PARLIAMENT OF NEW SOUTH WALES

REPORT

OF THE

LAW REFORM COMMISSION

ON

PROCEEDINGS BY AND AGAINST THE CROWN 1975

L.R.C. 24

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PREFACE

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are—

Chairman: The Honourable Mr Justice C. L. D. Meares.

Deputy Chairman: Mr R. D. Conacher.

Others: Mr C. R. Allen.

Mr D. Gressier.

Professor J. D. Heydon.

His Honour Judge R. F. Loveday, Q.C.

The offices of the Commission are in the Goodsell Building, 8–12 Chifley Square, Sydney. The Secretary of the Commission is Mr F. McEvoy. Letters should be addressed to him.

This is the twenty-fourth report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 24.

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REPORT ON

PROCEEDINGS BY AND AGAINST THE CROWN

To the Honourable J. C. Maddison, B.A., LL.B., M.L.A., Attorney General and Minister of Justice.

PART 1.—*Introduction*

1.1 *Terms of reference.* We make this report under our reference "To review the law relating to proceedings by and against the Crown and incidental matters."

1.2 *Scope of the reference.* The principal legislation which presently governs these proceedings is the Claims against the Government and Crown Suits Act, 1912. This Act appears as appendix A.[1] The historical development of the liability of the Crown to give legal redress to subjects[2] is such that it is impossible to sever this liability from the procedures which, by statute, have been made available to subjects to sue the Crown. The Claims against the Government and Crown Suits Act, 1912, not only provides the procedure by which subjects can sue the Crown but also, in large measure as an incident of that procedure, it delimits the liability of the Crown. We are concerned, therefore, not merely with the adjectival law of methods of enforcement against the Crown of the liability which the Crown has but also with the substantive law of that liability. Our reference requires us to consider proceedings brought by the Crown against a subject as well as proceedings brought by a subject against the Crown. We are concerned also with matters which are incidental to the review entrusted to us. As will appear we find it necessary to review the law relating to the application to the Crown of statutes and to make recommendations concerning this.[3] We recommend also reform of the present law by which a master is not liable for torts committed by his servant in the exercise of a function which is not conferred or imposed upon him by the instructions of the master but is conferred or imposed upon him directly by the law itself. This law has its application mainly in respect of servants of the Crown. But in some unusual cases it applies also in respect of servants of private employers. We recommend, as an incidental matter, that the reform extend to these cases.[4] Unless the reform is thus extended, it will be incomplete. But we do not regard our terms of reference as a warrant to recommend reforms of general law, as equally applicable to

[1] For comparative legislation *see* Hogg, *Liability of the Crown* (1971) at pp. 237–246. But note that the relevant legislation in South Australia is now the Crown Proceedings Act, 1972–5.

[2] We use the expression "subject" to mean any person or body corporate other than the Crown.

[3] Part 14.

[4] Part 13.

subjects as to the Crown, on the ground that the general law affects the liability of the Crown.[5]

1.3 *Objectives of the report.* We do not aspire to a definitive treatise upon the Crown and the law.[6] Our principal task, as we see it, is to determine in what respects the present law exhibits deficiencies for which the appropriate remedy is legislation and to make recommendations as to the legislation which is needed. Our report would be of inordinate length if we were to discuss all the problems which can arise in litigation between a subject and the Crown. We do not, in general, discuss problems which the courts have satisfactorily resolved by judicial decision,[7] problems for which adequate judicial solutions are evolving,[8] or problems in respect of which it would be sanguine to suppose that any formula provided by legislation would lead more often to decisions which would be a reasonable adjustment of the interests of subjects, on the one hand, and considerations special to the Crown, on the other hand, than would be the decisions to which courts would come by applying principles derived from the common law.[9]

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[5] For example, we refrain from discussion of whether it is just that where a servant of the Crown commits a tort in the course of his service, not only the Crown, but also the servant himself, is liable in damages to the person wronged. The liability of the servant of the Crown is but an instance of the general law that a tortfeasor is personally liable for his tort notwithstanding that the tort was committed in the course of his service as the servant of a master. In practice, of course, it is almost invariably the master who pays.

[6] A succint general account, containing much valuable comment, is P. W. Hogg, *Liability of the Crown,* published in 1971.

[7] For example, the problem of Crown privilege against disclosure of documents, where disclosure would be injurious to the public interest, was satisfactorily resolved by the decision of the House of Lords in *Conway* v. *Rimmer* [1968] A.C. 910.

[8] For example, where a Minister indicates his intention to advise the Governor to take some action, and that action would be in unlawful derogation of the rights of a subject, the Supreme Court is unable, because of the constitutional convention that the Governor must act in accordance with advice given to him by the Ministers of the Crown, to make any coercive order directed to the Governor (or the Governor-in-Council) that he act otherwise than in accordance with the proposed advice. But the court would now surmount this difficulty by making an order which declares what the rights of the subject are. Such an order would not infringe the constitutional convention because it would not be a coercive order as to what the Governor is to do. But the result would be the same as if such a coercive order were made—because the Minister would not give advice which is inconsistent with the rights declared by the court. See *N.S.W. Mining Co. Pty Ltd* v. *Attorney-General for New South Wales* (1967) 67 S.R. 341. Section 75 of the Supreme Court Act, 1970, now provides that "No proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of rights whether any consequential relief is or could be claimed or not."

[9] For example, the problem of determining whether the Crown evinces an intention to contract where, in pursuance of a policy of public welfare, it enters into an arrangement with a subject to confer benefits upon him conditionally upon some action being taken by him. *See,* for example, *Administration of the Territory of Papua and New Guinea* v. *Leahy* (1961) 105 C.L.R. 6. But the Crown is contractually bound by ordinary commercial arrangements—albeit that they are entered into "as a matter of Government policy": *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455 per Evatt *J.* at pp. 462–463. See also *Australian Woollen Mills Pty Ltd* v. *The Commonwealth* (1954) 92 C.L.R. 424 in the joint judgment of the court at p. 460.

We direct our attention principally to those aspects of the law in respect of which we consider that legislative intervention is needed because the existing legislation and rules of the common law, of particular application to the Crown, either constrain the courts to make decisions which we consider to be unjust[10] or unduly restrict the considerations to which the courts may have regard.[11]

We do, however, also explain and examine the general operation of the Claims against the Government and Crown Suits Act, 1912. We do so because that Act is the cornerstone of the rights which subjects have in litigation against the Crown and an understanding of it is essential to an appreciation of our specific recommendations. To facilitate an understanding of that Act we also discuss the common law which it displaces and the history of the legislation which preceded it and we contrast the provisions of the Act with those contained in more recent legislation of the United Kingdom.

1.4 *Acknowledgments.* We are grateful to those who have assisted us by making pertinent observations on aspects of this report. They have been of great value. We mention particularly the Rt Hon. Sir Victor Windeyer; Parliamentary Counsel (Mr H. E. Rossiter QC); and the Crown Solicitor (Mr R. J. McKay). But the opinions expressed, and the recommendations made, in this report are those of this Commission. It should not be assumed that those who have assisted us would agree with them.

We have also had the benefit of the report dated 21st November, 1966, by subcommittee No. 14 (under the chairmanship of Mr Justice Jenkyn) of the Chief Justice's Law Reform Committee.

1.5 *Scheme of the report.* The scheme of our report is this. In part 2 we trace the historical development of the law of England, inherited in New South Wales on the foundation of the Colony, as to the liability of the Crown in litigation and the procedures by which subjects could obtain redress against the Crown. In part 3 we trace the history of bold innovation effected by the legislation in the Australian Colonies, by which subjects were enabled to obtain redress in respect of any tort committed by the Crown. In part 4 we discuss the effect of this legislation, now the Claims against the Government and Crown Suits Act, 1912, compare it with the Crown Proceedings Act 1947 of the United Kingdom, and conclude that the fundamental principles which underlie it should be retained. In part 5 we recommend several reforms in respect of the Claims against the Government and Crown Suits Act, 1912. In part 6 we recommend that the Crown, which presently is bound by the Supreme Court Act, 1970, be bound also by the District Court Act, 1973, and the Courts of Petty Sessions (Civil Claims) Act, 1970. In part 7, we consider proceedings

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[10] As in *Downs* v. *Williams* (1971) 126 C.L.R. 61. This case is discussed in part 4 section 9 and, in detail, in appendix C.

[11] As does the present rule of the common law which courts must apply in determining whether a statute binds the Crown. This rule is discussed in part 14.

against the Attorney General which may be brought in equity by a subject independently of the Claims against the Government and Crown Suits Act, 1912. In part 8 we consider proceedings by the Crown against a subject. In part 9 we recommend several reforms relating generally to proceedings to which the Crown and a subject are parties but which fall outside the ambit of the Claims against the Government and Crown Suits Act, 1912. In part 10 we recommend a provision as to the title of the Crown in proceedings to which it is a party in separate inconsistent interests. In part 11 we recommend a new Crown Proceedings Act to give effect to all of the abovementioned recommendations. In part 12 we briefly discuss the relevance of the Claims against the Government and Crown Suits Act, 1912, to litigation against Crown instrumentalities and conclude that no difficulty exists which warrants legislative intervention. In part 13 we consider the liability of the Crown for the torts of independent officers committed in the exercise of a function conferred or imposed upon them by law, the liability of the Crown and of other masters for the torts of servants committed in the exercise of any such function, and make recommendations for reform. In part 14 we consider the rule of construction that legislation does not bind the Crown unless the legislation expressly provides that the Crown is bound or it is a necessary inference that the Crown is bound. We conclude that this rule is unsatisfactory and recommend reform of it. In part 15 we summarize the principal recommendations made.

PART 2.—*Historical Background of Proceedings by a Subject Against the Crown*

2.1 *Development of the concept of the State.* We construe the expression "the Crown", in the reference to us, as meaning the State of New South Wales and not as meaning the Queen as a person. The present law, however, as to the legal responsibility of the State and the court procedures which are applicable has much of its origins in by-gone times when the sovereign was in fact the State, it being "almost treasonable to separate the capacity of the king as man from his capacity as king".[1] The development of the law relating to proceedings by a subject against the Crown is to a large measure an expression of the development of the concept of the State as distinct from the sovereign;[2] but the law has been tardy in its adaptation to the modern concept of the State and to the functions now exercised by the State; and the adaptation is not complete.

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[1] Holdsworth, *A History of English Law*, 3rd edn (1944), vol. 9 at p. 5.

[2] It has been somewhat irreverently written that the "Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the state behind them." (H. J. Laski, "The Responsibility of the State in England" (1919) 32 *Harv. L.R.* 447 at p. 472). The irreverence may be welcomed as a means of debunking mysticism in considering what the liability of the State ought to be. But the statement is not a definition. Legislation is an activity of the State no less than is administration. *See* part 13 sections 4 and 5.

2.2 *The petition of right.* A feudal lord could not be sued in his own court. The king therefore could not be sued in his own court; and there was no higher court. But it would not have been appropriate for the Crown as "the fountain of justice and equity" to refuse redress when petitioned so to do; and as early as the thirteenth century it was recognized that the king should and would enable the court to give redress of grievances he had caused to his subjects, if he was petitioned to do so. Originally these petitions were the same as those seeking a royal grace or favour but they gradually evolved as a different kind, being petitions asking for a legal right, that is, petitions of right. Whilst, however, it was recognized that the king ought to enable redress to be had, it remained within the absolute discretion of the Crown whether to grant or refuse the prayer in a petition of right that the court be permitted, by the fiat of the Crown, to determine the claim.

2.3 *Disadvantages of the petition of right.* The procedures associated with the obtaining of redress by petition of right were cumbersome and slow and the Crown had, in court proceedings which followed upon the grant of the fiat, many procedural advantages[3] which were not available in proceedings between subject and subject.

2.4 *Obsolescence of alternative remedies.* These disadvantages led to the petition of right procedure being largely superseded from the fifteenth century onwards, until returning to favour in the nineteenth century, by less dilatory procedures. But by the beginning of the nineteenth century these procedures (other than that of proceedings against the Attorney-General in the Court of Exchequer for equitable relief[4]) had themselves become obsolete as they related to feudal tenures which had ceased to exist or to fiscal machinery of government no longer in use.[5] A revival of the petition of right procedure ensued.[6]

2.5 *Scope of the petition of right.* Extensive relief could be obtained against the Crown by the petition of right procedure. By the middle of the nineteenth century it was settled by judicial decisions that relief could be obtained by that procedure at least in respect of—

(a) A debt or liquidated sum due under contract or by statute.

(b) An unliquidated sum due by statute.

(c) Damages for breach of contract.

(d) Property in the hands of the Crown.

The law failed, however, fully to give effect to the principle that where there would be redress against a subject there should be redress also against the Crown.

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[3] Dignified by the title "garland of prerogatives". *See* Holdsworth, *A History of English Law*, 3rd edn (1944), vol. 9 at pp. 22 *et seq.*

[4] We discuss this procedure in part 7.

[5] Hogg, *Liability of the Crown* (1971) at pp. 3, 4.

[6] This included revival for the purpose of obtaining equitable relief.

2.6 *Refusal to extend its scope to redress for tort.* The principal reason for this failure was the application by the courts of the maxim that "the King can do no wrong". Whatever that maxim originally meant,[7] it came to be applied in the nineteenth century in a way which excluded liability of the Crown in respect of a tort (for example, the tort of negligence) committed by a servant or agent of the Crown (save that relief could be given in respect of any property which thereby came into the hands of the Crown). The way in which the maxim became to be applied in respect of the torts of servants and agents of the Crown is clearly expressed in a judgment of Cockburn C.J. given in 1865. He said—

> Now apart altogether from the question of procedure, a petition of right in respect of a wrong in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress.[8]

2.7 *The now outdated basis for this refusal.* The reasoning of Cockburn *C.J.* reflects a now outdated view as to the basis of the liability of a master for a wrongful act committed by his servant—namely that liability depends upon whether the master has authorized or directed the commission of the wrongful act in question or, after its commission, has assented to what the servant has done. Such a basis of liability ceased to be appropriate upon the development of industrial and other enterprises of such size and complexity that a criterion related to personal supervision by the master of each of his servants became quite unreal. It has now long been settled that the basis of a master's liability for a tort committed by his servant is not that the master necessarily has himself done anything wrong; it is simply that the law requires him to accept liability for any wrongful act which his servant commits in the course of his employment. Thus, if the servant in the course of his employment, commits the tort of negligence, the master (as well as the servant) is liable in damages—no matter how careful the master has been in the selection of the servant and in training him to do his work in a way that would have avoided the risk of harm which the servant's negligence has caused. It is irrelevant that the personal

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[7] We discuss the meaning of this maxim in appendix C. *See,* particularly, sections 6–9 of that appendix.

[8] *Feather* v. *The Queen* (1865) 6 B. & S. 257 at pp. 295, 296; 122 E.R. 1191 at p. 1205.

conduct of the master has been beyond reproach. It is unfortunate, therefore, that the question of the liability of the Crown for the torts of its servants was settled, by judicial decision, before the emergence of the modern basis of the liability of a master for his servants' torts—because, on the modern basis, the maxim "the King can do no wrong" ought to be irrelevant. It would be, in any event, a curious relic of history if the liability of the State for torts committed by public servants and officials were to be determined by a maxim related to the personal blamelessness of the reigning monarch. Yet this remained the law in the United Kingdom until the Crown Proceedings Act 1947 and in Victoria until as recently as 1955—although the Crown did recognize its moral obligations by such expedients as paying,[9] in most cases, damages awarded against its servants.

PART 3.—*The Bold Australian Innovation: Equating the State "As Nearly As Possible" to the Subject*

3.1 *The Claims against the Government Act,* 1857: *the nominal defendant procedure.* In 1857, following the lead of South Australia in 1853 (Act 6 of 1853), New South Wales, by Act 20 Vic. No. 15 (Claims against the Government Act, 1857), introduced a new procedure for obtaining relief against the Crown. The preamble to this Act recited that ". . . the ordinary remedy by petition of right is of limited operation and is insufficient to meet all . . . cases and is attended with great expense inconvenience and delay". The new procedure, like the petition of right procedure, involved a petition. It provided that, upon petition, the Governor in Council could refer to the Supreme Court for trial against a named nominal defendant "all cases of dispute or difference touching any claim between any subject of Her Majesty and the Colonial Government of the Colony of New South Wales . . ." Two things are noteworthy. The first is that no limitation was imposed as to the type of disputes or differences which, upon reference to the Supreme Court, were justiciable. The second is the reference to the "Colonial Government". Traditionally, the reference would have been to "Her Majesty" or some other expression would have been used which perpetuated the confusion between the Sovereign and the State.

3.2 *The Claims against the Crown Act,* 1861: *a temporary step backwards.* The Claims against the Government Act, 1857, was appropriate to displace entirely the traditional procedure by way of petition of right. But it did not abolish that procedure. It continued to be available for any who, despite its shortcomings, preferred to proceed in the familiar traditional manner. In 1860 the United Kingdom, by the Petitions of Right Act, 1860 (23 and 24 Vict. c. 34), effected procedural improvements in the petition of right remedy as available in the United Kingdom; but the Act expressly declared that it left unchanged the substantive law.[1] This United

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[9] As a matter of grace.

[1] S. 7.

Kingdom Act was adopted in New South Wales in the following year by Act 24 Vic. No. 27 (Claims against the Crown Act, 1861); but the adoption in New South Wales of this United Kingdom Act was of little significance because it did not take away, or in any way affect, the nominal defendant procedure which had been introduced in New South Wales in 1857 by the Claims against the Government Act, 1857. It soon came to be realized that there was no real advantage in the petition of right procedure, despite the improvements effected to it. In 1876 the link with tradition was broken. The Claims against the Government Act, 1861, was repealed.[2] The petition of right procedure, retained in the United Kingdom until 1947,[3] ceased to be used in New South Wales.

3.3 *The Claims against the Colonial Government Act,* 1876: *the nominal defendant procedure made available as of right.* The repeal of the Claims against the Crown Act, 1861, was effected by Act 39 Vic. No. 38 (Claims against the Colonial Government Act, 1876).[4] It repealed also the Claims against the Government Act, 1857. But it did not abolish the nominal defendant procedure. It re-enacted it in a strengthened form. The Act of 1857 had left the Crown with one final refuge. This refuge was that under that Act it could fail to appoint a nominal defendant. The Act of 1876 destroyed the refuge. Section 2 provided not only that "Any person having or deeming himself to have any just claim or demand whatever against the Government of this Colony" might petition the Governor for appointment of a nominal defendant, but also that if the appointment were not made within 1 month the Colonial Treasurer became the nominal defendant.

3.4 *Equating the State "as nearly as possible" to the subject.* We have pointed out that one of the innovations made by the Act of 1857 was that no limitation was imposed as to the type of disputes or differences touching a claim between a subject and the Government which, upon reference to the Supreme Court, were justiciable.[5] The Claims against the Government Act, 1876, made specific provision. It did so by section 3 which contains what is still the basic formula for the liability of the Crown. This provision is repeated, in identical language, in the present Act, the Claims against the Government and Crown Suits Act, 1912.[6] The provision is—

> The petitioner may sue such nominal defendant at law or in equity in any competent Court and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject.

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[2] Act 39 Vic. No. 38 (The Claims against the Colonial Government Act, 1876), s. 1.

[3] It was abolished by the Crown Proceedings Act 1947 (U.K.), s.1.

[4] Section 1.

[5] Part 3 section 1.

[6] Section 4.

3.5 *The Claims against the Government and Crown Suits Act,* 1912. The Claims against the Government and Crown Suits Act, 1912,[7] re-enacts the essential provisions, to which we have referred, of the Act of 1876 which, in turn strengthened the innovation made by the Act of 1857. These features are—

(a) the intending litigant petitions the Governor to appoint a nominal defendant;

(b) in default of appointment the Treasurer[8] becomes the nominal defendant;

(c) the nominal defendant may be sued in any competent court and "the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject."[9]

For convenience we hereafter refer to the Acts of 1876 and 1912[10] by the generic term the "Claims against the Government Act".

PART 4.—*Liability of the State under the Claims against the Government and Crown Suits Act,* 1912

4.1 *A restrictive or a liberal interpretation?* The drafting of the Claims against the Government Act left open to the Crown an argument that it could still shelter behind the maxim that "the King can do no wrong". In 1885, in the leading case of *Farnell* v. *Bowman,*[1] it relied upon this argument in an endeavour to avoid suffering judgment to pay damages to a subject whose property was damaged by fire negligently lit by servants of the Crown. The argument was that the Act applied only in respect of a "just" claim which the plaintiff had, or believed he had, against the Government.[2] Admittedly, where there was such a "just" claim the Act required that the case proceeded against the nominal defendant "as nearly as possible the same . . . as in an ordinary case between subject and subject." But, the argument went, a "just" claim meant one which, before the Act, the law recognized as one which might be brought against the State under the former procedure. In the Full Court of the Supreme

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[7] The full text of this Act appears as appendix A.

[8] As the Colonial Treasurer has been styled since the Ministers of the Crown Act, 1959.

[9] The Claims against the Government and Crown Suits Act, 1912, s. 4.

[10] Also the intervening consolidating Act, the Claims against the Government and Crown Suits Act, 1897.

[1] Sub. nom. *Bowman* v. *Farnell* (1886) 7 N.S.W.L.R. 1: the proceedings were on demurrer.

[2] The Claims against the Colonial Government Act, 1876, s. 2: The Claims against the Government and Crown Suits Act, 1912, s. 3.

Court, this argument found favour with the Chief Justice, Sir James Martin. He said—

> It is one of the undoubted prerogatives of the Crown not to be sued for damages in an action *ex delicto* [for tort], and neither that nor any other of the prerogatives can be taken away by implication. In the present case, the words used in the Act by no means imply that any person who conceives that he has any claim against the Crown can maintain a suit in respect of it. Before the passing of this enactment certain claims against the Crown, of which the claim for damages *ex delicto* was not one, might be put in suit in a particular way. After the passing of that Act, those claims, and no other, were made suable at the mere will of the plaintiff, and without any preliminary consent. The Act of 39 Vic. No. 38 has done this, and nothing more.[3]

The majority of the court, however, thought otherwise. The defendant appealed to the Privy Council.

4.2 *Farnell* v. *Bowman*: *the Act is to be construed liberally*. The decision of the Privy Council[4] on this appeal has been described by Sir Victor Windeyer as "cataclysmic."[5] The Privy Council pointed to the history of the legislation. It said:

> It appears from the recital in Act 20 Vict., No. 15, [Claims against the Government Act, 1857, which introduced the nominal defendant procedure] that one of the reasons which induced the legislature to pass that Act was that the ordinary remedy by petition of right was of limited operation, and insufficient to meet all cases of disputes and differences which had arisen or might arise between the subjects of Her Majesty the Queen and Her Majesty's local Government in the Colony. It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them. Their Lordships further observe that, in the Act of 24 Vict. [Claims against the Crown Act, 1861, adopting the limited United Kingdom reforms], which was directed to amend the procedure on petitions of right, there was a proviso that it should not give to the subject any new remedy. But in the Act of 20 Vict. [Claims against the Government Act, 1857], where one of the motives of the Act was that the existing remedy is limited and insufficient, there was no such proviso. So also in the Act of 39 Vict. [Claims against the Colonial Government Act, 1876, which strengthened the innovation made by

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[3] At pp. 5-6.

[4] (1887) 12 App. Cas. 643.

[5] *Downs* v. *Williams* (1971) 126 C.L.R. 61 per Windeyer *J.* at 80.

> the Claims against the Government Act, 1857], which repeals that or the 24th [Claims against the Government Act, 1857], there is no repition of the repealed proviso. The makers of these laws seem to have kept well before their eyes the two distinct processes, that of opening a larger range of remedies to the subject and that of amending procedure without any enlargement of remedy. Their Lordships therefore cannot see why in construing the Act now under consideration, a court of law should go out of its way to strain the words, and give them a meaning other than their ordinary literal meaning. If they do so, they would be introducing a certain amount of repugnancy into the Act itself [the Act of 1876]: for the 5th section gives to the subject a right to have specific performance of contracts, which is not a kind of relief available against the Crown. The 3rd section expressly says that, in every case, not the proceedings only but the rights, shall be the same, and that judgment shall follow as in an ordinary case between subject and subject. These enactments are not consistent with holding . . . that the words "any just claim or demand whatever" can mean no more than such claims or demands as the law then recognized, and that they cannot include a claim for damages *ex delicto*.[6]

4.3 *Functions which are special to the Crown.* It has to be recognized, however, that the role of the Crown requires it to exercise functions which are special to it in the sense that no like function is exercised by subjects. For example, subjects have no function analogous to that exercised by the Crown in incarcerating and controlling persons undergoing sentence of imprisonment. In respect of such functions the question may arise whether considerations affecting the public welfare, recognized by the courts under the concept of "public policy," require some restriction upon the circumstances in which liability to a subject is incurred by the Crown.[7]

4.4 *"Public policy" as a fetter to application of the Act.* In 1900, the case of *Gibson* v. *Young*[8] directly raised this question. A prisoner was required to work a steam engine in a gaol. The pressure gauge exploded and the prisoner was severely injured. He sued the Crown (by the nominal defendant procedure) alleging negligence in that, amongst other things, the Crown had failed to keep the engine properly maintained. The Supreme Court[9] held, on demurrer, that the Crown could not be liable, as it would be contrary to public policy to allow such a claim against either the Crown or the prison officials. The Chief Justice expressed himself thus—

> I can conceive nothing more disastrous to the public interests than to allow actions of this description. Every sentence would be followed by an action . . . thus, in effect, taking the management of our gaols out of the hands of skilled officials . . . and replacing this management

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[6] (1887) 12 App. Cas. pp. 649-650.

[7] It has been accepted that, unless "public policy" requires that the Crown be exempted, it is liable for torts committed in the exercise of such special functions. *See* generally, Hogg, *Liability of the Crown* (1971) at 77–80.

[8] (1900) 21 N.S.W.L.R. 7.

[9] The Full Court constituted by Darley *C.J.*, Stephen and Cohen *JJ.*

> by the uncertain, unstable and unskilled management of the jury box. It is obvious to me that public officers connected with the gaols of the colony could not discharge their duty freely if the Government and they themselves were not protected by a positive rule of law from being harassed by action, or what is perhaps more important, the fear of action in respect of the mode in which they discharged the duties imposed upon them.[10]

In the following year Simpson *J.*, in the case of *Davidson* v. *Walker,*[11] said: "I do not think it [Claims against the Government Act] was intended to put the Government in the same position as private persons. If it were, this would amount to submitting to the control of a jury the exercise of various important functions of government, such as the administration of military matters, of justice, the control and management of prisons, lunatic asylums, public schools, etc. Practically, this would render the Government departments in these important matters helpless." By thus invoking the principle of public policy, "a very unruly horse" as it has been called,[12] the way was open to the courts to deny redress in respect of torts committed in the exercise of functions special to the Crown.

4.5 *Judicial retreat from reliance upon public policy.* Were it still the law that public policy shields the Crown as envisaged in these judicial pronouncements, we would consider ourselves bound to recommend reforms which would remove, or at least greatly limit, this shield. But judicial attitude has changed—although the decision in respect of liability for prisoners stood for more than fifty years before receiving judicial disapproval[13] and it was not until 1964 that it was established that the Crown is liable for torts committed by State school teachers.[14] No longer are courts inhibited from allowing actions against the Crown (or servants of the Crown) because of exaggerated fears of fettering governmental activity. The change in judicial attitude is evidenced by the remarks of Smith *J.*,[15] in 1957, in refusing to follow *Gibson* v. *Young.* His Honour said—

> These reasons . . . rest upon fears . . . which are unfounded. Lawyers are commonly disinclined to take up cases of a frivolous character . . . Moreover, juries are not composed of enemies of society but of ordinary members of it. Like more august tribunals they may occasionally be misled into stretching the law when their feelings are aroused; but the likelihood of their doing so in favour of a plaintiff with a criminal record does not seem very great. Then

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[10] At pp. 12-13.

[11] (1901) 1 S.R. 196 at p. 212.

[12] *Richardson* v. *Mellish* (1824) 2 Bing. 229 per Burrough *J.* at 252: 130 E.R. 294 at 303.

[13] *Quinn* v. *Hill* [1957] V.R. 439. See also *Dixon* v. *The State of Western Australia* [1974] W.A.R. 65. There is no doubt that these decisions would be followed in N.S.W.

[14] *Ramsay* v. *Larsen* (1964) 111 C.L.R. 16, overruling *Hole* v. *Williams* (1910) 10 S.R. 638.

[15] Now the Law Reform Commissioner (Victoria). *Quinn* v. *Hill* [1957] V.R. 439 at 448–449. Applied in *Hall* v. *Whatmore* [1961] V.R. 225.

> again it is difficult to see how the management of gaols would in any real sense be transferred to juries. Such an argument may properly be advanced when what is in question is what consequences would follow if regulations made for the administration of prisons were construed as conferring rights of action on prisoners . . . But when all that is in question is the enforcement of claims in tort under the common law the position appears to me to be otherwise. Furthermore, so far as concerns the effects on prison officers of fears that action will be brought against them, it seems difficult to attach any weight to this aspect of the reasoning when, so far as appears, no consequences of the kind suggested have arisen among other classes of public servants who are clearly exposed to appreciable risks of being sued, such as police officers, doctors and attendants in receiving homes, lunatic asylums and government hospitals and teachers in state schools.

There remains no real ground for apprehension that the courts will invoke public policy as a means of giving special protection to the Crown against liability in tort.

4.6 *The value of the judicial role.* There are two main approaches which can be taken in legislation for the purpose of determining the substantive liability of the Crown to subjects. One is the approach taken by the Claims against the Government Act, derived from the South Australian Act of 1853,[16] of making claims against the Crown as justiciable as claims against a subject, leaving it to the courts to resolve by judicial determination such particular difficulties as may occasionally arise from the fact that the role of the Crown may be special. This approach is what we have called "the bold Australian innovation". The Claims against the Government Act does not preclude this judicial role. The Act does not provide that the Crown shall be treated, in litigation, in every case precisely as if it were a subject. It provides that "the proceedings and the rights of the parties therein shall as nearly as possible be the same . . . as in an ordinary case between subject and subject".[17] The other approach is to endeavour to review every branch of the substantive law between subject and subject, to consider it, so far as possible, in relation to the special features of the role of the Crown, and to legislate as specifically as practicable as to the way in which that branch of the law is to apply in respect of the Crown. This is a daunting undertaking. More importantly, it suffers from two inherent defects. The first is that the range of the law is too great to permit of confidence that nothing of importance has been overlooked. Pressures upon parliamentary time are too great to enable oversights to be remedied promptly; and remedial legislation to deal with future cases is cold comfort to any litigant whose claim has already failed. The second of the inherent defects is that the general law is not static. It is constantly

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[16] Act 6 of 1853.

[17] In appendix C, particularly, sections 6–9, we discuss the view which has been canvassed that this provision refers only to rights of procedure. But even if this view is correct, application of the general law to the Crown, required because all claims against the State are made justiciable, must necessarily take into account matters special to the Crown to which the general law, evolved for litigation between subject and subject, is not directed.

evolving from judicial decisions. Little of the general law is the creature of statute. It is, for the most part, the law as expounded by the judiciary, continually being adapted, refined and extended to meet new conditions and contemporary needs. The common law has not lost its vitality. Legislation as to the Crown liability which applies specifically branches of the law as it then was, no matter how carefully it has been drafted, is likely, in time, to become difficult or impossible to apply to new heads of liability which evolve or to old heads of liability which undergo radical transformation. There is no comparable problem where the legislation simply makes all claims against the Crown justiciable and leaves to the courts the application of changes in the general law which occur after the date of the legislation. This was the bold Australian innovation. No doubt there were many, including some judges, who feared that it would lead to disastrous disruption of the affairs of government. In more than a century of experience in its operation no such disruption has occurred. We see no reason to apprehend any such disruption in the future.

4.7 *Comparison with the Crown Proceedings Act* 1947 (*U.K.*). It was not until the Crown Proceedings Act 1947, that comprehensive legislation was enacted in the United Kingdom in respect of liability of the Crown.[18] This legislation has been copied, in various measures, in New Zealand[19] and in Canada.[20] It is relatively complex: but it falls far short of the Australian innovation. Sections 1 and 2 are the key provisions. Section 1 provides that a person may enforce under the Act any claim which, if the Act had not been passed, he might have enforced against the Crown by petition of right. Thus the old law in respect of these petitions is not swept away. It is preserved by reference: and the law so preserved is the law as it was in 1947. Section 2 deals with the liability of the Crown in tort.[21] It is fair comment upon the section that "in view of the barrage of criticism that has been directed against the maxim that 'the King can do no wrong', it might have been expected that the Crown Proceedings Act would abolish this maxim. This, however, the Act does not altogether do. There is no section of the Act stating generally that the Crown shall be liable in tort. Instead the general principle is left but very wide exceptions are carved out of it".[22] In comparison with the Claims against the Government Act, the United Kingdom legislation is complex and restrictive of the

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[18] This Act, as amended, appears as appendix B. Prior to its enactment the principal procedure for redress against the State remained the petition of right and the State could not be sued in tort. The harshness of the immunity in respect of tort was ameliorated by the practice of the State to pay, in appropriate cases, damages awarded against its servants. This was an unsatisfactory expedient —particularly where the Crown was unwilling to accept that the servant had been acting in the course of his employment or where there was no particular servant of the State whom it was appropriate to sue. See *Adams* v. *Naylor* [1946] A.C. 543. *See also* Glanville Williams, *Crown Proceedings* (1948) at pp. 16–19.

[19] Crown Proceedings Act 1950 (New Zealand).

[20] A model Act, based upon the United Kingdom Act, was adopted by the Conference of Commissioners of Uniformity of Legislation in Canada in 1950. *See also* the Report on Civil Rights (Project No. 3) of the Law Reform Commission of British Columbia. The model Act has been (as at 1974) adopted by the Legislatures of eight of the Provinces.

[21] For the terms of this section, *see* appendix B.

[22] Glanville Williams, *Crown Proceedings* (1948) at p. 28.

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

4.8 *Recommendation: the substance of the basic formula should be retained.* We consider that the substance of the key provision of the Claims against the Government Act, namely that where a subject sues the Crown at law or in equity "the proceedings and the rights of parties therein shall as nearly as possible be the same . . . as in an ordinary case between subject and subject", should be retained. We refer hereafter to this provision as "the basic formula" of the Claims against the Government Act.

There is a body of judicial decisions which has evolved as to the effect of this formula. One of the advantages of retention of the formula is that the continuity of these decisions is preserved.

The most recent decision of importance is that of the High Court in *Downs* v. *Williams*.[23] This is a difficult case:[24] but properly understood, it supports our view as to the value of the judicial role which is left open by the simplicity of the basic formula.

4.9 *Downs* v. *Williams*. The relevant facts in *Downs* v. *Williams* are that the plaintiff was injured while operating an unguarded grinding wheel in premises which, he alleged, were a factory within the meaning of the Factories, Shops and Industries Act, 1962, and were occupied by the Crown. He sued the Crown for damages on several bases. One of these was that the Crown had been in breach of the statutory duty which the Factories, Shops and Industries Act, 1962, imposed upon the occupiers of factories to fence dangerous machinery. The High Court was concerned only with this basis of the plaintiff's claim. It held that the Factories, Shops and Industries Act, which was not expressed to bind the Crown did not, properly construed, bind it by implication. It further held that as the Crown did not have the statutory duty in question the plaintiff's claim, so far as it was based upon breach by the Crown of the supposed statutory duty, failed. It failed not because of any inadequacy in the basic formula of the Claims against the Government Act but because of a deficiency in the Factories, Shops and Industries Act—namely that that Act did not provide that it bound the Crown.

It is a deplorable feature of the statute law, not only in New South Wales but generally in all common law countries, that all too often Acts, which clearly should bind the Crown, do not contain a provision that they do so.[25]

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[23] (1971) 126 C.L.R. 61.

[24] We discuss it at length in appendix C.

[25] In part 14 we discuss this shortcoming and make recommendations for reform.

The High Court was not prepared in *Downs* v. *Williams* to go so far as to hold, in respect generally of Acts which do not themselves bind the Crown, that the effect of the basic formula of the Claims against the Government Act is that, in cases brought pursuant to that Act, the rights of the subject are as nearly as possible the same as if the Crown were bound by those Acts. But the judgments do indicate that the basic formula does apply in respect of any legislation which, although it does not itself bind the Crown, is directed to making a general provision as to rights in litigation—whether those rights are procedural or substantive. The subject-matter of the basic formula is rights in litigation. It follows that where a subject sues the Crown, pursuant to the Claims against the Government Act, the procedural and substantive rights which he has include those conferred or regulated by any legislation directed to making general provision as to rights in litigation. These rights he has "as nearly as possible the same . . . as in an ordinary case between subject and subject".[26]

4.10 *Application to the Crown of legislation directed to procedural or substantive rights in litigation.* It is as well that the basic formula of the Claims against the Government Act does apply in respect of legislation of this character. Much of the legislation which has reformed the law of torts is not expressed to bind the Crown and it is very doubtful whether it is to be construed as binding the Crown by necessary implication.[27] Neither the provisions of the Law Reform (Miscellaneous Provisions) Act, 1965 (which enable recovery of damages for tort notwithstanding contributory negligence, the amount recovered being reduced), nor the provisions of the Law Reform (Miscellaneous Provisions) Act, 1946 (which enable recovery of contribution from a joint tortfeasor notwithstanding that the other joint tortfeasor has been sued to judgment), nor the provisions of the Law Reform (Miscellaneous Provisions) Act, 1944 (which enable an executor to recover damages for loss of earnings suffered by his testator as a result of injuries tortiously inflicted), nor the provisions of the Statutory Duties (Contributory Negligence) Act, 1945 (which provide that contributory negligence shall not affect either the right to damages for breach of statutory duty or the amount recoverable for damages) are expressed to bind the Crown and it is very doubtful whether, properly construed, they bind the Crown by implication.

In England there is, as in New South Wales, the difficulty that much of modern legislation which reforms the law of torts is not expressed to

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[26] The relevant provision of the Factories, Shops and Industries Act, 1962, s. 27, was not directed to making any provision whatsoever in respect of rights in litigation. It was directed only to requiring the occupiers of factories to fence dangerous machinery—in default of which they were liable to fine. It made no reference, direct or indirect, to any right of a worker injured by such default to recover damages from the occupier. The right of a worker to damages for breach of a statutory duty was not a right conferred or regulated by the Factories, Shops and Industries Act, 1962. It was a right conferred by the common law. But in *Downs* v. *Williams* the Crown did not have the statutory duty. Accordingly, there was no relevant statutory duty to which the common law right could be applied.

[27] We discuss the relevant rule of construction in part 14.

bind the Crown. If, as is probably the case, this English legislation does not itself bind the Crown,[28] it would seem that it is only because the Crown does not object that, in England, this legislation is applied in litigation brought by a subject against the Crown under the Crown Proceedings Act 1947. The detailed provisions of that Act, unlike the simple basic formula of the Claims against the Government Act, do not seem to leave room for a beneficial judicial construction of that Act by which a subject has the rights conferred by such legislation notwithstanding it does not itself bind the Crown.

PART 5.—*Recommendations in Respect of the Claims Against the Government and Crown Suits Act,* 1912

5.1 *Retention of the basic formula.* We have recommended retention of the substance of the basic formula of the Claims against the Government Act that where a subject sues the Crown at law or in equity "the proceedings and the rights of parties therein shall as nearly as possible be the same . . . as in an ordinary case between subject and subject". But we consider that in some other respects changes ought to be made.

5.2 *Procedural difficulties.* The procedure for suing the Crown, provided by the Act, is unsatisfactory. The intending plaintiff must petition the Governor to appoint a nominal defendant and must bring the proceedings against the person appointed (or against the Treasurer if the Governor does not appoint a person to be the nominal defendant). The practice is that the Governor appoints the Under-Secretary of the Department of the Attorney General and of Justice to be the nominal defendant. He does so promptly where an appropriate petition is presented. But the procedure inevitably results in some delay in the institution of proceedings: and where the misfortune occurs that the Under-Secretary dies before the proceedings are concluded, prosecution of the proceedings is delayed by the necessity of having a new nominal defendant appointed.[1] There is a further difficulty. Where a subject is sued by the Crown (under the title of the Attorney General as its law officer) the Act does not enable him to plead by way of counterclaim against the Crown in those proceedings.[2] To prosecute his claim against the Crown even though it relates to the claim of the Crown against him, the subject is obliged to petition under the Act for the appointment of a nominal defendant and then, having obtained the appointment of a nominal defendant, to sue the Crown in separate proceedings. This is a tortuous and clumsy procedure—even though the

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[28] G. H. Treitel, "Crown proceedings: Some recent developments" (1957) *Public Law* 321 at p. 322: Hogg, *Liability of the Crown* (1970) at p. 232.

[1] Section 6. The proceedings do not abate on the death of the nominal defendant (s. 5).

[2] *The Attorney-General* v. *Adams* [1965] S.A.S.R. 129; *Attorney General* v. *McLeod* (1893) 14 N.S.W.L.R. 121. We use the expression counterclaim as including set-off and cross-action.

inconvenience and expense can be reduced by the subject suing in the same court as that in which he is being sued by the Crown and obtain an order of that court that the separate proceedings be tried concurrently.

5.3 *Recommendation: proceedings should be brought directly against the Crown.* We recommend that the nominal defendant procedure be abandoned and that in lieu thereof it be provided that proceedings may be brought directly against the Crown under the title "State of New South Wales". There is ample precedent for this approach in the legislation of the Commonwealth and other States.[3]

5.4 *Recommendation: the subject should be entitled to counterclaim against the Crown.* We recommend that it be provided that a subject may counterclaim against the Crown in proceedings in which the Crown is already a party.[4]

5.5 *Recommendation: the Crown should be required to pay interest on judgment debts.* Section 11 of the Claims against the Government Act requires the Treasurer to pay "damages and costs adjudged" against the nominal defendant. But it makes no provision for payment of interest on unpaid judgment debts. We are informed that it is the practice of the Crown, where so requested, to pay interest on a judgment debt in any case where interest would be payable on the judgment debt if the judgment were against a subject. But we consider that the payment of interest should not depend upon grace. We recommend that it be provided that the judgment debts of the Crown shall bear interest as do judgment debts of a subject.[5]

5.6 *Recommendation: the ambit of the Act should be clarified.* The Claims against the Government Act applies where a subject sues a nominal defendant, appointed pursuant to the Act, at law or in equity. It contains no definition of "sue". This leaves room for doubt as to whether third-party proceedings[6] against the Crown are within the ambit of the Act. We consider that any doubt should be resolved and we recommend that "to sue" be defined so as to include third-party proceedings. There is a further difficulty as to the ambit of the Act. Whilst it provides that "judgment" shall follow as in an ordinary case between subject and subject, it contains no definition of "judgment". Section 9 specifically provides that "every species of relief, whether by way of—

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[3] Judiciary Act 1903–1973 (Cth), sections 56 and 57; Crown Proceedings Act 1958 (Vict.), s. 22; Crown Suits Act, 1947–1954 (W.A.); Crown Proceedings Act, 1972–1975 (S.A.), s. 5.

