Kingdom and Australia, have still encountered their share of controversy as illustrated by the Campbell and Ellicott cases.

This experience indicates that it is the attitudes of the Attorney-General and his political colleagues, rather than the actual structure within which they operate, that determine whether abuses will occur.

To use the words of Professor Edwards

> ... in the final analysis it is the strength of character, personal integrity and depth of commitment to the principles of independence and impartial representation of the public interest, on the part of the holders of the office of Attorney-General which is of supreme importance. Such qualities are by

no means associated with either the political or non-political nature of the office of Attorney-General (163)

New Zealand has been well served by those who have held the office of Attorney-General, with few blemishes against a record of decision making otherwise without the influence of improper political considerations being present. Those few occasions on which the Attorney-General's political impartiality have been questioned, combined with overseas experience, show that there can be no room for complacency. But it would seem both more desirable and realistic to remove the core of any difficulties that do arise, the discretionary powers that give the Attorney-General ultimate control over criminal proceedings and certain civil proceedings, rather than expect a political officer to somehow shut out of his mind all those considerations that condition the daily existence of all politicians.

The appointment of an Advocate-General would achieve this, particularly if there was also recognition that courts do make decisions with a high policy content, and therefore could responsibly exercise a discretion to determine whether a relator action should proceed in the absence of the Advocate-General's consent. The present government in proposing the introduction of a Bill of Rights, (164) implicitly recognised the court's ability to involve itself in policy oriented issues, even to the extent of striking down legislation.

Whether it is appropriate to involve the courts in the political process to such an extent is arguable, but it is clear that in so far as relator actions are concerned the courts would capably any discretion provided to them. It now falls to the legislature to recognise the shortcomings inherent in the office of Attorney-General and act accordingly.

It is to be hoped that action is taken before New Zealand encounters an abuse of the office to rival Campbell and Ellicott, which are still of sufficiently recent memory to illustrate vividly what can go wrong when the integrity of the legal system is place at risk by either the Attorney-General or his political colleagues.

FOOTNOTES

1. Rt Hon Geoffrey Palmer, "The Role of Attorney-General in Modern Government", Counsel Brief, October 1986, 6
2. S A de Smith, Constitutional and Administrative Law, (4ed, 1981, H Street and R Brazier ed's) 30.
3. Idem
4. Idem
5. John Edwards, "The Integrity of Criminal Prosecutions - Watergate Echoes Beyond the Shores of the United States", (1979) 5 C L B 879
6. John Griffith, "Judicial Decision-Making in Public Law", [1985} Pub L 564
7. J E Hodder, "Advocating an Advocate-General: Abandoning the Attorney-General", [1987] New Zealand Law Conference Papers, 203
8. Rt Hon Sir Elwyn Jones, "The Office of Attorney-General", (1969) 27 Camb L J 43
9. J Ll J Edwards, The Law Officers of the Crown, (London, 1964) 17
10. Ibid, 26
11. Ibid, 27, 69
12. Ibid. 32
13. Above n8
14. Above n9, 69
15. Idem
16. Above n9, 72
17. Ibid, 65
18. Neither the Attorney-General or the Solicitor-General are members of Cabinet in the United Kingdom.
19. Above n9, 101
20. Ibid, 65
21. Ibid, 124
22. George Burton Adams, Constitutional History of England (London, 1935) 560

23. Above n9, 174
24. Idem
25. Ibid, 124
26. Solicitor-General ex rel Cargill v Dunedin City Corporation 1 Jur NS 1, 14 per Williams J
27. F M Brookfield, "The Attorney-General", [1978] N Z L J 334, 335.
28. Idem
29. J Ll J Edwards, The Attorney-General, Politics and the Public Interest, (London, 1984), 389
30. Idem. Edwards makes the point that the reasons for the demise of a system of non-political Attorney's-General were never clearly stated.
31. The two most recent occasions when the Attorney-General did not also hold the office of Minister Of Justice were 1969-1972 and 1975-1978.
32. (1934) 10 N Z L J 81, 83
33. 10 National and 8 Labour
34. Geoffrey Palmer, Unbridled Power (2nd ed, 1987) 65
35. Idem
36. Above n27
37. s345(2) Crimes Act 1961
38. s345(3) Crimes Act 1961
39. s77A Summary Proceedings Act 1957
40. See page 21
41. Question for Written Answer; Paul East MP to Rt Hon G W R Palmer, Attorney-General. Notice Given 24 March 1988, Reply Due 5 April 1988
42. Above n9, 239
43. Dominion, Wellington, 22 March 1988, 1