[4] Later in this report (part 9 section 3) we recommend that in any proceedings in which the Crown sues a subject it be a party under the title "State of New South Wales". Accordingly it will have the same title, "State of New South Wales" in both the claim and the counterclaim.

[5] Supreme Court Act, 1970, s. 95; District Court Act, 1973, s. 85; Courts of Petty Sessions (Civil Claims) Act, 1970, s. 39.

[6] Law Reform (Miscellaneous Provisions) Act, 1946, s. 3; Supreme Court Act, 1970, s. 78.

(a) specific performance; or

(b) restitution of rights; or

(c) recovery of lands or chattels; or

(d) payment of money or damages",

may be granted. But there is no specific mention of a declaratory judgment or order—that is, a judgment or order which declares what the legal rights of the parties are but which is not enforceable by execution, punishment for disobedience, or otherwise. It is arguable that "judgment" within the meaning of that word as used in the Act is confined to an enforceable judgment. No room should be left for such an argument. We recommend that judgment be defined to include every species of relief which a court can grant whether interlocutory or final and whether by way of order that anything be done or be not done or otherwise and that it be specifically provided that it includes a declaration.

PART 6.—*Application of the District Court Act, 1973, and the Courts of Petty Sessions (Civil Claims) Act, 1970, to the Crown*

6.1 *Limitation of the Claims against the Government Act to cases in which a subject "sues" the Crown.* We have pointed out that in any case to which the Claims against the Government Act applies the rights of the parties, which are "as nearly as possible . . . the same . . . as in an ordinary case between subject and subject", include rights conferred by legislation which is directed to making general provision as to rights in litigation. This is so whether the legislation, which confers the rights, itself binds the Crown. But the Claims against the Government Act applies only where a subject "sues" the Crown at law or in equity. Where the Act does not apply, a subject has against the Crown the rights conferred by such legislation only where the legislation binds the Crown.

The limitation that the Claims against the Government Act applies only where a subject "sues" the Crown is of practical significance. There are important court procedures, provided by legislation,[1] which are not such that by availing himself of them a person "sues" any other person.[2]

We give three examples of such court procedures. The first is preliminary discovery introduced by the Supreme Court Act, 1970, and substantially adopted, in respect of the District Court, by the District Court Act, 1973.[3] Preliminary discovery enables an intending plaintiff who wishes to sue on a cause of action, but who is unable to ascertain the name or address of the person against whom the alleged cause of action lies, to compel any person who has that information to disclose it.

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[1] We include in the expression "legislation" rules of court made by statutory authority.

[2] Or, at least, it is very doubtful whether he "sues" that person. "Sues" is not a technical legal term. It is an expression of uncertain meaning. Compare, for example, *Guthrie* v. *Fisk* (1824) 3 B. & C. 178; 107 E.R. 700 and *Re W. Carter Smith* (1908) 8 S.R. 246.

[3] S. 68.

The second example is interpleader. A person may be subjected to, or apprehend, a claim for a debt or for the recovery from him of personal property yet be in the awkward position that although he acknowledges that he owes the money or is not entitled to keep the property he is uncertain as to which of rival claimants is entitled to payment of the money or possession of the property. Interpleader is the process by which he can compel the rival claimants to interplead—that is to take proceedings between themselves to determine which of them is entitled. This process is called a "stakeholder's interpleader". Similarly, where money or goods are taken in execution by a sheriff or bailiff, and there are rival claims in respect of the money or goods, the sheriff or bailiff can apply for interpleader relief. Interpleader relief can be obtained against a subject in the Supreme Court,[4] the District Court,[5] and a court of petty sessions exercising jurisdiction under the Courts of Petty Sessions (Civil Claims) Act, 1970.[6]

The third example is the procedure of garnishment. This is the procedure by which a judgment creditor can obtain an order of the court that, *inter alia,* the employer of the debtor make deductions from the debtor's wages, the amounts deducted being applied towards satisfaction of the judgment debt.[7] This procedure is available in the Supreme Court,[8] the District Court[9] and a court of petty sessions exercising jurisdiction under the Courts of Petty Sessions (Civil Claims) Act, 1970.[10]

6.2 *Recommendation: the Crown should be bound by the District Court Act,* 1973, *and the Courts of Petty Sessions (Civil Claims) Act,* 1970. We see no reason why such statutory remedies, and such further statutory remedies as hereafter may be introduced into the general civil jurisdiction of the courts, should not be available against the Crown as they are available against subjects. They already have been made available against the Crown in the Supreme Court. The Supreme Court Act, 1970, unlike the earlier Acts which governed proceedings in the Supreme Court, expressly provides that the Act binds the Crown. But it is otherwise in respect of the two other courts of general[11] civil jurisdiction, namely, the District Court and a court of petty sessions exercising jurisdiction under the Courts of Petty Sessions (Civil Claims) Act, 1970. Neither the District Court Act, 1973,

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[4] Supreme Court Rules part 56.

[5] District Court Act, 1973, ss. 115–118.

[6] Courts of Petty Sessions (Civil Claims) Act, 1970, ss. 65–68.

[7] Section 56A of the Public Service Act, 1902, gives a discretionary power to any permanent head of a government department to make deductions, without a court order, from the salary or wages of a person employed, in that department, under that Act. But not all employees of the Crown are employed under that Act. Many are Ministerial employees employed pursuant to s. 47 of the Constitution Act, 1902, or are persons holding statutory office under some other Act.

[8] Supreme Court Act, 1970, s. 99. Supreme Court Rules, part 46.

[9] District Court Act, 1973, ss. 97–106.

[10] Courts of Petty Sessions (Civil Claims) Act, 1970, ss. 47–57.

[11] These courts have only statutory jurisdiction. But subject to limitations as to amount, some limitations as to subject matter, and, in the case of courts of petty sessions, limitations as to locality, the jurisdiction is general.

notwithstanding that it was enacted after the Supreme Court Act, 1970, nor the Courts of Petty Sessions (Civil Claims) Act, 1970, provides that the Act binds the Crown.

We recommend that each of these Acts be amended to provide that it binds the Crown.[12] Consequential amendment of the Law Reform (Law and Equity) Act, 1972, is desirable. This Act requires like effect to be given, in the District Court or a court of petty sessions, to any equitable ground of defence as is given, in a like case, in the Supreme Court.[13] We recommend that this Act be amended to provide that it, also, binds the Crown.

PART 7.—*Proceedings in Equity by a subject against the Crown independently of the Claims against the Government and Crown Suits Act,* 1912

7.1 *Origin of the procedure.* In 1668 it was held that equitable relief could be obtained by a subject against the Crown on a bill brought against the Attorney-General in the Court of Exchequer.[1] Baron Atkyns "was strongly of opinion, that the party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed, that he will be defective in either. And it would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him".[2] We refer to this procedure as the Exchequer procedure.

7.2 *Relationship to the petition of right.* The Exchequer procedure was a distinct procedure from that of obtaining such relief by the procedure of the petition of right. The subject could choose between these procedures.[3] Both procedures were well established in England[4] before the equity jurisdiction of the Court of Exchequer was transferred, into the Court of Chancery in 1841.[5] But after this transfer of jurisdiction the Exchequer procedure fell into disuse.[6] It was revived, however, in 1910 when it was

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[12] It may be assumed that a departmental head would not, in the exercise of his discretion, make deductions under s. 56A of the Public Service Act, 1902, where he has received a garnishment order in respect of an employee. No doubt, however, judgment creditors generally will take advantage of the simple procedure of that section, in those cases in which it is available, rather than obtain a garnishment order. As to the application of the section, *see* footnote 10 in this part.

[13] Section 6.

[1] *Pawlett* v. *Attorney-General* (Hardres 465; 145 E.R. 550).

[2] *Id.* at p. 469; 145 E.R. at p. 552.

[3] The Exchequer procedure had the advantage that the fiat of the Crown was not required.

[4] We are not aware of any instance of the Exchequer procedure having been used in New South Wales.

[5] Court of Chancery Act, 5 Vict. c. 5 (1841), s. 1.

[6] Equitable relief remained available by the petition of right procedure.

held by the Court of Appeal in England[7] that in consequence of the transfer of the jurisdiction in 1841 and the Judicature Acts 1873–1875, the procedure was still available.[8] This decision has been "enthusiastically embraced by the courts of Australia.[9] There is no problem of jurisdiction in respect of the Supreme Court of New South Wales. The Supreme Court retains all the jurisdiction with which it was invested on its foundation in 1824. This includes the former jurisdiction in equity of the Court of Exchequer.[10]

7.3 *The present position in New South Wales.* The procedure is available in New South Wales. But it has not supplanted the procedure of seeking equitable relief against the Crown by a suit against the nominal defendant appointed under the Claims against the Government Act. A subject may sue by either procedure. But it is an unsatisfactory complication that where a subject sues by the Exchequer procedure his suit is against the Attorney General whereas if he seeks the same substantive relief by the nominal defendant procedure his suit is not against the Attorney General but against a nominal defendant. The purpose, no matter which procedure is adopted, is to obtain relief against the Crown. This complication would be avoided if the title of the Crown in any proceedings, no matter how brought, were the "State of New South Wales." Later in this report we make a recommendation to this effect.[11]

PART 8.—*Proceedings by the Crown against a Subject*

8.1 *The Crown may adopt procedure available to a subject.* It is a fundamental rule that the Crown may bring proceedings against a subject by the same process as that by which a subject may sue another subject. It has become the firmly established practice in this State for the Crown to adopt this course. In such proceedings the Crown can obtain all the relief which a subject can obtain.

8.2 *The prerogative procedures in England before the foundation of the Colony.* In England, before the foundation of the Colony of New South Wales, the Crown used special procedures for suing a subject—procedures which were available to it alone. These procedures were founded upon the prerogatives of the Crown—although they were in large measure regulated,

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[7] *Dyson* v. *Attorney-General* [1911] 1 K.B. 410.

[8] It was available in any division of the High Court.

[9] Meagher, Gummow and Lehane, *Equity Doctrine and Remedies* (1975) at p. 391.

[10] The Imperial Act 4 Geo. IV c. 96, commonly called the New South Wales Act 1823, authorized the constitution of the Supreme Court, having the jurisdiction of, *inter alia,* "His Majesty's Courts of . . . Exchequer at Westminster" (s. 2). The Supreme Court was established, pursuant to this Imperial Act by Letters Patent dated 13th October, 1823, known as the Charter of Justice. The patent took effect from its promulgation in Sydney on 17th May, 1824. The jurisdiction was confirmed by the Imperial Act 9 Geo. IV c. 83 (The Australian Courts Act 1828), s. 3.

[11] Part 9 Section 3.

limited, or extended by statute. They lingered on in England until abolished by the Crown Proceedings Act 1947. We refer to them as the prerogative procedures. They were complex and technical. The principal of them were—

(a) Latin information—so-called because the pleadings were, originally, in Latin. This was a procedure by which the Crown could recover chattels which had come into the hands of subjects (information of devenerunt), recover debts due to it, recover damages (for tort or otherwise), and secure the removal of intruders from its lands (information of intrusion);

(b) English information—also known as the Crown information in equity. This was a procedure for the assertion of the right of the Crown to hereditaments (particularly where the title claimed against the Crown was obscurely based in antiquity). It was available also for the recovery of money debts; and

(c) *Scire facias.* This was used for recovering Crown debts of record and also for the rescission of Crown grants, charters and franchises.

These prerogative procedures were supported by particular mesne process (that is the procedure intervening between the initiating process and judgment). Mesne process included *capias ad respondendum* (whereby in proceedings brought by the Crown the defendant was arrested and held in custody until he gave bail to appear in the proceedings) and *subpoena ad respondendum* (which commanded, under penalty, appearance in the proceedings brought by the Crown).

In addition the Crown, by the writ of extent, could seize the body, property and debts of a subject by summary process to obtain satisfaction of debts due to it.

The complexity and variety of the procedures, and the mass of learning associated with them, cannot be conveyed in an account as brief as that which we have given. But a fuller account is not needed. Mercifully they are no longer of significance in New South Wales.

8.3 *Inheritance of the prerogative procedures.* The infant Colony of New South Wales received the inheritance of English law. For it is a principle of the common law, the origin of which lies in the Middle Ages, that if a country, such as New South Wales was in the eighteenth century, "be discovered and planted by English subjects all the English laws then in being, . . . are immediately there in force [where they are] . . . applicable to their [the colonists'] own situation and the condition of an infant colony".[1] By the Imperial Act, 9 Geo. IV c.83, s. 24, the inheritance by the Colony of English law was confirmed although the material date was fixed as being the commencement of that Act (25th July, 1828) so as to apply in the Colony certain statutory reforms effected since 1788. But the prerogative proceedings, like any other rights of the Crown, can be made available, or abolished altogether, by statute. They are court procedures: and where the procedures of a court are prescribed by statute, or

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[1] Blackstone, *Commentaries on the Laws of England,* 4th edn, (1876) vol. 1 at p. 81.

by rules made pursuant to a statute, and the procedures do not extend to the prerogative procedures, those procedures are not available in that court.[2]

8.4 *Abandonment of the prerogative procedures.* It would be difficult to identify each of the prerogative procedures which became part of the inherited law of New South Wales and to determine to what extent, if at all, that procedure would have been available to the Crown under the rules, from time to time, of the Supreme Court. But the exercise is not warranted. It is not warranted because use of the prerogative procedures has long been abandoned. It is a general rule that "the King may waive his prerogative remedies, and adopt such as are assigned to his subjects".[3] The remedies "assigned to . . . subjects" have proved to be entirely adequate for the requirements of the Crown; and they have the advantage not only of comparative simplicity but also of familiarity. They have supplanted the prerogative procedures. Even in England, where the prerogative procedures remained in use, subject to statutory modifications, until 1947, they came to be regarded as "archaic procedures" the abolition of which, by the Crown Proceedings Act 1947, was "for the lawyer the greatest blessing" conferred by that Act.[4]

Until the decision of the High Court in *Commonwealth* v. *Anderson,*[5] given in 1960, there was some doubt whether the Crown could recover possession of land, by the ordinary action in ejectment available to subjects. The reason was that there were some old authorities which suggested that the Crown could not adopt that procedure because it was inconsistent with the dignity of the Crown in that the procedure involved an acknowledgement by the claimant that he had been dispossessed whereas, in legal theory, the Crown, unlike a subject could never be dispossessed by an intruder. Despite this doubt the Crown, in New South Wales, came to adopt the procedure of the action in ejectment in preference to the prerogative procedure, the Latin information of intrusion.[6] Its right to do so was settled by the High Court in *Commonwealth* v. *Anderson.*[7] As Windeyer *J.* put it:

> The defendant's insistence that, for the honour of the Crown, she should have been proceeded against by information of intrusion has enticed out of the past a most stubborn ghost. But it is quite time it was laid: and the Queen's dignity will not suffer.[8]

There are no other ghosts from the past that stand in the way of the Crown availing itself fully of the procedures available to subjects.

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[2] *R.* v. *Hughes* (1865) L. R. 1 P. C. 81.

[3] Chitty, *Prerogatives of the Crown* (1820) at p. 245.

[4] Glanville Williams, *Crown Proceedings* (1948) at p. 113.

[5] (1960) 105 C.L.R. 303.

[6] *Housing Commission of New South Wales* v. *Panayides* (1963) 63 S.R. 1 per Sugerman *J.* at p. 4.

[7] (1960) 105 C.L.R. 303.

[8] At p. 325.

It is unthinkable that the Crown would seek to resurrect any of the prerogative procedures. Even if it were tempted to do so, there are so many obstacles that would confront it that even the most cursory investigation of them surely would daunt it. We give three examples. The first is that procedure in the Supreme Court has been reformed by the Supreme Court Act, 1970, and the rules made under it. Section 3 of that Act provides that the Act, and the rules, bind the Crown. The rules provide that "proceedings in the Court shall be commenced by statement of claims or by summons".[9] Proceedings no longer can be commenced by information. The second example is that the Supreme Court Act, 1970, provides that "no person shall be arrested . . . on mesne process".[10] *Capias ad respondendum,* therefore, even if it were available, would be futile. The third example is that the Imperial Acts Application Act, 1969, has repealed, so far as it may have had effect in this State, the English statute 33 Hen. VIII c. 39. But the writ of extent, at least in so far as it extended to debts which were not debts of record, was founded upon section 37 of that enactment.[11]

8.5 *Adequacy of the remedies assigned to subjects.* It would be supererogation to determine which, if any, of the prerogative proceedings might, perhaps, be relied upon by the Crown in New South Wales, if its advisers undertook enough research and exercised enough ingenuity, and to abolish each of them by legislation. For all practical purposes they have disappeared. Their disappearance has left no void. The Crown has available to it all the processes available to subjects. It needs nothing more.

8.6 *The rights of a subject against the Crown in proceedings against him by the Crown where the Crown adopts a remedy assigned to subjects.* There are dicta in two old decisions of the High Court that where the Crown adopts a remedy assigned to subjects, that is the Crown sues by the same process as that by which a subject sues another subject, the Crown submits itself in those proceedings to all the procedures of the court which would be available to the subject if the proceedings had been brought against him not by the Crown but by another subject. These dicta are based upon the view that in such proceedings the Crown is in the same position as that of a foreign sovereign power which invokes the assistance of the court. "It has always been held that a sovereign power invoking the assistance of a Court of justice as plaintiff submits itself to the jurisdiction of the Court for the purposes of the suit, so that any order that could be made against an ordinary plaintiff may be made against it".[12] These dicta extend to procedures made available only by legislation which does not bind the

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[9] Part 4 r.l.

[10] Section 10.

[11] Chitty, *Prerogatives of the Crown* (1820) at pp. 263–264; Robertson, *Civil Proceedings by and against the Crown* (1908) at p. 169.

[12] *The Commonwealth* v. *Baume* (1905) 2 C.L.R. 405 per Griffith *C.J.* at pp. 412–413: see also *The Commonwealth* v. *Miller* (1910) 10 C.L.R. 742 per Barton *J.* at p. 747, per O'Connor *J.* at pp. 752–753, and per Isaacs *J.* at p. 757.

Crown.[13] But they are only dicta.[14] They may be expressed too generally. They ill-accord with the rule of construction that the Crown is not bound by an Act except by express words or necessary implication;[15] and it is a somewhat surprising proposition that the courts are to regard the Crown as being in no more favourable a position than a foreign sovereign. But we do not need to consider these matters. The Supreme Court Act, 1970, binds the Crown; and we have recommended that the District Court Act, 1970, and the Courts of Petty Sessions (Civil Claims) Act, 1970,[16] be amended to provide that they too bind the Crown.[17] Implementation of this recommendation would remove any doubts.

PART 9.—*Recommendations in respect of proceedings to which the Crown and a Subject are parties other than proceedings under the Claims against the Government and Crown Suits Act,* 1912

9.1 *General.* The proceedings to which this part applies are proceedings in the Supreme Court, the District Court or a court of petty sessions exercising jurisdiction under the Courts of Petty Sessions (Civil Claims) Act, 1970, to which both the Crown and a subject are parties,[1] but which are not proceedings under the Claims against the Government and Crown Suits Act, 1912. We have already recommended that the District Court Act, 1973, and the Courts of Petty Sessions (Civil Claims) Act, 1970,[2] be amended to provide that they, like the Supreme Court Act, 1970, shall bind the Crown.[3] But there are other reforms which we consider to be desirable.

9.2 *Recommendation: the Crown should be bound by general legislation directed to rights in litigation.* In these proceedings a subject does not have the benefit of the basic formula of the Claims against the Government and

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[13] *The Commonwealth* v. *Miller ibid.*: *The Commonwealth* v. *Baume ibid.*

[14] In *The Commonwealth* v. *Baume* which concerned an application for discovery against the Crown in right of the Commonwealth, it was held that discovery did not lie against the Crown as the relevant statutory provision in respect of discovery could not be applied to the Crown as, so far as relevant, it related to a "body corporate" and the Crown was not a body corporate. In *The Commonwealth* v. *Miller* where the relevant statutory provision as to discovery was in terms applicable to the Crown it was held that discovery did lie against the Crown in right of the Commonwealth. But the decision was based upon section 64 of the Judiciary Act 1903 which provided that the "rights of parties shall as nearly as possible be the same . . . as in a suit between subject and subject".

[15] Unless, as in *The Commonwealth* v. *Miller* a general statutory provision that the rights shall as nearly as possible be the same as an ordinary case between subject and subject can be prayed in aid.

[16] And also the Law Reform (Law and Equity) Act, 1972, which deals, amongst other things, with equitable defences in the District Court or in a court of petty sessions.

[17] Part 6 section 2.

[1] No matter which is the plaintiff or applicant.

[2] And also the Law Reform (Law and Equity) Act, 1972.

[3] Part 6 section 2.

Crown Suits Act that the proceedings and rights of the parties therein shall as nearly as possible be the same as in an ordinary case between subject and subject. Accordingly, in those proceedings the rights of the parties are not the same, as nearly as possible, as if the Crown were bound by legislation which is directed to making general provision as to procedural or substantive rights in litigation (but does not itself bind the Crown).[4] The legislation which, in this regard, is a matter for concern[5] is the Law Reform (Miscellaneous Provisions) Act, 1944, parts II and III of the Law Reform (Miscellaneous Provisions) Act, 1946, part III of the Law Reform (Miscellaneous Provisions) Act, 1965, and the Statutory Duties (Contributory Negligence) Act, 1945.[6] We recommend that this legislation be amended to provide that it binds the Crown. We further recommend that care be taken that any future legislation of this character be so drafted that it is clear that it does bind the Crown.

9.3 *Recommendation: the Crown should be a party to proceedings under the title "State of New South Wales."* The other reform relates to the title by which the Crown is a party to proceedings. The Attorney General is the proper legal representative of the Crown in all courts.[7] In the proceedings to which the Part applies the Crown is a party under the title of the Attorney General.[8] But we consider that it is an unnecessary complication in the law that in such proceedings the Crown is a party under the title of the Attorney General whereas, in proceedings under the Claims against the Government Act, the proceedings are against a nominal defendant. We have already recommended that the procedure of suing a nominal defendant be altered so that proceedings which now would be taken against a nominal defendant shall be taken directly against the Crown under the title "State of New South Wales".[9] In conformity with this recommendation, we further recommend that it be enacted that in all other proceedings to which the Crown is a party, it shall be a party under the same title—"State of New South Wales."

Apart from achieving general uniformity in title this recommendation, if implemented, removes the complication of a difference in the title of the Crown where it makes a counterclaim in proceedings brought by a subject under the Claims against the Government Act or is subjected, pursuant to that Act, to a counterclaim in proceedings brought by it against a subject.[10]

Further, the unnecessary complication is removed that a subject, desiring equitable relief against the Crown, may seek that relief either

[4] As to the effect of the basic formula in proceedings to which the Claims against the Government Act applies, *see* part 4 section 9.

[5] We have already recommended that the Crown be bound by the District Court Act, 1973, and by the Courts of Petty Sessions (Civil Claims) Act, 1970. *See* part 6 section 2.

[6] *See* part 4 section 10.

[7] Except where it is otherwise provided by statute.

[8] Or, in some circumstances, under the title of the Solicitor General. *See* the Solicitor General Act, 1969; *The Solicitor-General* v. *Wylde* (1946) 46 S.R. 83.

[9] Part 5 section 3.

[10] *See* part 5 section 4.

against the Attorney General by the Exchequer procedure[11] or against a nominal defendant appointed under the Claims against the Government Act. Proceedings for equitable relief against the Crown become simply proceedings against the Crown under the title "State of New South Wales."

PART 10.—*Title of the Crown in proceedings to which it is a party in separate inconsistent interests*

10.1 *The problem.* We have recommended that proceedings under the Claims against the Government Act be brought directly against the Crown under the title "State of New South Wales". We have also recommended that the Crown be a party to any other proceedings under this title. But a qualification is necessary to deal with the complication that cases can occur in which the Crown is a party in separate inconsistent interests. The Crown not only has its own interests to protect, such as the preservation of its own property, but has the role of upholding the public interest. This latter role is its role as *parens patriae.* This role may be considered as having two branches. One is the protection of subjects who are under disability. The other is the protection of the general public welfare or of the welfare of a particular "aggregation of . . . subjects".[1]

As to the first branch the "King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled (or rather it is his Majesty's duty, in return for the allegiance paid to him,) to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st non-age: 2. idiocy: or 3. lunacy, to take proper care of themselves and their property".[2] However, the statutory protections now given to persons under disability are so extensive that litigation in which the Crown is a party by reason of this branch of the role of the Crown as *parens patriae* is rare.

But the other branch of the role of the Crown as *parens patriae,* the protection of the general public welfare or of the welfare of a particular aggregation of subjects, remains of importance in litigation. Two instances suffice. One is that the Crown as *parens patriae* may take proceedings to restrain the commission of a public nuisance such as an unlawful act which endangers the safety, health, or comfort of the general public or of a substantial section of the general public. Another is that the Crown may take proceedings for the enforcement of a charitable trust. "It is the duty of the Crown, as *parens patriae,* to protect property devoted to charitable purposes, and that duty is executed by the Attorney General as the officer who represents the Crown for all forensic purposes. He represents the beneficial interest, in other words, the objects of the charity."[3]

The Attorney General, as the law officer of the Crown, may take proceedings, for protection of the general public welfare or of the welfare of a particular aggregation of subjects, by himself or on relation—that is, at the behest of a subject who accepts responsibility for the costs which may be

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[11] *See* part 7.

[1] *Williams* v. *Attorney-General for N.S.W.* (1913) 16 C.L.R. 404 per Isaacs *J.* at p. 431.

[2] Chitty, *Prerogatives of the Crown* (1820) at p. 155.

[3] Jacobs, *Law of Trusts,* 2nd edn (1967) at pp. 280–281.

ordered against the Crown in the proceedings. But whether the Attorney General takes the proceedings by himself or on relation the proceedings are "the King's suit brought by his Attorney, not the Attorney General's suit, just as an action by a lay client by his attorney is the client's action not the attorney's".[4]

It is obvious that the interest of the Crown and the interest (or the various interests) which the Crown seeks to uphold as *parens patriae* may be inconsistent. For example, the Attorney General on relation may sue to restrain conduct by the Crown which is a public nuisance. Again, in proceedings in respect of an alleged trust the Crown may, as *parens patriae,* seek to assert that there is a properly constituted charitable trust but, in respect of its own interests, seek to deny that there is such a trust and to assert that the Crown is beneficially entitled to the relevant property as *bona vacantia.* The distinction between the Crown in respect of its interest and the Crown in respect of any interest which it seeks to uphold as *parens patriae* must be recognized in litigation. Unless this is done there is introduced "aimless and indescribable confusion into the law".[5]

At present, the procedural difficulties which the separate inconsistent interests present are overcome in a variety of ways. If, for example, the Attorney General seeks to restrain conduct of the Crown which is a public nuisance, he may bring the proceedings against the particular servant or agent of the Crown whose actions create the nuisance. In other cases the Attorney General, exercising the role of the Crown as *parens patriae,* may sue the Solicitor General who asserts the separate inconsistent interest of the Crown.[6] And at least in one case the Crown overcame the difficulty by the Attorney General, for the Crown as *parens patriae,* taking advantage of the Claims against the Government and Crown Suits Act, 1912, and suing a nominal defendant, appointed pursuant to that Act, in respect of the separate inconsistent interest of the Crown.[7]

We have recommended that it be provided that the title by which the Crown is a party to proceedings shall be "State of New South Wales". But there is need for a qualification in cases in which the Crown is seeking to assert separate inconsistent interests. We refer to such cases as "multiple interest proceedings". It would be confusing if the Crown were not given a different title in respect of each of those separate inconsistent interests. Unless this were done such apparent absurdities would be created as proceedings titled *State of New South Wales* v. *State of New South Wales,* or *Jones* v. *State of New South Wales and State of New South Wales,* or even *State of New South Wales* v. *State of New South Wales and State of New South Wales.*

10.2 *Recommendation.* We recommend that it be provided that in multiple interest proceedings the Crown shall be a party in respect of one of the

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[4] *The Solicitor-General* v. *Wylde* (1946) 46 S.R. 83 per Jordan *C.J.* at p. 93. *See also* per Halse Rogers *J.* at p. 102).

[5] *Williams* v. *Attorney-General for N.S.W.* (1913) 16 C.L.R. 404 per Isaacs *J.* at p. 434.

[6] *Attorney-General* v. *Dean & Canons of Windsor* 8 H.L.C. 369; 11 E.R. 472. *See generally,* Robertson, *Civil Proceedings Against the Crown* (1908) at pp. 14–16.

[7] *Williams* v. *Attorney-General for N.S.W.* above.

separate inconsistent interests under the title "State of New South Wales", and in respect of each other of those interests, under the name of the person nominated by the Attorney General in respect of that interest.

PART 11.—*Draft Crown Proceedings Bill*

The draft bill contained in appendix D expresses in legislative form the recommendations which, to this point, we have made in respect of the reform of the law relating to proceedings to which the Crown and a subject are parties, whether or not the proceedings are proceedings to which the Claims against the Government Act now applies. Notes on the draft bill appear as appendix E.

PART 12.—*Crown Instrumentalities*

12.1 *The Shield of the Crown.* "[F]or facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued . . . [T]here is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies."[1] In this part we refer to them as Crown instrumentalities. In respect of each Crown instrumentality the question arises, where the relevant legislation does not make express provision, whether it is to be inferred from the particular relationship which the legislation creates between the instrumentality to the Crown (such as the type of functions which the instrumentality is to exercise, and the degree of the ministerial control to which the legislation subjects it) that the instrumentality is entitled to what is commonly called the "shield of the Crown" —that is, the benefit of prerogative rights and privileges of the Crown including, where the application to the Crown instrumentality of an Act is in question, that of not being bound by legislation which does not bind the Crown expressly or by necessary implication. It is not uncommon for courts to infer that a Crown instrumentality is not bound by provisions of an Act notwithstanding that the Act does not expressly exempt the instrumentality. For example, the Crown is not bound by the provisions of the Local Government Act, 1919, which require the approval by a Council of plans and specifications for buildings; and, because of its relationship to the Crown, the Housing Commission[2] also is exempt.[3]

12.2 *A Crown instrumentality is not "more royal than the King".* We have expressed the opinion that a consequence of the basic formula of the Claims against the Government Act is that, in litigation pursuant to that Act, the rights of the parties are to be the same as they would be if the Crown, like a subject, were bound by Acts which are directed to making general provision as to procedural or substantive rights in litigation—albeit that the Acts do not, of their own force, bind the Crown.[4] But the

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[1] *Graham* v. *Public Works Commissioners* [1901] 2 K.B. 781 per Phillimore *J.* at pp. 790–791.

[2] Established by the Housing Act, 1941.

[3] *North Sydney Municipal Council* v. *The Housing Commission of New South Wales* (1948) 48 S.R. 281.

[4] Part 4 sections 9, 10.

Claims against the Goverment Act deals only with proceedings by a subject against the Crown. It does not deal with proceedings by a subject against a Crown instrumentality. It could be argued, therefore, that in litigation against a Crown instrumentality a subject does not have any rights conferred by any legislation which is not expressed to bind the Crown and does not do so by necessary implication, notwithstanding that the legislation is such that, in like litigation against the Crown itself, he would have those rights. But we consider that the decision of the Supreme Court in *Skinner* v. *Commissioner for Railways*[5] requires that such an argument be rejected. The Commissioner for Railways was incorporated by statute and made liable to be sued. He was a Crown instrumentality. A subject sued him at common law for negligence and, in that action, applied to a judge of the court for an order for discovery against the Commissioner. The Common Law Procedure Act, 1899, provided that in any action at law a judge may order a party to make discovery of relevant documents. The Commissioner, however, asserted that as he was entitled to the shield of the Crown, the order could not be made against him. The Crown, he claimed, was immune from discovery at law and that immunity was not displaced by that Act because the Act did not bind the Crown. The judge, however, made the order. The Commissioner appealed to the Full Court against the order. The Full Court dismissed the appeal. Jordan *C.J.* pointed out that "whatever prerogative exemption from discovery of documents the Crown may have enjoyed at Common Law . . . down to the coming into force of the first Claims against the Government Act in 1876, the language of the . . . Act, as repeated in the present Act of 1912 [Claims against the Government and Crown Suits Act, 1912], has the effect of exposing the Crown in any action brought against it under the Claims against the Government and Crown Suits Act to all such discovery as the Court has power to grant".[6] Later in his judgment the Chief Justice indicated the relevance of the fact that if the Crown had been sued under that Act the order could have been made against it. "If", he said, "the Commissioner, though deemed to be an agency of the Crown, were not liable to be sued, adequate redress could in general be obtained by a subject only by recourse to the Claims against the Government and Crown Suits Act . . . The Crown itself in the right of the State, when it is in the position of a defendant, now enjoys no immunity from giving discovery at Common Law under s. 102 of the Common Law Procedure Act. Assuming that the Commissioner must be deemed to be a statutory body representing the Crown for the purposes of that Act, I see no reason why he should be deemed to be more royal than the King and entitled to immunities to which the Crown itself can lay no claim."[7] *Skinner* v.

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[5] (1937) 37 S.R. 261.

[6] At p. 269. Halse Rogers *J.* and Bavin *J.* concurred in the judgment of the Chief Justice.

[7] At pp. 272–273. The Chief Justice also said that the statutory provision that the Commissioner was liable to be sued meant "sued according to the ordinary procedure applicable in the Court in which he is sued" (at p. 272). This dictum is a severable ground for the decision. The import of it is not clear. If his Honour meant that such a statutory provision is to be construed as depriving the Crown instrumentality, in respect of which it is made, of the benefit of being able to rely upon a Crown immunity, which the Crown itself could rely upon if it ever sued in a like case, the validity of the dictum is

Commissioner for Railways was concerned with a procedural right. But the reasoning is equally cogent in respect of substantive rights. We do not consider that legislation is needed as to the application to Crown instrumentalities of the basic formula of the Claims against the Government Act.[8]

PART 13.—*Liability in respect of the torts of persons exercising an independent function conferred or imposed by law*

13.1 *Provision made by the Crown Proceedings Act* 1947 (*U.K.*). Although we consider that it would be a retrograde step for this State to adopt the Crown Proceedings Act 1947 (U.K.),[1] there is one important respect in which that Act imposes liability upon the Crown in the United Kingdom whereas the Crown in New South Wales remains exempt. This extension of liability is effected by subsections (3) and (6) of section 2 of that Act. They provide—

> (3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.
>
> (6) No proceedings shall lie against the Crown by virtue of this section in respect of any Act, neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund of the

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very doubtful. See *The Commonwealth* v. *Rhind* (1966) 119 C.L.R. 584 per Barwick *C.J.* at p. 600, McTiernan *J.* concurring; *N.S.W. Housing Commission* v. *Allen* (1967) 86 W.N. (Pt. 2) 204 per Walsh *J.A.* at pp. 214–215; cf. *Housing Commission of N.S.W.* v. *Panayides* (1963) 63 S.R. 1. But this does not affect the validity of the reasoning of his Honour referred to in the text of our report.

[8] Whether the reasons which we have stated for this conclusion are soundly based will be of little importance if the recommendations which we have made earlier in this report are implemented. The shield of the Crown cannot exempt a Crown instrumentality from Acts which are expressed to bind the Crown. The Supreme Court Act, 1970, binds the Crown (s. 3); and we have recommended that the District Court Act, 1973, the Courts of Petty Sessions (Civil Claims) Act, 1970, and the Law Reform (Law and Equity) Act, 1972, be amended to provide that the Crown is bound by them (part 6 section 2). We have further recommended that each of the Law Reform (Miscellaneous Provisions) Act, 1944, parts II and III of the Law Reform (Miscellaneous Provisions) Act, 1946, Part III of the Law Reform (Miscellaneous Provisions) Act, 1965, and the Statutory Duties (Contributory Negligence) Act, 1945, be amended to provide that the Crown is bound by it and that care be taken that future legislation of this character be so expressed that it is clear that the Crown is bound by it (part 9 section 2).

[1] *See* part 4 section 7.

United Kingdom, moneys provided by Parliament, the Road Fund, or any other Fund certified by the Treasury for the purposes of this subsection or was at the material time holding an office in respect of which the Treasury certify that the holder thereof would normally be so paid.

The problems with which these United Kingdom provisions are concerned were not avoided in New South Wales by adoption of the simple formula that the liability of the State to a subject in litigation is to be "as nearly as possible" the same as that of a subject to another subject.

13.2 Tobin *v.* The Queen: *the leading English decision that the State is not liable for a tort committed by one of its officers in performing a duty which he has by statute irrespective of the will of the Executive Government.* The most significant of the early cases in which the problems came to notice was *Tobin* v. *The Queen*.[2] In that case, decided in 1864, the Court of Common Pleas in England considered whether the Crown could be adjudged liable for the seizure in peacetime of a privately owned ship by a naval commander. The naval commander had seized the ship in reliance upon the United Kingdom statute 5 Geo. IV, c. 113 (the Slave Trade Act 1824), section 43 of which enacted that vessels engaged in the slave trade shall be seized by commanders of the ships of His Majesty. The owners claimed damages from the Crown on the ground that the seizure was unlawful in that the ship had not been engaged in the slave trade. The court held that the Crown would not be liable in damages even if it were shown that the vessel had been seized unlawfully. Erle *C.J.* in giving the judgment of the court gave two principal grounds for the decision. One was that the maxim that the King can do no wrong was applicable to the facts alleged by the ship owner. This ground is not relevant in New South Wales.[3] The other ground stated by the court, however, is relevant in New South Wales and requires consideration. Erle *C.J.* said—

> If the vessel of the suppliants [the owners] had been lawfully seized, Captain Douglas [the naval commander] would have performed a duty imposed upon him by the statute . . . ; and, although he was appointed to the ship, and ordered to the station, and employed by the Queen, still we think that the duty which he had to perform in relation to the slave trade was not created by command of the Queen, nor would he have been doing an act which the Queen had commanded, if the seizure had been made lawfully under the statute . . . . There is no analogy between the relation of the captain of a Queen's ship to the Queen, and the relation of servant to master . . . , so as to create the liability here in question.
>
> The liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it. The act of the servant is then held to be the act of the master; . . . . When the duty to be performed is imposed

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[2] (1864) 16 C.B. (N.S.) 310: 143 E.R. 1148.

[3] Where operation of the maxim has been excluded by statute. *See* part 4 section 2.

by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment.[4]

13.3 Enever *v.* The King: *the High Court follows* Tobin's Case. *Tobin's Case* was persuasive to the High Court of Australia in the case of *Enever* v. *The King*[5] and this decision of the High Court, given in 1906, has dominated the approach of that court in later cases. In that case Enever brought an action against the Crown in right of Tasmania ("The King") for damages for his wrongful arrest and detention by a police constable. Enever claimed that the Crown could be sued for this tort committed by the constable because of section 4 of the Crown Redress Act 1891 (Tasmania) which enabled proceedings to be had against the Crown in respect of any act or omission "which would be the ground of an action at law . . . between subject and subject". The jury found that Enever had indeed been wrongfully arrested and imprisoned and awarded damages against the Crown. In due course the matter went on appeal to the High Court on the question whether the Crown could successfully be sued for this tort committed by the constable. The High Court held that the Crown was not liable. The principal argument of the Solicitor General for the Crown was that "The decision in *Tobin* v. *The Queen,* which has never since been questioned, governs this case."[6] This argument found favour in the High Court. The Chief Justice, Sir Samuel Griffith, said:

> Now, the powers of a constable, *quâ* peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself . . . A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application . . . . In my opinion, the Court ought to follow *Tobin's Case* which is not in principle distinguishable from the present.[7]

Mr Justice O'Connor said—

> . . . . The principle . . . was stated in a more general form by Erle *C.J.* in *Tobin* v. *The Queen,* as follows:
>
> "When the duty to be performed is imposed by law, and not by will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment."
>
> That principle is, to my mind, clearly applicable to the facts under consideration.[8]

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[4] (1864) 16 C.B. (N.S.) at pp. 348–351; 143 E.R. at pp. 1162–1163.

[5] (1906) 3 C.L.R. 969.

[6] At p. 973.

[7] At pp. 977–980.

[8] At p. 993.

A fundamental assumption underlying the decision in both *Tobin's Case* and *Enever's Case* appears in the following passage in the judgment of Barton *J.*—

> In arresting a person, even mistakenly, on a charge of committing within his view a breach of the peace, the constable was acting in the supposed exercise of an authority given to him by the Act of which I have read a section, viz., the Police Act 1865. It is contended on behalf of the appellant [Enever] that he [the constable] was in that respect and on that occasion acting as a servant of the Government in such a sense that the maxim *respondeat superior* applies. I have come to the conclusion that that position cannot be sustained. For the maxim to apply, it appears to be plain that the person for whose act it is sought to attach responsibility to the superior, must have been under the control of that superior at the time of the doing of the Act. Is a person who is obeying or endeavouring to obey the authority of an Act of Parliament so under the control of the State as to render the State responsible? It appears to me that in order to establish that position it must be shown that the control, if any, under which the person acted was that of the Executive Government of the State. The difficulty of sustaining that position was obvious. Counsel endeavoured to remove it by the argument that the State, that is to say, the Government as a whole, is one and indivisible in relation to what we understand to be its three branches, the Executive, the Legislature and the judiciary. In other words, counsel for the appellant contended that if what was done, was done under the authority of an Act of Parliament, then it was done under the authority of the State in its legislative capacity, and that the State was equally responsible whether the person whose act was complained of was obeying the State in that or in any other of its three capacities. This contention raised the argument that the State, which is of course recognized as between Government and Government as an indivisable authority in matters of international responsibility, is in the same position as to remedies sought in an action by a subject against it. Of course that argument if adopted gets rid of the difficulty. It is a bold and novel proposition, but before it can be established those who put it forward must remove the first obstacle that confronts them, which is that the proposition has not a shred of authority for its support, and has not been put forward before, so far as we know, in any court of justice where the question was the responsibility of the State to the subject. Its establishment would be followed by consequences which may be thought of as merely novel and curious, until it is realised that they would involve the whole fabric of the State in confusion and disaster. I do not feel justified in seriously entertaining such an argument.[9]

The appropriate comment on this passage is, it seems to us, that made 45 years later by Professor Sawer,[10] namely—

> But the most interesting feature of this case was the bold attempt of counsel for the plaintiff to establish a rational and comprehensive concept of State personality and liability which would include *all* the

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[9] At pp. 982–983.

[10] *Res Judicatae* (1951) vol. 5, at p. 18.

> activities of the central Government—legislation, adjudication and execution. His proposal was in effect that the State Treasurer should pay for wrongs committed by policemen because even though not subject, in a crude sense, to detailed orders from the King, or the Governor, or the Governor-in-Council, they were carrying out the duties of Government on behalf of the complex of authorities which control it. This conception, completely appropriate to the circumstances of modern democratic government, was to some extent beyond the comprehension of the court and entirely beyond the reach of its imaginative sympathy. Barton *J.* in particular took refuge in the usual cliches on such occasions: the concept had no authority and "its establishment would be followed by consequences which would . . . involve the whole fabric of the State in confusion and disaster." His Honour did not particularize the disasters in question and it is submitted with respect that they are imaginary. . . . But it seems a pity that the High Court did not on this occasion rise to a conception of the central Government somewhat less naive than that of *Erle C.J.* [in *Tobin's Case*].[11]

13.4 *The premise that legislation is not an expression of the will of the State.* A fundamental premise of the reasoning of Erle *C.J.* in *Tobin's Case* is that the Crown does not act by legislation; and that it acts only through the Executive Government. As Erle *C.J.* put it, the duty which the naval commander had to perform was "a duty imposed upon him by the statute". It was not a duty "created by command of the Queen". But, as we have pointed out,[12] the development of the law relating to the Crown as a litigant is to a large measure an expression of the development of the concept of the State as distinct from the Sovereign. If the expression "command of the Queen" is understood to mean the "command of the State" the fallacy of the fundamental premise in the reasoning of the Chief Justice becomes apparent—for the legislation of the State is no less the expression of its will than are the administrative actions of Ministers of the State (be they called by that title or by the title Ministers of the Crown) or of those subject to their directions.[13]

To avoid the confusion between the Sovereign and the State, which can arise from use of the title "the Crown", we adopt in this Part of our report the title "the State" instead of "the Crown".

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[11] We proceed in this report to consider the liability of the State in respect of functions conferred by the will of the State expressed through executive action or through legislation. Although the concept of the State extends to the judiciary, legal liability for acts done by or pursuant to the exercise of judicial authority raises special questions of policy which fall outside the ambit of this report.

[12] Part 2 section 1.

[13] Even if the expression "the Queen" were not understood to mean the modern concept of the State, it would be difficult to argue that legislation is not an expression of the will of "the Queen". The conventional words of enactment of an English statute long have been—

> "BE it enacted by the King's (Queen's) Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and the Commons in Parliament assembled and by the authority of the same as follows . . ."

Until the Crown assents to the statute as passed by both Houses the process of legislation is not complete.

Suppose that in *Tobin's Case* the naval commander had arrested the vessel in reliance not upon the statute but upon an instruction given to him by the Admiralty to seize all slaving vessels. Clearly in that case he would have been acting as the servant or agent of the State carrying out a duty imposed upon him by its will. This would still be so, on the reasoning of the court in that case, even if the Admiralty had acted pursuant to statutory power—a statute which, for example, provided that it would be lawful for the Admiralty, where it considered that British subjects were involved in slavery, to instruct naval commanders to seize slaving vessels. The instruction by the Admiralty to the commander, as authorized by the statute, would be an executive act of the State. The State would be liable for the commander's wrongful act in endeavouring to comply with this instruction (where, as in New South Wales, the effect of the maxim that the King can do no wrong has been abolished). On what principle of justice, however, should the State escape liability where the instruction to the commander is given directly by statute instead of by executive command authorized by statute? We cannot find one. The mode of expression of the will of the State, the will that the commander arrest slaving vessels, ought to be irrelevant. In each case the State has expressed its will. In the one case it has expressed it through Parliament. In the other it has expressed it through the Executive Government which is subject to control by Parliament.

Limiting the liability of the State to liability for the conduct of the "Executive Government" is not an unworkable criterion. In countries which have inherited the English constitutional system the concept of "Executive Government" is familiar as meaning the State acting administratively through cabinet ministers administering the departments of State, the administrative directions being implemented by employees (servants) answerable to their superior officers up to the departmental heads who are immediately responsible to their Ministers. Our criticism is not that the criterion is unworkable. It is that there is no justification for so limiting the liability of the State.

13.5 *There is no relevant difference between what the State does by legislation and what is does by executive action.* There is no relevant difference between what the State does by exercise of the legislative function and what it does by exercise of the executive function. The usual basis of distinguishing legislative from executive functions is to postulate that legislation establishes the general principles to be applied and that the executive function is to apply the principles.[14] Such a division is not maintained in practice. Especially in regulations and other subordinate legislation, the particularity of modern legislation ill-accords with the supposed distinction. "[T]he general shades off into the particular . . ."[15] In administration, that is, in the exercise of the executive function, on the other hand, the laying down of general rules or principles is commonplace.[16]

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[14] *See*, for example, the report in 1932, of the Committee on Ministers' Powers (U.K.), Cmd 4060 at p. 20.

[15] de Smith, *Judicial Review of Administrative Action*, 3rd edn (1973) at p. 62.

[16] The artificiality is well brought out by an example given in Benjafield and Whitmore, *Principles of Australian Administrative Law*, 4th edn (1971) at pp. 117. The (English) Town and Country Planning Act 1947 provided for the

13.6 *Application of the Crown Proceedings Act* 1947 (*U.K.*) *where the function is imposed not by statute but by the common law.* The Crown Proceedings Act 1947 (U.K.) subjects the Crown (the State) to vicarious liability not only for torts committed by its officers in the performance or purported performance of functions which are conferred or imposed upon them by statute but also for torts committed by them in the performance or purported performance of functions conferred or imposed upon them by the common law. This extension is justified. The common law is subject to the will of the State in that the common law may be changed by legislation.

13.7 *Recommendation that the policy of the provision made by the United Kingdom legislation be implemented in New South Wales.* We consider that the policy as to the liability of the State which underlies the United Kingdom Act in respect of the torts of independent officers is correct. We recommend that it be implemented in New South Wales. We refer to this recommendation as our recommendation of policy. There is no justification for the State escaping responsibility for torts of its officers on the ground that the relevant functions of those officers are conferred or imposed not by the authority of the Executive Government but by the authority of Parliament or by the common law. Nor should the State escape liability because the common law or the relevant statute law requires an officer of the State to act on his personal judgment. We go on to consider the application of this policy in this State.

13.8 *Application of the policy: the police force.* A most important consequence of the application of the policy is that the State becomes liable for the torts which members of the police force commit in the course of their service. That is not always the case under the present law. The State is not liable where the tort occurs in the exercise by a member of the police force of "a discretion and responsibility in the execution of an independent legal duty"[17]—such as the duty to arrest. Probably the State is liable for torts otherwise committed by policemen in the course of their service.[18] If, for

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making by a local planning authority of building preservation orders (s. 29) and tree preservation orders (s. 28) each order being subject to confirmation by the Minister. The Act empowered the Minister to make regulations as to certain matters, these including "the form of any order". In respect of building preservation orders the Minister made a regulation under the Act prescribing a form to be substantially compiled with. This was an exercise of the "legislative" function. In respect of tree preservation orders the Minister did not make a regulation prescribing a form. Instead, he issued a "memorandum" to local planning authorities indicating that he would not approve a tree preservation order unless it substantially complied with the form set out in the memorandum. This was an exercise of the "executive" function. But was there any difference in effect between the regulation and the memorandum? The effect of each was that unless the Minister's form was substantially complied with, the Minister would not confirm the order—whether it was a building preservation order or a tree preservation order. It is sophistic to maintain that the memorandum issued by the Minister was an expression of the will of the State but that the regulation made by the Minister was not—because it was an exercise of the legislative function. Each was the will of the State: the difference lay only in the mode of expression of the will.

[17] *Little* v. *The Commonwealth* (1947) 75 C.L.R. 94 per Dixon *J.* at 114.

[18] *Ramsay* v. *Pigram* (1968) 188 C.L.R. 271 per Barwick *C.J.* at pp. 279–280 and per Windeyer *J.* at 289.

example, a policeman, in the course of doing his work at a police station, accidently, but negligently spills scalding tea over a person who has called at the police station to report an accident, the State would be vicariously liable—just as it would have been liable if the tea had been spilt by a tea-lady acting in the course of employment by the State. But our recommendation of policy subjects the State also to vicarious liability for a policeman's torts committed in the exercise of "a discretion and responsibility in the execution of an independent legal duty".[19]

This extension of the liability of the State does not imply any denigration of the office of members of the police force. Every member of the police force holds the office of constable (no matter what his rank in the force). This is an ancient and honourable office. It is traceable back to the reign of Alfred the Great. But we agree with the observation of the report, in 1962, of the Royal Commission on the Police (in the United Kingdom) that "traditional thinking has tended to invest the constable's position with a character that in some ways has little to do with modern conditions. There are many people, such as surgeons in the National Health Service, masters of ships and captains of aircraft, to name but a few, who enjoy wide discretion based on professional skill in the way in which they carry out their duties; but these people are all servants and enjoy no special legal status implying the degree of independence which, in practice, they exercise".[20] Yet it is not thought that the status of a captain of a giant civil aircraft, for example, is demeaned because the law makes the airline which employs him liable for any torts which he commits in the course of his employment.

13.9 *Four possible objections to implementation of the policy.* There are four objections which may be raised to our recommendation of policy that the State be legally liable for the torts of its officers committed in the performance of an independent legal duty. These objections are—

(a) Nothing is gained by imposing this liability because it is the practice of the State to satisfy judgments against such officers in respect of such torts.

(b) The recommendation, if implemented, might subject the State to liability for conduct of officers which has no real connection with the performance by them of their office.

(c) the personal liability which an officer has, under the present law, in respect of his torts is a salutary sanction for proper conduct by him.

(d) The recommendation, if implemented, would impose upon the State a contingent liability the amount of which cannot accurately be predicted.

It is convenient to deal with these objections by considering their cogency in respect of the police force. The relevant principles are the same in respect of all officers who perform an independent legal duty.

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[19] *See* footnote 17.

[20] (1962) Cmnd 1728 para. 67.

13.10 *The first objection: that it is unnecessary as the State pays damages adjudged against its officers.* We do not consider that a continuance of the present immunity of the State for liability for the torts of its officers where they have been committed in the performance or purported performance of an independent legal duty, is warranted by the practice of the State to pay damages and costs awarded against the officers where the Crown law authorities consider it proper that the Crown do so. The subject should know what he must establish in the courts in order to obtain redress against the State; and he should know that if he proves such a case he is entitled to the redress as of right. The uncertainties of litigation and the deterrents to litigation are great enough without the addition to them of the element of a discretion, not subject to supervision or control by the courts, as to whether the State will satisfy a judgment found against the officer who carried out its will in a wrongful manner. A further difficulty, which presently confronts a person wronged by an officer, is that he may not know the identity of the officer who committed the tort—although it is clear it was an officer who committed it. He may not, for example, be able to identify the particular policeman who wrongfully arrested him. Under the present law he could not sue. Adoption of our recommendation of policy would remove this difficulty. He could sue the State.

13.11 *The second objection: that it would subject the State to liability in cases unconnected with the State's affairs.* We do not consider that the State should be liable for torts committed by officers where the tortious conduct does not have a real connection with their office, and the policy we recommend does not imply that the State would be so liable. The liability which we consider that the State should have is akin to the liability which a master has in respect of his servant. He is liable only for the conduct of the servant which is in "the course of employment". The concept of "course of employment", no matter how it defies reduction to a satisfactory comprehensive formula, is well understood and it is an effective barrier against unreasonable burdens being thrust upon the master. It may be anticipated that, if the policy which we favour is implemented, the courts will apply their experience in the application of that concept. Take this case. A policeman arrests a person. The arrest is unlawful. It is not justified under section 352 (2) (a) of the Crimes Act, 1900, which empowers a constable to arrest "any person whom he, with reasonable cause, suspects of having committed any . . . crime"; nor is it justified by any other enactment or by the common law. The policeman has committed the tort of false imprisonment. Is the State to be liable? The conduct of a servant does not fall outside the course of his employment because the servant "was guilty merely of an error of judgment or excessive zeal in exercising an authority devolved on him".[21] By analogy, if the policeman genuinely suspected that the person he arrested was guilty of the crime for which he arrested him and merely erred in judgment or showed excessive zeal in that he did not have "reasonable cause" for that suspicion, the State would be liable. On the other hand, if the policeman did not really suspect that the person was guilty of that crime, and arrested him only to pay him

[21] Fleming, *The Law of Torts*, 4th edn (1971) at p. 328.

back for what the policeman took to be a personal insult the State would not be liable—just as a master is not liable for the intentional wrongdoing of his servant done for the servant's personal ends and not for the purposes of his employment. The State would not be liable where the policeman has gone "on a frolic of his own"[22] any more than a master is personally liable for the "frolic" of a servant.

It is not the practice of the State to satisfy every judgment in tort given, under the present law, against a person who is a policeman. There must be what the Crown law authorities regard as being an appropriate nexus between the tortious conduct and the duties of the tortfeasor as a policeman. This is not an issue which, under the present law, falls to be determined in the proceedings against the policeman. The issue in those proceedings is whether the policeman has committed a tort—not whether the tort was committed in such circumstances as to make the State liable for the tort. Judgment against the policeman, therefore, does not necessarily mean that the State will pay: and there is no means of obtaining a judicial determination between the State and the aggrieved citizen of whether the policeman in committing the tort was acting in the course of his service as a policeman. But our recommendation of policy, if implemented, would enable the liability of the State to be determined in the proceedings in which the issue of whether the officer acted tortiously is decided.

13.12 *The third objection: that the personal liability of an officer is a salutary sanction for proper conduct by him.* It is not necessary for us to consider whether fear of the incurring of personal liability for tort is a significant deterrent to officers of the State acting tortiously. It is not necessary because our recommendation of policy does not extend to the relief of any such officer from personal liability. The officer would remain liable. If he were acting in the course of his independent functions the State also would be liable—just as a master is liable, as well as his servant, for torts of the servant committed in the course of employment. If he were acting on a "frolic"[23] of his own, the State would not be liable also—just as a master is not liable for the personal frolic of his servant. No doubt the person wronged by an officer would seek to establish the liability of the State just as a person wronged by a servant seeks to establish the liability of the master—in each case to get the advantage (amongst other advantages) of the deeper purse. But the officer, like a servant, would know that his status does not shield him from personal liability for what he does as a "frolic" of his own.

13.13 *The fourth objection: that it would be difficult to estimate the amount of the contingent liability of the State.* Any legislation which imposes upon the State, or a State instrumentality, a general legal liability which it does not have at common law raises this problem. The problem is less acute in respect of our recommendation of policy than it is in respect of most other instances of such legislation because of the past

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[22] *Joel* v. *Morison* (1834) 6 C. & P. 501 per Parke *B.* at p. 503; 172 E.R. 1338 at p. 1339.

[23] *See* footnote 22.

practice of the State to satisfy, in most cases, a judgment obtained by a subject against a member of the police force (or other officer of the State) in respect of any tort, committed by him in the execution of his office. Past experience as to the amount of these payments would furnish a guide. To some extent the payments which the State would be obliged to make under our recommendation of policy may be greater than what it would voluntarily pay. Subjects may be less reluctant to sue the State than they now are to sue a member of the police force. But it is unlikely that the difference would be great: and it is just that the State have the legal liability to which, if our recommendation is implemented, it will be subjected.

13.14 *The position in the United Kingdom in respect of liability for the torts of members of the police forces.* We have illustrated the application in New South Wales of the policy of the United Kingdom legislation by considering its impact in respect of members of the police force. It is ironic, therefore, that the legislation did not apply to police in the United Kingdom. This came about, however, not because of any view that there should not be an acceptance of public responsibility for the torts of individual policemen but because of the peculiar organization of the police in the United Kingdom. There was a multplicity of separate civil controlling authorities which were responsible for, and paid, the various local constabularies.[24] But the legislation applied only in respect of officers whose salaries were paid out of the "Consolidated Fund of the United Kingdom, moneys provided by Parliament, the Road Fund, or any other Fund certified by the Treasury".[25] In 1962, however, the Royal Commission on Police recommended—

> There is a fresh responsibility which we think should be placed upon a police authority. It should, in our view, be liable for tortious acts, or delicts, committed by a police officer in the course of his duty as a constable, or in the intended execution of such duty.[26]

This recommendation was in substance implemented for England and Wales by the Police Act 1964.[27] Under that Act damages and costs awarded against the police authority are payable out of public money (the various "police funds"). The acceptance of public responsibility for the torts of police is implicit in the Act—although, because of the particular organization of the police forces in England and Wales, it was considered appropriate that the defendant should be "the chief officer of police" for the police area and that payment of damages or costs awarded should be from the appropriate "police fund".[28] We are not aware of any dissatisfaction with the operation of that legislation in any relevant respect.

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[24] These authorities had no legal liability for torts committed by their constables in the execution of their independent legal duty (*Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364).

[25] Crown Proceedings Act 1947, s. 2 (6).

[26] Cmnd 1728 para. 195.

[27] S. 48.

[28] S. 48.

13.15 *The position in New Zealand in respect of liability for the torts of members of the police force.* Section 2 (3) of the Crown Proceedings Act 1947 of the United Kingdom was copied in New Zealand in 1950.[29] No exception was made, directly or indirectly, in respect of liability for the torts of police and it is accepted that the Crown in New Zealand is liable for torts committed by a policeman "while performing or purporting to perform" his functions as a policeman.[30] No untoward consequences appear to have ensued.

13.16 *The recommended liability would not be confined to the case where the tortfeasor holds an "office".* The impact of our recommendation of policy extends beyond the police force. This needs to be made clear because the obvious application of the recommendation to the police force may detract from recognition of its wider application.

Members of the police force are all, as we have pointed out, holders of the ancient office of "constable". There still lingers imprecision, and perhaps uncertainty, in judicial decisions touching on their status. The principal relevant decision is that of the Privy Council in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd)*[31] In that case the Privy Council held that despite the modern organization of "constables" into a disciplined force there is not such a contract of service between a member of the police force and the State as is necessary to found an action for damages for wrongful deprivation of the services of a servant (the action *per quod servitium amisit*). "Changes in organization", the Privy Council said, have not "altered the fundamental character of the constable's office. Today, as in the past, he is in common parlance described in terms which aptly define his legal position as 'a police officer', 'an officer of justice', 'an officer of the peace'. If ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the State.[32]

It would be easy to fall into the error of supposing that the law which presently exempts the State from liability for torts committed in the exercise of a personal discretion conferred or imposed by law applies only where the tortfeasor, like a policeman, holds an "office" which gives him a status which is distinct from that of ordinary employees (servants) of the State. It is not so. The exemption has been applied in respect of persons

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[29] Crown Proceedings Act 1950, s. 6 (3).

[30] *Ellis* v. *Frape & Ors* [1954] N.Z.L.R. 341.

[31] [1955] A.C. 457.

[32] At 480–481. The correct understanding of the judgment may be not that the Privy Council is holding that the ordinary legal relationship of master and servant cannot exist between a constable and the State in respect of duties in the performance of which the constable is bound to accept the orders of his superiors, but merely that it is holding that the relationship necessary to found the *per quod servitium amisit* action is more narrow than the ordinary master-servant relationship which is the basis of *respondeat superior* in tort. If so, much of the judgment is expressed too widely.

who clearly were in a master-servant relationship with the State.[33] The exemption applies wherever the tortfeasor committed the tort in the exercise of a function which the law required him to exercise in accordance with his personal judgment as distinct from the judgment of any superior. The tortfeasor might be a servant of the State or like, perhaps, a policeman, he might not be. The expression "officer" of the State is convenient, in this context, as a general term to embrace not only servants of the State but also those holding public office who are not in a master-servant relationship with the State. So used it includes servants: it does not exclude them. But the expression can be misleading.[34]

13.17 *Under the present law the State may be immune from liability for a tort committed by an ordinary public servant.* The case of *Field* v. *Nott*[35] illustrates the immunity which the State may have, under the present law, in respect of a tort committed by one of its ordinary public servants. The rules of the District Court (N.S.W.) provided that an application for leave to proceed in the court as a "poor person" was to be referred "to such one or more solicitors . . . willing to act in the matter . . . or to such officer in the Public Service as may be appointed". The rules further provided that the solicitor or public servant was to report to the court on the means of the applicant and the merits of his case so that the court could decide whether to grant the leave. The plaintiff applied to the court for leave. The court referred the application to the officer-in-charge of the Legal Aid Office, conducted by the State, for report. He was a public servant. By the time he made his report, it was too late for the plaintiff to commence her proposed action within a statutory time limit which was applicable.[36] She sued the State (by the nominal defendant procedure) for damages for the negligence of the public servant. The case went to the High Court. The plaintiff failed. The Court applied the same principles as those applied in respect of constables. As Latham *C.J.* put it:

> He [the public servant] is bound to act according to his discretion and is not subject to any control in the exercise of that discretion. In other words, his authority is original, being derived from the statutory rules. His authority is not a delegated authority . . . "He was doing a duty by virtue of something imposed as a public obligation to be done, not by the Government, but an officer whom the Government had by statutory authority appointed." *Enever* v. *The King* ((1906) 3 C.L.R. 969 at 986). See also *Tobin* v. *The Queen*: "When the duty to be performed is imposed by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment." ((1864) 16 C.B. N.S. 310 at p. 351: 143 E.R.

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[33] For example, *Baume* v. *The Commonwealth* (1906) 4 C.L.R. 97 (The Crown in right of the Commonwealth): *Fowles* v. *Eastern and Australian Steamship Co. Ltd* [1916] 2 A.C. 556 (The Crown in right of the State of Queensland): *Field* v. *Nott* (1939) 62 C.L.R. 660 (The Crown in right of the State of N.S.W.).

[34] In the drafting of relevant legislation it would seem to be desirable to avoid using the expression. Cf. The Crown Proceedings Act 1947 (U.K.), s. 2 (3), (6).

[35] (1939) 62 C.L.R. 660.

[36] The action was brought. It failed because of the statutory bar.

1148 at p. 1163). Thus even if the officer did owe a duty to the applicant [for leave to proceed as a poor person] and failed in the performance of that duty, the Government would not be liable for that failure.[37]

13.18 *The present immunity exists notwithstanding that the law does not require that action be taken by the tortfeasor.* The principles applied in *Field* v. *Nott* are not limited to the case where the tortfeasor has a "duty" in the sense that the law requires him to take action. They apply also where the law confers or imposes upon him a function by which it is within his personal discretion whether or not to take action. A policeman, for example, is empowered to arrest any person whom he suspects on reasonable grounds of having committed an offence against any penal law, no matter how trivial.[38] Thus he may arrest a person whom he suspects of having dropped a cigarette packet on the footpath in contravention of a local government ordinance against littering, for which offence the penalty is a small fine. But he is not bound to do so.

13.19 *Statutory functions in respect of which the immunity presently exists.* There are many functions conferred by the legislation of New South Wales upon public servants which, under the present law, do not subject the State to liability for a tort committed in the performance of them. It is commonplace, for example, to give "inspectors" powers of entry, powers to take samples, powers to seize where in their opinion the law has been infringed, and even powers to destroy where in their opinion public health or safety so requires. Wherever the relevant legislation commits a function to the personal judgment of a public servant so that whether there is occasion for exercise of the power depends upon his own judgment and not that of anyone else, even the Minister, the immunity exists.[39]

13.20 *Liability of a master (other than the State) where the tortious conduct of his servant is relevant to a function given to him by the master but occurs in the exercise of a function conferred on him by law.* A difficult problem is presented by judicial decisions in cases where a person commits a tort relating to performance of a function which he has by law as the holder of an office but his tortious conduct is relevant also to a function which he has as the servant of a master other than the State. Such a case is *Jobling* v. *Blacktown Municipal Council*—a decision of the New South Wales Court of

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[37] At pp. 669–670.

[38] Crimes Act, 1900, s. 352 (2).

[39] Consider, for example: Dairy Industry Act, 1915, s. 9; Fertilizers Act, 1934, s. 16; Fisheries and Oyster Farms Act, 1935, ss. 9, 14 (c); Inflammable Liquid Act, 1915, s. 22; Meat Industry Act, 1915, ss. 21, 22 and 28; Pest Destroyers Act, 1945, s. 10; Plant Diseases Act, 1924, ss. 9, 13 and 17; Pure Food Act, 1908, s. 22; Radioactive Substances Act, 1957, s. 8; Stock Diseases Act, 1923, ss. 7, 8, 8A, 12A, 17A and 19; Stock Foods and Medicines Act, 1940, s. 21; Weights and Measures Act, 1915, ss. 40 and 41. But often it may be a fine point of construction whether the function, power or duty in question is one which is personal to the servant in the relevant sense that it is one which by law he is to exercise according to his own judgment irrespective of any contrary opinion of servants superior to him in the service.

Appeal.[40] The relevant issue in that case was whether the council was liable for conduct of the manager of the council swimming pool. The manager was employed by the council as its servant to manage the pool. He was also, at the time of the alleged tortious conduct, a special constable, having been appointed to that office at the request of the council—no doubt so that he would have greater authority to keep order at the pool. The relevant statutory provisions as to special constables are contained in Part IV of the Police Offences Act, 1901.[41] By section 101 (1A) a magistrate "may, at the request of his employer, or of the council of a municipality or shire . . . appoint any person employed as a caretaker, nightwatchman, or in any similar capacity . . . as a special constable". By section 103 every special constable is given all the authority and immunities and all the responsibilities "as any constable duly appointed"; and by section 101 (2)[42] he is obliged to take an oath to "well and truly serve our Sovereign Lady the Queen in the office of special constable . . ." The plaintiff was a schoolteacher who, with other teachers, was in charge of school children attending the pool. She did not comply with one or more requests by the manager to move away from an exit where she was standing to mark the roll. The manager, stating that he was speaking as a "constable" or as an "officer of the law", told the plaintiff that she was under arrest, took her by the arm and for some time detained her in his office. The manager claimed that he had made the requests to the plaintiff to move away from the exit because the presence of the plaintiff and the children was leading to congestion at the exit and so causing difficulty to other people wishing to leave the pool. The plaintiff and the manager were in sharp conflict in their evidence as to their respective demeanours on the occasion and the degree of force used. The plaintiff sued both the manager and the council, claiming that the manager had been guilty of the torts of assault and false imprisonment. The trial judge directed a verdict for the council on the ground that even if the manager had committed a tort no liability would have been incurred by the council. The Court of Appeal upheld this decision. In delivering the principal judgment Asprey *J.A.* said:

> . . . . Counsel for the plaintiff upon this appeal argued that the council was liable for the acts of Wilson [the manager] because Wilson was the council's full-time employee and that one of his duties was to keep order at the baths and that his acts in relation to the plaintiff were done for that purpose. But I consider that it matters not whether the person who effects the arrest is in the service of the Crown or of a private body so far as the principle to be extracted from *Enever* v. *R.*, supra is concerned; the governing factor is that the act is done by a person in the exercise of an authority vested in him by virtue of an office held by him independently of the nature of his employment even although his appointment to that office may have come about by reason of that employment . . .[43]

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[40] [1969] 1 N.S.W.R. 129.

[41] In our *Report on Special Constables* (*L.R.C.* 19) we have recommended that the Commissioner of Police be empowered to restrict the powers of privately employed special constables.

[42] *See also*, s. 15 of the Interpretation Act, 1897.

[43] At p. 134.

The report of *Jobling's Case* does not indicate that the court was referred to the decision of the English Court of Appeal in *Lambert* v. *Great Eastern Railway Co.*[44] This also was an action for damages for false imprisonment consequent upon an arrest of the plaintiff effected by special constables. These special constables were employed by the defendant railway company and the arrest related to a suspected theft of goods in course of consignment by rail. The trial judge directed a verdict for the defendant on the ground that the constables were not acting as servants of the company. The relevant legislation was quite similar to that under which the special constable was appointed in *Jobling's Case,* although the English Act, The Great Eastern Railway (General Powers) Act 1900, related only to that company. The special constables had been appointed by justices on the application of the defendant company, as provided by the Act, "to act as special constables upon and within the whole of the railway stations and works belonging . . . to or worked by the company . . ."[45] By the Act a special constable had "all the powers protection and privileges of a constable in respect of the exercise of his duties . . .",[46] and was obliged to take an oath "to act duly to execute the office of a constable".[47] The English Court of Appeal nevertheless unanimously ordered a new trial. Cozens-Hardy *M.R.* with whom the other judges concurred, said:

> . . . . What is the precise position of these constables? . . . It seems to me quite plain under s. 50 . . . that they are the servants of the company, and that the relation of a master and servant exists between them . . . It is the railway company who employ; it is the railway company who pay; it is the railway company who dismiss; and in these circumstances it seems to me . . . in the acts which they did they acted as servants of the company. No doubt they are servants who . . . have the peculiar protection which other constables have, namely, that they are not liable if they have reasonable ground for believing that a felony has been committed, and that the person whom they have arrested was guilty of a felony. If they had such reasonable grounds, their employers, I take it, would not be liable for their acts, but if they had not reasonable grounds then it seems to me that their employers must be liable.[48]

This reasoning is cogent as a matter of policy. But it does not state the present law.

13.21 *The tendency of the general law towards imposing liability upon a master where the tortfeasor is an integral part of the master's organization.* The decision of the Court of Appeal (New South Wales) in *Jobling's Case*

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[44] [1909] 2 K.B. 776.

[45] S. 50.

[46] S. 50 (2).

[47] S. 50 (1). The legislation did not contain any provision (as did the relevant legislation in *Goff* v. *Great Northern Railway Co.* (1861) 3 E. & E. 672; 121 E.R. 594), a case which was referred to in *Jobling's Case,* that the authority to arrest was authority to do so "on behalf of the company" or any like provision of a limiting nature.

[48] At p. 781.

is supported by much of the reasoning in *Tobin's Case, Enever's Case* and subsequent cases following that reasoning. It must be accepted that the case was correctly decided. Nevertheless, the law so declared is in an isolated pocket which ill-accords with the general direction in which the law has developed over the last half century as to the legal responsibilities of masters for the conduct of persons who are their servants. The direction of this development has been an increasing willingness to regard, without areas of reservation, expressed or unexpressed, the liability of the master for the conduct of servants as being an entrepreneurial risk not necessarily involving any element of shortcoming in conduct other than that of the servant himself and, in particular, not necessarily involving any reasonable ground for criticism of the master personally. In view of the growth of large company organizations this is a natural legal development which may be expected to continue. There has been what has aptly been described[49] as a "transformation" in the approach of the law as to whether an employer is liable for torts committed by others working "as an integral part of the business".[50] This transformation is illustrated by the far greater willingness of the courts to hold that a hospital authority is liable for torts committed in respect of the care of a patient in the hospital. Professor Fleming describes the development as follows:

> Less than 50 years ago, it was the accredited view that a hospital was responsible to its patients only for the exercise of due care in the selection of its staff, but not for the negligence of its doctors and nurses in matters of professional skill and competence. A distinction prevailed between responsibility for the performance of the staff of ministerial or administrative tasks, on the one hand, and professional duties on the other, corresponding to the measure of "control" which could literally be attributed to the employer in relation to these dual functions. This vestigial immunity progressively eroded . . . . Thus hospitals became successively liable for the negligence of nurses, resident medical officers, radiographers, and even part-time anaesthetists and special consultants. The uncontrollability of such personnel in the exercise of their professional tasks no longer precludes recovery, so long as they are part of the hospital organization and not employed by the patient himself . . . .[51]

13.22 *Recommendation as to liability of a master (including the State) in respect of tortious conduct of a servant which relates to the activity of the master.* It would be a natural step in the course of the "transformation" to which we have referred for the master to be responsible for the torts of his servant, notwithstanding that they occur in the course of an "independent" function conferred upon the servant by law, where performance by the servant of that function is a part of the business of the employer. Indeed, our recommendation of principle that the State be liable for the torts of its officers committed in the performance or purported performance of a

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[49] Fleming, *Law of Torts,* 4th edn (1971) at p. 318.

[50] *Stevenson, Jordan & Harrison Ltd* v. *Macdonald* [1952] 1 T.L.R. 101 per Denning *L.J.* at p. 111.

[51] Fleming, *Law of Torts,* 4th edn (1971) at pp. 318–319.

function conferred or imposed upon them by law necessarily involves that the State is liable in respect of such a tort where the officer is the servant of the State. But the tortfeasor may be the servant not of the State but of another master—as in *Jobling's Case*. We recommend that the master be liable where the performance or purported performance was directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of the master. Where the servant is that of the State, the State should be liable. Where the servant is that of another master, that master should be liable. But we do not consider that where the servant is that of a master other than the State, and the master incurs the liability, the State also should be liable. We consider it just, in such a case, that the person wronged have the same redress against the master as he would have if the tortfeasor had acted in the course of his employment by the master: but it would exceed the occasion to give him redress also against the State. It is appropriate, in such a case, to treat the tortfeasor as being the officer of the master rather than the officer of the State. We recommend that in such a case the master, but not the State, be liable.

In by far the greatest number of the cases in which the recommendation made in this section of our report would be applicable, the servant at fault, where not the servant of the State, would be the servant of a public corporation or other body, such as a local government body, which is, in large measure, an instrument of the State. It is rare that the law confers or imposes an independent function upon a servant where that person is not the servant either of the State or of some such body. The recommended exception in respect of State liability is, therefore, far less significant in its practical consequences than it might, at first, appear. But there are cases where the law imposes functions on a servant whose master is not in any sense an instrument of the State. A storekeeper, for example, who has a servant who acts as his store detective may obtain his appointment of him to the office of special constable for the purpose of enabling him to deal more effectively with shoplifters. If the store detective wrongfully arrests a customer it seems to us appropriate that the storekeeper, rather than the State, be liable.

13.23 *Cases in which it may be arguable whether the relevant activity is the activity of the master.* In drafting legislation intended to give effect to the intent of the recommendations made in the last section, it is necessary to take into account that the law may confer or impose a function upon a servant in such a way that although he performs it along with doing his other work, it is arguable whether the performance is for the purpose of any business, enterprise, undertaking, or activity[52] which is that of his master. Two United Kingdom cases illustrate the problem. They are *Stanbury* v. *Exeter Corporation*,[53] decided in 1905, and the more recent case of *Ministry of Housing* v. *Sharp*,[54] decided in 1970.

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[52] For the sake of brevity we hereafter use the expression "activity" of the master as meaning "business, enterprise, undertaking, or activity" of the master.

[53] [1905] 2 K.B. 838.

[54] [1970] 2 Q.B. 223.

13.24 Stanbury *v.* Exeter Corporation. The facts in *Stanbury's Case*[55] were these. The Disease of Animals Act 1894 (United Kingdom) required local authorities, of which the defendant corporation was one, to appoint inspectors for implementing the Act and provided that the local authorities "shall assign to those inspectors . . . such duties, and salaries . . . , and may delegate to any of them such authorities and discretions as to the local authority seem fit, and may at any time revoke any appointment so made". It was clear that an inspector so appointed would be the servant of the local authority which employed him. The Act, however, also empowered the Board of Agriculture to make orders having effect as if "enacted by this Act". An order made by the Board provided that "the inspector of the local authority" shall "detain" sheep affected with or suspected of being affected with sheep scab. Exeter Corporation was sued for an alleged negligent performance by an inspector appointed by it of this duty prescribed by the subordinate legislation. The corporation was found not liable. The Lord Chief Justice, Lord Alverstone, said:

> If this had been an ordinary case of delegation by the corporation of duties which they had to perform, or of powers which they were entitled to exercise, then the ordinary rule in cases of master and servant and the doctrine of *respondeat superior* might apply . . . [But] the inspector was not acting in performance of duties imposed by statute upon the defendants [Exeter Corporation] or, in other words, was not performing as their agent duties imposed upon them and delegated by them to him, but was acting in discharge of duties imposed on him as inspector by the order of the Board of Agriculture.[56]

It could be argued that the detention of the sheep was not directed to or incidental to the carrying on of any activity of the corporation. The control of sheep scab was not an activity, it could be said, in which the corporation engaged—because the function was not imposed upon it: it was imposed upon the inspector. Such an argument may well be thought to be unreal. But the liability of the master in a case such as *Stanbury's Case* should be put beyond doubt. Whether or not in that case the activity was an activity of the corporation, it was an incident of the service of the inspector, as the corporation health inspector, to detain scab affected sheep. That was part of his job as inspector.

13.25 Ministry of Housing *v.* Sharp. In *Ministry of Housing* v. *Sharp*,[57] the facts were these. A certificate issued by a local land registry failed to note a land charge in favour of the Ministry of Housing. The certificate was issued, under the name of the local registrar, by a search clerk of the local council. The error was due to a negligent failure by the search clerk properly to search the records. The Ministry suffered consequential loss and sued the local registrar on the ground that he had an absolute duty to ensure that any certificate issued was accurate and sued also the council on the ground that it was liable for the negligence of its search

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[55] [1905] 2 K.B. 838

[56] At pp. 840–842.

[57] [1970] 2 Q.B. 223.

clerk. The local registrar was held not liable on the ground that on the true construction of the statute he did not have an absolute duty to ensure that any certificate issued was accurate. The council was, however, found liable as the search clerk was guilty of the tort of negligence and the council conceded that it would be liable if the search clerk had acted negligently. The relevant point in this case, however, is that the local land registrar was himself a servant of the council. He was the town clerk ("clerk to the council"). Nevertheless, the Court of Appeal expressed the view that the council would not have been liable if the negligent search had been done and issued by him and not by the search clerk. The relevant legislation provided that rules might be made under the Act for "prescribing the proper officer to act as local registrar, and making provision as to official certificates of search to be given by him in reference to subsisting entries in his register".[58] A rule was made prescribing the town clerk of the council as local registrar. In respect of the local registrar, the Master of the Rolls, Lord Denning, said:

> . . . According to the rules, the "proper officer" to act as registrar . . . is the clerk to the local council. But in this respect he does not act as a servant of the council. He acts as a public officer in his own right. His duties are prescribed by statute. It is he who is responsible for their due performance, not the council: see *Stanbury* v. *Exeter Corporation* [1905] 2 K.B. 838.[59]

It is, however, a strange result that if the council's town clerk had personally searched the records and had done so negligently the council would not have been liable, but the council was liable for negligent searching by the search clerk. Both were servants of the council. The strangeness of this result was appreciated by the Court of Appeal. Lord Denning said:

> I have some doubt whether the council were responsible for the clerk who made the mistake. It might be said that, although they paid the [search] clerk, he was, so to speak, seconded to the registrar [the town clerk], so as to be, for the purposes of the register, on the registrar's staff: and so the registrar was responsible for his mistake. But Mr Hunter [counsel for the defendant] did not take this point. He conceded that, if the [search] clerk was liable, the council would accept liability for him. I gladly accept this concession: for clearly, if the registrar is not liable, the council must be. The injured person cannot be left without a remedy. . . .[60]

The doubt of Denning *L.J.* was not shared by Salmon *L.J.* who said:

> . . . It would, in my view, be altogether too pedantic and unrealistic to hold that the council's servant who searched the register must be deemed to have ceased to be in their employment and to have been transferred for this purpose to another master, namely, the council clerk [that is, the town clerk] . . .[61]

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[58] Land Charges Act 1925, s. 15 (6).

[59] At p. 265.

[60] At p. 269.

[61] At p. 278.

We agree. The anomaly should be resolved not by absolving the council from liability for the negligence of the search clerk, but imposing upon the council liability for like negligence, if committed, by the town clerk. Both the town clerk and the search clerk were doing their work as part of the one organization—namely, that of the council. But it might be argued that the conduct of the local land registry was not an activity of the local council, but merely a burden thrust by legislation upon their town clerk. But whether or not it was an activity of the council, it was an incident of the service of the town clerk, as the town clerk to the council, that he perform this function (whether or not this incident was made a term of his contract of service).

13.26 *Further recommendation as to the liability of a master in respect of tortious conduct by a servant.* The problem illustrated by *Stanbury's Case*[62] and *Ministry of Housing* v. *Sharp*[63] makes it prudent to supplement the provision which we have already recommended[64] as to liability for the tortious conduct of a servant. We recommend that a master be liable also where the servant was guilty of the tort in the performance or purported performance of a function conferred or imposed upon him by law and the performance or purported performance was an incident of his service (whether or not it was a term of his contract of service that he perform the function).

13.27 *Summary of recommendations as to the liability of a master.* It is convenient at this point to summarize the specific recommendations which so far we have made in respect of liability for torts committed by a servant in the performance or purported performance of a function conferred or imposed upon him by law. They are that the master (whether the State, an instrument of the State or a private employer) shall be liable where the performance or purported performance was—

(a) directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of the master; or

(b) an incident of his service (whether or not it was a term of his contract of service that he perform the function).

We use the word "function" as including power and as including duty.

13.28 *Application of statutory defences available to the servant.* Legislation may provide a measure of protection to the servant, where sued in respect of his tort, by limiting the damages recoverable, by requiring notice to him before action, or by fixing a period of limitation of action which is shorter than that provided by the general law. We recommend that it be provided that such legislation shall apply, where the master is sued in respect of the servant's tort, as if it limited the damages recoverable from the master, required notice to him before action or, as the case may be, fixed the time within which he may be sued.[65]

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[62] [1905] 2 K.B. 838.

[63] [1970] 2 Q.B. 223.

[64] *See* section 22 of this part.

[65] In our report *L.R.C.* 21 we have recommended repeal generally of legislative provisions which require notice before action or which fix a limitation period shorter than that provided by the general law.

13.29 *Application of the recommendations to statutory duties for the safety of workers.* We draw attention to the fact that implementation of our proposals may have an impact, albeit in few cases, upon employers in respect of liability for breach of regulations for the safety of employees. The nature of the impact becomes apparent from a consideration of the decision of the High Court in *Darling Island Stevedoring and Lighterage Co.* v. *Long*.[66] In that case the plaintiff, Long, was a wharf labourer employed by the defendant. The defendant was a stevedoring company. The plaintiff was injured, in the course of his employment, because a hatch beam had not been kept securely fastened as required by the relevant regulations.[67] The plaintiff sued the defendant, relying only upon the cause of action that failure to keep the hatch beam securely fastened was a breach of statutory duty. He failed. He failed because the particular regulations did not take the usual form of imposing a statutory duty to protect employees upon the employer. They took the form of imposing the duty upon the "supervisor or foreman as person-in-charge representing a stevedoring firm". The High Court held that notwithstanding that the foreman was a servant of the defendant, and notwithstanding that the failure of the foreman securely to fix the beam occurred in the course of the foreman's employment, the defendant was not liable. The foreman was guilty of the tort of breach of statutory duty. But, the court held, the stevedoring company was not liable in respect of the breach because the statutory duty was not imposed upon it. It was imposed only upon the foreman personally. Thus the form in which the regulations were cast deprived the injured worker of redress from his employer. Under our recommendations the stevedoring company would have been liable.