44. The Race Relations Conciliator, Mr Wally Hirsh, considered bringing a prosecution under s9A of the Act but did not proceed as the remarks in question had not been made in a "public place" as required by the Act.
45. Above n1
46. Idem
47. Letter to the writer from Hon J K McLay, 22 March 1988
48. Idem
49. Report of the Departmental Committee on s2, Official Secrets Act 1911, Vol 1 Cmnd 5104
50. Idem
51. B M Dickens, "Prosecuting Roles of the Attorney-General and the Director of Public Prosecutions", [1974] Pub L, 50, 51
52. (1977) C L B 203
53. Ibid, 204
54. s378 Crimes Act 1961
55. F M Brookfield, "The Attorney-General and the Staying of Prosecutions", [1978] N Z L J 467
56. s2 Summary Proceedings Amendment Act 1967
57. Above n9, 213
58. Ibid, 199
59. Ibid, 203
60. (1916) Law Department files, quoted in Above n9, 192
61. R Plehwe, "The Attorney-General and Cabinet: Some Australian Precedents", (1980) 11 F L Rev 1, 2
62. H C Debates, Vol 179, Cols 354-355, December 11 1924, quoted in Above n9, 213
63. Above n29, 380
64. Idem
65. Sankey v Whitlam and Others [1980] C L R 1
66. US v Nixon (1974) 418 US 683, 712

67. Parl Debates, H R Sep 6 1977, 721-727, quoted in Above n29, 381
68. Above n29, 383
69. Ibid, 384
70. Above n67
71. (1977) 51 Aust L J 675, 678
72. Ibid, 679
73. [1976] 2 N Z L R 615
74. Above n27, 338
75. Hon P I Wilkinson, Press Statement, 7 April 1976
76. Hon P I Wilkinson, "Some Thoughts on Stepping Down", [1979] N Z L J 116, 117
77. Idem
78. Above n73
79. This hypothetical situation was raised in a comment on Fitzgerald v Muldoon by W A Keen, [1982] Pub L 7, 14
80. Hon P I Wilkinson, Press Statement, 17 August 1978
81. Idem
82. Idem
83. Above n76
84. Idem
85. [1987] 2 N Z L R 100
86. The writer in his previous position as a Research Officer, National Parliamentary Research Unit, was involved in the preparation of Mr Banks' defence to these charges and generally as a political advisor to Mr Banks.
87. Submissions of the Solicitor-General in Solicitor-General v Broadcasting Corporation of New Zealand [1987] 2 N Z L R 100, 1
88. New Zealand Parliamentary Debates, Vol 481, 1987;9533
89. Ibid, 9534

90. Affidavit of Jillian Maree King in Solicitor-General v Broadcasting Corporation of New Zealand [1987] 2 N Z L R 100 2
91. Above n88, 9625
92. Paul East MP, Press Statement, 21 July 1987
93. New Zealand Herald, Auckland 28, December 1984, 1
94. Above n92
95. Rt Hon Sir Robert Muldoon, Press Statement, 5 January 1987
96. Above n93, 6 January 1988
97. Letter from Mr D P Neazor QC, Solicitor-General, to Rt Hon Sir Robert Muldoon, 6 March 1987
98. Idem
99. Dominion Sunday Times, Wellington, 27 July 1987
100. Evening Post, Wellington, 22 July 1988
101. Boyce v Paddington Borough Council [1903] 1 Ch 109, 114
102. T C Hartley, "Gouriet: The Constitutional Issue", (1978) 41 Mod L Rev 58, 59
103. Idem
104. See for example Inland Revenue Commissioner v National Federation of Self-Employed [1982] A C 617 and Budget Rent A Car Ltd v Auckland Regional Authority [1985] 2 N Z L R 414.
105. "The Concept of Environmental Law", [1975] N Z L J 631, 636 quoted in Above n27, 341
106. [1978] A C 435
107. See for example P P Mercer, "The Gouriet Case: Public Interest Litigation in Britain and Canada", [1979] Pub L 214
108. [1977] Q B 729, 768
109. Ibid, 768
110. Ibid, 761
111. Above n106, 482

112. Idem
113. [1961] 1 Q B 74, 92
114. Ibid, Above n106, 510
115. Ibid, 526,
116. Idem
117. Letter to "The Times", 3 August 1977
118. [1902] A C 165
119. Ibid, 168
120. Idem
121. Above n106, 477
122. G M Illingworth, "Judicial Review and the Attroney-General", [1985] N Z L J 176
123. [1985] A C 374
124. G Taylor, Editorial, (1988) Capital Letter 11, 26
125. Puhlhofer v Hillingdon London Borough Council [1986] A C 484
126. [1979] 2 N Z L R 7
127. Ibid, 26
128. Unreported, High Court, Auckland, 7 November 1983, A383/83
129. Ibid, 9
130. Ibid, 13
131. Padfield v Minister of Agriculture, Fisheries and Food [1968] A C 997
132. [1981] 1 N Z L R 136
133. Unreported, High Court, Wellington, 16 June 1988, CP 129/87
134. Ibid, 7
135. Ibid, 19
136. Above n37 and n38, for example
137. Above n1
138. [1973]Q B 629
139. Ibid, 649

140. Above n108, 763
141. As reported in (1981) C L B 605
142. Ibid, 606
143. Ibid, 611
144. Ibid, 612
145. Ibid, 611
146. Above n108, 771
147. Idem
148. Above n141, 611
149. Above n29, 22
150. Above n85, 108
151. Above n93
152. Letter from Peter Fulcher to Paul East MP, 6 January 1986
153. At 25
154. Above n29, 65
155. Above n55, 471
156. Ibid, 472
157. Above n47
158. Above n1
159. Above n7
160. Above n6
161. Ibid, 582
162. Above n7
163. Above n29, 67
164. A Bill of Rights for New Zealand - A White Paper, (Wellington, 1985) .

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