We adopt[68] the following observations of Professor Fleming[69] on this case:

> Is this conclusion commendable? On the technical level, it undoubtedly runs counter to the view expressed by Lord MacDermott and, perhaps by Lord Porter in *Harrison* v. *National Coal Board* ([1951] A.C. 639, at 671 and 659 respectively). But Lord Reid (diss.) seemed inclined the other way (at 687–688). Lord Porter expressly declared the question as still open in *National Coal Board* v. *England* ([1954] A.C. 403, 415); quite apart from the many occasions in which the point seems to have gone by default, as in *L.P.T.B.* v. *Upson* ([1949] A.C. 155). More important is the question whether the decision is socially desirable. As Fullagar *J.* in the instant case so well put it, the principle of vicarious liability "was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy which did not really need to be juristically rationalised". Without elaborating the matter in detail it can be confidently asserted that there are . . . policy factors supporting the liability ordinarily imposed on the

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[66] (1957) 97 C.L.R. 36.

[67] The Navigation (Loading and Unloading) Regulations made under the Navigation Act 1912–1953 (Cth).

[68] Subject to the qualification stated in footnote 70.

[69] (1959) 20 *Modern Law Review* at pp. 657.

employer. The master is better able to compensate accident victims than the less pecunious employee, [and] the rule advances the policy of wide loss distribution among that section of the public which benefits from the enterprise . . .[70]

If these premises be granted, the decision to exempt the employer (in reality, his insurer) from liability for his servant's breach of a statutory duty in the circumstances of the instant case may well be regarded as an unwelcome departure from the well-settled foundations on which the principle of vicarious liability has come to rest. It withholds all legal incentive to induce the employer to ensure strict observance of safety standards, reinforced by well-founded doubts whether he need even direct the foreman's attention to the existence of safety regulations and require him to observe them (per Webb *J.* [1957] *A.L.R.* at 513; 31 *A.L.J.* at 213). A foreman is a poor substitute for the employer as a guarantor of the safety of his workmates, both from the point of view of accident prevention and as a source of recompense. The statutory policy underlying the enactment of safety regulations is thus directly jeopardized . . .

13.30 *Liability of the State in respect of the tortious conduct of an officer who is not a servant of the State.* Our specific recommendations in respect of the liability of a master for torts committed by his servant in the performance of a function conferred or imposed upon him by law stem from our recommendation of policy that the State should be liable for such torts committed by its own officers.[71] Usually these officers of the State are servants. But there are officers of the State between the State and whom the relationship of master and servant does not exist.[72] We proceed to consider more closely what the liability of the State should be in respect of the torts of these officers; for they do not come within the ambit of the specific recommendations so far made.

13.31 *The problem of defining an officer of the State.* The task is to identify the persons who are "officers of the State" in the sense in which we have used the term, even though they are not in the master-servant relationship. We have considered, but have rejected, three possible tests, they are—

(a) that the officer performs a function of government;

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[70] Professor Fleming stated a further consideration of policy, namely that the rule "plays a significant part in accident prevention in so far as deterrent pressure is most effectively brought to bear on the employer, who is in a strategic position to reduce accidents by efficient organisation and supervision of his working staff". We do not adopt this statement in so far as it assumes that the imposition upon employers of safety regulations has, in fact, been effective in accident prevention.

[71] *See* section 7 of this part.

[72] As to whether the relationship of master and servant exists between the State and a member of the police force, see section 16 of this part. There are other holders of public offices (for example, the members of the Privacy Committee established by the Privacy Committee Act, 1975) who have no duties at all other than those entrusted to them by statute to exercise as they see fit. Such officers are not servants in the sense which the word "servant" has in the legal concept of the master-servant relationship.

(b) that his office is one which is "public"; and

(c) that he was appointed to his office by the State.

13.32 *Possible test: performance of a function of government.* The concept of a function of government is a concept of variable content. The roles undertaken by government do not remain the same from generation to generation and there are no criteria which would command general acceptance as to what is, at any given time, to be considered to be a function of government. The unsatisfactory nature of a test which depends upon the concept of a function of government is demonstrated by experience in the United States in respect of the immunity which, under the common law as developed in that country, is generally accorded to municipal corporations in respect of torts committed in the exercise of a function which is "governmental" or "public". A chaos of judicial decisions has resulted as to what is to be classified as governmental and what is not. "There is little that can be said about such distinctions except that they exist, that they are highly artificial, and that they make no great amount of sense. Obviously this is an area in which the law has sought in vain for some reasonable and logical compromise, and has ended with a pile of jackstraws".[73]

13.33 *Possible test: that the office is public.* Whether or not an office is "public" does not fall to be determined by any fixed test. Judicial decisions show clearly that what is "public" depends upon the purposes relevant to the particular statute which is being considered. Thus for the purposes of the Income Tax Act 1918 (U.K.) the House of Lords has held that even the director of a private (proprietary) company held a "public office". Lord Porter said—

> That it is an office is, I think, plain. It has permanency apart from the temporary holder . . . What is contraverted is the allegation that a directorship, at any rate in a so-called private company, is a public office . . . There is no magic in the phrase "private company". It is true that it need not have directors or issue a prospectus, and that it is not permitted to have more than fifty shareholders and may have no more than two, but it still must be registered and keep an official register of its members. It is a corporate body constituted by Act of Parliament (now the Companies Act, 1929), and that Act imposes duties upon the office itself and its holder for the time being. These obligations are imposed in the public interest that some public control over its organization and activities may be obtained. No doubt less control is exercised in the case of a private than in the case of a public company, but the former is not private in the sense that it has no public formalities to carry out, and the word "private" is only used as a convenient label to distinguish it from a so-called public company. I think the office is a public one . . . [74]

Yet, in other cases, a far narrower meaning has been given. Thus in *Beeston and Stapleford U.D.C.* v. *Smith*[75] the Court of Appeal in England held that the clerk to the defendant council (that is, the town clerk) who in the course

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[73] Prosser, *Law of Torts*, 3rd edn (1964) at p. 1009.

[74] *McMillan* v. *Guest* [1942] A.C. 561 at p. 570.

[75] [1949] 1 K.B. 656.

of his duty to the council had filled in and executed standard printed forms of mortgage to secure loans by the council to residents, committed an offence against the Solicitors Act 1932. Section 47 (3) of that Act provided that the relevant provisions of the Act constituting the offence "shall not extend to (a) any public officer drawing or preparing instruments in the course of his duty . . . " The Lord Chief Justice, Lord Goddard (with whom the other judges concurred) said:

> . . . The words "public officer" [are words to which] different meanings can be given according to the statute in which they occur . . . I have no doubt that the words "public officer" in [this subsection] . . . should be limited to a public officer in the strict sense, that is to say, to an officer of a public department, whose salary is charged on national and not local funds . . .[76]

The concept of "public" office is too uncertain to delimit the liability of the State.

13.34 *Possible test: appointment by the State.* Appointment by the State also would be too uncertain a test.[77] No doubt appointments made pursuant to the Public Service Act, 1902, and ministerial appointments made pursuant to the Constitution Act, 1902, would come within its ambit. But there are a host of functions which can be exercised only where permission is granted by the Executive Government or by some authority created by the State.[78] One cannot, for example, act as an auditor under the Companies Act, 1961, unless one is registered by the Public Accountants Registration Board as a public accountant.[79] Nor can a person act as a builder unless he is registered as such by the Builders Licensing Board.[80] Such registrations might be characterized as appointments and they are made by the State. But these appointees do not thereby become officers of the State in any sense appropriate to attract liability of the State in respect of their torts. Not even appointment to office directly by legislation is a satisfactory criterion. Persons appointed to office directly by legislation often are officers of the State in an appropriate sense.[81] But this is not always so. The appointment may be for essentially private purposes—such as the appointment by legislation of persons to be trustees of church property where legislation is convenient to overcome some technical difficulty. Nor is appointment by judicial order a satisfactory criterion. A person cannot act as a special constable without judicial order:[82] but neither can he carry on business as a private inquiry agent without a licence and, where the police object to the licence being granted, the licence can be granted only by a stipendiary magistrate (or, on appeal, by the District Court).[83]

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[76] At pp. 663–665.

[77] Cf. Crown Proceedings Act 1947 (U.K.), s. 2 (6): "directly or indirectly appointed by the Crown."

[78] Reference to most such functions is made in appendix D to our *Report on Appeals in Administration* (*L.R.C.* 16).

[79] Public Accountants Registration Act, 1945, s. 28.

[80] Builders Licensing Act, 1971, s. 9.

[81] For example, Law Reform Commission Act, 1967, s. 7.

[82] Police Offences Act, 1901, part IV.

[83] Commercial Agents and Private Inquiry Agents Act, 1963, ss. 6, 10 and 14.

13.35 *Recommended test: that the tortfeasor is in the service of the State.* We consider that the most satisfactory description of an officer of the State, where that person is not a servant of the State, is that notwithstanding that the relationship between him and the State is not that of servant and master, he is "in the service" of the State. For example, the connotation, if any, in which a member of the police force is a servant of the State, may be far from being clear:[84] but there is no doubt that he is "in the service" of the State. Again, there are holders of many statutory officer who clearly are "in the service" of the State—albeit that they have only statutory duties to perform and, during their term of office, enjoy statutory independence. We recommend that this test be adopted.

13.36 *Qualification: that the tortfeasor is paid out of Consolidated Revenue or an appointed fund.* We recommend, nevertheless, that this test be supplemented by the test that it was an incident of the service to the State of the tortfeasor that he be paid out of the Consolidated Revenue Fund (or such other fund as the Governor appoints) some emolument by way of salary, attendance allowance, travelling allowance or otherwise. This is similar to the qualification contained in section 2 (6) of the Crown Proceedings Act 1947 (U.K.). It is a safeguard against an excessively generous construction of the expression "in the service" of the State.

13.37 *Further qualification: that the tortfeasor is not conducting his own business.* We consider that a further safeguard is needed. It might be argued that in some cases an independent contractor is "in the service" of the State. An insistance of such a case could be that of a carrier, conducting his own business, but carrying under contract to the State. Such an argument should be precluded. We recommend that it be made clear that the concept of being "in the service" of the State does not extend to the carrying on of business on one's own account.

13.38 *Recommendation as to liability of the State in respect of persons who are in the service of the State but who are not servants of the State.* We recommend that where a person who is in the service of the State (although not its servant) commits a tort in the performance or purported performance of a function conferred or imposed by law,[85] and the tort is committed in the course of the service of that person, the State be liable.

13.39 *Application of statutory defences available to the person in the service of the Crown.* We recommend that it be provided that legislation which provides for a measure of protection to the person in the service of the Crown, where sued in respect of his tort, by limiting the damages recoverable, by requiring notice to him before action, or by fixing a period of limitation of action which is shorter than that provided by the general law, shall apply, where the Crown is sued in respect of his tort,

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[84] Section 16 of this part.

[85] Or by failure to perform that function.

as if it limited the damages recoverable from the Crown, required notice to the Crown before action or, as the case may be, fixed the time within which the Crown may be sued.[86]

13.40 *Draft Vicarious Liability (Independent Functions) Bill.* In appendix F we express in the form of a draft bill the recommendations made in this part of our report.[87] Notes on the draft bill appear in appendix G.

PART 14.—*The Application of Statutes to the Crown*

14.1 *The rule of construction.* The Interpretation Act, 1897, makes no provision in respect of the application to the Crown of Acts or of regulations (or other subordinate legislation) made under Acts. A rule of the common law for the construction of Acts is that an Act does not bind the Crown unless it is expressly provided by the Act that the Crown is bound or it is a matter of necessary implication that the Crown is bound. There is some divergence of judicial opinion as to the theoretical basis of the rule. Sometimes the rule is explained on the basis that "it is inferred *primâ facie* that the law made by the Crown, with the assent of Lords and Commons [Parliament], is made for subjects and not for the Crown".[1] At other times it is explained on the basis that it is to be inferred *primâ facie* that legislation, on its true construction, does not bind the Crown because it is a "prerogative" of the Crown that it is exempt from legislation which would prejudice the Crown in the discharge of its executive functions or would prejudice it in respect of its property unless the legislation makes it clear that the Crown is to be bound.[2] It is of little consequence, if any, which of these views is preferred. On either view the rule is a rule of construction.

In 1955 an heretical view was argued before the House of Lords.[3] This view is that there is no rule of construction that prima facie an Act does not apply to the Crown; but the Crown has a prerogative right to override any Act in the sense that, unless the Act expressly or by necessary implication precludes exercise of this prerogative, the Crown may plead the prerogative and thereby prevent the Act, notwithstanding that as a matter of construction the Act applies to it, from operating to its prejudice. It found favour with only one of the Law Lords.[4] It is untenable.

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[86] We have made a like recommendation as to the application of such legislation to proceedings against a master in respect of the tort of his servant. *See* section 28 of this part.

[87] Together with further recommendations of a minor or ancillary nature.

[1] *Attorney-General* v. *Donaldson* (1842) 10 M. & W. 117 per Alderson *B.* at p. 124: 152 E.R. 406 at p. 409.

[2] *Madras Electric Supply Corporation Ltd.* v. *Boarland* [1955] A.C. 667 per Lord Reid at pp. 686–690.

[3] *Madras Electric Supply Corporation Ltd.* v. *Boarland* [1955] A.C. 667.

[4] Lord Keith of Avonholm; at pp. 692–695.

It is indeed a somewhat astonishing proposition that, notwithstanding the long-established supremacy of Parliament, the Crown has a prerogative to prevent the application to it of an Act which on its true construction applies to the Crown. As Lord Reid stated in that case, it is a view which had never previously been suggested "at least since 1688".[5] The generally accepted, and clearly better view, is that the rule is one of construction.[6] We proceed, therefore, on this basis.

14.2 *Subordinate legislation.* The rule applies, not only to Acts themselves, but also to regulations (or other subordinate legislation) made under Acts.[7]

14.3 *The history of the rule.*[8] It was, at the outset of the development of the rule, recognized that the Crown is not bound by a statutory provision merely because the general words of it are capable of application to the Crown. Thus, in 1498, Fineux *C.J.* and Brian *C.J.* were in agreement that the King was not bound by "ceux general pois" (these general words)[9] of a statute. It has remained the law that a statute is not to be construed as binding upon the Crown merely because the words used are capable of application to the Crown. For example—it does not follow that because an Act is expressed to impose obligations upon "landlords" the Crown, where it is a landlord, is bound. Where the general words are not capable of application to the Crown, the Crown is not bound by them. Where the words are capable of application to the Crown, the rule requires that this be not taken to be an indication either that the Crown, where it is a landlord, is bound or that it is not bound. But early in the development of the common law the courts recognized that, where the words were capable of application to the Crown, it could be inferred that it was intended that the Crown be bound, this inference being drawn, not from the generality of the language of the legislation, but from a consideration of the purposes sought to be achieved by the legislation (as apparent from the provisions made by it read in the light of the state of affairs which existed before the provisions were made) and of whether or not the Crown, if bound, would be stripped of any of its prerogatives or property which were appurtenant to royal dignity and the exercise of regal functions. To take but a few of the decisions, it was held, in the sixteenth century, that the King was bound, although not named, by the Statute of Westminster, *De Donis Conditionalibus*, which prevented a person having an estate tail in land (an estate granted to a person and the heirs of his body) alienating the land to the detriment of the person who is entitled in reversion in the event of failure

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[5] At p. 687.

[6] *Madras Electric Supply Corporation Ltd* v. *Boarland* [1955] A.C. 667 per Lord MacDermott at p. 685, per Lord Reid at pp. 686–689; *Downs* v. *Williams* (1971) 126 C.L.R. 61 per Windeyer *J.* at pp. 85–86; and *see* Hogg, *Liability of the Crown* (1971) at pp. 166–167 and 171–173.

[7] *Minister for Works (W.A.)* v. *Gulson* (1944) 69 C.L.R. 338. However, regulations (or other subordinate legislation) must be read with, and be consistent with, the Act under which they are made. If the relevant provisions of the Act do not bind the Crown, the regulations will not bind the Crown.

[8] We acknowledge our indebtedness to the scholarly article by H. Street in (1947–1948) *University of Toronto Law Journal* at 357.

[9] Keilwey 35: 72 E.R. 192.

of heirs of the body of the grantee. Browne *J.* stated that the King "perceived the mischief, and saw that it was necessary and profitable to provide a remedy, and therefore he ordained a remedy; and when he ordered a remedy for the mischief, it is not to be presumed that he intended to be at liberty to do the mischief".[10] In the same century it was held the King was bound, although not named, by the provisions of the Statute of Merton[11] made against the practice of doubling the rent in the case of an infant heir who had made default in payment.[12] In the seventeenth, eighteenth and the early part of the nineteenth century the courts adopted the same approach. The Crown, although not named, was held bound, for example, by legislation for the consolidation of endowed rectories and vicarages,[13] legislation against the buying or selling of ecclesiastical preferment,[14] and by the Statute of Marlborough which prohibited the distraint of freeholders otherwise than by writ.[15] But during the nineteenth century a change in judicial approach emerged. The courts became increasingly reluctant to infer from the apparent policy of legislation an intention that the Crown be bound by it. Although not, at least in general, going so far as to treat the apparent policy as wholly irrelevant as an aid to construction, they interpreted the rule that the Crown, where not expressly bound, is bound only by implication (which may not be drawn only because the statutory provisions are expressed in general language) in a way which robbed the apparent policy of the legislation of significance as a determining factor. They required that the implication be a "*necessary*" implication and gave this expression a very restricted meaning. The extent of the shift in judicial approach is indicated by the often cited decision of *Gorton Local Government Board* v. *Prison Commissioners*[16] in which Day *J.* said that a "necessary implication" arises only where "otherwise the legislation would be unmeaning".[17] It may be, as Professor Street has suggested, that the change in judicial attitude was in part brought about by the increasing reluctance, during the nineteenth century, in the interpretation generally of statutes (not merely on the question of whether they bound the Crown), to attach much significance to the apparent policy of the statute. "From 1870 onwards, there has been a steady drift away from the consideration of the policy of the statute . . . Whereas in the sixteenth century judges interpreting a statute would seek 'the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances' *Stradling* v. *Morgan* (1558) 1 Plowden 199 at 205 [75 E.R. 305 at 315], now [they] . . . sum up their approach thus: 'All the court can do is to say: Is that what is enacted by the statute? and, if it is, it must give effect to it.' (*Scranton's Trustee* v.

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[10] *Willion* v. *Berkley* (1561) 1 Plowden 223 at p. 248: 75 E.R. 339 at p. 380.

[11] 20 H. 3, c. 5.

[12] Y.B. 35 H. 6, f. 61.

[13] *R.* v. *Archbishop of Armagh* (1722) 1 Str. 516; 93 E.R. 671.

[14] Coke on Littleton at p. 120.

[15] 52 H. 3, c. 22.

[16] Decided in 1877; reported [1904] 2 K.B. 165 n.

[17] At p. 167 n.

Pearce [1922] 2 Ch. 87 per Lord Sterndale M.R. at 124)."[18] In earlier times a court would not have given so literal a construction of a section of an Act, as did the Court of Appeal in England in 1967,[19] albeit "with great regret", which enabled a local authority to conduct itself in a manner which was "flying in the face of the intention which Parliament manifested when it passed the Act".[20] Another and perhaps more influential, factor in the increasing reluctance of the courts, which emerged in the latter half of the nineteenth century, to hold the Crown bound by a statute in which it was not named, was an extreme regard for the dignity and majesty of the Crown and failure clearly to distinguish between the personal dignity of the sovereign and mundane tasks of administration in the modern State. Thus one finds in the reports of cases decided in the Victorian era language such as that used by Lord Campbell *C.J.* in 1859, namely:

> I consider it a sacred maxim that the Crown is not bound by an Act of Parliament, unless it is quite clear, from the language employed, that the Legislature contemplated including the Crown, and her Majesty, in giving her Royal Assent, assented that the Crown should be bound, and was fully aware that she was giving her assent to be subject to the provisions of the statute.[21]

But whatever be the reasons for the change in judicial attitude, the result was that the presumption that the Crown is not bound by a statute unless named therein became "almost irrebuttable".[22]

14.4 *The rule is not restricted to legislation which would strip the King of any part of his ancient prerogative or of rights essential to his regal capacity.* It may be that the rule that the Crown is not bound by legislation unless expressly named or included by necessary implication does not apply in respect of legislation which, even if binding upon the Crown, could not in any way prejudice the Crown.[23] At least the courts will readily imply an intention that such legislation applies to the Crown.[24] But until the decision of the Privy Council, in 1946, in *Province of Bombay* v. *Municipal Corporation of Bombay*[25] it was possible that, at least in Australia, the ambit of the rule would be more narrowly limited. The limitation, which might have become established as the law, was that the rule applies only in respect of legislation which would strip the King "of any part of his ancient prerogative, or of those rights which are . . . essential to his regal capacity".[26] On this approach the rule would apply where the Crown would be fettered in respect of its primary and inalienable functions of government but not where it would be affected only in respect of commercial or industrial enterprises which the Crown, like subjects, may undertake.

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[18] H. Street (1947–1948) 7 *U.T.L.J.* 357 at p. 367.

[19] *Bradbury* v. *Enfield London Borough Council* [1967] 1 W.L.R. 1311.

[20] Per Diplock *L.J.* at p. 135.

[21] *Moore* v. *Smith* [1859] 5 Jur. N.S. 892 at p. 893.

[22] H. Street (1947–1948) 7 *U.T.L.J.* 357 at p. 367.

[23] *See* Hogg, *Liability of the Crown* (1971) at pp. 173–174.

[24] *Madras Electric Supply Corporation Ltd* v. *Boarland* [1955] A.C. 667.

[25] [1947] A.C. 58.

[26] *Sydney Harbour Trust Commissioners* v. *Ryan* (1911) 13 C.L.R. 358 per Griffith *C.J.* at p. 365 citing *Hardcastle on Statutes,* 1st edn, p. 180.

The decision of the Privy Council, however, precluded such a limitation upon the rule.[27] It is as well that it did. It was not a practical approach to tempering the severity of the rule. Windeyer J. clearly pointed to the reasons for its deficiency in *Ex parte Professional Engineers' Association.*[28] His Honour referred to the descriptions "regal functions" and "the primary and inalienable functions of government" in these terms—

> But these phrases, however expressive of an idea, have no precise legal meaning. It is thus not helpful to ask of any activity of the State "is it a regal, or an inalienable, function?" . . . The functions which government in fact undertakes vary with the time in history and the country concerned and the nature of its polity. . . . The maintenance of the post office is today an established function of government in most countries; and the Postmaster-General is, in Britain and Australia, a Minister. But before the reign of Charles I, the provision of postal services was not a function of government in Britain . . .
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> I cannot see any ground for saying that, in law, any one activity which government undertakes is really more a true function of government than any other. No fixed criteria for the application of the assumed distinction have been formulated. And it has no firm historical foundation . . . This is not to say that there is not a difference between the industrial and trading activities of government and its other activities. The fallacy lies in supposing that this difference can in some way to be made to correspond with a distinction between functions which are properly or essentially governmental and those which are not . . . To quote only from Frankfurter J. (*New York* v. *United States* (1946) 326 U.S. 572 at 580): "To rest [the federal taxing power] on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers."

14.5 *The judgment of the Privy Council in* Province of Bombay *v.* Municipal Corporation of Bombay. In *Province of Bombay* v. *Municipal Corporation of Bombay*[29] the Privy Council took a very restrictive approach as to what is to be taken as disclosing a necessary implication that the Crown be bound by an Act. Their Lordships rejected the argument that the Crown is bound "by necessary implication" if it can be shown that the legislation cannot operate with reasonable efficiency unless the Crown is bound. They stated "[T]heir Lordships are of opinion that to interpret the principle in [that] sense would be to whittle it down, and they cannot find any authority which gives support to such an interpretation."[30] They explicitly rejected, also, the argument that "whenever a statute is enacted 'for the

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[27] *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58 at pp. 63–64.

[28] (1959) 107 C.L.R. 208 at pp. 274–276.

[29] [1947] A.C. 58.

[30] At p. 62.

public good' the Crown, though not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown".[31] "Every statute", they said, "must be supposed to be 'for the public good', at least in intention."[32] They went on: "Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be *wholly* frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."[33] In this dictum the Privy Council was, in terms, directing attention only to the argument that it is a sufficient indication, standing alone, of legislative intention to bind the Crown, that the legislation would not fully achieve its apparent purpose for the "public good" unless the Crown were bound. The dictum does not, in terms, preclude the apparent purpose of the legislation being taken into account with other indications of intention that the Crown be bound. Nevertheless, the significance, as stated by the Privy Council, of the apparent purpose of a statute is small indeed when contrasted with the significance attached to it before the change in judicial attitude which had emerged in the nineteenth century.[34] Their Lordships, further, stated that it was to be borne in mind that the Legislature might well be content to rely upon the servants of the Crown acting wisely in accordance with the spirit of legislation "and may well have thought that to compel the Crown's subservience . . . beyond that point would be unwise".[35] They also indicated, although obiter, that it is not to be inferred from the fact that the Legislature in some provisions of an Act stated that the Crown was not bound by those provisions, that the Legislature was indicating an intention that the Crown be bound by others of the provisions. "This is not an unfamiliar argument, but, as has been said many times, such provisions may often be inserted . . . *ex abundanti cautela.*"[36]

The law as to the application of legislation to the Crown is settled. But is it satisfactory? It is clear that, unless legislative intervention occurs, the rule will be narrowly and rigidly applied. Thus, as already noted in part 4,[37] the High Court held, in *Downs* v. *Williams*[38] that the Crown is not

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[31] At p. 62.

[32] At p. 63.

[33] At p. 63: emphasis supplied.

[34] *See* section 3 of this part.

[35] At p. 62.

[36] At p. 65. See also *North Sydney Council* v. *Housing Commission* (1948) 48 S.R. 281 at pp. 285–286.

[37] *See, particularly,* section 9.

[38] (1971) 126 C.L.R. 61. Windeyer *J.* dissented. Gibbs *J.* also dissented—but not on this point. This case is discussed at length in appendix C.

bound by the Factories, Shops and Industries Act, 1962, to fence dangerous machinery in a factory of which it is the occupier—even though that Act requires, in general terms, that the occupier of a factory shall fence dangerous machinery in it. The High Court so held notwithstanding that the beneficent purpose of that Act is to provide minimum legal standards of safety for employees, and that this purpose is not fully achieved if the Crown is not bound.

14.6 *Qualification of the primary rule of literal construction.* The primary rule of construction of any legislation is the rule of literal construction—namely, that legislation is to be construed in accordance with the ordinary and natural meaning of the words used.[39] There are many subsidiary rules—such as the rule expressed by the maxim *expressio unius est exclusio alterius*, that is, that the express mention of one thing is an indication that things not specifically mentioned are intended to be excluded. These subsidiary rules are valuable aids. They assist in determining the ordinary and natural meaning of the language of the legislation. But the primary rule remains that in construing legislation one must "intend the Legislature to have meant what they actually have expressed".[40]

The rule of construction that a legislative provision binds the Crown only where it does so by express words or necessary implication qualifies the primary rule. Suppose this case. A legislative provision requires "every owner" of a "rowing boat" to install in it floatation tanks. Unless he is expressly or impliedly excepted by other provisions of the legislation, every person who is the "owner" of a "rowing boat", within the ordinary and natural meaning of these words, is bound to install the tanks. But it is not so in the case of the Crown. The Crown may be the "owner" of a "rowing boat", within the ordinary and natural meaning of those words, be not expressly or impliedly excepted by other provisions of the legislation, yet still not be bound to install the tanks. This is because, under the rule as to whether the Crown is bound by legislation, the Crown is not bound by the provision unless the legislation provides, expressly or by necessary implication, that the Crown, where it is the "owner" of a "rowing boat", shall have this statutory obligation which is expressed to be imposed upon "every owner" of a "rowing boat". To this extent the primary rule of construction is qualified in respect of the Crown.

14.7 *Condemnation of the rule by academics.* The rule, as now understood and applied, has come under the general condemnation of academic writers. This general condemnation is expressed by Professor Hogg as follows:

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[39] Technical expressions, however, are given their technical meaning.

[40] *R.* v *Banbury* (*Inhabitants*) (1834) 1 Ad. & E. 136, per Parke *J.* at p. 142; 110 E.R. 1159 at p. 1161. It is not to the point that the application of the primary rule leads to results which it is unlikely that Parliament would have intended. As Lord Hershell has said, "[I]t must be admitted that, if the language of the Legislature, interpreted according to the recognized canons of construction, involves this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not within the contemplation of the Legislature." (*Cox* v. *Hakes* (1890) 15 App. Cas. 506 at p. 528.)

> It is a truism that there has been in the last century a vast increase in the scope both of governmental activity and of social welfare legislation; naturally, there is now a large area of overlap. In general, where the Crown engages in an activity which is controlled by statute, it should surely be subject to the statutory controls; and where legislation is passed to benefit a class of the community, the benefits should not be denied to some members of that class merely because of their relationship with the Crown. Take rent restriction legislation, for example; if Parliament deems it desirable to control rents and evictions to protect tenants of dwelling houses, is there any reason why the Crown as landlord should be exempt, or why the Crown's tenants should lose the benefits of the legislation? And yet the failure to expressly refer to the Crown has produced these results. Similarly (to draw at random from decided cases), the Crown has been held not bound by town and country legislation designed to order our environment (*Ministry of Agriculture* v. *Jenkins* [1963] 2 Q.B. 317), by building restrictions aimed at public health (*Gorton Local Board* v. *Prison Commissioners* 1887), [1904] 2 K.B. 165 n.), by speed limits aimed at public safety (*Cooper* v. *Hawkins* [1904] 2 K.B. 164), by companies winding-up provisions designed to give priority to wages debts (*In re Henley & Co.* (1878) 9 Ch.D. 469), and by debtor's legislation designed to keep our debtors out of gaol (*Attorney-General* v. *Edmunds* 1870) 22 L.T. 667; *Attorney-General* v. *Hancock* [1940] 1 K.B. 427; *Attorney-General* v. *Randall* [1944] 1 K.B. 709); the Crown may even be exempt from reforms in the law of torts (*See* G.H. Treitel, "Crown proceedings: some recent developments" [1957] *Public Law* 321 at p. 322) . . . This wide immunity is simply not needed by an executive which controls the legislature, and because it is not needed it conflicts with the basic constitutional assumption that the Crown should be under the law.[41]

14.8 Downs *v.* Williams *demonstrates that the rule is unsatisfactory.* *Downs* v. *Williams*[42] illustrates the unsatisfactory results which flow from the rule. Subjects who occupy factories are required by the Factories, Shops and Industries Act, 1962, to fence dangerous machinery. This legislation affords a basic safeguard for the protection of employees from injury. But the Crown is not bound by the Legislation. What justification is there for not giving to persons employed by the Crown the same statutory safeguards which are given to persons employed by other occupiers of factories? Is it desirable that persons employed on printing presses in the Government Printing Office, for example, are without the protection that by statute the dangerous parts of the presses must be securely fenced whereas persons employed on like presses in private industry do have this protection? And if a person employed on a printing press in the Government Printing Office suffers injury because dangerous parts of the press have not been securely fenced why should he not have the same entitlement to damages for breach

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[41] Hogg, *Liability of the Crown* (1971) at pp. 201–203. The authorities cited by Hogg are not decisions upon New South Wales legislation. But the principles are the same and the decisions would be applicable to like legislation of this State which does not apply to the Crown by express words or "necessary" implication.

[42] (1971) 126 C.L.R. 61.

of statutory duty as has a person similarly injured by a similarly unguarded printing press in private industry? As the law now stands, the person employed in private industry has a cause of action against his employer for breach of the statutory duty to fence. He does not have to prove that his employer was also in breach of the common law duty to take reasonable care for his safety: and, where his own carelessness has contributed to the accident, the damages which he is entitled to recover are not reduced by reason of that carelessness.[43] But the person employed in the Government Printing Office does not have a cause of action against the Crown for breach of the statutory duty to fence. The Crown does not have this duty. He must establish that the Crown was in breach of the common law duty to take reasonable care for his safety. And if he succeeds in doing this, but his own carelessness contributed to the accident, the damages which he recovers are reduced by reason of that carelessness.[44] Is this discrimination justifiable? Moreover, many public corporations established by statute and subject to executive direction by the Government are entitled to the shield of the Crown to the intent that they are not bound by legislation which is not binding upon the Crown and which, if applied to the corporation, might prejudice any interest or purpose of the Crown. Thus, the Factories, Shops and Industries Act, 1962, may not bind the Public Transport Commission. The practical consequences would be less serious if the Public Transport Commission did not take the point in litigation against it by injured employees. But our inquiries indicate that the point is taken. It may be that there are considerations of Government policy which do justify the present law that the Crown and public corporations and officials entitled, in this regard, to the shield of the Crown do not have the statutory duty which other employers have of fencing dangerous parts of machinery—although no reference to these considerations was made in the debates in Parliament on the Factories, Shops and Industries Act, 1962, or its predecessor the Factories and Shops Act, 1912. It is not our purpose to canvass the merits of such considerations (if any). What we do draw attention to is that a consequence of the rule that the Crown is not bound by a statute unless expressly named or bound by "necessary implication" is that if Parliament does not give specific attention to the question whether the Crown ought to be bound, and in consequence the legislation contains no provision on this question, the result, in nearly all cases, is that the Crown will not be bound even by legislation of the type of the Factories, Shops and Industries Act, 1962. This result does not follow from the expressed will of Parliament: it follows from inadvertence of Parliament to the narrowness and rigidity of the rule as applied by the courts.

14.9 *Evident anomalies in legislation.* The statute book abounds with apparent anomalies. The Scaffolding and Lifts Act, 1912, is expressed to bind the Crown;[45] but the Factories, Shops and Industries Act, 1962, does

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[43] Law Reform (Miscellaneous Provisions) Act, 1965, s. 7 and s. 9.

[44] Law Reform (Miscellaneous Provisions) Act, 1965, s. 10.

[45] S. 4B, added in 1948.

not contain a like provision and, accordingly, the rule applies and the Crown is not bound. It is expressly provided that the Public Health Act, 1902, and the Pure Food Act, 1908, are binding on the Crown;[46] but there is no such provision in respect either of the Cattle Slaughtering and Diseased Animals and Meat Act, 1902, or the Stock Diseases Act, 1923, and it would not seem that either of these last mentioned Acts is binding upon the Crown by "necessary implication" under the rule.[47] The Compensation to Relatives Act, 1897, is expressed to bind the Crown;[48] but no provision in this regard is contained in the Law Reform (Miscellaneous Provisions) Act, 1944, which provides for the survival of causes of action after death: and it is difficult to see how the Crown can be said to be bound by that Act by "necessary implication" under the rule. It is probable that the Law Reform (Miscellaneous Provisions) Act, 1944, does not bind the Crown. It would seem that, if the Law Reform (Miscellaneous Provisions) Act, 1944, does not bind the Crown, unjust consequences to subjects in litigation against the Crown would be avoided by the Claims against the Government Act[49] and that as a statutory corporation or other person entitled to the shield of the Crown is not "more royal than the King",[50] unjust consequences to subjects would be avoided likewise in litigation against such a corporation or other person. But the anomaly remains. We have referred to apparent anomalies in the legislation of New South Wales. We do not suggest that this State is unique in this respect. Indeed, it would seem that such anomalies are the general pattern wherever the common law rule applies. Why is this so?

14.10 *The reasons for anomalies in legislation.* The principal reasons are, we consider, these. It is a time-consuming task to consider each provision of a bill (or draft of a bill) for the purpose of determining whether it ought to be provided that the provision shall bind the Crown. Bills are, in general, drafted and debated under considerable pressure of time. Competing demands upon the time available usually relegate the question of whether the Crown ought to be bound by each provision to a low order of priority. This relegation is made easier because the rule not only fills the gap where no express provision is made but also makes it very unlikely that the Crown will be adversely affected by omission of a provision as to whether the Crown is to be bound. Perhaps, also, there are some who find comfort in an assumption that the Crown will always act in the spirit of legislation even if not legally bound by that legislation. It is not surprising that the oft-repeated suggestions made by the courts that more attention should be given to inserting in legislation express provision as to whether the Crown is to be bound have met with little response.

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[46] Public Health Act, 1902, s. 111.

[47] Cf. Windeyer *J.* in *Downs* v. *Williams* (1971) 126 C.L.R. 61 at p. 89.

[48] S. 6E, added in 1928.

[49] Claims against the Government and Crown Suits Act, 1912: *see* part 4 sections 9, 10.

[50] *Skinner* v. *Commissioner for Railways* (1937) 37 S.R. 261 per Jordan *C.J.* at p. 273. *See* part 12 section 2.

It would be sanguine to assume that a great deal more attention will be given in the future. Observations such as that made by the Privy Council in *Province of Bombay* v. *Municipal Corporation of Bombay*[51] that "it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words",[52] whilst accurate so far as they go, show little appreciation of the difficulties under which draftsmen and legislators perform their tasks.

14.11 *Does the rule accord with the expectations of Parliamentarians?* We consider that it is a self-evident proposition that legislation should bind the Crown unless Parliament otherwise intended. It is a "basic constitutional assumption that the Crown should be under the law."[53] But we gravely doubt whether the rule, as applied by the courts, accords with the expectations of Parliamentarians. For example,[54] did parliamentarians, when they considered the Factories, Shops and Industries Bill, contemplate that the Crown would not have the duty, like a subject, to fence dangerous machinery? The course of debate on the bill in Parliament suggests that they did not. We note, for example, that a suggestion made in debate in the Legislative Assembly that it be expressly provided that the Crown be bound elicited the question "The honourable member is not suggesting that the Crown will not be bound to comply with the provisions of the measure?" The reply to this question was "No, but I think it would be of assistance to provide specifically to that effect."[55] It is very unsatisfactory that proposed legislation be debated without its being clear to parliamentarians whether the legislation, if enacted, will bind the Crown. It is even more unsatisfactory if the rule, as it is understood and applied by the courts, is such that parliamentarians may be under the impression that the Crown will be bound although, in fact, it will not be bound. Yet this seems to be the case.

It is not surprising that many parliamentarians may be under a false impression as to whether legislation, if enacted, will bind the Crown. The conventional mode of expressing the rule can be very misleading. If one asked intelligent and generally well-informed people whether one would infer that a fundamental safety provision for employees would have been intended by Parliament to apply to the Crown no less than to anyone else who has a factory, many, if not most of them, surely would say "of course". In one sense the inference is a "necessary" inference. It is a necessary inference in that, most such people would, we believe, say that it is an inference which does not permit of doubt. But, as we have pointed out, this is not what the rule means by "necessary inference" or "necessary

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[51] [1947] A.C. 58.

[52] At p. 63.

[53] Hogg, *Liability of the Crown* (1971) at p. 203.

[54] *See also* section 32 of this part.

[55] Hansard (1962) Vol. 43, p. 2038.

implication". So severe are the criteria, applied by the courts, in determining whether there is a necessary implication that the Crown is bound that, unless legislation expressly provides that the Crown is to be bound, the presumption that the Crown is not intended to be bound is "almost irrebuttable".[56]

14.12 *The rule should be abolished.* We consider that radical reform is needed. We recommend that the rule be abolished. For convenience, we refer hereafter to the rule as the "old rule".

14.13 *But some protection should be given to the Crown.* But we believe that some special protection should be given to the Crown—protection which would accord with the expectations of Parliamentarians. There are those who argue that no special protection should be given.[57] Their view is that if Parliament wishes to except the Crown from legislation it should do so by express words. Such an approach applies in reverse the dictum of the Privy Council that "it must always be remembered that, if it be the intention of the Legislature that the Crown shall be bound, nothing is easier than to say so in plain words".[58] It suffers from the same defect. It does not give sufficient weight to the pressures of competing demands upon the time of draftsmen and legislators. No doubt it is practicable for draftsmen and legislators to give specific attention to the problem in respect of provisions as to which it is manifest that a major issue of policy is involved, that rights of subjects will be seriously affected, or that a difficult question of interpretation will arise if express provision is not made. But it is all too easy, under the pressure of a heavy work load, to fail to anticipate these considerations where they do not manifestly arise from the nature of the provision in question. Oversights are inevitable.

Our task, as we see it, is to devise special protection which produces a just result where no express provision is made—a result which accords with what reasonable men would expect.

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[56] H. Street (1947–1948) 7 *U.T.L.J.* 357 at p. 367. Are there any Acts of which it can be said literally, that their "apparent purpose" would be "'*wholly* frustrated" if the Crown were not bound? If, to take an extreme example, an Act provides a test for the merchantable quality of goods which differs from the present test, it would not be fanciful to argue that the apparent purpose of the legislation would be achieved, to some extent, if the Crown, as a vendor of goods, were not bound. It is reasonable to contemplate that, in a case as extreme as this, the courts would strain to hold that there would be total frustration unless the Crown were bound and that the Crown therefore is bound by "necessary implication". The test, as applied by the courts, lacks even the merit of being precise as to its connotation.

[57] *See, for example,* Glanville Williams, *Crown Proceedings* (1948) at pp. 53 and 54: Hogg, *Liability of the Crown* (1971) at p. 203.

[58] *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58 at p. 63.

14.14 *Recommendation for radical reform.* We recommend that a section be added to the Interpretation Act, 1897, to the following effect:

(1) In this section—

"foreseeable" in relation to a legislative provision means foreseeable at the time of the making of the legislative provision;

"legislative provision" means a provision of an Act or of a regulation;

"making", in relation to a legislative provision, means, in the case of a provision of an Act, the passing of the Act and, in the case of a provision of a regulation, the making of the regulation.

"old rule" means the special rule of construction that a legislative provision binds the Crown only where it does so by express words or necessary implication.

"regulation" means ordinance, by-law, rule or other legislation made under an Act.

(2) The old rule is abolished.

(3) Where, but for the old rule, a legislative provision would bind the Crown, it shall be construed as binding the Crown except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to:

(a) the foreseeable extent if any to which the legislative provision, if binding the Crown, might impede the Crown (or any agency of the Crown which would not be bound unless the Crown were bound) in any activity and the foreseeable extent to which that impediment might be against the public interest;

(b) the foreseeable extent if any to which the legislative provision, if binding the Crown, might burden the Crown (or any agency of the Crown which would not be bound unless the Crown were bound) in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision, in respect of any property; and

(c) the foreseeable extent if any to which the purpose or any of the purposes of the legislative provision might fail if the Crown were not bound and the foreseeable extent to which that failure might be against the public interest.

(4) All courts and persons acting judicially shall take judicial notice of all matters pertinent to the considerations mentioned in paragraphs (a), (b) and (c) of subsection (3) and for that purpose may obtain information by any means whereby a court may obtain information for the purpose of equipping itself to take judicial notice which by law it is required to take but shall not be bound to receive evidence in respect of any of those matters.

(5) This section does not apply to a legislative provision made before the commencement of the Interpretation (Amendment) Act, 1976.

We proceed to state our reasons for this recommendation. We do so by reference to the subsections of the provision recommended.

14.15 *Abolition of the old rule.* Subsection (2) abolishes the old rule.

It does not follow that the Crown would be bound by all legislative provisions which do not expressly except it. It may be impliedly excepted by reason of another rule of construction, special to the Crown. This is the rule that there is the strongest presumption that legislation is not intended to subject the Crown to criminal liability. Or it may be impliedly exempted by application of the ordinary rules of construction—that is, the rules of construction which are of general application and are not special to the Crown.

14.16 *Implied exception of the Crown from criminal liability.* The rule that there is the strongest presumption that legislation is not intended to subject the Crown to any criminal liability is independent of the old rule abolished by subsection (2).

It was considered by the High Court in *Cain* v. *Doyle*.[59] In that case the legislation in question made it an offence, punishable by the prescribed fine, for an "employer" to terminate, in certain circumstances, the employment of a servant. The legislation defined "employer" as including the Crown. The High Court[60] held that the Crown though bound by the requirement not to dismiss a servant was not liable to the prescribed fine for breach. Latham *C.J.* expressed the view that it was not conceivable that the Crown could be liable. "[T]he fundamental idea", he said, "of criminal law is that breaches of the law are offences against the King's peace, and it is inconsistent with this principle to hold that the Crown can itself be guilty of a criminal offence."[61] Dixon *J.*, with whom Rich *J.* concurred, accepted that it may be possible to subject the Crown to liability to fine but went on to say that there is "the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them. But we should at least look for quite certain indications that the legislature had adverted to the matter and had advisedly resolved upon so important and serious a course".[62]

14.17 *Implied exemption of the Crown by application of the ordinary rules of construction.* By application of the ordinary rules of construction, that is rules of construction which are of general application, a person, whether a natural person or an artificial person such as a corporation, may be impliedly excepted from a legislative provision the language of which is capable of literal application to it. This may be illustrated by reference to the subsidiary rule of construction that every provision of an Act is to "be construed with

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[59] (1946) 72 C.L.R. 409.

[60] Latham *C.J.*, Rich and Dixon *JJ.*, Starke and Williams *JJ.* dissenting.

[61] At p. 418.

[62] At p. 424. Compare *Downs* v. *Williams* (1971) 126 C.L.R. 61 per Windeyer *J.* at pp. 76, 77.

reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute".[63] Suppose this simple case. A section of an Act provides: "Every person who is not a minor shall lodge an application for registration within 14 days after the commencement of this Act". This section is capable of literal application to the Crown in right of the State of New South Wales as it is to all subjects other than minors. But if the context of the section, as it appears in the supposed Act, is that registration is required for the purpose of a compulsory medical examination, the Crown in right of the State would not be bound to register. It is apparent from the context that the word "person", where used in the section, means a natural person. It does not include a corporation or a body politic. The Crown is impliedly excepted by application of the ordinary rules of construction—just as a corporation is impliedly excepted.

We have supposed a simple case. Cases of implied exception usually involve much more complicated legislation. But in every such case, where legislation is construed according to the ordinary rules of construction, one must "intend the Legislature to have meant what they have actually expressed".[64] The ordinary rules do not permit the implication of an exception which does not appear from the actual language of the relevant legislation considered as a whole.

14.18 *The new rule.* Subsection (3) provides a new rule of construction which is special to the Crown. Where it applies the Crown may be impliedly excepted from a legislative provision, in whole or in part, notwithstanding that the actual language of the relevant legislation, considered as a whole, is not such that, construed according to the present rules of construction, it impliedly excepts the Crown.

The subsection commences with the positive declaration that "where, but for the old rule, a legislative provision would bind the Crown, it shall be construed as binding the Crown . . . " The rules of construction, other than the old rule, apply. If, in accordance with these rules, the Crown would be bound, it is bound. This does not mean that the Crown is bound by all legislative provisions which do not expressly except it. For, as we have seen, it may be exempted by the special rule that there is the strongest presumption that legislation is not intended to subject the Crown to any criminal liability, or it may be impliedly exempted by application of the ordinary rules of construction.

But the subsection goes on to state an exception. The exception is intended to give to the Crown the degree of special protection which, we believe, accords with what reasonable persons would expect where no express provision has been made in the legislation to be construed. It is this. The Crown is bound "except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to—

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[63] *Canada Sugar Refining Co. Ltd* v. *R.* [1898] A.C. 735 per Lord Davey at p. 741.

[64] *R.* v. *Banbury (Inhabitants)* (1834) 1 Ad. & E. 136 per Parke *J.* at p. 142: 110 E.R. 1159 at p. 1161.

(a) the foreseeable extent if any to which the legislative provision, if binding the Crown, might impede the Crown (or any agency of the Crown which would not be bound unless the Crown were bound) in any activity and the foreseeable extent to which that impediment might be against the public interest;

(b) the foreseeable extent if any to which the legislative provision, if binding the Crown, might burden the Crown (or any agency of the Crown which would not be bound unless the Crown were bound) in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision, in respect of any property; and

(c) the foreseeable extent if any to which the purpose or any of the purposes of the legislative provision might fail if the Crown were not bound and the foreseeable extent to which that failure might be against the public interest.

If, of course, legislation expressly provides that it binds the Crown, the Crown would be bound. For in that case it cannot be said that "it is unlikely that it would have been intended to bind the Crown". Parliament has declared its intention. But where Parliament has not declared its intention, the courts are required to consider whether it is unlikely that, having regard to the particular matters stated, in subsection (3), it would have been intended that the legislative provision in question bind the Crown.

14.19 *Regard is to be had to the foreseeable consequences.* In determining whether it is unlikely that Parliament would have intended that the Crown be bound, the courts are required by subsection (3) to have regard to the foreseeable consequences if the Crown were bound or, on the other hand, were not bound. As Parliament has not expressed its intention as to whether the Crown is to be bound, these consequences are to be considered as indicating whether it is unlikely that it would have been intended that the Crown be bound. The courts are accustomed, in applying the present rules of construction, to have regard to consequences as an aid to construction. In applying the present rules "the court . . . when faced with two possible constructions of legislative language, is entitled to look to the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament".[65] The essential difference between the present rules and subsection (3) as to regard being had to consequences is that, under the present rules, such regard is had only where Parliament has expressed its intention but in language which is unclear. Subsection (3), on the other hand, extends to the case, on the question whether the Crown is bound, where Parliament has not expressed its intention. But the fact remains that it is by no means a novel task for the courts, in construing legislation, to have regard to the foreseeable consequences.

14.20 *Statement of the particular matters to which regard is to be had.* We have considered whether it is desirable that the new rule specify the particular matters to which regard is to be had in weighing the effect of the foreseeable consequences. One approach which could be taken is to leave

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[65] *Gill* v. *Donald Humberstone & Co. Ltd* [1963] 1 W.L.R. 929 per Romer *L.J.* at p. 934.

the courts without statutory guidance as to this. On this approach the new rule could be formulated in this way—namely, "Where, but for the old rule, a legislative provision would bind the Crown, it shall be construed as binding the Crown except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to the foreseeable consequences if the Crown were bound." But we do not favour this approach. We consider that an exhaustive statement of the relevant matters would be a valuable guide to the courts and would promote uniformity of construction. Subsection (3) contains an exhausive statement of the relevant matters. We proceed to consider them.

14.21 *The extent to which any activity of the Crown would be impeded.* Paragraph (a) of the subsection directs attention to the extent to which any activity of the Crown would be impeded.

It refers to "any" activity. The paragraph is not limited by any concept of a function which is a traditional function of government: for there is nothing in the inherent nature of any function which requires it to be categorized as either governmental or non-governmental.[66] All functions exercised by the Crown or a statutory body or other person representing the Crown come within the ambit of the expression—including functions of an industrial or commercial nature which are exercised by subjects as well as by the Crown or a person representing the Crown.

It may be helpful to expound by illustration the operation of the paragraph. Take this hypothetical case. A provision of an Act relating to prevention of injury from fire provides that no door of a place intended to be occupied or used by any person shall be locked so as to prevent the door being opened, without a key, from the inside. The Act is silent as to whether the Crown is bound by the provision. Paragraph (a) requires the courts to determine, where occasion arises, the extent, if any, to which it is unlikely that it would have been intended that the Crown be bound by the provision, having regard to the foreseeable extent to which the provision, if binding the Crown, might impede the Crown in any activity, and the foreseeable extent to which that impediment might be against the public interest. One of the activities of the Crown is to incarcerate persons serving prison sentences. It is clear that the Crown would be greatly impeded in that activity if it were bound by the provision. If the Crown were bound by the provision in respect of that activity, the danger of the escape of prisoners, particularly of those prone to resort to physical violence, would be magnified. Clearly, it is in the public interest that the Crown be not impeded by being bound to keep cell doors, and prison doors in general, unlocked from the inside. The paragraph requires the courts to take cognisance of this public interest. The appropriate inference, we suggest, is that it is unlikely that it would have been intended that the provision bind the Crown in respect of the incarceration of persons serving prison sentences. But this may not be the appropriate inference in respect of other activities. The Crown may be bound in respect of some activities; but not bound in respect of others. Consider, for example, the activity of running government schools. It may be inconvenient for the Crown to be

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[66] *See* section 4 of this part. *See also* part 13 section 32.

required to keep unlocked from the inside all the doors of a school hall. The orderly control of boisterous schoolboys may be facilitated if they are able to leave only by one of the doors. But the Crown would not be greatly impeded if it were bound to keep all the doors unlocked from the inside. Schoolboys are not likely to defy orders as to which door they are to leave by: and, even if they did, no great harm would be likely to result. There is little, if any, public interest that the Crown be not impeded, in the running of government schools, to the extent of being required to keep the doors of school halls, or other school buildings, unlocked from the inside. It would not be reasonable to infer that it is unlikely that it would have been intended that the Crown be bound by the provision to the extent that it were obliged to keep the doors of school halls unlocked from the inside.

14.22 *Effect upon the Crown in respect of its property.* Paragraph (b) of the subsection requires the courts to have regard also to the foreseeable extent, if any, to which the legislative provision, if binding the Crown, might burden the Crown in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision, in respect of any property. It may be helpful again, to expound the operation of the paragraph by example. Take this hypothetical case. A provision of an Act requires that the owner of any land destroy all rabbits upon it. The Act is silent as to whether the Crown is bound. But the Crown owns millions of acres of virgin land which are unoccupied, unfenced, and put to no substantial use. It would be a grossly onerous burden upon the Crown for it to be bound to destroy all rabbits upon land of this character. The courts are required to take cognisance of this. It is some indication that it may be unlikely that it would have been intended that the Crown be bound, in respect of land of this character, by the legislation. But there is, in this example, more. The Crown, if bound, would be onerously affected to a very much greater extent than any subject. No subject owns millions of acres of land of this character. The paragraph requires that the courts take this, also, into account. We suggest that the appropriate inference is that it is unlikely that it would have been intended that the Crown be bound in respect of land of this character. But the inference may not be appropriate in respect of other legislative provisions which would burden the Crown in respect of land of this character. Questions of degree are involved. Take this hypothetical case. A provision of an Act requires that the owner of any land take all reasonable precautions to prevent prickly pear on the land spreading onto land in other ownership. Poisoning so much of the prickly pear, on Crown land of this character, as is in close proximity to land in private ownership, would satisfy the provision. In this case, we suggest it would not be appropriate to infer that it is unlikely that it would have been intended that the Crown be bound by the provision.

We have pointed out, in respect of paragraph (a), that the correct inference may be that a provision does not bind the Crown in respect of some activities although this inference would not be drawn in respect of other activities. Likewise, the correct inference may be that the Crown is bound in respect of some of its property although this inference would

not be drawn in respect of other property. Take, again, the case of the provision requiring destruction of rabbits. Where the Crown owns a dairy as an adjunct to an agricultural college, there is no cause to infer that it would not be bound to destroy rabbits on the dairy. The burden upon the Crown would not be very onerous; nor would it be especially onerous in comparison with the burden upon other owners of dairies.

Paragraphs (a) and (b) are not mutually exclusive. A provision which, if it binds the Crown, will burden the Crown in respect of property may also impede it in some activity. In that case the courts are required to give weight both to the effect upon property and the effect upon the activity. The considerations referred to in these paragraphs may, in their combined weight, lead to the inference that it is unlikely that it would have been intended that the Crown be bound, at least in some respect, although neither paragraph (a) nor paragraph (b), considered separately, would lead to this inference.

14.23 *Extent to which the legislation will fail to achieve its apparent purpose if the Crown is not bound.* Paragraph (c) of subsection (3) requires the courts to have regard to the foreseeable extent, if any, to which the purpose or any of the purposes of the legislative provision might fail if the Crown were not bound and the foreseeable extent to which that failure might be against the public interest. If all the purposes of legislation would be fully achieved if the Crown were not bound it is, obviously, unlikely that it would have been intended that the Crown be bound. Take this hypothetical case. An Act requires a duty stamp to be affixed to any receipt by the person who receives the money. The purpose of the legislation is to raise revenue for the Crown. That purpose would be as fully achieved if the Crown were not bound by the provision as it would be if the Crown were bound by the provision. The Crown would not be bound by it. But in most cases of legislation which is expressed generally as to who is to be bound by it, some purpose of the legislation will fail, at least to some extent, unless the Crown is bound. And it may be that it is of considerable public importance that the purpose of the legislation be not in part frustrated by the Crown being exempt, wholly or in some respect, from operation of the legislation. Where this is the case, it is some indication that one should not draw the inference, which might otherwise be drawn, that it is unlikely that it would have been intended that it bind the Crown. Paragraph (c) leaves no doubt that it does not follow from paragraphs (a) and (b) that whenever the Crown, if bound, would be substantially impeded in some activity or substantially burdened in respect of some property, it must be inferred that the Crown is not bound. But, equally, it does not follow from paragraph (c) that whenever the purpose of legislation would fail, to some extent, unless the Crown were bound, it is not permissible to infer from other considerations that it is unlikely that it would have been intended that the Crown be bound. The countervailing indications, to which paragraphs (a) and (b) direct attention, may be stronger. The competing considerations must be weighed. It may be objected that this must lead to lack of certainty in interpretation. But weighing competing considerations in interpretations is the common role of the courts.

It may be helpful to expound by illustration the operation of paragraph (c). We have referred, in dealing with paragraph (a), to the hypothetical case where a provision of an Act requires, as a fire safety precaution,

that no door of a place intended to be occupied or used by any person shall be locked so as to prevent the door being opened, without a key, from the inside. Clearly, the purpose of the legislation is to prevent the tragedy of a person being trapped by fire because he is unable to open a door from the inside. And there is no doubt that this purpose might fail, to some extent, if the doors of prison cells are locked from the outside. A prisoner, locked in his cell, is at risk of death or injury from fire, just as is any other person locked in a room from which he cannot leave unless the door is unlocked for him. But so seriously would the Crown be impeded in incarcerating prisoners, if the legislation applies to the Crown in that respect, that the only reasonable inference, we suggest, would be, if nothing else appears from the legislation, that it is unlikely that it would have been intended that the Crown be bound. But take this hypothetical case. Regulations under an Act are made which limit, by reference to the existence of fire escapes, the number of persons whom the occupier of premises may permit to be in a building at the one time. There is nothing in the wording of the regulations to indicate that schools are not "premises"; and the regulations apply, accordingly, to private schools. But the standard prescribed by the regulations is high; and if the regulations apply to the Crown in respect of government schools, either the number of the pupils who are accommodated in many existing school buildings must be reduced or expensive additional fire escapes must be provided. This would be a serious problem for the Crown in administering the education system. Nevertheless, we suggest that in this case the Crown would be bound. Exemption of government schools would be a substantial inroad into the efficacy of the legislation to achieve the purpose of it; and it is, clearly, of considerable public importance that this beneficent purpose be not frustrated in this way. These considerations outweigh the inference which might otherwise have been drawn from the administrative problems which the legislation presents for the Crown. If the Crown wishes to escape the burden of the regulations, it is appropriate that it do so by express provision and accept the political responsibility for doing so.

14.24 *The requirement of foreseeability.* Subsection (3) requires the courts to have regard to the matters which it specifies so far as "foreseeable". It is a fundamental rule of construction that legislation bears the meaning which it has at the time of enactment.[67] The construction is fixed as at that time. It does not change from day to day. "Foreseeable", in subsection (3), means foreseeable at the time of enactment. This does not mean that regard may be had only to activities which were carried on at the time of enactment or to property which was, at that time, property of the Crown. It is foreseeable that the Crown will become involved in activities which do not presently concern it: and it is foreseeable that the Crown will acquire property. But in the unlikely event that some dramatic change occurs, which was not foreseeable at the time of enactment, the Crown, if theretofore bound by legislation, will not cease to be bound and, if theretofore not bound by legislation, will not become bound. Legislation is enacted to deal with what is foreseeable. It is not enacted to deal with what is not

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[67] *Sharpe* v. *Wakefield* (1888) 22 Q.B.D. 239 per Lord Esher at p. 242.

foreseeable. If circumstances occur which were not foreseeable and in consequence legislation, construed as at the date of enactment, binds the Crown where it is no longer appropriate that the Crown be bound, or does not bind the Crown where it has become appropriate that the Crown be bound, amendment of the legislation is a matter for Parliament. It is not a matter for the courts.

14.25 *Judicial notice.* Subsection (4) requires that the courts take judicial notice of matters necessary to give effect to subsection (3). Thus, for example, courts, in applying paragraph (a) of that subsection are required, where the question arises whether a legislative provision binds the Crown in respect of some activity, to have regard to, amongst other matters, the foreseeable extent if any to which that legislative provision, if binding the Crown, might impede it in that activity. It may be, in any particular case, that to equip himself to apply paragraph (a), a judge will need information. Subsection (4) enables the judge to obtain the information which he requires by any means whereby a court may do so to equip itself to take judicial notice which it is required by law to take.

This enabling provision requires some exposition. Where a judge is required by law to take judicial notice of a matter, and for that purpose requires information, the ordinary rights of parties in the litigation to adduce evidence and the ordinary rules relating to the admissibility of evidence do not apply. The position may be illustrated by considering the rule of construction of statutes that where the meaning of the words is not plain a court, in construing the statute, is to have regard to its historical setting so that the court may discern the "mischief" for which the earlier law did not make adequate provision and for which the statute is intended to supply a remedy. The construction of a statute is a matter for the court alone. Iti s not an issue of fact. The parties to the litigation have no right to call witnesses as to the historical setting. The judge takes judicial notice of the historical setting and, if his existing knowledge is inadequate, he informs himself by appropriate means—such as reference to published histories and other published works which fill any gaps in his knowledge. A litigant cannot require that the writers of the works consulted, if still living, be called to give evidence or that they submit themselves to cross-examination. The parties may, of course, draw to the attention of the judge the relevant works and passages in those works—just as they may cite authority for any proposition of law. Indeed, the judge may invite this assistance. But the judge is not limited to the materials to which the parties draw his attention any more than, on a proposition of law, he is limited to consideration of the authorities cited to him. His function, although directed to ascertaining the relevant facts as to the historical setting, is different from his function as the trier of facts in issue in the litigation. On facts in issue in litigation the parties have the right to adduce evidence and to test the evidence by cross-examination; and the judge decides the issues on the evidence. He does not make his own investigation. The precise limits to the means whereby a judge may equip himself with knowledge so that he may take judicial notice of matters, where it is the function of the court to take judicial notice, have not been drawn by reported decisions. No doubt the self-imposed restraints of judicial fairness and the caution with which courts exercise

inherent powers have made precise delineation unnecessary. It is fortunate that the courts have not confined themselves to precisely delineated means of obtaining information to equip them to take judicial notice. A wide discretion is needed. This is illustrated by the case of *McQuaker* v. *Goddard*.[68] In that case a man was injured by a camel. He sued the proprietor of the zoological garden in which the camel was kept. He was unable to prove that the camel had previously exhibited, to the proprietor's knowledge, a vicious propensity. In law, each species of animals is classified as being *ferae naturae* (wild) or as being *mansuetae naturae* (domesticated). The plaintiff could succeed only if, in law, camels, as a species, belong to the category of animals *ferae naturae*. The law requires that the court take judicial notice of whether any particular species of animals is within that category or within the other category (*mansuetae naturae*). The trial judge, who sat without a jury, permitted the parties to call experts on the behaviour of camels as a species and as to the extent to which, as a species, they were domesticated. These experts were sworn and, it may be inferred, cross-examined. The course taken by the trial judge did not receive any criticism by the Court of Appeal to which the plaintiff, who was unsuccessful before the trial judge, appealed. Clauson *L.J.* said:

> That evidence is not, it must be understood, in the ordinary sense evidence bearing upon an issue of fact . . . The reason why this evidence was given was for the assistance of the judge in forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge. The point is best explained by reading a few lines from that great work, the late Mr Justice Stephen's, *Digest of the Law of Evidence*. In the 12th edition article 62 is as follows: "No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take notice produces any such document or book of reference." From that statement it appears that the document or book of reference only enshrines the knowledge of those who are acquainted with the particular branch of natural phenomena; and in the present case, owing to some extent to the fact that there appears to be a serious flaw in a statement in a well-known book of reference on the matter here in question, the learned judge permitted, and properly permitted, oral evidence to be given before him by persons who had, or professed to have, special knowledge with regard to this particular branch of natural history. When that evidence was given and weighed up with the statements in the books of reference which were referred to, the facts become perfectly plain; and the learned judge was able without any difficulty whatever to give a correct statement of the natural phenomena material to the matter in question, of which he was bound to take judicial notice.[69]

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[68] [1940] 1 Q. B. 687.

[69] At pp. 700–701.

Subsection (4) leaves a judge free to choose, in any case, the means which, in that case, are appropriate for him to obtain the information which he needs to discharge properly his duty of construing the legislation in question. In some cases he may not need to supplement his existing knowledge. In other cases, he may need further information. Reference to published statistics or other works may suffice. If not, he may choose to call for statistical or other information from a reliable source. Cases may occur in which the judge considers that these avenues of inquiry would not suffice for his need for information to be satisfied. In these cases he may permit, even invite, parties to call witnesses and may permit cross-examination of those deponents to such extent as he considers helpful to get to the facts. But the judge remains in control and the danger, always present in our adversary system of litigation on the trial of disputed questions of fact, that time and money will be wasted in unhelpful battle between the parties, is obviated.

We have indicated that a judge requiring information to equip himself to take judicial notice may secure sworn testimony as to the material matters. But he should not be bound to receive such testimony. He may not need it; and, if he does not need it, it should not be thrust upon him. Subsection (4) provides, in direct terms, that he is not bound to receive evidence. We have expressed the view that it is the law that where a judge is, by law, required to take judicial notice, no party has a right to require that he receive evidence on the matter of which he is required to take such notice. But this view of the law may not be completely beyond argument. We would leave no room for doubt on this point in relation to the operation of the proposed section.

We consider that the requirement made by subsection (4) that the courts shall take judicial notice of all matters pertinent to the considerations mentioned in paragraphs (a), (b) and (c) goes far to allay any apprehension that our proposals, if implemented, might lead to inordinately lengthy and expensive disputation in court as to what are the facts which subsection (3) requires courts to take into account in construing a relevant enactment. But there is another matter which, we believe, allays any apprehension that might still remain. It is that where a court construes legislation it is declaring the law. This declaration of the law, like any other ruling of law integral to the decision of a court, attracts the doctrine of judicial precedent. In accordance with that doctrine the construction so declared will bind courts of inferior status. It will be persuasive authority, although not binding, in a court of equal status. It will not, of course, bind a court of superior status: but upon the question of construction arising in a court of superior status and being there decided, the decision of that court will prevail in all courts inferior to it. Thus, by the doctrine of judicial precedent, certainty and uniformity is attained. The relevant facts will not fall for investigation every time the question of construction arises.

14.26 *The proposed section is not given a retrospective effect.* Subsection (5) provides that the section does not apply to a legislative provision made before the commencement of the section.

14.27 *Should legislation implementing our recommendation take the form of a new Principal Act?* We have drafted the proposed new section on the assumption that, if it is acceptable in principle to the Government, provision for its objectives will be inserted in the Interpretation Act, 1897. It has been suggested to us that, if our proposals find favour in principle, it would be better that they receive legislative expression in a separate Act. It does not matter to us which course is taken. We do not seek to intrude into the role of parliamentary counsel. We put our proposals in legislative form solely for the purpose of making clear their intent.

14.28 *The radical nature of our recommendation.* The recommendation expressed by the proposed new section is radical. It is radical in that it is based upon abolition of the fundamental premise of the common law that, *prima facie,* legislation, although expressed in general terms, is to be construed as not being binding upon the Crown. It would be a bold step to implement the recommendation—but not, as we see it, an imprudent one. There are safeguards. The principal of these are:

(a) existing legislation would not be affected;

(b) Parliament would remain in control: it could ensure, in appropriate cases, that new legislation contained express provision that it did not bind the Crown; and

(c) notwithstanding that any legislation is expressed in general terms, and it is not expressly provided that the Crown is not bound by it, it will not bind the Crown to the extent to which it is unlikely that it would have been intended that it bind the Crown having regard to the matters specified in subsection (3): and the provisions of subsection (3) accord, we believe, with both common sense and reasonable expectations.

But it must be recognized that implementation of our proposals would destroy the present position, comfortable for the Crown, that it does not much matter so far as its own interests are concerned if legislation is prepared, and enacted, without attention being given to the question whether the legislation is to bind the Crown. If our proposals were implemented, government departments, for the purpose of giving instructions to parliamentary counsel for the preparation of any bill, would find it necessary to give attention to this question. This might cause some delay—at least until Departments became accustomed to the impact of the new provisions. It must also be faced that it would be natural that Departments would be prone to be very cautious, at least initially, and to seek express exemption of the Crown in any proposed legislation lest, if the Crown were bound, its interests might suffer some unforeseen prejudice. Departments might be reluctant to rely upon exception by subsection (3). But even if it were to happen—and we do not anticipate that this would happen—that almost every bill contained an express exclusion in favour of the Crown, so that the results were the same as it now is at common law where the legislation is silent as to whether the Crown is bound, the section which we have proposed would have achieved something worthwhile—namely that the attention of Parliament would be drawn to the fact that, if the bills in question were enacted as presented, the Crown would be exempt. The

Crown would not obtain exemption simply because the question of whether the Crown ought to be exempt had not been considered by Parliament or by those responsible for giving instructions for preparation of the bills.

14.29 *Comparison with the Claims against the Government Act.* There is a similarity in approach between the reforms effected by the Claims against the Government Act, as long ago as 1876,[70] and that which we recommend now be effected as to the application to the Crown of legislation. The approach taken by the Claims against the Government Act was to equate, in general, the liability of the Crown in litigation to that of a subject—yet recognizing, by the qualification that the equating is not the absolute in all respects but is to be "as nearly as possible the same", that the position of the Crown may be, in comparison with that of subjects, in some respects special. Likewise the approach taken in our recommendation as to whether legislation is to bind the Crown is that, in general, the Crown, like the subject, is bound by legislation which is expressed generally as to its application; but it is recognized that the position of the Crown may be, in comparison with that of subjects, in some respects special, and in such cases it may be inferred that it was not intended that the Crown be bound. Our recommendation is far less sweeping than the reform effected by the Claims against the Government Act—a reform which, as expounded by the Privy Council in *Farnell* v. *Bowman*,[71] has been described, fairly, as "cataclysmic".[72] But, no doubt, it will attract the same objections—objections directed in ultimate analysis, to the surrender of certainty as to the Crown's position (albeit to the detriment of subjects) to judicial wisdom in giving recognition to the special position of the Crown. The answer to those objections is that a century of experience with the operation of the Claims against the Government Act is cogent evidence, if such evidence is needed, that the courts are worthy of the trust in them which underlies the recommendation. We refer hereafter to this recommendation as our "principal recommendation".

14.30 *Recommendation in respect of the application to the Crown of statutory duties.* We are convinced that radical reform is needed and that it must have, as its foundation, abolition of the existing rule that, *prima facie*, legislation, although expressed in general terms, is to be construed as not binding upon the Crown. But if our principal recommendation is not acceptable, we recommend that a more modest and limited reform be implemented to deal with the specific problem to which *Downs* v. *Williams*[73] has drawn attention. It is this. A legislative provision may impose a statutory duty which is such that a person who suffers damage[74] caused by breach of the duty is entitled to recover damages from the offender. The provision may be expressed in general language as to who is to have the duty, language wholly apt to include the Crown. But, by the old rule, the Crown is not bound by the provision unless the legislation

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[70] Claims against the Colonial Government Act, 1876.

[71] (1887) 12 A.C. 643.

[72] *Downs v. Williams* (1971) 126 C.L.R. 61 per Windeyer *J.* at p. 80.

[73] (1971) 126 C.L.R. 61.

[74] The damage may be of any description—such as bodily injury or detriment to property.

expressly states that the Crown is bound or it binds the Crown by necessary implication: and it is almost impossible to show that the Crown is bound by necessary implication. If the Crown is not bound it is not liable to pay damages on the cause of action that the Crown has broken the statutory duty. The limited reform which we recommend is a provision to the following effect:

(1) In this section—

"damage" includes loss of life and personal injury;

"legislative provision" means a provision of an Act or of a regulation;

"making", in relating to a legislative provision, means, in the case of a provision of an Act, the passing of the Act and, in the case of a provision of a regulation, the making of the regulation;

"regulation" means ordinance, by-law, rule or other legislation made under an Act.

(2) Where, but for the special rule of construction that a legislative provision binds the Crown only where it does so by express words or necessary implication, the Crown would have a statutory duty breach of which causing damage to a person would entitle that person to recover damages from the Crown, the rule shall not apply and the Crown shall have the duty.

(3) This section does not apply in respect of a legislative provision made before the commencement of the Interpretation (Amendment) Act, 1976.

We refer to the recommendation embodied in this provision as our "limited recommendation". We proceed to comment upon it.

14.31 *Scope of the recommendation.* Our limited recommendation does not abolish the old rule. What, in substance, it does is to exclude from the ambit of the old rule, statutory duties of such a character that the Crown, if it were bound by them, would be liable, as would be a subject bound by them, in damages to a person injured by breach of them. Relatively few statutory duties are of this character; but they are commonly of the greatest importance in litigation. In the main they are duties directed to the protection of employees from accident at work or exposure at work to physically harmful conditions.[75]

The limited recommendation does not affect rules of construction other than the old rule. It follows that if the language of legislation is not apt to apply to the Crown, the Crown is not bound—any more than a subject is bound by legislation the language of which is not apt to apply to him.

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[75] Fleming, *The Law of Torts*, 4th edn (1971) p. 131 n.36.

The limited recommendation takes a direct approach. It subjects the Crown to some statutory duties from which otherwise it would be exempt because of the old rule. An alternative approach would be to leave the Crown exempt from these statutory duties but to provide that it shall have the same liability in damages for breach of any of them as is would have if it were bound by them. But the concept of a breach by the Crown of a statutory duty which it does not have is clumsy. Introduction into the Claims against the Government Act[76] of a provision giving effect to the concept could be perilous. An Act must be read as a whole. The provision, if inserted in the Claims against the Government Act, might create further difficulty as to the construction of the fundamental provision of the Act that "the proceedings and rights of parties therein shall as nearly as possible be the same . . . as in an ordinary case between subject and subject".[77] One could seek to avoid this risk by implementing the alternative approach in an Act separate from the Claims against the Government Act. But it is not desirable that there be two Acts dealing with the liability of the Crown in litigation. We prefer the direct approach taken by our limited recommendation. It does not touch upon the construction of the fundamental provision of the Claims against the Government Act. It deals with a different matter. It is appropriate that legislation giving effect to it does not take the form of a provision inserted into that Act but that it takes the form of an amendment to the Interpretation Act, 1897, or is enacted as a separate Act.

14.32 *The melancholy record of inattention or misunderstanding.* Neither our principal recommendation nor our limited recommendation applies to existing legislation. It seems likely that it is only because of inattention or misunderstanding that some of this legislation (such as section 27 of the Factories, Shops and Industries Act, 1962, in so far as it imposes the statutory duty to fence dangerous machinery)[78] is not expressed to bind the Crown. From time to time there has been *ad hoc* remedial legislation to deal with particular oversights and errors. For example, the Compensation to Relatives Act, 1897, was not expressed to bind the Crown. More than 30 years later, in 1928, the Act was amended to provide that it does bind the Crown[79]—although, in this instance, because of the Claims against the Government Act, the amendment probably was not needed to achieve the result that, in litigation against the Crown, a subject has the same rights as he has against another subject bound by the Act.[80] The Scaffolding

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[76] Or our draft Crown Proceedings Bill: appendix D.

[77] Claims against the Government and Crown Suits Act, 1912, s. 4; draft Crown Proceedings Bill, clause 5. The draft Bill appears as appendix D.

[78] *See* section 11 of this part: this appears to be an instance of misunderstanding.

[79] Act No. 8, 1928, s. 2 (2).

[80] *See* part 4 sections 9, 10.

and Lifts Act, 1912, was not expressed to bind the Crown. Thirty-six years later, in 1948, that Act was amended to provide that it did bind the Crown[81] —and until this amendment the Crown was not liable to any subject for the tort of breach of statutory duty where it failed to observe the requirements of that Act (and regulations made under it) for the safety of workers.[82] This is a melancholy record. No one knows how many subjects, injured during those thirty-six years in which the Scaffolding and Lifts Act, 1912, did not bind the Crown, were deterred thereby from bringing actions for damages against the Crown (or a Crown instrumentality) or, having brought such actions, settled them cheaply.

14.33 *Recommendation: review of legislation.* We recommend that a review be undertaken of all existing legislation to determine to what extent provisions of it should be expressed to bind the Crown. Such a review can be undertaken, initially, by each Department of the Acts administered by it. But more is needed; for departments have become accustomed to the Crown being in a privileged position. There is need for machinery which will enable a more detached point of view, one especially alert to risk of injustice to subjects, to have a persuasive influence. In our Report on Appeals in Administration[83] we have recommended creation of the office of Commissioner for Public Administration and the appointment of an Advisory Council to assist him. If this recommendation is adopted, the Commissioner and the council could be entrusted with the role of presenting the detached point of view. But whatever be the machinery for review, more than the voice of departments which are directly concerned needs to be heard. There is, moreover, no occasion for secrecy. We recommend that the reports of the review body be tabled in Parliament.

We further recommend that the functions of the review body, however constituted, be extended to the review of legislation hereinafter enacted. Clearly, we suggest, this should be done if our principal recommendation in respect of the application of legislation to the Crown is rejected and only our limited recommendation, which is directed to the construction of legislation which imposes a statutory duty, is implemented. *A fortiori* the function of the review body should be extended if both the principal recommendation and the limited recommendation are rejected. But even if our principal recommendation is accepted, it may happen that future legislation contains express exemptions of the Crown which turn out to produce unanticipated hardship to subjects. The role of the review body should be defined sufficiently widely for it to have authority to deal with this contingency.

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[81] Act No. 38, 1948, s. 2 (b).

[82] *Downs* v. *Williams* (1971) 126 C.L.R. 61.

[83] *L.R.C.* 16.

PART 15.—*Summary of Main Recommendations.*

The principal features of the main recommendations which we have made in this report are these—

1. The fundamental principles of the Claims against the Government and Crown Suits Act, 1912, namely—

(a) that a subject having or deeming himself to have any just claim whatever against the Crown may sue the Crown in any competent court; and

(b) the proceedings and rights of the parties therein shall as nearly as possible be the same as in an ordinary case between subject and subject,

should be retained.[1]

2. The more elaborate and detailed provisions of the Crown Proceedings Act 1947 of the United Kingdom should not be adopted.[2]

3. The Claims against the Government and Crown Suits Act, 1912, should be replaced by an Act which preserves the fundamental principles referred to in the first paragraph of this summary but which—

(a) substitutes for the nominal defendant procedure the procedure of suing the Crown directly;[3]

(b) provides that to "sue" under the new Act includes to bring and maintain proceedings against the Crown by way of counterclaim or third-party;[4]

(c) provides that the relief which may be granted includes a declaration;[5] and

(d) requires the Crown, like a subject, to pay interest on judgment debts.[6]

4. The new Act should provide that the title under which the Crown is a party to proceedings shall be "State of New South Wales"[7] save that where it is a party in separate inconsistent interests, it shall be a party, in respect of one of those interests, under that title, and, in respect of each other of those interests, under the name of a person nominated by the Attorney-General in respect of that interest.[8] This provision should apply not only to proceedings brought under those provisions of the new Act which take the place of the provisions of the Claims against the Government and Crown Suits Act, 1912, but also to any other civil proceedings to which the Crown is a party.[9]

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[1] Part 4. *See, particularly,* section 8.
[2] Part 4 section 7.
[3] Part 5 sections 2, 3.
[4] Part 5 sections 4, 6.
[5] Part 5 section 6.
[6] Part 5 section 5.
[7] Part 5 section 3.
[8] Part 10.
[9] Part 9 section 3; part 10.

5. The following enactments should be amended to provide that the Crown is bound by them—

(a) District Court Act, 1973;[10]

(b) Courts of Petty Sessions (Civil Claims) Act, 1970;[10]

(c) Law Reform (Law and Equity) Act, 1972;[10]

(d) Law Reform (Miscellaneous Provisions) Act, 1944;[11]

(e) Parts II and III of the Law Reform (Miscellaneous Provisions) Act, 1946;[11]

(f) Part III of the Law Reform (Miscellaneous Provisions) Act, 1965;[11] and

(g) Statutory Duties (Contributory Negligence) Act, 1945.[11]

6. Legislation should be enacted to provide—

(a) that where a servant of the Crown or of any other master is guilty of a tort in the performance or purported performance by him of a function conferred or imposed upon him by law[12] and the performance or purported performance was—

(i) directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of his master;[13] or

(ii) an incident of his service (whether or not it was a term of his contract of service that he perform the function),[14]

the master is liable in tort as if he, by the servant, were guilty of the tort;[15] and

(b) that where a person is not a servant of the Crown but is in the service of the Crown[16] and he is guilty of a tort—

(i) in the course of his service;[17] and

(ii) in the performance or purported performance of a function conferred or imposed upon him by law,[18]

the Crown is liable in tort as if it, by the person, were guilty of the tort.[19]

7. The special rule of the common law that a legislative provision binds the Crown only where it does so by express words or necessary implication[20] should be abolished in respect of future legislation. It should be replaced,

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[10] Part 6.

[11] Part 9 section 2.

[12] Part 13. *See, particularly,* sections 1–5, and section 18.

[13] Part 13. *See, particularly,* sections 20–22.

[14] Part 13. *See, particularly,* sections 23–26.

[15] Part 13. *See, particularly,* section 27.

[16] Part 13. *See, particularly,* section 30 and sections 35–37.

[17] Part 13. *See, particularly,* section 11.

[18] Part 13. *See, particularly,* sections 1–5 and section 18.

[19] Part 13, section 38.

[20] Part 14. *See, particularly,* sections 1–6.

in respect of future legislation, by a legislative requirement to the effect that where, but for the former special rule, a legislative provision would bind the Crown, it shall be construed as binding the Crown except in so far as it is unlikely that it would have intended that it bind the Crown having regard to—

(a) the foreseeable extent to which the provision, if binding the Crown, might impede it in any activity and the forseeable extent to which that impediment might be against the public interest;

(b) the foreseeable extent to which the provision, if binding the Crown, might burden it in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision, in respect of any property; and

(c) the foreseeable extent to which the purpose or any of the purposes of the provision might fail if the Crown were not bound and the foreseeable extent to which that failure might be against the public interest.[21]

8. If the recommendation referred to in the last paragraph is rejected, the limited reform should be effected of providing, in respect of future legislation, that where, but for the special rule of the common law referred to in that paragraph, the Crown would have a statutory duty breach of which, causing damage to a person, would entitle him to recover damages from the Crown, the rule shall not apply and the Crown shall have the duty.[22]

9. A body of review, not comprised solely of representatives of the departments directly concerned, should be established to make recommendations as to the application to the Crown of existing legislation and of future legislation.[23]

The recommendations referred to in paragraphs 1–4 of this summary are inter-dependent. Otherwise each of the recommendations referred to in this summary is an independent recommendation which can be implemented whether or not any other of the recommendations is accepted.

C. L. D. MEARES,
Chairman,

COLIN R. ALLEN,
Commissioner.

9th December, 1975.

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[21] Part 14. *See, particularly,* sections 14–24.

[22] Part 14. *See, particularly,* sections 30, 31.

[23] Part 14 section 33.

APPENDIX A

CLAIMS AGAINST THE GOVERNMENT AND CROWN SUITS ACT, 1912

Act No. 27, 1912.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the "Claims against the Government and Crown Suits Act, 1912." Short title.

2. (1) The Acts mentioned in the Schedule to this Act are hereby repealed. Repeal. Schedule.

(2) All rules of court made or deemed to have been made under the authority of any Act hereby repealed, and being in force at the time of the passing of this Act, shall be deemed to have been made under the authority of this Act. Rules of court under Acts hereby repealed. Act No. 30, 1897, s. 2.

3. (1) Any person having or deeming himself to have any just claim or demand whatever against the Government of New South Wales may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition, and the Governor may by notification in the Gazette appoint any person resident in New South Wales to be a nominal defendant accordingly. Claimant may petition Governor. Act No. 30, 1897, s. 3.

(2) If within one month after presentation of such petition no such notification is made, the Colonial Treasurer shall be the nominal defendant. Governor may appoint nominal defendant.

4. The petitioner may sue such nominal defendant at law or in equity in any competent court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject. Petitioner may sue as in ordinary cases. Act No. 30, 1897, s. 4.

5.

Action not to abate by by reason death of nominal defendant. Act No. 4, 1904, s. 2.

5. The death of a nominal defendant appointed under this Act, or any Act hereby repealed, shall not cause the action or suit to abate, but it may be continued as hereinafter provided.

Governor to appoint fresh nominal defendant. Act No. 4, 1904, s. 3 (2).

6. Where such death occurs the Governor shall, by notification in the Gazette, appoint any person resident in New South Wales to be a nominal defendant within fourteen days after being petitioned to do so by the claimant.

Order of court for amendment of pleadings. Act No. 4, 1904, s. 4.

7. On an appointment being made under the last preceding section, the court before whom any such action or suit is pending, or a judge of such court, may order that the pleadings, issue, or record in the action or suit be amended by substituting for the original defendant the name of the nominal defendant so appointed; and thereupon all judgments, decrees, and orders made or given in the action or suit in respect of the original defendant shall have effect in respect of the person appointed, and all future proceedings may be continued against the said person as if he had been the original nominal defendant.

Limited liability of nominal defendant. Act No. 30, 1897, s. 5.

8. The nominal defendant in any case under this Act shall not be individually liable in person or property by reason of his being such defendant.

Nature of relief. Act No. 30, 1897, s. 6.

9. In any action or suit under this Act all necessary judgments, decrees, and orders may be given and made, including every species of relief, whether by way of—

(a) specific performance; or

(b) restitution of rights; or

(c) recovery of lands or chattels; or

(d) payment of money or damages.

10. In any information, action, suit, or other proceeding by or on behalf of the Crown in respect of any property of the Crown, the proceeds, or rents, or profits whereof by any Act now in force or hereafter to be passed are to be carried to the Consolidated Revenue Fund of New South Wales, or in respect of any money due to the Crown by virtue of any Act relating to the public revenue, costs shall follow or may be awarded as in an ordinary case between subject and subject. Costs in proceedings by Crown. Act No. 30, 1897, s. 7.

11. (1) The Colonial Treasurer shall pay— Treasurer to pay damages, &c. Act No. 30, 1897, s. 8.

(a) all damages and costs adjudged against such nominal defendant; or

(b) costs awarded against the Crown or Attorney-General,

out of any moneys in his hands then legally applicable thereto and forming part of or belonging to the Consolidated Revenue or voted by Parliament for that purpose.

(2) In the event of such payment not being made within sixty days after demand, execution may be had for the amount, and levied upon any property vested in the Government, but not upon any property— Execution.

(a) vested in the Government on behalf of the Imperial Government; or

(b) to which the Imperial Government has any claim or is in anywise entitled.

12. Costs recovered by or on behalf of the Crown shall be paid into the Treasury and become part of the Consolidated Revenue. Payment into Treasury. Act No. 30, 1897, s. 9.

13. (1) The judges of the Supreme Court, or any three of them may make general rules for carrying this Act into effect. Rules. Act No. 30, 1897, s. 10.

(2) Such rules shall not be inconsistent with this Act and on being published in the Gazette shall have the force of law.

(3)

(3) Copies of all such rules shall be laid before both Houses of Parliament within seven days after publication thereof, or if Parliament be not sitting, then within seven days after the commencement of the next ensuing session.

(4) If either House shall at any time by resolution disapprove of such rules, the rules so disapproved of shall, on notification of such resolution to the Chief Justice, cease and determine.

SCHEDULE.

Reference to Act.	Title of Act.
Act No. 30, 1897 ..	Claims against the Government and Crown Suits Act, 1897.
Act No. 4, 1904 ..	Claims against the Government and Crown Suits (Amendment) Act, 1904.

APPENDIX B

CROWN PROCEEDINGS ACT 1947 (U.K.)

BE it enacted etc.

PART I.

SUBSTANTIVE LAW.

Right to sue the Crown.

1. Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.

Liability of the Crown in tort.

2. (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject :—

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property :

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act

or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(2) Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

(3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

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

(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(6) No proceedings shall lie against the Crown by virtue of this section in respect of any act, neglect or default of any officer of the Crown, unless that officer has been

directly

directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund of the United Kingdom, moneys provided by Parliament, the Road Fund, or any other Fund certified by the Treasury for the purposes of this subsection or was at the material time holding an office in respect of which the Treasury certify that the holder thereof would normally be so paid.

Provisions as to industrial property.

3. (1) Where after the commencemnet of this Act any servant or agent of the Crown infringes a patent, or infringes a registered trade mark, or infringes any copyright (including any copyright in a design subsisting under the Patents and Designs Acts, 1907 to 1946), and the infringement is committed with the authority of the Crown, then, subject to the provisions of this Act, civil proceedings in respect of the infringement shall lie against the Crown.

7 Edw. 7. c. 29. 9 and 10 Geo. 6. c. 80.

(2) Nothing in the preceding subsection or in any other provision of this Act shall affect the rights of any Government department under section twenty-nine or section fifty-eight A of the Patents and Designs Act, 1907, or the rights of the Minister of Supply under section twelve of the Atomic Energy Act, 1946.

(3) Save as expressly provided by this section, no proceedings shall lie against the Crown by virtue of this Act in respect of the infringement of a patent, in respect of the infringement of a registered trade mark, or in respect of the infringement of any such copyright as is mentioned in subsection (1) of this section.

Application of law as to indemnity, contribution, joint and several tortfeasors, and contributory negligence. 25 and 26 Geo. 6. c. 30.

4. (1) Where the Crown is subject to any liability by virtue of this Part of this Act, the law relating to indemnity and contribution shall be enforceable by or against the Crown in respect of the liability to which it is so subject as if the Crown were a private person of full age and capacity.

(2) Without prejudice to the effect of the preceding subsection, Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which relates to proceedings against, and contribution between, joint and several tortfeasors) shall bind the Crown.

8 and 9 Geo. 6. c. 28.

(3) Without prejudice to the general effect of section one of this Act, the Law Reform (Contributory Negligence) Act, 1945 (which amends the law relating to contriubtory negligence) shall bind the Crown.

Liability in respect of Crown ships, &c.

5. (1) The provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liability of His Majesty in respect of His Majesty's ships; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly.

(2) Without prejudice to the provisions of the preceding subsection, where a ship is built at any port or place within His Majesty's dominions, and His Majesty is interested in her by reason of the fact that she is built by or on behalf of or to the order of His Majesty in right of His Government in the United Kingdom, the provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liabilities in respect of that ship of His Maesty, her builders, her owners, and any other persons interested in her; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly.

This subsection shall have effect only in respect of the period from and including the launching of the ship until the time of her completion, and shall not in any event have effect in respect of any period during which His Majesty is not so interested in the ship as aforesaid. In relation to a ship built to the order of His Majesty in right of His

Government

Government in the United Kingdom, the time of her completion shall be taken for the purposes of this subsection to be the time when His Majesty, acting in His said right, finally takes delivery of her under the building contract.

(3) Where any ship has been demised or sub-demised by His Majesty acting in right of His Government in the United Kingdom, then, whether or not the ship is registered for the purposes of the Merchant Shipping Acts, 1894 to 1940, the provisions of those Acts which limit the amount of the liability of the owners of ships shall, in respect of the period for which the demise or sub-demise continues, apply, with any necessary modifications, for the purpose of limiting the liabilities in respect of the ship of any person entitled to her by demise or sub-demise; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly.

This subsection shall be deemed always to have had effect.

(4) Where by virtue of any arrangement betwen His Majesty and some other person (not being a servant of His Majesty) that other person (hereinafter referred to as "the manager") is entrusted with the management of any of His Majesty's ships, the provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall apply for the purpose of limiting the manager's liability in respect of the ship while so entrusted; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly.

This subsection shall be deemed always to have had effect.

(5) Where for the purposes of any enactment as applied by this section it is necessary to ascertain the tonnage of any ship, and that ship is not registered for the purposes of the Merchant Shipping Acts, 1894 to 1940, the tonnage of the ship shall be taken for the purposes of that enactment to be the tonnage arrived at by—

57 and 58 Vict. c. 60.

(a) ascertaining her tonnage in accordance with regulations made under the Merchant Shipping Act, 1965, and deducting from her tonnage as so ascertained ten per cent thereof; or

(b) where it is impossible to ascertain her tonnage as provided by paragraph (a) of this subsection, taking her estimated tonnage as certified for the purposes of this paragraph, and deducting from her estimated tonnage as so certified ten per cent thereof.

Where it is necessary to ascertain the tonnage of a ship in the manner provided by paragraph (b) of this subsection, the Chief Ships Surveyor of the Ministry of Transport, or the officer for the time being discharging the functions of the said Surveyor, shall, upon the direction of the court concerned, and after considering such evidence of the dimensions of the ship as it may be practicable to obtain, estimate what her tonnage would have been found to be if she could have been duly measured for the purpose, and issue a certificate stating her tonnage as so estimated by him.

(6) For the purposes of this section the expression "ship" has the meaning assigned to is by section seven hundred and forty-two of the Merchant Shipping Act, 1894, but includes also :

61 and 62 Vict. c. 14.

(a) any structure to which Part VIII of that Act is applied by section four of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958; and

(b) every description of lighter, barge or like vessel used in navigation in Great Britain, however propelled, so, however, that a vessel used exclusively in non-tidal waters, other than harbours, shall not for the purposes of this paragraph be deemed to be used in navigation.

(7)

(7) Any reference in this section to the provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall be construed as including a reference to any provision of those Acts which negatives the liability of the owner of a ship, and accordingly any reference in this section to limiting the liability of any person shall be construed as including a reference to negativing his liability.

(8) Relief shall not be available by virtue of the Merchant Shipping (Liability of Shipowners) Act, 1898, in any case in which it is available by virtue of this section.

Application to Crown ships of rules as to division of loss, &c. 1 and 2 Geo. 5. c. 57.

6. The provisions of sections one, two and three of the Maritime Conventions Act, 1911 (which relate to the apportionment of damage or loss caused by vessels) shall apply in the case of vessels belonging to His Majesty as they apply in the case of other vessels.

Liability in respect of Crown docks, harbours, &c.

7. (1) It is hereby declared that the provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of docks and canals, and of harbour and conservancy authorities, apply for the purpose of limiting the liability of His Majesty in His capacity as the owner of any dock or canal, or in His capacity as a harbour or conservancy authority, and that all the relevant provisions of the said Acts have effect in relation to His Majesty accordingly.

63 and 64 Vict. c. 32.

(2) In this section the expressions "dock", "harbour", "owner", "harbour authority" and "conservancy authority" have respectively the same meanings as they have for the purposes of section two of the Merchant Shipping (Liability of Shipowners and others) Act, 1900.

(3) In this section references to His Majesty include references to any Government department and to any officer of the Crown in his capacity as such.

8.

Salvage claims against the Crown and Crown rights to salvage.

8. (1) Subject to the provisions of this Act, the law relating to civil salvage, whether of life or property, except sections five hundred and fifty-one to five hundred and fifty-four of the Merchant Shipping Act, 1894, or any corresponding provisions relating to aircraft, shall apply in relation to salvage services rendered after the commencement of this Act in assisting any of His Majesty's ships or aircraft, or in saving life therefrom, or in saving any cargo or apparel belonging to His Majesty in right of His Government in the United Kingdom, in the same manner as if the ship, aircraft, cargo or apparel belonged to a private person.

(2) Where after the commencement of this Act salvage services are rendered by or on behalf of His Majesty, whether in right of His Government in the United Kingdom or otherwise, His Majesty shall be entitled to claim salvage in respect of those services to the same extent as any other salvor, and shall have the same rights and remedies in respect of those services as any other salvor.

9. * * * * *

Provisions relating to the armed forces.

10. (1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if—

(a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown; and

(b) the Secretary of State certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award

under

under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member:

Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.

(2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if—

(a) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and

(b) the Secretary of State certifies as mentioned in the preceding subsection;

nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.

(3) . . . a Secretary of State, if satisfied that it is the fact—

(a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or

(b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces;

may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies.

Saving in respect of acts done under prerogative and statutory powers.

11. (1) Nothing in Part I of this Act shall extinguish or abridge any powers or authorities which, if this Act had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any powers or authorities conferred on the Crown by any statute, and, in particular, nothing in the said Part I shall extinguish or abridge any powers or authorities exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of the realm or of training, or maintaining the efficiency of, any of the armed forces of the Crown.

(2) Where in any proceedings under this Act it is material to determine whether anything was properly done or omitted to be done in the exercise of the prerogative of the Crown, a Secretary of State may, if satisfied that the act or omission was necessary for any such purpose as is mentioned in the last preceding subsection, issue a certificate to the effect that the act or omission was necessary, for that purpose; and the certificate shall, in those proceedings, be conclusive as to the matter so certified.

Transitional provisions.

12. (1) When this Act comes into operation, the preceding provisions of this Part of this Act (except subsections (3) and (4) of section five thereof and any provision which is expressly related to the commencement of this Act) shall be deemed to have had effect as from the beginning of the thirteenth day of February, nineteen hundred and forty-seven :

Provided that where by virtue of this subsection proceedings are brought against the Crown in respect of a tort alleged to have been committed on or after the said thirteenth day of February and before the commencement of this Act, the Crown may rely upon the appropriate provisions of the law relating to the limitation of time for bringing procedings as if this Act had at all material times been in force.

(2) Where any civil procedings brought before the comencement of this Act have not been finally determined, and the court for the time being seized of those proceedings

is of opinion that having regard to the provisions of this section the Crown ought to be made a party to the proceedings for the purpose of disposing completely and effectually of the questions involved in the cause or mater before the court, the court may order that the Crown be made a party thereto upon such terms, if any, as the court thinks just, and may make such consequential orders as the court thinks expedient.

PART II.

JURISDICTION AND PROCEDURE.

The High Court.

Civil proceedings in the High Court.

13. Subject to the provisions of this Act, all such civil proceedings by or against the Crown as are mentioned in the First Schedule to this Act are hereby abolished, and all civil proceedings by or against the Crown in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise.

57 and 58 Vict. c. 39.

In this section the expression "rules of court" means, in relation to any claim against the Crown in the High Court which falls within the jurisdiction of that court as a prize court, rules of court made under section three of the Prize Courts Act, 1894.

Summary applications to High Court in certain revenue matters.

14. (1) Subject to and in accordance with rules of court, the Crown may apply in a summary manner to the High Court: —

(a) for the furnishing of information required to be furnished by any person under the enactments relating to capital transfer tax;

(b) for the delivery of accounts and payment of capital transfer tax under Part III of the Finance Act, 1975;

54 and 55 Vict. c. 38.

(c) for the delivery of an account under section two of the Stamp Duties Management Act, 1891, or under that section as amended or applied by any subsequent enactment;

(d) for the payment of sums improperly withheld or retained within the meaning of the said section two.

(2) Subject to and in accordance with rules of court, the Crown may apply in a summary manner to the High Court :—

(a) for the payment of duty under the enactments relating to excise duties;

(b) for the delivery of any accounts required to be delivered, or the furnishing of any information required to be furnished, by the enactments relating to excise duties or by any regulations relating to such duties;

(c) for the payment of tax under the enactments relating to value added tax;

(d) for the delivery of any accounts, the production of any books, or the furnishing of any information, required to be delivered, produced or furnished under the enactments relating to value added tax.

County Courts.

Civil proceedings in the county court.

15. (1) Subject to the provisions of this Act, and to any enactment limiting the jurisdiction of a county court (whether by reference to the subject matter of the proceedings to be brought or the amount sought to be recovered in the proceedings or otherwise) any civil proceedings against the Crown may be instituted in a county court.

(2) Any proceedings by or against the Crown in a county court shall be instituted and proceeded with in accordance with county court rules and not otherwise.

16.

General.

16. The Crown may obtain relief by way of interpleader proceedings, and may be made a party to such proceedings, in the same manner in which a subject may obtain relief by way of such proceedings or be made a party thereto, and may be made a party to such proceedings notwithstanding that the application for relief is made by a sheriff or other life officer; and all rules of court and county court rules relating to interpleader proceedings shall, subject to the provisions of this Act, have effect accordingly. Interpleader.

17. (1) The Minister for the Civil Service shall publish a list specifying the several Government departments which are authorized departments for the purposes of this Act, and the name and address for service of the person who is, or is acting for the purposes of this Act as, the solicitor for each such department, and may from time to time amend or vary the said list. Parties to proceedings.

Any document purporting to be a copy of a list published under this section and purporting to be printed under the superintendence or the authority of His Majesty's Stationery Office shall in any legal proceedings be received as evidence for the purpose of establishing what departments are authorized departments for the purposes of this Act, and what person is, or is acting for the purposes of this Act as, the solicitor for any such department.

(2) Civil proceedings by the Crown may be instituted either by an authorized Government department in its own name, whether that department was or was not at the commencement of this Act authorized to sue, or by the Attorney General.

(3) Civil proceedings against the Crown shall be instituted against the appropriate authorized Government department, or, if none of the authorized Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney General.

(4) Where any civil proceedings against the Crown are instituted against the Attorney General, an application may at any stage of the proceedings be made to the court by or on behalf of the Attorney General to have such of the authorized Government departments as may be specified in the application substituted for him as defendant to the proceedings; and where any such proceedings are brought against an authorized Government department, an application may at any stage of the proceedings be made to the court on behalf of that department to have the Attorney General or such of the authorized Government departments as may be specified in the application substituted for the applicant as the defendant to the proceedings.

Upon any such application the court may if it thinks fit make an order granting the application on such terms as the court thinks just; and on such an order being made the proceedings shall continue as if they had been commenced against the department specified in that behalf in the order, or, as the case may require, against the Attorney General.

(5) No proceedings instituted in accordance with this Part of this Act by or against the Attorney General or an authorized Government department shall abate or be affected by any change in the person holding the office of Attorney General or in the person or body of persons constituting the department.

Service of documents.

18. All documents required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown shall, if those proceedings are by or against an authorized Government department, be served on the solicitor, if any, for that department, or the person, if any, acting for the purposes of this Act as solicitor for that department, or if there is no such solicitor and no person so acting, or if the proceedings are brought by or against the Attorney General, on the Solicitor for the affairs of His Majesty's Treasury.

19.

Venue and related matters.

19. (1) In any case in which civil proceedings against the Crown in the High Court are instituted by the issue of a writ out of a district registry the Crown may enter an appearance either in the district registry or in the central office of the High Court, and if an appearance is entered in the central office all steps in relation to the proceedings up to trial shall be taken at the Royal Courts of Justice.

(2) The trial of any civil proceedings by or against the Crown in the High Court shall be held at the Royal Courts of Justice unless the court, with the consent of the Crown, otherwise directs.

Where the Crown refuses its consent to a direction under this subsection the court may take account of the refusal in exercising its powers in regard to the award of costs.

(3) Nothing in this section shall prejudice the right of the Crown to demand a local venue for the trial of any proceedings in which the Attorney General has waived his right to a trial at bar.

Removal and transfer of proceedings.

20. (1) If in a case where proceedings are instituted against the Crown in a county court an application in that behalf is made by the Crown to the High Court, and there is produced to the court a certificate of the Attorney General to the effect that the proceedings may involve an important question of law, or may be decisive of other cases arising out of the same matter, or are for other reasons more fit to be tried in the High Court, the proceedings shall be removed into the High Court.

Where any proceedings have been removed into the High Court on the production of such certificate as aforesaid, and it appears to the court by whom the proceedings are tried that the removal has occasioned additional expense to the person by whom the proceedings are brought, the court may take account of the additional expense so occasioned in exercising its powers in regard to the award of costs.

(2)

(2) Without prejudice to the rights of the Crown under the preceding provisions of this section, all rules of law and enactments relating to the removal or transfer of proceedings from a county court to the High Court, or the transfer of proceedings from the High Court to a county court, shall apply in relation to proceedings against the Crown:

Provided that :—

(a) an order for the transfer to a county court of any proceedings against the Crown in the High Court shall not be made without the consent of the Crown; and

24 and 25 Geo. 5. c. 53.

(b) the duty of a judge to make an order under section forty-four of the County Courts Act, 1934, for the transfer to the High Court of proceedings commenced against the Crown in a county court shall not be conditional upon the giving of security by the Crown.

Nature of relief.

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

Provided that :—

(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.

(2)

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

Appeals and stay of execution.

22. Subject to the provisions of this Act, all enactments, rules of court and county court rules relating to appeals and stay of execution shall, with any necessary modifications, apply to civil proceedings by or against the Crown as they apply to proceedings between subjects.

Scope of Part II.

23. (1) Subject to the provisions of this section, any reference in this Part of this Act to civil proceedings by the Crown shall be construed as a reference to the following proceedings only :—

(a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 1 of the First Schedule to this Act;

(b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action at the suit of any Government department or any officer of the Crown as such;

(c) all such proceedings as the Crown is entitled to bring by virtue of this Act;

and the expression "civil proceedings by or against the Crown" shall be construed accordingly.

(2) Subect to the provisions of this section, any reference in this Part of this Act to civil proceedings against

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the Crown shall be construed as a reference to the following proceedings only :—

(a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 2 of the First Schedule to this Act;

(b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney General, any Government department, or any officer of the Crown as such; and

(c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act;

and the expression "civil proceedings by or against the Crown" shall be construed accordingly.

(3) Notwithstanding anything in the preceding provisions of this section, the provisions of this Part of this Act shall not have effect with respect to any of the following proceedings, that is to say :—

(a) proceedings brought by the Attorney General on the relation of some other person;

(b) proceedings by or against the Public Trustee;

(c) proceedings by or against the Charity Commissioners;

(d) * * * * *

(e) * * * * *

(f) proceedings by or against the Registrar of the Land Registry or any officers of that registry.

(4) Subject to the provisions of any Order in Council made under the provisions hereinafter contained, this part of this Act shall not affect proceedings initiated in any court other than the High Court or a county court.

PART

PART III.

JUDGMENTS AND EXECUTION.

Interest on debts damages and costs.

24. (1) Section seventeen of the Judgments Act, 1838 (which provides that a judgment debt shall carry interest) shall apply to judgment debts due from or to the Crown.

1 and 2 Vict. c. 110.

(2) Where any costs are awarded to or against the Crown in the High Court, interest shall be payable upon those costs unless the court otherwise orders and any interest so payable shall be at the same rate as that at which interest is payable upon judgment debts due from or to the Crown.

24 and 25 Geo. 5. c. 41.

(3) Section three of the Law Reform (Miscellaneous Provisions) Act, 1934 (which empowers courts of record to award interest on debts and damages) shall apply to judgments given in proceedings by and against the Crown.

(4) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.

Satisfaction of orders against the Crown.

25. (1) Where in any civil proceedings by or against the Crown, or in any proceedings on the Crown side of the King's Bench Division, or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the solicitor, or as the person acting as solicitor, for the Crown or for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon :

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs.

(5) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.

Execution by the Crown.

26. (1) Subject to the provisions of this Act, any order made in favour of the Crown against any person in any civil proceedings to which the Crown is a party may be enforced in the same manner as an order made in an action between subjects, and not otherwise.

This

This subsection shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.

(2) Sections four and five of the Debtors Act, 1869 (which provide respectively for the abolition of imprisonment for debt, and for saving the power of committal in case of small debts), shall apply to sums of money payable and debts due to the Crown : 32 and 33 Vict. c. 62.

Provided that for the purpose of the application of the said section four to any sum of money payable or debt due to the Crown, the section shall have effect as if there were included among the exceptions therein mentioned default in payment of any sum payable in respect of death duties.

(3) Nothing in this section shall affect any procedure which immediately before the commencement of this Act was available for enforcing an order made in favour of the Crown in proceedings brought by the Crown for the recovery of any fine or penalty, or the forfeiture or condemnation of any goods, or the forfeiture of any ship or any share in a ship.

27. (1) Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the High Court may, subject to the provisions of this Act and in accordance with rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver : Attachment of moneys payable by the Crown.

Provided

Provided that no such order shall be made in respect of :—

(a) any wages or salary payable to any officer of the Crown as such;

(b) any money which is subject to the provisions of any enactment prohibiting or restricting assignment or charging or taking in execution; or

(c) any money payable by the Crown to any person on account of a deposit in the National Savings Bank.

(2) The provisions of the preceding subsection shall, so far as they relate to forms of relief falling within the jurisdiction of a county court, have effect in relation to county courts as they have effect in relation to the High Court, but with the substitution of a reference to county court rules for any reference in the said subsection to rules of court.

PART IV.

MISCELLANEOUS AND SUPPLEMENTAL.

Miscellaneous.

Discovery.

28. (1) Subject to and in accordance with rules of court and county court rules :—

(a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection; and

(b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories :

Provided that this section shall be without prejudice to any rule of law which authorizes or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

Any

Any order of the court made under the powers conferred by paragraph (b) of this subsection shall direct by what officer of the Crown the interrogatories are to be answered.

(2) Without prejudice to the proviso to the preceding subsection, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.

Exclusion of proceedings in rem against the Crown.

29. (1) Nothing in this Act shall authorise proceedings in rem in respect of any claim against the Crown, or the arrest, detention or sale of any of His Majesty's ships or aircraft, or of any cargo or other property belonging to the Crown, or give to any person any lien on any such ship, aircraft, cargo or other property.

(2) Where proceedings in rem have been instituted in the High Court or in a county court against any such ship, aircraft, cargo or other property, the court may, if satisfied, either on an application by the plaintiff for an order under this subsection or an application by the Crown to set aside the proceedings, that the proceedings were so instituted by the plaintiff in the reasonable belief that the ship, aircraft, cargo or other property did not belong to the Crown, order that the proceedings shall be treated as if they were in personam duly instituted against the Crown in accordance with the provisions of this Act, or duly instituted against any other person whom the court regards as the proper person to be sued in the circumstances and that the proceedings shall continue accordingly.

Any such order may be made upon such terms, if any, as the court thinks just; and where the court makes any such order it may make such consequential orders as the court thinks expedient.

30.

Limitation of actions.

30. (1) Section eight of the Maritime Conventions Act, 1911 (which relates to the limitation of actions in respect of damage or loss caused to or by vessels and the limitation of actions in respect of salvage services) shall apply in the case of His Majesty's ships as it applies in the case of other vessels: —

Provided that the said section eight, as applied by this section, shall have effect as if the words from "and shall, if satisfied" to the end of the said section eight were omitted therefrom.

(2) . . .

(3) In this section the expression "ship" includes any boat or other description of vessel used in navigation, and the expression "His Majesty's ships" shall be construed accordingly.

Application to the Crown of certain statutory provisions.

31. (1) This Act shall not prejudice the right of the Crown to take advantage of the provisions of an Act of Parliament although not named therein; and it is hereby declared that in any civil proceedings against the Crown the provisions of any Act of Parliament which could, if the proceedings were between subjects, be relied upon by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be so relied upon by the Crown.

32 and 33 Vict. c. 62.

(2) Section six of the Debtors Act, 1869 (which empowers the court in certain circumstances to order the arrest of a defendant about to quit England) shall, with any necessary modifications, apply to civil proceedings in the High Court by the Crown.

No abatement on demise of Crown.

32. No claim by or against the Crown, and no proceedings for the enforcement of any such claim, shall abate or be affected by the demise of the Crown.

Abolition of certain writs.

33. No writ of extent or of diem clausit extremum shall issue after the commencement of this Act.

Proceedings in courts other than the High Court and county courts.

34. (1) His Majesty may by Order in Council make such provision as appears to him to be expedient with respect to civil proceedings by or against the Crown in any court not being the High Court or a county court.

(2) An Order in Council made under this section may in particular—

(a) define the jurisdiction of the court to which the Order relates in civil proceedings by or against the Crown; and

(b) apply, in relation to civil proceedings by or against the Crown in the said court, any provisions of this Act which would not otherwise apply in relation to those proceedings with such additions exceptions and modifications as appear to His Majesty to be expedient.

(3) The provisions of any such Order shall have effect notwithstanding any provision made by or under any enactment with respect to the court in question; and any such Order may provide for amending or revoking any provision so made as aforesaid.

(4) An Order in Council made under this section may be varied or revoked by a further Order in Council made by His Majesty thereunder.

(5) An Order in Council under this section shall be laid before Parliament as soon as may be after it is made, and, if either House of Parliament, within the next twenty-eight days on which that House has sat after such an Order is laid before it, resolves that the Order be annulled, the Order shall thereupon cease to have effect except as respects things previously done or omitted to be done, without prejudice, however, to the making of a new Order.

Supplemental.

Rules of court and county court rules.

35. (1) Any power to make rules of court or county court rules shall include power to make rules for the purpose of giving effect to the provisions of this Act, and any such rules may contain provisions to have effect in relation to any proceedings by or against the Crown in substitution for or by way of addition to any of the provisions of the rules applying to proceedings between subjects.

(2) Provision shall be made by rules of court and county court rules with respect to the following matters :—

(a) for providing for service of process, or notice thereof, in the case of proceedings by the Crown against persons, whether British subjects or not, who are not resident in the United Kingdom;

(b) for securing that where any civil proceedings are brought against the Crown in accordance with the provisions of this Act the plaintiff shall, before the Crown is required to take any step in the proceedings, provide the Crown with such information as the Crown may reasonably require as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the departments and officers of the Crown concerned;

(c) for providing that in the case of proceedings against the Crown the plaintiff shall not enter judgment against the Crown in default of appearance or pleading without the leave of the court to be obtained on an application of which notice has been given to the Crown;

(d) for excepting proceedings brought against the Crown from the operation of any rule of court providing for summary judgment without trial, and for enabling any such proceedings to be put in proper cases into any special list which may be kept for the trial of short causes in which leave to defend is given under any such rule of court as aforesaid;

(e) for authorizing the Crown to deliver interrogatories without the leave of a court in any proceedings for the enforcement of any right for the enforcement of which proceedings by way of English information might have been taken if this Act had not been passed, so, however, that the Crown shall not be entitled to deliver any third or subsequent interrogatories without the leave of the court;

(f) for enabling evidence to be taken on commission in proceedings by or against the Crown;

(g) for providing :—

(i) that a person shall not be entitled to avail himself of any set-off or counterclaim in any proceedings by the Crown for the recovery of taxes, duties or penalties, or to avail himself in proceedings of any other nature by the Crown of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties or penalties;

(ii) that a person shall not be entitled without the leave of the court to avail himself of any set-off or counterclaim in any proceedings by the Crown if either the subject matter of the set-off or counterclaim does not relate to the Government department in the name of which the proceedings are brought or the proceedings are brought in the name of the Attorney General;

(iii) that the Crown, when sued in the name of a Government department, shall not, without the leave of the court, be entitled to avail itself of any set-off or counterclaim if the subject matter thereof does not relate to that department; and

(iv) that the Crown, when sued in the name of the Attorney General, shall not be entitled to avail itself of any set-off or counterclaim without the leave of the court.

(3) Provision may be made by rules of court for regulating any appeals to the High Court, whether by way of case stated or otherwise, under enactments relating to the revenue, and any rules made under this subsection may revoke any enactments or rules in force immediately before the commencement of this Act so far as they regulate any such appeals, and may make provision for any matters for which provision was made by any enactments or rules so in force.

Pending proceedings.

36. Save as otherwise expressly provided, the provisions of this Act shall not affect proceedings by or against the Crown which have been instituted before the commencement of this Act; and for the purposes of this section proceedings against the Crown by petition of right shall be deemed to have been so instituted if a petition of right with respect to the matter in question has been left with a Secretary of State for submission to His Majesty before the commencement of this Act.

Financial provision.

37. (1) Any expenditure incurred by or on behalf of the Crown in right of His Majesty's Government in the United Kingdom by reason of the passing of this Act shall be defrayed out of moneys provided by Parliament.

(2) Any sums payable to the Crown in right of His Majesty's Government in the United Kingdom by reason of the passing of this Act shall be paid into the Exchequer.

Interpretation.

38. (1) Any reference in this Act to the provisions of this Act shall, unless the context otherwise requires, include a reference to rules of court or county court rules made for the purposes of this Act.

(2)

(2) In this Act, except in so far as the context otherwise requires or it is otherwise expressly provided, the following expressions have the meanings hereby respectively assigned to them, that is to say :—

"Agent", when used in relation to the Crown, includes an independent contractor employed by the Crown;

"Civil proceedings" includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division;

"His Majesty's aircraft" does not include aircraft belonging to His Majesty otherwise than in right of His Government in the United Kingdom;

"His Majesty's ships" means ships of which the beneficial interest is vested in His Majesty or which are registered as Government ships for the purposes of the Merchant Shipping Acts, 1894 to 1940, or which are for the time being demised or subdemised to or in the exclusive possession of the Crown, except that the said expression does not include any ship in which His Majesty is interested otherwise than in right of His Government in the United Kingdom unless that ship is for the time being demised or subdemised to His Majesty in right of His said Government in the exclusive possession of His Majesty in that right;

"Officer", in relation to the Crown, includes any servant of His Majesty, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown;

"Order" includes a judgment, decree, rule, award or declaration;

"Prescribed" means prescribed by rules of court or county court rules, as the case may be;

"Proceedings against the Crown" includes a claim by way of set-off or counterclaim raised in proceedings by the Crown;

"Ship" has the meaning assigned to it by section 742 of the Merchant Shipping Act, 1894;

"Statutory duty" means any duty imposed by or under any Act of Parliament.

(3) Any reference in this Act to His Majesty in His private capacity shall be construed as including a reference to His Majesty in right of His Duchy of Lancaster and to the Duke of Cornwall.

(4) Any reference in Parts III or IV of this Act to civil proceedings by or against the Crown, or to civil proceedings to which the Crown is a party, shall be construed as including a reference to civil proceedings to which the Attorney-General, or any Government department, or any officer of the Crown as such is a party :

Provided that the Crown shall not for the purposes of parts III and IV of this Act be deemed to be a party to any proceedings by reason only that they are brought by the Attorney-General upon the relation of some other person.

(5) Any reference in this Act to the armed forces of the Crown shall be construed as including a reference to the following forces :—

(a) the Women's Royal Naval Service;

(b) the Queen Alexandra's Royal Naval Nursing Service; and

(c) any other organization established under the control of the Admiralty, the Army Council or the Air Council.

(6) References in this Act to any enactment shall be construed as references to that enactment as amended by or under any other enactment, including this Act.

39. (1) * * * * *

(2) For subsection (1) of section twenty-six of the Ministry of Transport Act, 1919, there shall be substituted the following subsection :— 9 and 10 Geo. 5. c. 50.

(1) The Minister of Transport may for all purposes be described by that name.

40. (1) Nothing in this Act shall apply to proceedings by or against, or authorize proceedings in tort to be brought against, His Majesty in His private capacity. Savings.

(2) Except as therein otherwise expressly provided, nothing in this Act shall :—

(a) affect the law relating to prize salvage, or apply to proceedings in causes or matters within the jurisdiction of the High Court as a prize court or to any criminal proceedings; or

(b) authorize proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom, or affect proceedings against the Crown in respect of any such alleged liability as aforesaid; or

(c) affect any proceedings by the Crown otherwise than in right of His Majesty's Government in the United Kingdom; or

(d) subject the Crown to any greater liabilities in respect of the acts or omissions of any independent contractor employed by the Crown than those to which the Crown would be subject in respect of such acts or omissions if it were a private person; or

(e) subject the Crown, in its capacity as a highway authority, to any greater liability than that to which a local authority is subject in that capacity; or

(f) affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament; or

(g) affect any right of the Crown to demand a trial at bar or to control or otherwise intervene in proceedings affecting its rights, property or profits; or

6 Edw. 7. c. 55. (h) affect any liability imposed on the public trustee or on the Consolidated Fund of the United Kingdom by the Public Trustee Act, 1906;

and, without prejudice to the general effect of the foregoing provisions, part III of this Act shall not apply to the Crown except in right of His Majesty's Government in the United Kingdom.

(3) A certificate of a Secretary of State :—

(a) to the effect that any alleged liability of the Crown arises otherwise than in respect of His Majesty's Government in the United Kingdom;

(b) to the effect that any proceedings by the Crown are proceedings otherwise than in right of His Majesty's Government in the United Kingdom;

shall, for the purposes of this Act, be conclusive as to the matter so certified.

(4)

(4) Where any property vests in the Crown by virtue of any rule of law which operates independently of the acts or the intentions of the Crown, the Crown shall not by virtue of this Act be subject to any liabilities in tort by reason only of the property being so vested; but the provisions of this subsection shall be without prejudice to the liabilities of the Crown under this Act in respect of any period after the Crown or any person acting for the Crown has in fact taken possession or control of any such property, or entered into occupation thereof.

(5) This Act shall not operate to limit the discretion of the court to grant relief by way of mandamus in cases in which such relief might have been granted before the commencement of this Act, notwithstanding that by reason of the provisions of this Act some other and further remedy is available.

PART V.

APPLICATION TO SCOTLAND.

(This Part is not reproduced)

PART VI.

EXTENT, COMMENCEMENT, SHORT TITLE, &C.

(This Part is not reproduced)

SCHEDULES.

SCHEDULES.

FIRST SCHEDULE.

Section 23. *Proceedings Abolished by this Act.*

1. (1) Latin informations and English informations.

(2) Writs of capias ad respondendum, writs of subpoena ad respondendum, and writs of appraisement.

(3) Writs of scire facias.

(4) Proceedings for the determination of any issue upon a writ of extent or of diem clausit extremum.

28 and 29 Vict. c. 104. (5) Writs of summons under Part V of the Crown Suits Act, 1865.

27 and 28 Vict. c. 25. 2. (1) Proceedings against His Majesty by way of petition of right, including proceedings by way of petition of right intituled in the Admiralty Division under section fifty-two of the Naval Prize Act, 1864.

(2) Proceedings against His Majesty by way of *monstrans de droit.*

SECOND SCHEDULE.

Section 39. *Enactments Repealed.*

(This Schedule is not reproduced)

APPENDIX C

THE IMPLICATIONS OF THE DECISION OF THE HIGH COURT IN *DOWNS* v. *WILLIAMS*

1. *The importance of the case.* The recommendations which we have made in respect of the general liability of the Crown to a subject are expressed in the draft Crown Proceedings Bill which appears in Appendix D. They do not involve any departure from the basic formula of the Claims against the Government Act that there is no restriction on the claims made by a subject which are to be justiciable and that "the proceedings and rights of the parties therein shall as nearly as possible be the same and judgment and costs shall follow or may be awarded as in an ordinary case between subject and subject". But the decision of the High Court, given in 1971, in *Downs* v. *Williams*[1] may be thought to raise doubts as to the continuing efficacy of this formula. We do not consider that these doubts would be well-founded. But we should state our reasons. The case is a difficult one: and it raises problems of some complexity. We are obliged therefore to discuss it at some length.

2. *The decision.* In *Downs* v. *Williams* the plaintiff claimed damages for personal injuries which he suffered while operating a grinding wheel in premises which, he alleged, were a factory within the meaning of the Factories, Shops and Industries Act, 1962, and were occupied by the Crown. He claimed that the Crown was guilty of a breach of the statutory duty imposed by section 27 to fence dangerous machinery. That Act does not provide, expressly or by implication, that it is binding upon the Crown. The point of law which arose for decision was whether, assuming that he made out the allegation that the Crown had failed to fence dangerous machinery, the Crown would be liable by reason of the Claims against the Government Act.

On this point of law it was argued on behalf of the nominal defendant that section 27 did not apply to the Crown, that accordingly the Crown did not have the statutory duty to fence, and that it followed that it could not be liable in respect of the alleged breach. The trial judge rejected the argument. An appeal to the Court of Appeal (constituted by Sugerman *P.*, Mason *J.A.*,[2] and Manning *J.A.*) was dismissed (the President and Manning *J.A.* concurring in the judgment of Mason *J.A.*). The nominal defendant appealed to the High Court. That court upheld the appeal (McTiernan, Menzies and Owen *JJ.*, Windeyer and Gibbs *JJ.* dissenting). Thus, of the nine judges who considered the argument of the Crown six rejected it and only three accepted it. But the plaintiff did not appeal to the Privy Council, and the decision of these three judges stands as the determination of the High Court on the point of law which fell to it for decision. This point of law is in a narrow compass. But it raises questions of a more general nature as to the liability of the Crown.

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[1] (1971) 126 C.L.R. 61.

[2] Since appointed to the High Court.

3. *The area of difficulty.* The area of difficulty directly involved in *Downs* v. *Williams* is the relevance in proceedings against the Crown of rights conferred by Acts which do not, themselves, expressly or impliedly bind the Crown. This area of difficulty had been explored, to a limited extent, in earlier cases. These were cases, however, in which the liability in issue was not that of the Crown in right of New South Wales but that of the Crown in right of the Commonwealth of Australia. The Crown in right of the Commonwealth had been held liable in litigation as if its rights and obligation were the same as those of subjects under several statutes which did not, expressly or by implication, bind it. Thus, in litigation against the Crown in right of the Commonwealth, legislation which conferred a right to damages upon the dependants of a person tortiously killed,[3] legislation prescribing a maximum limit of damages which could be awarded in certain circumstances,[4] legislation abolishing the defence of common employment,[5] and legislation providing that contributory negligence by the plaintiff did not bar recovery by him of damages[6] were held to apply to determine the rights of the parties in the litigation. The Judiciary Act 1903 (Commonwealth) provides, so far as relevant, that "In any suit to which the Commonwealth . . . is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."[7] This section is in similar terms to the basic formula of the Claims against the Government Act.

4. *Complications in applying decision in respect of the liability of the Commonwealth.* But the extent to which these cases, referred to in the last section, turned upon the imposition by section 64 of the Judiciary Act of liability upon the Crown is by no means clear. There was (and still is) an unresolved divergence of judicial view as to whether the substantive liability of the Crown in right of the Commonwealth flows from section 64 of the Judiciary Act or whether it is based upon other provisions of that Act or even upon the Constitution itself. A corollary to this divergence of judicial view is that section 64 of the Judiciary Act, in referring to the "rights" of the parties "in any suit to which the Commonwealth is a party", may relate only to procedural rights as distinct from substantive rights.[8] This unresolved divergence in judicial view left open in *Downs* v. *Williams* the argument that basic formula of the Claims against the Government Act, which is in terms similar to those of that section, does no more than subject the Crown to procedural rights "as nearly as possible . . . the same . . . as in an ordinary case between subject and subject".

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[3] *Pitcher v. Federal Capital Commission* (1928) 41 C.L.R. 385; *Washington* v. *The Commonwealth* (1939) 39 S.R. 133; *Parker* v. *The Commonwealth* (1965) 112 C.L.R. 295.

[4] *Asiatic Steam Navigation Co. Ltd* v. *The Commonwealth* (1956) 96 C.L.R. 397.

[5] *Parker* v. *The Commonwealth* (1965) 112 C.L.R. 295.

[6] *Suehle* v. *The Commonwealth* (1967) 116 C.L.R. 353.

[7] S. 64.

[8] The uncertainty as to the ambit of section 64 of the Judiciary Act was adverted to in the joint judgment of Dixon *C.J.*, McTiernan *J.*, and Williams *J.* in *Asiatic Steam Navigation Co. Ltd* v. *The Commonwealth* ((1956) 96 C.L.R. 397) where their Honours considered the application to the Commonwealth of

But the statutory provisions applied, in the cases to which we have referred, dealt with substantive rights.

5. *A possible ambiguity in the judgment in* Farnell *v.* Bowman. *Farnell* v. *Bowman*[9] is clear authority for the proposition that the effect of the Claims against the Government Act is that, in litigation to which the Crown in right of New South Wales is a party, courts bound by the law of the State may give judgment against the Crown for damages for a tort committed by the Crown. Prior to the Claims against the Government Act such a judgment could not have been given. The Claims against the Government Act swept aside the immunity which prior to that Act the Crown enjoyed from suffering judgment in tort. But it is arguable that this immunity, which the Crown had enjoyed, was due only to the fact that no procedure existed whereby the Crown could be sued in tort. If this view is correct, it does not follow, from the Privy Council's decision, that section 4 of the Claims against the Government Act does more than deal with procedural rights, even though a consequence is that judgment against the Crown in tort may be given whereas theretofore it could not be given.

6. *The legal foundation of the maxim that the King can do no wrong.* At common law the Crown could not be sued in tort. This immunity was expressed by the maxim that the King can do no wrong. But there are two views as to the legal foundation of the immunity which the maxim expressed. One is that the immunity resulted only from the absence of any procedure for suing the Crown in tort. "[O]ne traditional mode of

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section 503 of the (Imperial) Merchant Shipping Act 1894 which limited damages recoverable as a result of improper navigation of a ship. Their Honours said "Unless s. 503 or the principles it embodies is applicable the Commonwealth rests under a liability unlimited in amount as for tort. That is a result of s. 75 (iii) and s. 78 of the Constitution and ss. 56 and 64 of the Judiciary Act 1903–1955. The consequence of these provisions is to impose upon the Commonwealth a substantive liability in tort ascertained as nearly as may be by the same rules of law as would apply between subject and subject. There has been some difference of opinion as to how far s. 75 of the Constitution operates to impose substantive liability upon the Commonwealth, as distinguished from making the Commonwealth subject to the jurisdiction of this Court. There has also been a difference of view as to the scope of s. 64 of the Judiciary Act which sometimes has been treated as limited to questions of procedure and at other times as extending in itself to the substantive law governing the liability put in suit . . . These differences are of little or no importance in the present case because, by whatever road, it all leads to the same result." (At pp. 416, 417.) We do not pursue the problem of the construction of section 64 of the Judiciary Act in its context of the other provisions of that Act and the relevant provisions of the Constitution. Nor do we proceed to consider the special problems of the liability of the Crown in right of the Commonwealth which arise where a choice has to be made as to the law of which State it is which is to be applied in respect of the Commonwealth. These problems are discussed in Hogg, *Liability of the Crown* (1971) at pp. 217–226. What is to the point for our purposes is that the unresolved difference of judicial opinion as to whether section 64 of the Judiciary Act deals only with "procedural" as distinct from substantive rights, left open in *Downs* v. *Williams* the argument that, despite the authoritative decision of the Privy Council in *Farnell* v. *Bowman*, ((1887) 12 App. Cas. 643) the "rights" to which the Crown is subjected by the Claims against the Government Act are only procedural rights.

[9] (1887) 12 App. Cas. 643.

expressing and indeed accounting for the absence of any liability on the part of the Crown for the torts of its servants has been to say that the Crown cannot be sued except by its own consent and no fiat will be granted for a petition of right for tort."[10] On this view tortious conduct of the Crown was no less a wrong, in the contemplation of the law, than the tortious conduct of a subject—even though, because of the inadequacy of the procedure for suing the Crown, a subject could not compel the Crown to pay damages in respect of its tortious conduct. This view is consistent with the role of the Crown as the fountain of justice. Indeed, it would seem that in its origin in bygone centuries the maxim, far from meaning that the King is privileged to act tortiously, meant that it was a legal wrong for the King to act tortiously and, if he did so act, he ought to give redress to a subject thereby aggrieved.[11]

The competing view is that the legal basis of the immunity of the Crown from being sued in tort was that nothing which the King did, whether personally or by his servants or agents, could be, in the contemplation of the law, tortious. If this view is the correct one, it means that apart from the obstacle which confronted the subject that, unless the Crown gave its fiat to the proceedings, there was no procedure for suing the Crown in tort, he faced the further barrier, no less formidable, that nothing the Crown did or omitted to do was tortious in the contemplation of the law. This view, which is at variance with the original meaning of the maxim, was adopted in three decisions in England between 1843 and 1865.[12] In each of these cases the Crown did, in fact, grant its fiat to a petition of right by which a subject sought damages against the Crown for tort: but it demurred on the ground that the Crown could not be liable in tort. In each case the demurrer was upheld. In the last of these cases Cockburn *C.J.* said:

> [T]he petition of right . . . is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore shew on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, or petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be suffered to be possible, but to injuries done by a subject by the authority of the Sovereign."[13]

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[10] *Werrin* v. *The Commonwealth* (1938) 59 C.L.R. 150 per Dixon *J.* at p. 167.

[11] This is discussed in a monograph entitled "Proceedings against the Crown (1216–1377)" by Dr L. Erlich, published in Vol. 6 in the *Oxford Studies in Social and Legal History* (1921). *See particularly* pp. 9, 14, 40, 42, 62, 127.

[12] *Viscount Canterbury* v. *Attorney General* (1843) 1 Phillips 306; 41 E.R. 648: *Tobin* v. *The Queen* (1864) 16 C.B. (N.S.) 310; 143 E.R. 1148: *Feather* v. *The Queen* (1865) 6 B. and S. 257; 122 E.R. 1191.

[13] *Feather* v. *The Queen* (1865) 6 B. and S. 257 at p. 295; 122 E.R. 1191 at p. 1205.

In *Farnell* v. *Bowman* the Privy Council did not express any view as to the legal foundation of the immunity of the Crown expressed by the maxim.

7. *The argument for the Crown.* In *Downs* v. *Williams* the Crown contended that the immunity which, prior to the Claims against the Government Act, the Crown had enjoyed from liability in tort was no more than the procedural immunity which arose from the absence of any procedure for suing the Crown in tort. It followed, so the argument continued, that if by statute appropriate procedural rights were conferred upon subjects, the Crown would be exposed thereby to liability: for it was only the procedural immunity, expressed by the maxim the King can do no wrong, which shielded the Crown from liability. The necessary procedural rights, the Crown argued, were conferred by the Claims against the Government Act. That Act, by providing that a subject could sue the nominal defendant (representing the Crown) and that in such a case the proceedings and "rights", that is rights of procedure, are the same as in an ordinary case, destroyed the immunity which, therefore, the Crown had enjoyed. It followed, as was held by the Privy Council in *Farnell* v. *Bowman,* that since the Claims against the Government Act the Crown could be adjudged liable in damages for the tort of negligence (or any other common law tort). Prior to that Act it was no less the legal duty of the Crown to take reasonable care for others than it was the legal duty of a subject; and the Claims against the Government Act provided the procedure whereby an aggrieved subject could sue the Crown for damages for harm caused by a breach by the Crown of that duty. But, the argument continued, the Crown, like a subject, could not be liable for damages for breach of a statutory duty which the relevant statute did not impose upon it, albeit that the duty was imposed on many other persons. In such a case the Crown had not committed a tort; and it was not to the point that the Claims against the Government Act provided a procedure for suing it in tort. If the Crown was not bound by the Factories, Shops and Industries Act, it did not have the duty to fence which that Act imposed upon other occupiers of factories. The Crown, the argument continued, was not bound by that Act. It could not therefore, by having refrained from fencing, have been guilty of the tort of breach of statutory duty.

8. *The essence of the Crown argument: that the Claims against the Government Act does not impose upon the Crown any legal obligations but merely enables the obtaining of redress for breach of obligations which it has apart from that Act.* The significance of the argument for the Crown in *Downs* v. *Williams* goes far beyond the particular question whether the Crown, in litigation against it, is liable in damages for conduct which, if it had been done in like circumstances by a subject, would have been in breach by the subject of a statutory duty imposed upon him by an Act which does not, itself, expressly or impliedly also bind the Crown. For the essence of the argument of the Crown was that the Claims against the Government Act does not impose upon the Crown any legal obligations which it did not have prior to that Act; it merely enables subjects to obtain redress against the Crown for breach of any legal obligation (which the Crown has apart from that Act) by the same process, as nearly as possible,

as that by which redress could be obtained against another subject for a like breach by that subject. So understood, the Claims against the Government Act is concerned only with procedural rights. These rights are to be as nearly as possible the same as in an ordinary case between subject and subject and it follows that the procedural rights between subject and subject apply even if they are rights conferred by legislation which does not, as a matter of construction of it, bind the Crown.

9. *The argument would place in jeopardy the application in litigation against the Crown of fundamental reforms of substantive law.* But if this is indeed the way in which the Claims against the Government Act is to be understood it means that the Act gives no warrant for applying, to determine the liability of the Crown in litigation, legislation which is directed to substantive rights, as distinct from procedural rights, and which does not, as a matter of construction of it, bind the Crown. There is legislation, of fundamental importance to the substantive rights of subjects in litigation between them, which is not expressed to bind the Crown—for example, the Law Reform (Miscellaneous Provisions) Act, 1965, which enables recovery of damages despite contributory negligence, the Law Reform Miscellaneous Provisions) Act, 1946, which enables recovery from a joint tortfeasor notwithstanding that the other joint tortfeasor has been sued to judgment and the Law Reform (Miscellaneous Provisions) Act, 1944, which enables an executor to recover damages for loss of earnings suffered by his testator as a result of injuries tortiously inflicted. This is legislation which confers substantive rights—not merely rights of procedure. It would seem that it does not, as a matter of construction of it, bind the Crown by implication.[14] It follows that if the Claims against the Government Act is to be understood in accordance with the argument for the Crown in *Downs* v. *Williams* these rights, which any subject has in litigation between him and any other subject, are not enjoyed by a subject, as of right, in litigation against the Crown. In *Downs* v. *Williams* the Crown sought to escape from its position, at least to some extent, by a gloss upon this argument. It sought to draw a distinction between statutes which modify the common law and statutes which create new rights. The Crown, it suggested by this gloss, is bound by the common law, and where the common law is modified by statute, by the common law as so modified; but it is not subject in litigation to new rights created by statute as distinct from common law rights modified by statute. This gloss ill accords with its principal argument that all that the Claims against the Government Act does is to deprive the Crown of any immunity from court process so that the substantive rights of a subject against the Crown can be enforced by the same procedures as like substantive rights can be enforced against another subject. In any event, as Windeyer *J.* pointed out in *Downs* v. *Williams* it "is an illusory distinction. Every Act of Parliament alters the law to some degree unless it is merely a re-enactment of an existing statute as in a consolidation of statute law, or is truly declaratory of common law".[15] We put aside, therefore, the gloss and go on to see how the principal argument of the Crown fared.

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[14] *See* part 14, particularly sections 1–6, of the report.

[15] At p. 84.

10. *Rejection of the argument by the Court of Appeal.* The argument was not put explicitly to the trial judge.[16] It failed before all the judges who constituted the Court of Appeal.[17] In essence, they held that the immunity which the Crown had enjoyed was not only a procedural immunity but also a substantive immunity in the sense that the law was that the King could not commit a tort so that damages could not have been awarded against the Crown on a cause of action based solely on tort even if a procedure for suing the Crown on such a cause of action had been available. In *Farnell* v. *Bowman* the Privy Council held that the Claims against the Government Act enabled a subject to obtain damages against the Crown on such a cause of action. This decision was possible, the judges of the Court of Appeal considered, only if that Act, in providing that the "rights of the parties . . . shall as nearly as possible be the same . . . as in an ordinary case between subject and subject" dealt not only with procedural rights but also with substantive rights. The Act subjected the Crown in litigation "as nearly as possible" to the whole body of the substantive law which applied between subject and subject. This included both the common law and statutory law. Just as the Claims against the Government Act made the Crown liable in damages to a subject for the tort of negligence which did not apply to it at common law, so it was liable for a breach of a statute which did not apply to it by the terms of the statute. "It is not to the point that, since the Factories, Shops and Industries Act does not bind the Crown *proprio vigore,* the Crown is not under a duty enforceable by prosecution, conviction and the imposition of a penalty to carry out the obligations [to fence dangerous machinery] imposed by section 27 as part of the criminal law and which are the foundation of the existence of a civil cause of action against an occupier of factory premises. The Parliament has declared its intention that in a case brought under the Claims against the Government and Crown Suits Act the civil law as between subject and subject, so far as may be, is to regulate the rights of the parties to the case. It is immaterial that a particular law had an origin in a rule of criminal law which did not apply to the Crown."[18]

11. *"Want of right and want of remedy are the same thing in law".* The argument for the Crown requires that a distinction be drawn between a legal right which is enforceable by courts of unlimited general jurisdiction and a legal right which such courts are unable to enforce through want of an appropriate procedure. This is a distinction which is familiar to students of modern jurisprudence. But the maxim that the King can do no wrong long antedated this concept. It may not be helpful, in seeking the legal foundation of the maxim, to apply the concept. This point was clearly made by Windeyer *J.* in the High Court when the Crown appealed to that court from the decision of the Court of Appeal. He said that the matter was put neatly in 1820 by Chitty when he wrote "The law will presume that the subject cannot have sustained any such personal wrong from the Crown, because it cannot afford any adequate remedy: and want of right and want

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[16] (1969) 2 D.C.R. 114.

[17] (1970) 72 S.R. 622.

[18] (1970) 72 S.R. 622 per Mason *J.A.* at pp. 631–632.

of remedy are the same thing in law."[19] His Honour continued "Maine's statement that 'so great is the ascendancy of the law of actions in the infancy of courts of justice that substantive law has at first the look of being gradually secreted in the interstices of procedure' can be matched by later events than those of early law and custom."[20]

12. *The more general approach taken by the High Court.* It is not surprising, therefore, that although the Crown succeeded in the High Court (by the narrow margin of three justices to two) none of the justices who constituted the majority accepted the narrow basis put forward by the Crown in support of the claim that the Crown was not liable. Each took a more general approach. We now turn to their judgments.

13. *The dissenting judgments.* The dissentients were Windeyer and Gibbs *JJ.*

The approach which Gibbs *J.* took is, in substance, that taken by the Court of Appeal.[21]

Windeyer *J.* dissented on the ground that the duty to fence dangerous machinery under section 27 of the Factories, Shops and Industries Act, 1962, applied to the Crown on the true construction of that Act.[22] None of the other judges, at first instance or on appeal, took this view.

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[19] *Prerogatives of the Crown* (1820) at p. 340.

[20] *Downs* v. *Williams* (1971) 126 C.L.R. 61 at p. 83.

[21] "With all respect, however", he said, "it seems to me unreal to say that at common law the Crown was under a substantive responsibility for the wrongs of its servants but there was no remedy by which this responsibility could be enforced. The truth, in my opinion, is that there was a substantive rule of the common law, expressed by the maxim the King can do no wrong, that the Crown can neither itself commit a tort nor be responsible for torts committed by its servants . . . In my opinion, *Farnell* v. *Bowman* is authority that the statute in granting a new remedy created new rights and imposed upon the Crown a liability which had not previously existed . . . *Farnell* v. *Bowman* established that legislation in the form of the Claims against the Government and Crown Suits Act, 1912, introduced into the Colonies in which it was enacted a reform as sweeping as it was simple. It enabled a subject, by proceedings under that legislation, to enforce against the Crown substantive rights as nearly as possible the same as those which he would have had against another subject in the same circumstances . . . Section 4 of the Claims against the Government Act, 1912, . . . [has] an ambulatory operation and [requires] the court to consider the whole of the law of torts between subject and subject, including modifications effected by statutes subsequently passed . . ."

[22] However, his Honour did discuss what the effect of the basic formula of the Claims against the Government Act would be if, contrary to his view, s. 27 of the Factories, Shops and Industries Act did not bind the Crown. He did not approach the problem by applying to the maxim that the King can do no wrong concepts of analytical jurisprudence. "After all", he said, "wrongs in law are acts and omissions for which redress can be had by some process known to the law." (At p. 83.) "The Claims against the Government Act", he continued, "subjects the Crown in New South Wales to all liabilities of the law of torts known to the law when it was enacted, whether they were of common law origin or created by statute. This is illustrated by the statute relating to fatal accidents, Lord Campbell's Act, now in New South Wales the Compensation to Relatives Act, 1897–1953. Section 6E (3) of that Act, introduced in 1928,

14. *The judgment of Menzies* J. We turn now to the majority judgments in the High Court. Menzies J. did not approach the problem by jurisprudential analysis of the law expressed by the maxim the King can do no wrong. His Honour's approach was to draw a distinction between legislation, which although not expressed to bind the Crown, makes provisions which are of general application and legislation which makes provisions which are of particular application. His Honour said—

> Where, by reason of a law of general application, one subject may sue another, it may be that the Government, by virtue of the sections [of the Claims against the Government Act] in question, is made liable if it causes damage that would be recoverable from it, had it been a subject. It seems to me, however, an altogether different proposition to treat the Claims against the Government and Crown Suits Act as imposing upon the Government obligations which are of particular, and not of general, application.[23]

He upheld the Crown's appeal on two grounds. One was that, in his view, the statutory duty to fence, was a law of particular, and not of general application. The other was that it would have been, in his view, unjust to hold the Crown liable for breach of a duty provided by a statute which does not apply to the Crown. "Perhaps", he said, "the most important sentence in the judgment of the Privy Council [in *Farnell* v. *Bowman*] is this: 'Thus, unless the plain words are to be restricted *for any good reason*, a complete remedy is given to any person having or deeming himself to have any *just claim or demand* whatever against the Government.' ((1887) 12 App. Cas. 643 at 648)."[24]

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provides that the Act shall bind the Crown. Before 1928 there was no express provision, but the Act and its predecessors were assumed to be binding on the Crown: *Pitcher* v. *Federal Capital Commission* (1928) 41 C.L.R. 385, at pp. 390, 395–396. This was taken to be the result of the successive statutes enabling claims in tort to be brought against the Government . . . This new tort became part of the general law of torts in New South Wales in 1847 when, by 11 Vict. No. 32, the provisions of Lord Campbell's Act were enacted by the local legislature. That was 10 years before the Act of 1857, the first of the series of statutes by which the Crown in New South Wales became liable in tort. The new rights created by Lord Campbell's Act were a part of the existing law of torts to which the Crown became subject. This case is a marked contrast. So far as I am aware, a statutory duty to fence dangerous machinery first appeared in New South Wales in the Factories and Shops Act, 1896, 60 Vict. No. 37, s. 28. That is 20 years after the Claims against the Colonial Government Act, the statute under consideration in *Farnell* v. *Bowman*, had come into force. . . . A statute which was not passed until after the Claims against the Government legislation came into force does not impose any duty on the Crown unless it does so expressly or by implication." (At pp. 83–85.) Windeyer J. was the only one of the judges, at first instance or on appeal, who took the view that it is relevant whether the statute in question was enacted before or after the Claims against the Government legislation. In so doing he adopted a suggestion made earlier by Jordan C.J. in *Washington* v. *The Commonwealth* (1939) 39 S.R. 133. This restrictive interpretation is not a view which had previously attracted favourable judicial notice and it would seem unlikely that it will prevail.

[23] At p. 70.

[24] At p. 68: emphasis supplied.

One may doubt the cogency of the second ground relied upon by his Honour. Section 3 of the Claims against the Government Act refers not only to a person who has a just claim against the Government but also to "any person . . . *deeming himself* to have any just claim".[25] This ground did not commend itself to any of the other judges, at first instance or on appeal, in the case.[26] But the first ground, the distinction between Acts of general application and Acts of particular application, is an important indication of the trend of judicial construction of the Claims against the Government Act.

It was not necessary to the decision of Menzies *J.* for him to commit himself to the view that the Crown is liable in litigation where by reason of a law of general application, as distinct from a law of particular application a subject would be liable. His Honour went no further than saying that this "may be" so.[27] But it is significant that he cited with approval the decision of Fullagar *J.* in *Asiatic Steam Navigation Co. Ltd* v. *The Commonwealth*[28] that for "the purposes of suits to which the Commonwealth is a party, the general law as between subject and subject is to apply. But this general enactment cannot be regarded as derogating from any *special enactment* which by its own terms is made either applicable or inapplicable to the Commonwealth".[29] His Honour's judgment is consistent with the "rights" conferred by the Claims against the Government Act extending beyond procedural rights. It is sufficient, for our purposes, that the judgment gives no ground for apprehension that in litigation against the Crown, the rights of subjects would not be the same as in litigation against subjects bound by Acts, such as those to which we have referred in section 9 of this Appendix, which reform the body of the general law or which introduce new principles of general law. If the approach taken by Menzies *J.* is followed in future cases, difficulty may arise, in respect of some Acts, in determining whether they are to be characterized as being Acts of general application or Acts of particular application. But it is scarcely open to argument that Acts of the type to which we have referred in section 9 of this appendix can be regarded otherwise than as being of general application.

15. *The judgment of Owen* J. We turn now to the judgment of Owen *J.* Like Menzies *J.*, his Honour did not approach the problem by analysing the nature of the immunity which the Crown enjoyed from tort liability prior to the Claims against the Government Act. The substance of his Honour's reasons for judgment are as follows:

> In an action against a subject claiming damages for breach of a statutory duty, it would have to be shown that the defendant was one of those persons upon whom the statute imposed an obligation. Why should this not be necessary where it is sought to make the Crown liable for a breach of statutory duty? Submissions made on behalf of the plaintiff seem to me to disregard the words of s. 4 that "the . . . rights of the

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[25] Emphasis supplied.

[26] Although McTiernan *J.* stated that he did not find it necessary to express any opinion upon it.

[27] At p. 70.

[28] (1956) 96 C.L.R. 397 at p. 424.

[29] At p. 69: emphasis supplied.

> parties therein shall as nearly as possible be the same" as in an action between subject and subject . . . I do not find in the cases cited to us authority for the proposition for which counsel for the plaintiff has contended. They undoubtedly lay down that a subject is to have the same right of action in tort against the Crown as he would have in an action of tort against another subject but the Crown is, by virtue of s. 4, entitled to the rights which a subject would have if sued for a breach of statutory duty and that includes the right to deny that any obligation is imposed upon it by the statute said to have been breached.[30]

His Honour did not adopt the argument of the Crown that "the rights of the parties" referred to in section 4 of the Claims against the Government Act mean only procedural rights. He made no distinction in his judgment between procedural rights and substantive rights. "No doubt", he said, "by the provisions of the Claims against the Government and Crown Suits Act, the Crown submitted itself to liability for tort."[31] He drew no distinction, in this respect, between procedural rights and substantive rights. And there is nothing in his judgment to suggest that the rights in tort to which the Crown submitted itself, rights "as nearly as possible" the same as in a case between subjects, do not include substantive rights in tort conferred by statute as well as procedural rights. The point which he made is that, as he saw the case, a subject to whom the Factories, Shops and Industries Act did not apply would not have been liable to the plaintiff and hence the Crown was not liable.

It would seem that his Honour's reasons for judgment are to be understood as follows. The Claims against the Government Act subjects the Crown to the same liability which a subject has under the general law of tort whether that law be the creature of the common law or of statute. But it is not part of the general law of tort that an occupier of a factory has a duty to fence dangerous machinery irrespective of whether his failure to fence it was negligent. The general law of tort which is applicable is that where a person has a statutory duty to take a safety measure to protect his employees, breach of that duty causing injury to one of the employees gives that employee a cause of action for damages. This general law of tort applies to the Crown as well as to a subject. But if the Crown does not have a particular statutory duty such as the duty to fence dangerous machinery, no cause of action arises against it for breach of that duty any more than it would arise against a subject who does not have that duty.

So understood, his Honour's approach is similar to that taken by Menzies *J.*, namely that the Factories, Shops and Industries Act creates obligations "which are of particular, and not of general, application".[32] And, so understood, his judgment does not give rise to fear that in litigation against the Crown the rights of subjects do not include the same substantive rights as those, of the type to which we have adverted in section 9 of this appendix, conferred by statute and applicable in like litigation against a subject.

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[30] At pp. 91–92.

[31] At p. 91.

[32] At p. 70.

16. *The judgment of McTiernan* J. We turn now to the judgment of McTiernan *J.* The substance of his Honour's reasons for judgment are as follows:

> It must be borne in mind . . . that it is the rights of the parties in the suit in question, rather than the law, which are to apply as nearly as may be as if between subject and subject . . . In such a case as this therefore it is only after it has been ascertained that a statutory duty is imposed on the Crown that the rights of the parties are determined by the *general law* applicable as between subject and subject . . . The respondent relied . . . on a decision of this Court on the construction of s. 64 of the Judiciary Act: *Asiatic Steam Navigation Co. Ltd* v. *The Commonwealth* ((1956) 96 C.L.R. 397). That decision allowed to the defendant, the Crown of the Commonwealth, which had conceded liability in tort, a defence which would have been open to a subject in the same circumstances.
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> It is of course a different question which confronts the Court on this occasion.[33]

For an appreciation of the significance of his Honour's judgment it is necessary to consider the *Asiatic Steam and Navigation Case.* That case arose out of a collision between two ships. The owner of one of the ships sued the Commonwealth for damages alleging that the other ship, which was owned by the Commonwealth, had been navigated negligently. The Commonwealth admitted the negligence. It was liable in damages for the tort: but it claimed that the damages which could be recovered against it were to be limited in accordance with section 503 of the Merchant Shipping Act 1894, an Imperial Act in force in Australia. This section limited, by reference to the registered tonnage of a ship, damages recoverable for collision caused by negligent navigation. Unless the limitation provided by this section applied in the litigation between the subject and the Crown, the liability of the Crown was for the full amount of the damage caused. There was no doubt that the limitation would have applied in like litigation between subject and subject. The High Court held that the limitation applied. In the joint judgment of Dixon *C.J.*, McTiernan *J.* and Williams *J.* the question for decision was posed this way:

> It was certainly open to the [Commonwealth] Parliament to deal with the question by what substantive law should the Crown's liability in tort be governed, by adopting a general rule that, so far as may be, the law applicable in like circumstances as between subject and subject should aply to the relations between the Crown and the subject. No reason exists why the law between subject and subject thus to be adopted or adapted should not be found in the Merchant Shipping Act 1894 . . . as well as elsewhere. On this view the question is . . . whether s. 503 [the limitation section] contains . . . principles or provisions forming part of private law falling under such a description that the general rule, of its own nature, would or would not, so to speak, gather in and incorporate them in the law governing the delictual responsibility of the Crown.[34]

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[33] At pp. 65–66: emphasis supplied.

[34] At p. 419.

They decided that the rule did govern the delictual responsibility of the Commonwealth.

It is not to the point that in the *Asiatic Steam and Navigation Case* the section in question limited the amount which a subject could recover from the Crown. In proceedings by a subject against the Crown it is the "rights of the parties", not merely the rights of the subject, which are as nearly as possible the same as in an ordinary case between subject and subject (Claims against the Government Act, s. 4: the Judiciary Act 1903 (Commonwealth), s. 64). The principle of the section would have been no less applicable in the proceedings if it had provided not that the damages were to be limited but that they were to be trebled.

The *Asiatic Steam and Navigation Case* illustrates what we understand McTiernan *J.* had in mind when he said, in *Downs* v. *Williams*, "It is the rights of the parties in the suit in question, rather than the law, which are to be applied as nearly as may be as if between subject and subject."[35] His Honour is not there distinguishing between "rights" and "law" in the sense that "rights" are procedural rights and the "law" is substantive rights. The limitation of damages in the *Asiatic Steam and Navigation Case* was a substantive right of the defendant—not a procedural right. The distinction made, so far as it relates to legislation as distinct from the common law, would seem to be between, on the one hand, legislation directed to what redress can be obtained in litigation (causes of action, defences, conditions of recovery) or procedures in relation to the obtaining of redress by litigation and, on the other hand, legislation not so directed.

17. Downs *v.* Williams *does not herald a more restrictive construction of the Act.* The foregoing discussion of *Downs* v. *Williams* leads us to the conclusion that it does not indicate that any judicial trend has emerged which, if it further develops, will lead to a restrictive interpretation of the sweeping reform effected by the Claims against the Government Act. Although, in that case, the Crown succeeded in having the decision of the Court of Appeal reversed, it did not succeed in persuading any of the judges of the High Court to construe that Act as doing no more than removing the procedural obstacles which had prevented the Crown being sued by the same process as that by which a subject can sue another subject. The effect of that Act, as construed in the light of judicial decisions, including *Downs* v. *Williams* is, we believe, in general terms as stated in the next section.

18. *The construction of the Act implicit in* Downs *v.* Williams. The Claims against the Government Act does more than confer procedural rights.

In litigation by a subject against the Crown pursuant to the Act, the whole of the common law applies as nearly as possible as if the Crown were a subject. It is the common law of the day, not the common law at the stage of development it had reached at the time of enactment of the Claims against the Government Act.

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[35] At p. 65.

Further, where any statute, whenever enacted, is directed to the procedural or substantive rights of subjects in litigation against another subject, a subject has the same rights, as nearly as possible, in litigation against the Crown. Thus legislation, such as that to which we have referred in section 9 of this Appendix, which reforms the general body of the law of tort by providing that contributory negligence is not a bar to the recovery of damages for negligence, or by providing that damages can be recovered from a joint tortfeasor notwithstanding that the other tortfeasor has been sued to judgment, or by providing that an executor can recover damages for financial loss caused to his testator, in his lifetime, by tortious conduct, applies in litigation by a subject against the Crown. It applies in the sense that it confers these rights in litigation by subjects against other subjects and, in litigation against the Crown, a subject has these rights, as nearly as possible the same. Such legislation applies notwithstanding that it is not expressed to bind the Crown and notwithstanding that, as would seem to be the position,[36] it does not bind the Crown by implication. Parliament, of course, can provide that legislation of this character shall not apply in litigation against the Crown.[37]

We have dealt, so far, with legislation which is directed to the procedural or substantive rights of subjects in litigation against other subjects. Whether legislation which is not expressed to bind the Crown and which is not directed to the rights of subjects in litigation against other subjects, governs the rights of a subject in litigation against the Crown, depends upon the nature of the legislation. There is a great body of legislation, which is not directed to rights in litigation, but which is fundamental to the rights and obligations between subjects as the legal basis on which their affairs are conducted. It forms part of the body of the general law. It is common that such legislation is not expressed to bind the Crown. For example, the Sale of Goods Act, 1923, is not expressed to bind the Crown. It is, we consider, extremely unlikely that any court would hold that such legislation does not, on its true construction, by its own force bind the Crown by implication. If so, no question arises of a subject, in litigation against the Crown, needing to rely upon the Claims against the Government Act to have the benefit of the legislation. But, if we are wrong in this respect, the Claims against the Government Act would afford to a subject, in litigation against the Crown, the same rights; for the legislation is part of the body of the general law as distinct from particular law.

But where legislation is not directed to rights in litigation and is not part of the body of the general law, in the sense in which we have used the expression "general law", and it does not of its own force bind the Crown, the Claims against the Government Act does not have the effect of conferring upon a subject in litigation against the Crown the same rights as the subject would have, by reason of the particular legislation, in litigation against another subject to whom that legislation applies. Section 27 of the Factories, Shops and Industries Act, 1962, is legislation of this nature.

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[36] *See* part 14, particularly sections 1–6, of the report.

[37] It may be that there is a sufficient indication of such a legislative intention where the legislation expressly provides that it shall not bind the Crown (*Downs* v. *Williams* per Menzies *J.* at p. 69 and per Gibbs *J.* at p. 102).

So far as relevant, it provides only that occupiers of factories, not exempted by proclamation, shall fence dangerous machinery and that it is an offence, punishable by fine, to fail to do so. It is not part of the general body of law which provides the legal basis of rights and obligations between subjects upon which the conduct of their affairs is ordered: and it is not directed to the procedural or substantive rights of subjects in litigation against other subjects. It is true that an employee injured in consequence of failure by his employer, bound by the section, to fence dangerous machinery, can sue his employer for damage caused by breach of the statutory duty. But this is not a right of action to which the Factories, Shops and Industries Act, 1962, is directed. The right of action for damages for breach of any statutory duty imposed for the safety of employees is conferred, not by the Factories, Shops and Industies Act, 1962, but by the common law: and the common law confers it only against persons who have the statutory duty. Assume, for the sake of comparison, that the right of action for breach of any statutory duty imposed for the safety of employees was conferred not by the common law, as is the case, but by a Law Reform Act which does not, expressly or by implication, bind the Crown. Such an Act would be one directed to the rights of subjects in litigation against other subjects. Accordingly the Claims against the Government Act would apply in respect of the right of action conferred by this supposed Law Reform Act: where the Crown has such a statutory duty, it would be liable in damages, as now it is liable by the common law, for injury to an employee thereby injured. But it would not, despite this supposed Law Reform Act, be liable for breach of section 27 of the Factories, Shops and Industries Act or of any other provision which does not impose upon it the statutory duty breach of which is alleged.

19. *Conclusion: no restatement of the basic formula as to the liability of the State is needed.* We have considered whether, bearing in mind the divergences in judicial opinion which emerged in *Downs* v. *Williams* as to the correct construction of the basic formula of the Claims against the Government Act that "the proceedings and rights of the parties . . . shall as nearly as possible be the same . . . as in an ordinary case between subject and subject", and which had been foreshadowed to some extent in earlier decisions in respect of section 64 of the Judiciary Act 1903, we should assay a restatement of the formula so as to set at rest any remaining doubts. We have decided not to do so. We have come to this decision on two grounds. The first is that the existing formula works well. We do not consider that judicial decisions are likely, in consequence of *Downs* v. *Williams*, to impede the efficiency of its operation. If this forecast proves wrong, it will be, then, appropriate to reframe the formula. It would be an over-reaction to the difficulties considered in *Downs* v. *Williams* to reframe the formula now. The second ground is that we do not believe that any statutory formula can be devised which will be free from difficulty in interpretation as, from time to time, its application to novel situations, particularly those which arise from the impact of legislation which does not bind the Crown, falls for decision. We do not believe that it is a realistic approach to endeavour, in detailed, and necessarily lengthy, legislation to anticipate and explicity provide for every contingency. The general law applicable as between subject and subject, is not static. As it changes, unforeseen problems of

adaptation to the Crown inevitably will arise. It is better, we believe, to provide no more than a general formula for its adaptation to the Crown, leaving to the courts the working out of the detail of its application. The present formula is, in this respect, a good one. The record of the courts in applying the present formula, despite the divergences of judicial opinion which from time to time have emerged, is cause for confidence in the willingness of the courts to respond to new circumstances and changes in social outlook.

20. *Should the Factories, Shops and Industries Act,* 1962, *be amended to provide that the Crown shall have the statutory duty to fence dangerous machinery?* It may well be thought to be surprising that if an employee of the Crown, working in a factory occupied by the Crown, is injured by unfenced dangerous machinery he does not have the same right to damages for breach of statutory duty as a person injured, in like circumstances, in private industry. But it is, we consider, a misconception to attribute this state of affairs to unsoundness of the basic formula for civil liability of the Crown provided by the Claims against the Government Act. The state of affairs arises because the duty to fence imposed upon subjects by the Factories, Shops and Industries Act, 1962, is not, by that Act imposed also upon the Crown. That Act may be contrasted with the Scaffolding and Lifts Act, which, by amendment in 1948, imposes upon the Crown the same statutory duties to protect workers as are imposed generally upon subjects. If the Government wishes to subject the Crown to the statutory duty to fence dangerous machinery, it can achieve this result by a simple amendment to the Factories, Shops and Industries Act, 1962.

APPENDIX D

DRAFT CROWN PROCEEDINGS BILL

An Act to make provision with respect to proceedings by and against the Crown; to repeal the Claims against the Government and Crown Suits Act, 1912; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.—PRELIMINARY.

Short title.

1. This Act may be cited as the "Crown Proceedings Act, 1976".

Commencement.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Division of Act.

3. This Act is divided as follows—

PART I.—PRELIMINARY—*ss.* 1–3.

PART II.—PROCEEDINGS WHERE THE CROWN IS SUED —*ss.* 4–7.

PART III.—TITLE OR NAME UNDER WHICH THE CROWN IS A PARTY TO ANY PROCEEDINGS—*ss.* 8–13.

PART IV.—GENERAL—*ss.* 14–18.

SCHEDULE.

PART II.—PROCEEDINGS WHERE THE CROWN IS SUED.

Interpretation.

4. In this Part—

"cross-claim" includes counterclaim, cross-action, set-off, and third-party claim.

"judgment" includes every species of relief which a court can grant whether interlocutory or final and whether by way of order that anything be done or be not done or otherwise and includes a declaration.

"to sue" includes to bring and maintain proceedings by way of cross-claim.

Claims against the Crown. Act No. 27, 1912, s. 3 (1) and s. 4.

5. (1) Any person, other than the Crown, having or deeming himself to have any just claim or demand whatever against the Crown may sue the Crown at law or in equity in any competent court.

(2) Every such case shall be commenced in the same way, and the proceedings and rights of the parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side and shall bear interest as in an ordinary case between subject and subject.

Repeal.

6. The Claims against the Government and Crown Suits Act, 1912, is repealed.

Pending proceedings.

7. (1) Where, before the commencement of this section, a person sues a nominal defendant at law or in equity in accordance with the Claims against the Government and Crown Suits Act, 1912, and the case has not been disposed of before the commencement of this section, the case shall continue and be disposed of as if this Act had not been enacted.

(2) For the purposes of this section a case is not disposed of until damages and costs, if any, adjudged or awarded against the nominal defendant have been paid or have been satisfied by execution.

PART III.—TITLE OR NAME UNDER WHICH THE CROWN IS A PARTY TO ANY PROCEEDINGS.

8. In this Part— **Interpretation.**

"multiple interest proceedings" means any proceedings in any court to which the Crown is a party, whether or not there is any other party to the proceedings, in separate inconsistent interests.

"nominated person" means a person nominated by the Attorney General, or appointed by a court pursuant to section 12, to represent the Crown in respect of a separate inconsistent interest in multiple interest proceedings or proposed multiple interest proceedings.

"ordinary proceedings" means any proceedings in any court other than multiple interest proceedings.

"proceedings" means multiple interest proceedings or ordinary proceedings.

9. This Part applies to— **Application.**

(a) proceedings in any case to which Part II applies; and

(b) any other proceedings in any court to which the Crown is a party, whether or not on the relation of another person, as plaintiff, defendant, intervener or otherwise, except criminal proceedings.

10. (1) The Crown shall be a party to ordinary proceedings under the title "State of New South Wales" and not under the title or name of the Attorney General or other law officer of the Crown. **Ordinary proceedings.**

(2) This section is subject to any Act.

11.

Multiple interest proceedings.

11. (1) In multiple interest proceedings the Crown shall be a party to the proceedings, in respect of one of the separate inconsistent interests, under the title "State of New South Wales" and, in respect of each other of those interests, under the name of the nominated person nominated in respect of that interest.

(2) A nominated person shall not incur any personal liability arising from the use of his name as the name under which the Crown is a party to multiple interest proceedings.

(3) Where the Crown, in respect of a separate inconsistent interest, is a party to multiple interest proceedings under the name of a nominated person and that person dies, or in the opinion of the Attorney General it is for any other reason desirable that a different person be the nominated person in respect of that interest, the Attorney General may nominate a different person to be the nominated person in the place of the first-mentioned person.

(4) Where the Attorney General nominates a different person as provided by subsection (3) and notice of that nomination is given to the court in which the proceedings are pending—

(a) the Crown shall be a party, in respect of the separate inconsistent interest to which the nomination relates, under the name of that person;

(b) all judgments and orders made or given in the proceedings shall have effect and the proceedings may be continued as if, in respect of the separate inconsistent interest to which the nomination relates, the name under which the Crown is a party were at all times the name of that person;

(c) the court may make all such orders as to amendment of the pleadings or otherwise as are necessary or convenient for the purposes mentioned in paragraphs (a) and (b).

(5) This section is subject to any Act.

Failure to nominate.

12. Where—

(a) any person requests the Attorney General to nominate a person to represent the Crown in respect of a separate inconsistent interest in multiple interest proceedings or proposed multiple interest proceedings; and

(b) there is not, at the time of the making of the request, a nominated person to represent the Crown in respect of that interest in those proceedings or proposed proceedings, and the Attorney-General does not nominate such a person within 30 days after the making of the request or, in any case of urgency, within such shorter period as the court, in which the proceedings are pending or, as the case may be, within which it is proposed to bring the proceedings, thinks fit,

the Court may appoint the Attorney General or any other person to be the nominated person.

Pending proceedings.

13. (1) Nothing in this Part shall affect proceedings commenced before the commencement of this section or any step in such proceedings.

(2) For the purposes of this section "step" in proceedings includes the joining after the commencement of this section of the Crown as a party to proceedings commenced before the commencement of this section.

PART

PART IV.—GENERAL.

Interpretation.

14. In this Part "proceedings" means proceedings in any case to which part II applies, and any other proceedings in any court to which the Crown is a party, whether or not on the relation of another person, as plaintiff, defendant, intervener, or otherwise, except criminal proceedings.

Demise of the Crown.

15. No proceedings by or against the Crown shall abate or be affected by the demise of the Crown.

Execution against the Crown.

16. (1) The Treasurer shall pay all moneys payable by the Crown under any judgment or order of any court for debt, damages, costs or otherwise, including any interest thereon, out of any moneys in his hands then legally applicable thereto and forming part of or belonging to the Consolidated Revenue or voted by Parliament for that purpose.

(2) In the event of such payment not being made within 60 days after demand, execution may be had for the amount and levied upon any property of the Crown.

(3) Payment of any moneys payable by the Crown under any judgment or order of any court for debt, damages, costs or otherwise, including any interest thereon, may be enforced as mentioned in subsection (2) but not otherwise.

Rules.

17. (1) All such rules of court may be made as are necessary or convenient for carrying out the purposes of this Act.

(2) This section does not limit any power, conferred by any Act, to make rules of court.

Amendment of Acts.

18. Each Act mentioned in column 1 of the Schedule is amended in the manner specified opposite that Act in column 2 of the Schedule.

SCHEDULE

Sec. 18.

SCHEDULE

AMENDMENT OF ACTS

Column 1		Column 2
Year and number of Act.	Short title of Act.	Amendment.
1944, No. 28..	Law Reform (Miscellaneous Provisions).	Section 1 (2)— Omit "*s.* 1"; insert instead "*ss.* 1, 1A". Section 1A— Insert next after section 1 the following new section— The Crown. 1A. This Act shall bind the Crown.
1945, No. 1 ..	Statutory Duties (Contributory Negligence).	Section 3— Insert next after section 2 the following new section— The Crown. 3. This Act shall bind the Crown.
1946, No. 33..	Law Reform (Miscellaneous Provisions).	Section 1 (2)— Omit "*ss.* 2-4"; insert instead "*ss.* 1A-4". Omit "*s.* 5"; insert instead "*ss.* 4A, 5". Section 1A— Insert in Part II next before s. 2 the following new section— The Crown. 1A. This part shall bind the Crown. Section 4A— Insert in Part III next before s. 5 the following new section— The Crown. 4A. This Part shall bind the Crown.
1965, No. 32..	Law Reform (Miscellaneous Provisions).	Section 8A— Insert next after section 8 the following new section— The Crown. 8A. This Part shall bind the Crown.
1970, No. 11..	Courts of Petty Sessions (Civil Claims).	Section 1A— Insert next after section 1 the following new section— The Crown. 1A. Subject to the Crown Proceedings Act, 1976, this Act shall bind the Crown.
1972, No. 28..	Law Reform (Law and Equity).	Section 7— Insert next after section 7 the following new section— The Crown. 8. This Act shall bind the Crown.
1973, No. 9 ..	District Court.	Section 2A— Insert next after section 2 the following new section— The Crown. 2A. Subject to the Crown Proceedings Act, 1976, this Act shall bind the Crown. Section 68(2) (a)— Omit "officers"; insert instead "officers, or the Crown through any of its officers".

APPENDIX E

NOTES ON DRAFT CROWN PROCEEDINGS BILL

Clause 2—Commencement

The purpose of providing for a delay in the general commencement of the Act is to afford an opportunity to the legal profession to familiarize itself with the provisions before they come into force and also to enable appropriate rules of court to be made.[1]

Part II—Generally

The principal provision of this part of the bill, clause 5, is closely modelled on the language of ss. 3 and 4 of the Claims against the Government and Crown Suits Act, 1912, save that proceedings are to be taken against the Crown and not against a nominal defendant. Our reason for adopting, so far as possible, the language of the previous sections is to retain the advantage of the case law upon those sections.

Clause 4—Interpretation

See part 5 sections 4 and 6 of the report.

Clause 5—Claims against the Crown

See, generally, part 5 sections 1, 2 and 3 of the report.

The Crown, as plaintiff, as distinct from the Crown as defendant, is excluded from the operation of the clause. It is a well-settled principle that the Crown can take advantage of any Act, the language of which is applicable to it, unless the Act otherwise provides. There is no provision of the Claims against the Government and Crown Suits Act, 1912, which excludes the Crown from suing under that Act. The Crown, under the title of the Attorney General, has sued a nominal defendant appointed under that Act.[2] The only advantage in this course is that it overcomes difficulties as to parties where the Crown seeks to assert a claim as *parens patriae* against an interest of the Crown itself.[3] However, the difficulties as to parties in multiple interest proceedings are fully resolved by the provisions of part III of the bill and it would be an unnecessary complication to enable the Crown, as plaintiff, to have recourse to clause 5 of the bill. The Crown, therefore, is excluded from the operation of that clause. The ambit of part II, other than as to pending proceedings, is thereby restricted to proceedings in which a subject sues the Crown.

As to interest, *see* part 5 section 5 of the report.

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[1] Interpretation Act, 1897, s. 37.

[2] *Williams* v. *Attorney-General for N.S.W.* (1913) 16 C.L.R. 404.

[3] *See* part 10 section 1 of the report.

Part III

This part deals only with the title under which the Crown is a party to proceedings. Substantive rights are not affected.

See part 10 of the report.

Part IV—Generally

This part contains general provisions in respect of any proceedings, other than criminal proceedings, to which the Crown is a party.

Clause 15—*Demise of the Crown*

"Demise of the Crown" means the transfer of the kingdom and of royal dignity which takes place upon one King or Queen succeeding to another. This may occur on death or on abdication. The demise of the Crown at one time caused many inconveniences including inconveniences in respect of the continuance of legal proceedings. The inconvenieces were remedied by various statutes. In respect of Crown proceedings the Imperial statute 1 Anne c. 2 (Demise of the Crown Act 1702), s. 4, provided that: "no writ plea or process or any other proceeding upon any indictment or information for any offence or misdemeanour or any writ process or proceeding for any debt or account that shall be due or to be made to her Majesty her heirs or successors for or concerning any lands tenements or other revenue that shall belong to her or them that shall be depending at the time of her Majesties demise (whom God long preserve) or any of her heirs or successors shall be discontinued or put without day by reason of her or any of their deaths or demises but shall continue and remain in full force and virtue to be proceeded upon notwithstanding any such death or demise". This constitutional enactment applies in New South Wales.[4] It remains in force, also, in the United Kingdom. In so far, however, as it relates to civil proceedings, the language of the enactment is not apt to cover all claims which may today be brought by or against the Crown or might be brought pursuant to the bill. In the United Kingdom, comprehensive legislation was enacted in 1947, the Crown Proceedings Act 1947, to provide for Crown proceedings. Section 4 of the Demise of the Crown Act 1702, which deals with criminal proceedings as well as civil proceedings, was left in force. But a general provision, section 32, was included in the Crown Proceedings Act 1947. It provides that "No claim by or against the Crown, and no proceedings for the enforcement of any such claim, shall abate or be affected by the demise of the Crown". The Bill adopts a similar approach. Section 4 of the Demise of the Crown Act 1702 is left in force.

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[4] Imperial Acts Application Act, 1969, s. 6 and Second Schedule, part I.

Clause 16—*Execution against the Crown*

This clause takes the place of section 11 of the Claims against the Government and Crown Suits Act, 1912. But it is a general provision. It applies in respect of all money payable by the Crown under any judgment or order of any court. It extends to costs and to any interest which may be payable.

Other than in respect of proceedings to which part II applies, that is proceedings in which a subject sues the Crown at law or in equity,[5] the bill contains no specific provision as to the Crown incurring liability for costs or for interest. Specific provision is unnecessary. General provisions as to costs and interest are contained in the Supreme Court Act, 1970, the District Court Act, 1973, and the Courts of Petty Sessions (Civil Claims) Act, 1970. The Supreme Court Act, 1970, binds the Crown.[6] The bill amends the other Acts so that they also bind the Crown.[7]

Clause 17—*Rules*

We draw attention to two matters. The first is service upon the Crown. The second is that as proceedings no longer will be brought under the title of the Attorney General but will be brought under the title "State of New South Wales" it may be thought desirable, for the guidance of the profession, that there be specific rules in respect of proceedings on relation.

Clause 18—*Amendment of Acts—Generally*

See part 6 section 2 and part 9 section 2 of the report.

Amendments to the District Court Act, 1973, *and to the Courts of Petty Sessions* (*Civil Claims*) *Act,* 1970

The qualification "Subject to the Crown Proceedings Act, 1976" is desirable because of the multiplicity of jurisdictional and procedural matters with which these Acts deal. The qualification removes any danger that the Acts (or the rules made under them) may be construed so as to impose upon the Crown obligations which would be inconsistent with the bill—such as liability to proceedings for enforcement of a judgment or order against the Crown for payment of money otherwise than by levy upon the property of the Crown.[8]

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[5] In respect of these proceedings we have closely followed in clause 5 the language of the basic formula of the Claims against the Government and Crown Suits Act, 1912. This formula makes specific provision in respect of costs. We have included, in clause 5, specific provision in respect of interest, notwithstanding that the Crown is bound by the Supreme Court Act, 1970, and will be bound by the District Court Act, 1973, and the Courts of Petty Sessions (Civil Claims) Act, 1970, to leave no room for the argument, which otherwise might be available, that the maxim *expressio unius est exclusio alterius* operates to exclude the Crown from liability to pay interest.

[6] Supreme Court Act, 1970, s. 3.

[7] Clause 18 and Schedule.

[8] Clause 16.

Amendment of section 68 (2) (a) of the District Court Act, 1973, is necessary to ensure that discovery before suit can be obtained against the Crown. The provision, in its present form, would not be capable of application to the Crown notwithstanding the general amendment that the Act binds the Crown.[9]

Notwithstanding that our terms of reference confine our attention to civil proceedings to which the Crown is a party and notwithstanding that the District Court Act, 1973, contains provisions dealing with criminal matters as well as civil matters, the proposed provision that the Act binds the Crown is made of general application and is not restricted to the civil jurisdiction of the District Court. If the provision were in terms limited to the civil jurisdiction of the court difficulties could arise in respect of the application to the Crown of the provisions relating to the criminal jurisdiction—because of the rule of construction *expressio unius est exclusio alterius*. The provisions relating to the criminal jurisdiction of the court are directed only to the District Court exercising the jurisdiction formerly exercised by courts of quarter sessions and to conferring upon the Governor power to make regulations in respect of the practice and procedure of the court in respect of such matters. There is no reason why the Crown should not be expressly bound in respect of these provisions.

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[9] *The Commonwealth* v. *Baume* 2 C.L.R. 405.

APPENDIX F

DRAFT VICARIOUS LIABILITY (INDEPENDENT FUNCTIONS) BILL

A BILL

To impose liability upon masters in certain circumstances in respect of torts committed by servants in the performance or purported performance of functions conferred or imposed by law; to impose upon the Crown liability in certain circumstances in respect of torts committed by persons in the service of the Crown in the performance or purported performance of functions conferred or imposed by law; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the "Vicarious Liability (Independent Functions) Act, 1976".

Interpretation.

2. In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"appointed fund" means the Consolidated Revenue Fund or any fund or source of payment appointed in accordance with section 3.

"Crown" means the Crown in right of New South Wales.

"function" includes power or duty.

"member of the police force" has the same meaning as in the Police Regulation Act, 1899.

"office" includes the office of special constable.

"performance" includes exercise.

"special constable" has the same meaning as in Part IV of the Police Offences Act, 1901.

3. (1) The Governor may, by proclamation published in the Gazette, appoint any fund or source of payment as an appointed fund for the purposes of this Act, either generally or in respect of any specified office or function. **Appointment of fund.**

(2) The Governor may, by proclamation published in the Gazette, terminate or amend any appointment made as provided by subsection (1) or any such appointment amended as provided by this subsection.

(3) A proclamation under subsection (1) or subsection (2)—

(a) takes effect from the date of publication of the proclamation or a later date specified in the proclamation; and

(b) shall be laid before each House of Parliament within 14 sitting days of that House after the date of publication.

(4) If either House of Parliament passes a resolution, of which notice has been given within 15 sitting days of that House after a proclamation referred to in subsection (1) or subsection (2) has been laid before it, disallowing the proclamation or any part thereof, the proclamation or part thereupon ceases to have effect.

(5) For the purposes of subsections (3) and (4), sitting days shall be counted, whether or not they occur during the same session.

4. (1) Where a servant of the Crown or of any other master is guilty of a tort in the performance or purported performance by him of a function conferred or imposed upon him by law and the performance or purported performance was— **Liability of master.**

(a) directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of his master; or

(b) an incident of his service (whether or not it was a term of his contract of service that he perform the function),

the

the master is liable in tort as if he, by the servant, were guilty of the tort.

(2) Where a servant of the Crown or of any other master is guilty of a tort by failing to perform a function conferred or imposed upon him by law, and if he had performed the function, the performance would have been—

(a) directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of his master; or

(b) an incident of his service (whether or not it was a term of his contract of service that he perform the function),

the master is liable in tort as if he, by the servant, were guilty of the tort.

(3) This section applies whether or not the function conferred or imposed by law was so conferred or imposed upon the servant as the holder of an office.

(4) Contributory negligence on the part of a person who has sustained personal injury shall not be a defence to any proceedings in any court for damages for that injury on a cause of action founded on—

(a) a breach by a servant of a statutory duty imposed on him for the benefit of a class of persons of which the person so injured was a member at the time the injury was sustained; and

(b) liability of a master, under this section, in respect of the tort whereof the servant was thereby guilty.

(5) Nothing in Part III of the Law Reform (Miscellaneous Provisions) Act, 1965, shall apply to proceedings to which subsection (4) applies and nothing in that Part shall affect the provisions and operation of that subsection.

(6) For the purposes of this section a member of the police force is not a servant of the Crown.

Vicarious Liability (Independent Functions).

5. (1) Where a person is not a servant of the Crown but is in the service of the Crown and he is guilty of a tort— Extension of liability of the Crown.

(a) in the course of his service; and

(b) in the performance or purported performance of a function conferred or imposed upon him by law, or by failure to perform such a function,

the Crown is liable in tort as if it, by the person, were guilty of the tort.

(2) This section applies whether or not the function conferred or imposed by law was conferred or imposed upon the person as the holder of an office.

(3) Contributory negligence on the part of a person who has sustained personal injury shall not be a defence to any proceedings in any court for damages for that injury on a cause of action founded on—

(a) a breach by a person in the service of the Crown of a statutory duty imposed on him for the benefit of a class of persons of which the person so injured was a member at the time the injury was sustained; and

(b) liability of the Crown, under this section, in respect of the tort whereof the person in its service was thereby guilty.

(4) Nothing in Part III of the Law Reform (Miscellaneous Provisions) Act, 1965, shall apply to proceedings to which subsection (3) applies and nothing in that Part shall affect the provisions and operation of that subsection.

(5) For the purposes of this section a member of the police force is not a servant of the Crown but is in the service of the Crown.

(6) This section does not apply in respect of any tort of which a person is guilty—

(a)

(a) in the conduct of any business, enterprise, undertaking or activity carried on by him on his own account; or

(b) in the conduct of any business, enterprise, undertaking or activity carried on by any partnership, of which he is a member, on account of the partnership.

Special defences to the extended liability of the Crown.

6. In any proceedings against the Crown in any court on a cause of action founded on the liability of the Crown, under section 5, in respect of a tort of a person in the service of the Crown—

(a) it shall be a defence available to the Crown that at the time of the wrongful act or omission of that person he was a servant of a master other than the Crown and his master became liable, under section 4, in respect of his tort; and

(b) it shall be a defence available to the Crown that at the time of the wrongful act or omission of that person it was not an incident of his service to the Crown that he be paid out of any appointed fund any emolument by way of salary, attendance allowance, travelling allowance or otherwise.

Amendment of Act No. 33, 1946.

7. The Law Reform (Miscellaneous Provisions) Act, 1946, is amended by inserting after section 5 (4) the following subsection—

(5) For the purposes of this section—

(a) where a servant commits a tort and his master is liable in tort, under section 4 of the Vicarious Liability (Independent Functions) Act, 1976, as if he, by the servant were guilty of the tort, the servant and the master are joint tort-feasors; and

(b)

(b) where a person commits a tort and the Crown is liable in tort, under section 5 of the Vicarious Liability (Independent Functions) Act, 1976, as if it, by the person were guilty of the tort, the Crown and the person are joint tort-feasors.

Application of certain Acts.

8. (1) This section applies to—

(a) proceedings in any court on a cause of action founded on liability of a master, under section 4, in respect of a tort of his servant; and

(b) proceedings in any court on a cause of action founded on liability of the Crown, under section 5, in respect of a tort of a person in the service of the Crown.

(2) In this section—

"employer" means—

(a) in relation to proceedings referred to in subsection (1) (a)—the master; and

(b) in relation to proceedings referred to in subsection (1) (b)—the Crown.

"employee" means—

(a) in relation to proceedings referred to in subsection (1) (a)—the servant; and

(b) in relation to proceedings referred to in subsection (1) (b)—the person in the service of the Crown.

(3) Any provision of any Act passed before the commencement of this Act as to the giving of notice of intended action to the employee before commencement of proceedings against him on a cause of action founded on his tort shall apply as nearly as possible as if it provided for the giving of like notice to the employer.

(4) Notice to the Crown Solicitor of intended action against the Crown shall have effect as notice to the Crown.

(5) Notwithstanding any provision referred to in subsection (3) the court in which the proceedings are pending may order, where it considers it reasonable in all the circumstances to do so, that failure to give notice of intended action or any inadequacy of or defect in such notice shall not be a bar to maintenance of the proceedings.

(6) Any provision of any Act passed before the commencement of this Act, other than the Limitation Act, 1969, as to limitation of the period within which proceedings may be commenced against the employee on a cause of action founded on his tort shall apply as nearly as possible as if it provided for the period within which the proceedings to which this section applies may be commenced.

(7) Notwithstanding any provision referred to in subsection (6) the court in which the proceedings are pending may order, where it considers it reasonable in all the circumstances to do so, that the proceedings may be maintained notwithstanding that they were commenced after the expiration of the limitation period.

(8) Any provision of any Act passed before the commencement of this Act as to limitation of the damages which can be recovered in proceedings against the employee on a cause of action founded on his tort shall apply as nearly as possible as if it provided for limitation of the damages which can be recovered in the proceedings to which this section applies.

Application.

9. This Act does not apply in respect of a tort committed by or arising out of a wrongful act or omission occurring before the commencement of this Act.

APPENDIX G

NOTES ON DRAFT VICARIOUS LIABILITY (INDEPENDENT FUNCTIONS) BILL

General

It is legislative practice to refer to the State as the "Crown". We have not departed from this practice in the Bill. It is a matter of drafting style. It is not a matter of substance. For the sake of consistency, we refer in these notes to the State by that name.

Clause 4

As to paragraph (a) of clauses 4 (1) and 4 (2) respectively *see* part 13 sections 19–22 of the report.

As to paragraph (b) of clauses 4 (1) and 4 (2) respectively *see* part 13 sections 23–26 of the report.

It should be noted that paragraphs (a) and (b) are not exclusive of each other. The master may be caught by paragraph (a) or paragraph (b), or by both of them. Thus in *Jobling* v. *Blacktown Municipal Council*[1] the council would have been liable for the wrongful arrest[2] of the schoolteacher by the pool manager in the exercise of his function as a special constable because the arrest was directed to or incidental to the carrying on of the council activity in providing public swimming facilities (para. (a)) and also because it was an incident of the service of the pool manager that he exercise his authority as a special constable when disorderly conduct occurred at the pool (para. (b)). But paragraphs (a) and (b) do not have the effect that the council would have been liable for every wrongful arrest made by the pool manager. If, for example, he had wrongfully arrested the schoolteacher in Martin Place because he suspected, without reasonable cause, that she had picked the pocket of a by-stander, the council would not have been liable. Such an arrest would not have been directed to or incidental to the carrying on of the council activity in providing public swimming facilities; and in making the arrest the pool manager would not have been exercising the authority of a special constable as an incident of his service to the Council.[3]

Subclause (2) precludes any argument that a master is not liable for a tort committed by his servant failing to exercise a function as distinct from his servant committing a tort in performance or purported performance of the function.

Subclause (3) precludes any argument that subclauses (1) or (2) can be read down so as to exclude from their operation cases where the servant has the relevant function pursuant to an "office" to which he has been appointed.

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[1] (1969) 1 N.S.W.R. 129: *see* part 13 section 20 of the report.

[2] The jury actually found, on the particular facts, that the arrest was not wrongful.

[3] The State, however, would be liable under clause 5; it could raise the defence, if it wished, that it was not an incident of his service to the Crown that he be paid an emolument out of an appointed fund (clause 6 (b)).

The effect of subclauses (4) and (5) is that where a person who has sustained personal injury sues the master for damages, founding that action on a breach by the servant of a statutory duty of the servant and the liability of the master, under clause 4, in respect of that tort, any contributory negligence on the part of that person is not a defence to the action and does not reduce the amount of the damages which he can recover. The provisions of the subclauses are the counterpart of those made by the Statutory Duties (Contributory Negligence) Act, 1945, and section 7 of the Law Reform (Miscellaneous Provisions) Act, 1965, in respect of an action against the servant. These lastmentioned provisions would not apply in the action against the master as they relate to a breach of statutory duty "imposed upon the defendant", and the relevant statutory duty is that imposed, not upon the master, but upon the servant.

Subclause (6) is intended to avoid difficulty arising from uncertainty as to the status of members of the police force. It can be argued that—

(a) there is no contract of employment between members of the police force and the Crown, apart from the relationship created by their appointment, pursuant to the Police Regulation Act, 1899, as members of the police force;[4] and

(b) the relationship so created is not that of master and servant.[5]

This uncertainty, unless appropriate provision is made by the Bill, could give rise to difficulty: for it might be uncertain whether, in respect of a tort committed by a member of the police force, the person injured should sue the Crown under clause 4, on the view that the tortfeasor was a servant of the Crown, or should sue the Crown under clause 5, on the view that the tortfeasor was not a servant of the Crown but was in its service. Subclause (6) provides that, for the purposes of clause 4, a member of the police force is not a servant of the Crown. Clause 5 (5) provides that, for the purposes of that clause, a member of the police force is not a servant of the Crown but is in the service of the Crown.

Clause 5

As to subclause (1) *see generally* part 13 sections 30–35 and 38 of the report. As to paragraph (b) *see* the note to clause 4 (2).

As to subclause (2) *see* the note to clause 4 (3).

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[4] A like difficulty does not exist in respect of special constables appointed to that office pursuant to the Police Offences Act, 1901. For example, it is the practice of the Crown to have parking patrol officers (formerly called parking police) appointed as special constables. But they each have a contract of employment which is independent of that appointment. They are ministerial employees employed pursuant to section 47 of the Constitution Act, 1902. The relationship of master and servant exists between them and the Crown, notwithstanding that they are also special constables. Likewise a person may be a servant of a master other than the Crown, notwithstanding that he is also a special constable. The office of special constable is discussed in our report *L.R.C.* 19.

[5] *See* part 13 section 16 of the report.

As to subclauses (3) and (4) *see* the note to clause 4 (4) and (5).

As to subclause (5) *see* the note to clause 4 (6). Where a member of the police force commits a tort in the course of his duties as a member of the police force, but not "in the performance or purported performance of a function conferred or imposed upon him by law, or by failure to perform such a function", clause 5 does not apply. But the Crown would be liable on the ordinary common law principles of vicarious liability. *See* part 13 section 8 of the report.

As to subclause (6) *see* part 13 section 37 of the report.

Clause 6

By paragraph (a) it is a defence available to the Crown, where sued on a cause of action that it is liable under clause 5, that the tortfeasor was a servant of a master other than the Crown and the master became liable, under clause 4, in respect of his tort. The paragraph does not provide for the case where the tortfeasor was a servant of the Crown. Provision for that case is not needed in clause 6. Clause 5 is expressed to apply where the tortfeasor "is not a servant of the Crown but is in its service". Where the tortfeasor is a servant of the Crown, the Crown is liable under clause 4.

But a person may be in the service of the Crown yet be a servant of a master other than the Crown. For example, the pool manager in *Jobling* v. *Blacktown Municipal Council*[6] was, as a special constable, in the service of the Crown, bound by his oath to uphold the Queen's peace: but he was a servant of the council.

Where a master other than the Crown is liable pursuant to clause 4 there is no need for the plaintiff to have recourse to clause 5. He has his remedy against the master. The effect of clause 6 (a) is that where the master is liable under clause 4, the Crown may rely on this liability as displacing liability which otherwise it would have under clause 5.[7] But where the master, although not the Crown, is a public instrumentality, and the plaintiff sues the Crown, there may be cases where it is convenient to the Crown that liability, for which ultimately it is financially responsible, be determined in the proceedings as brought. The Crown can refrain from relying upon the defence.

As to paragraph (b) *see* part 13 section 36 of the report. "Appointed fund" is defined by clauses 2 and 3. We consider it preferable that the requirement that it was an incident of the tortfeasor's service that he be paid out of an appointed fund be stated as a defence which the Crown may raise rather than as an ingredient of the cause of action. There well may be cases in which the Crown does not wish to take the point. For example—it may be prepared to accept liability if it be established that the holder of some entirely honorary office has committed a tort in the course of his service; or it may have been through an oversight by the Crown that a

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[6] (1969) 1 N.S.W.R. 129.

[7] The Crown, in such cases, usually would have a defence, also, under paragraph (b) of clause 6.

particular fund has not been made an appointed fund. If it were made an ingredient of the cause of action that it was an incident of the tortfeasor's service that he be paid out of an appointed fund, an "admission" by the Crown that he was so paid might not avail the plaintiff if the evidence showed that he was not so paid.[8]

Clause 7

Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1946, deals with contribution between joint tortfeasors.[9] The purpose of clause 7 is to put beyond argument that the Crown is a joint tortfeasor in respect of a tort to which clause 4 or clause 5 applies.

Clause 8

As to this clause *see* part 13 sections 28 and 39 of the report.

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[8] *Adams* v. *Naylor* [1946] A.C. 543.

[9] Professor Atiyah (*Vicarious Liability* (1967) at pp. 436, 437) has criticized the adequacy of the provisions made by this section. We do no more than bring under the general law of contribution between tortfeasors, made by these provisions, the special cases of liability arising under clause 4 or clause 5. It is not appropriate that we make these special cases the occasion for a review of this branch of the general law. Nor is it appropriate that we review the general law as to the relationship between vicarious liability and exemplary damages—notwithstanding criticism made by Professor Atiyah (*Vicarious Liability* (1967) at pp. 433–436) of this branch, also, of the general law (cf. *Carrington* v. *Attorney-General and Murray* [1972] N.Z.L.R. 1106 per Henry *J.* at pp. 1109–1112).

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1975–76

PARLIAMENT OF NEW SOUTH WALES

OUTLINE REPORT

OF THE

LAW REFORM COMMISSION

ON

PROCEEDINGS BY AND AGAINST THE CROWN

1975

(L.R.C. 24)

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OUTLINE OF THE REPORT OF THE LAW REFORM COMMISSION OF NEW SOUTH WALES ON PROCEEDINGS BY AND AGAINST THE CROWN

SECTION 1 – *Purposes of this paper*

The purpose of this Outline is to facilitate a quick appreciation of the principal recommendations contained in the report of this Commission on "Proceedings by and against the Crown". It is not a complete summary of the report.

Footnote references are, except where otherwise stated, references to the report.

SECTION 2 – *The Crown*

The Colony of New South Wales inherited the general body of the law of England. This included the law governing the redress which a subject could obtain against the Crown, the procedures by which that redress could be obtained, the redress which the Crown could obtain against a subject, and the procedures by which that redress could be obtained. In modern speech it is more common to speak of the "State" rather than of "the Crown". But in the tradition of the law the accepted usage is to speak of "the Crown". In this Outline we adopt this usage: but it needs to be kept in mind that, for our purposes, "the Crown" means the "State". It does not mean the Queen as a person.[1]

SECTION 3 – *The law which the Colony inherited*

At the foundation of the Colony, English law in respect of proceedings against or by the Crown was complex and cumbersome.

The main procedure by which a subject could obtain redress was by what was known as the petition of right. This was a petition to the Crown for permission to sue it. Where the Crown gave this permission the subject could then sue the Crown. But the Crown would not give this permission where the claim of the subject was for damages in respect of a tort[2] which the subject claimed that the Crown, by its servants or agents, had committed. There was no way in which a subject

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1. Part 2 Section 1.

2. A tort is a wrongful act, such as causing damage by negligence, which is not merely a breach of a contractual obligation.

could sue the Crown for damages in respect of a tort. He could sue the servant or agent of the Crown who acted wrongfully. But he could not sue the Crown itself. If he sued the servant or agent, and won, he might have a hollow victory: for the servant or agent might not have the means to satisfy the judgment. It was the practice of the Crown to pay damages awarded against its servant or agent where it was satisfied that the servant or agent had acted within the general scope of the authority given to him as the servant or agent of the Crown. But this practice was of no comfort to a subject where he was unable to obtain judgment against a servant or agent of the Crown because he was unable to identify the particular servant or agent who had committed the tort. And even if he were able to identify the particular servant or agent, and he obtained judgment against him, the Crown still might not pay -- for it might take the view that the servant or agent had not been acting within the general scope of his authority. If the Crown took this view and, accordingly, refused to pay, there were no means whereby the subject could obtain a determination by a court that, in fact, the servant or agent had been acting within the general scope of his authority.

The position was little better in respect of cases in which the Crown sued a subject. Although the Crown could sue by the ordinary process by which a subject sued another subject, it was not bound to use this process. It could use, instead, a variety of special processes which were available only to the Crown. These processes were archaic and technical and gave the Crown great advantages which were not enjoyed by a subject when suing another subject.[3]

SECTION 4 *The bold innovation in New South Wales*

In England the law described in the last Section remained in force, with only minor procedural improvements, until 1947. Ninety years earlier, a bold innovation was made in New South Wales by the Claims against the Government Act, 1857.[4] That Act recited that the ordinary remedy of petition of right was of limited operation, was insufficient to meet all cases of disputes and differences between the subjects and the Crown and was "attended with great expense inconvenience and delay". It provided that upon the petition of a subject, any case of "dispute or difference", and this included a claim by a subject for damages for a tort committed by the Crown, could be referred for trial in the Supreme Court against a nominal defendant appointed by the Governor. In 1876, by the Claims against the Colonial Government Act of that year,[5] this new procedure was strengthened. It provided that "any person having or deeming himself to have any just claim or demand whatever against the Government"[6] could petition the Governor to appoint a nominal defendant

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3. Part 8 Section 2.

4. Act 20 Vic. No. 15.

5. Act 39 Vic. No. 38.

6. S.2.

and, upon the appointment being made, sue the nominal defendant in any court of competent jurisdiction.[7] The Crown could not escape the hazards of litigation by declining to appoint a nominal defendant. The Act provided that in default of an appointment being made "the Colonial Treasurer for the time being shall be the nominal defendant".[8] The Act further provided that upon the subject suing the nominal defendant "the proceedings and rights of parties therein shall as nearly as possible be the same and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject".[9] This last-mentioned provision is still the basic formula for the liability of the Crown in New South Wales to subjects and the procedure remains as provided by that Act. The current Act is the Claims against the Government and Crown Suits Act, 1912. We refer to it as the Claims against the Government Act.

In 1881, the Privy Council in its judgment in the famous case of *Farnell* v. *Bowman*[10] declared that these provisions of the Claims against the Government Act are to be given their full meaning and that a subject can obtain a judgment against the nominal defendant, which the Crown has to pay, for damages for any tort which the Crown, by its servants or agents, has committed. A distinguished Justice of the High Court[11] has said that this decision by the Privy Council was "epochal" and "cataclysmic": and so it was. Not until 1947 did the Crown in England become liable for damages for tort.

SECTION 5 — *The operation of the Claims against the Government and Crown Suits Act, 1912*

There is no cause for dissatisfaction with the basic formula of the Claims against the Government Act that "the proceedings and rights of parties therein shall as nearly as possible be the same ... as in an ordinary case between subject and subject". It has worked very well.[12] At about the turn of the century some of the judges of the Supreme Court held exaggerated fears that application of the formula might hamstring the Crown in some areas of government by, in effect, handing over those areas to "the uncertain, unstable and unskilled management of the jury box".[13] These fears have simply not been borne out and they are no longer entertained.[14] We see no reason for not continuing the formula.

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7. S.3.

8. S.2.

9. S.3.

10. (1887) 12 A.C. 643. This case is discussed in Part 4 Section 2.

11. Sir Victor Windeyer in his judgment in *Downs* v. *Williams* (1971) 126 C.L.R. 61 at p. 80.

12. Part 4 Sections 4–8.

13. Part 4 Section 4.

14. Part 4 Section 5.

We are not tempted to alter it by the fact that a different approach was taken, in the United Kingdom, by the Crown Proceedings Act 1947,[15] and that this different approach has been adopted in New Zealand and in Canada. That Act spells out in some detail the sorts of grievances for which a subject can obtain redress against the Crown. That is a much more cautious approach than the one taken by the New South Wales Act. But more than a century of experience with the approach taken by the New South Wales Act (and by similar legislation of the Commonwealth and of some of the other States) demonstrates that this caution is not needed. Indeed, it is dangerous to spell out the sorts of grievances for which a subject can obtain redress. Some, for which a subject ought to be able to obtain redress, may be overlooked. And the law is not static. The courts are constantly refining the law dealing with grievances between subjects. If, in this State, we were to adopt the English approach there would be, necessarily, the risk that we would spell out those grievances for which a subject can obtain redress against the Crown in such a way that a subject would be denied the benefit of developments made in the law by the courts.

We recommend that no change be made to the basic formula as to the liability of the Crown expressed by the Claims against the Government Act.

SECTION 6 *Liability of the Crown for breach of statutory duties*

But we should mention a rather troublesome decision given by the High Court in 1971 in the case of *Downs* v. *Williams.*[16] In that case the plaintiff had been injured by an unguarded grinding wheel in premises occupied by the Crown. For the purposes of its decision the High Court assumed that these premises were a factory. The Factories, Shops and Industries Act, 1972, requires the occupier of any factory (not specially exempted) to securely guard dangerous machinery such as grinding wheels. The grinding wheel which injured the plaintiff had not been guarded and this was the reason for his being injured. He sued the nominal defendant for damages for breach of the statutory duty. There are two distinct advantages to any plaintiff where he is able to base his claim upon breach of a statutory duty. One is that the defendant cannot escape liability by proving that, although he broke the statutory duty, he had nevertheless taken reasonable care for the plaintiff's safety. The other is that the amount of the damages which the plaintiff recovers, if he proves the breach of statutory duty, are not reduced because of any failure on his own part to take reasonable care for his own safety. Seeking, no doubt, to obtain these advantages the plaintiff in *Downs* v. *Williams* based his claim upon breach by the Crown of the statutory duty to guard dangerous machinery. If the factory had been occupied by a subject, and not the Crown, and the plaintiff had sued that subject, he

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15. Part 4 Section 7.

16. (1971) 126 C.L.R. 61. This case is discussed briefly in Part 4 Section 9. It is more fully discussed in Appendix C to the report.

would have succeeded in his claim. But the plaintiff's claim against the Crown failed, notwithstanding the basic formula of the Claims against the Government Act that "the proceedings and rights of parties therein shall as nearly as possible be the same ... as in an ordinary case between subject and subject". But the claim did not fail because of any deficiency in the formula. It failed because Parliament did not provide, in the Factories, Shops and Industries Act, that the Crown was to be bound by the provision which required dangerous machinery to be guarded. Accordingly subjects had the statutory duty to guard dangerous machinery: but the Crown did not. The debates in Parliament, when the Factories, Shops and Industries Bill was being considered, suggest strongly that members of Parliament believed that it was not necessary to provide that the Crown was to have the statutory duty because, even without such a provision, the Crown would be bound by the section of the Act which imposed the duty.[17] This was not so. A misunderstanding such as this should never be allowed to occur again. We have examined, therefore, the law which courts apply in deciding whether an Act binds the Crown notwithstanding that there is no provision in it which expressly says so. We find it to be unsatisfactory and we recommend reform. We return to this matter later in this Outline (Section 13).

SECTION 7 – *A new Crown Proceedings Act*

We have said that the basic formula of the Claims against the Government Act works well and that it should be retained. But in some other respects the Act is inadequate or out of date.

One of these is that it is an unnecessary complication that a subject must have a nominal defendant appointed before he can sue.[18] This causes delay. It has happened, too, that the person appointed to be the nominal defendant has died before the case has been decided. Where this happens, the plaintiff has to go to the further trouble, and incur the further delay, of having someone else appointed to be the nominal defendant. There is no reason why it cannot simply be provided that the subject may sue the State directly as the "State of New South Wales". We recommend that this be done.[19]

Another deficiency in the Act is that it does not extend to the case where the Crown sues a subject and the subject wishes, in those proceedings, to counterclaim against the Crown. We recommend that it be provided that a subject may counterclaim against the Crown.

A further deficiency in the Act is that it does not provide that the Crown, like a subject, must pay interest on judgment debts.[20] We recommend that it be provided that the Crown shall do so.

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17. Part 14 Section 11.

18. Part 5 Section 2.

19. Part 5 Section 3.

20. Part 5 Section 5.

The recommendations referred to in this Section could be given effect to by amendments to the Claims against the Government Act. There is, however, some dead wood in it which needs to be removed, and we suggest that there be a new Act, entitled the Crown Proceedings Act, replacing the existing Act.[21]

SECTION 8 *Amendment of the District Court Act, 1973, and of the Courts of Petty Sessions (Civil Claims) Act, 1970*

The proposed new Act, like the Claims against the Government Act enables a subject to "sue" the Crown at law or in equity. But there are important court procedures, provided by legislation, which are not such that by availing himself of them a person "sues" any other person.[22] These procedures are available to a subject, in relation to the Crown, only if the relevant legislation binds the Crown. There is no difficulty in respect of the Supreme Court. The Supreme Court Act, 1970, is expressed to bind the Crown. But neither the District Court Act, 1973, nor the Courts of Petty Sessions (Civil Claims) Act, 1970, is expressed to bind the Crown. The consequences of this omission are unfortunate. For example[23]

(a) In the District Court an intending plaintiff cannot obtain an order that the Crown give preliminary discovery;[24]
(b) In neither the District Court nor a court of petty sessions is a person entitled to interplead[25] in respect of a claim of the Crown; and
(c) In neither the District Court nor a court of petty sessions can salary or wages due to a Crown employee be garnished.[26]

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21. A draft Bill appears as Appendix D to the report.

22. Or, at least, it is very doubtful whether he "sues" that person.

23. Part 6 Section 1.

24. Preliminary discovery enables an intending plaintiff who wishes to sue on a cause of action, but who is unable to ascertain the name or address of the person against whom the alleged cause of action lies, to compel any person who has that information to disclose it.

25. Interpleader is a very useful procedure. A person may owe money or have in his possession goods which do not belong to him. But he may be uncertain about which of rival claimants is entitled to receive the money or the goods. Interpleader enables him to require the rival claimants to litigate their claims between themselves without him becoming embroiled. Another type of interpleader enables a sheriff, or bailiff, who has seized, or who proposes to seize, money or goods for the purpose of satisfying a court judgment to have any rival claims to the money or goods litigated between the claimants themselves.

26. Garnishment is the procedure by which a judgment creditor can obtain an order of the court that the employer of the debtor make deductions from the debtor's salary or wages, the amount deducted being applied towards satisfaction of the judgment debt. Section 56A of the Public Service Act, 1902, gives a discretionary power to any permanent head of a government department to make deductions, without a court order, from the salary or wages of a person employed, in that department, under that Act. But many persons, who are employees of the Crown are not employed under that Act.

There is no justification for the Crown not being bound by these Acts. We recommend that they be amended to provide that the Crown is bound by them. We also recommend that it be provided, as a consequential amendment, that the Crown is bound also by the Law Reform (Law and Equity) Act, 1972. This Act requires like effect to be given, in the District Court or a court of petty sessions, to an equitable ground of defence as is given, in a like case, in the Supreme Court.

SECTION 9 – *Proceedings by the Crown against a subject*

We have pointed out, in Section 3 of this Outline, that the English law which the Colony inherited enabled the Crown to sue subjects by a variety of special processes which gave the Crown great advantages. Nothing needs to be done about these processes. The Crown does not use them. It uses the same process as that by which a subject sues another subject. There is no reason to fear that the Crown may seek to revive the special processes. They have receded into history.[27]

SECTION 10 – *Title under which the Crown is a party to any proceedings*

Quite apart from proceedings brought by a subject against the Crown pursuant to the Claims against the Government Act, there is a considerable amount of other civil litigation to which both a subject and the Crown are parties.

There are proceedings which are brought, not by a subject against the Crown, but by the Crown against a subject. These proceedings are brought under the title of the Attorney General.

There are also proceedings brought by a subject against the Attorney General to obtain equitable relief against the Crown.[28] Although these proceedings are brought against the Attorney General they are, in substance, proceedings against the Crown itself.[29]

It is an unnecessary complication that there is more than one title under which the Crown may be a party to civil litigation. We have already recommended that where a subject sues the Crown under the Crown Proceedings Act, the new Act to replace the Claims against the Government Act, the Crown shall be sued under the title "State of New

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27. Part 8 Section 4.

28. Part 7 Sections 1, 2.

29. Part 7 Section 3. The subject may obtain like relief by suing the Crown under the Claims against the Government Act.

South Wales". We recommend that legislation be enacted to provide that in any civil proceedings, no matter how brought and whether brought by a subject or brought by the Crown, the title under which the Crown is a party shall be "State of New South Wales".[30]

SECTION 11 — *The Crown should be bound by legislation directed to making general provision as to procedural or substantive rights in litigation*

We have already recommended that the District Court Act, 1973, the Courts of Petty Sessions (Civil Claims) Act, 1970, and the Law Reform (Law and Equity) Act, 1972, be amended to provide that they bind the Crown. There is other legislation which should be amended to provide that it, also, binds the Crown. It is legislation which is directed to making general provision as to procedural or substantive rights in litigation. This legislation is comprised of the Law Reform (Miscellaneous Provisions) Act, 1944, Parts II and III of the Law Reform (Miscellaneous Provisions) Act, 1946, the Law Reform (Miscellaneous Provisions) Act, 1965, and the Statutory Duties (Contributory Negligence) Act, 1945.[31] In proceedings to which the basic formula of the Claims against the Government Act applies,[32] the subject who is suing the Crown has the rights conferred by these enactments, "as nearly as possible ... the same ... as in an ordinary case between subject and subject". He has these rights even though the enactments do not bind the Crown.[33] But the position would be more straightforward if these enactments directly provided that the Crown is bound by them. There is another reason why it is desirable that these enactments be expressed to bind the Crown. It is this. As we have pointed out, both a subject and the Crown may be parties to civil litigation to which the basic formula of the Claims against the Government Act does not apply. In such litigation, also, the Crown should be bound by them.

We recommend that these enactments be amended to provide that they bind the Crown. We further recommend that future legislation which, like these enactments, is directed to making general provision as to procedural or substantive rights in litigation, be expressed to bind the Crown.

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30. Part III of the proposed Crown Proceedings Act so provides. However, the complication can occur that the Crown is a party in separate inconsistent interests. For example, in the one proceedings the Crown may seek to assert a claim of its own to property yet also, as *parens patriae*, seek to assert an inconsistent claim that the property is subject to a charitable trust. Part III of the proposed Act provides that in such a case the Crown, in respect of one of the separate inconsistent interests, shall be a party under the title "State of New South Wales" and, in respect of each other of those interests, shall be a party under the name of a person nominated by the Attorney General in respect of that interest. The problem of separate inconsistent interests is discussed in Part 10 Section 1 of the report.

31. This legislation is discussed in Part 4 Section 10 and Part 9 Section 2.

32. The formula is repeated in Section 5 of the proposed Crown Proceedings Act.

33. Part 4 Section 10.

SECTION 12 *Liability for torts committed by persons performing an independent function given to them by law*[34]

The proposed new Crown Proceedings Act does not deal with one problem to which judicial decisions have directed attention. The problem arises where an officer of the Crown commits a tort in the performance, or purported performance, of a function which is not one entrusted to him by the Executive Government but is one given to him by the law itself. It is better that this problem be dealt with by separate legislation.

The nature of the problem is best indicated by example. It was clearly revealed by the decision of an English court, in 1864, in the case of *Tobin* v. *The Queen*.[35] The facts were these. Tobin owned a ship. It was seized by the commander of a ship of the navy. The commander claimed that Tobin's ship was a slaver and that the seizure was lawful because the Slave Trade Act 1824 required commanders of ships of the navy to seize slavers. Tobin denied that his ship was a slaver and claimed that, accordingly, the seizure was unlawful. He sued the Crown for damages. He failed. The court held that the Crown could not be liable, even if Tobin's ship was not a slaver and the seizure was unlawful. There were a number of grounds for the decision. One was that the claim was a claim for damages for tort: and in England, at that time, a subject could not sue the Crown in tort. Another, and the one which gives rise to the problem with which we are here concerned, was that, assuming that the Crown would have been liable if the commander had seized the vessel pursuant to the orders of the Crown, it still was not liable because the commander "in seizing the vessel, was not acting in obedience to a command of Her Majesty but in the supposed performance of a duty imposed upon him by act of parliament". The court declared that "when the duty to be performed is imposed by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment". Although, it said, the commander "was appointed to the ship, and ordered to the station, and employed by the Queen, still we think that the duty which he had to perform in relation to the slave-trade was not created by command of the Queen".

It was unjust that Tobin was denied redress against the Crown on this ground. If his ship were unlawfully seized by the commander the law should have enabled him to obtain damages from the Crown. But the reasoning which led to this denial of justice has been accepted and applied, as we shall see, in more modern cases. It is still the law. It is time it was changed.

The reasoning rests on a premise of doubtful validity.[36] The premise is that a function (by which term we include duty, and power) which is imposed by law upon an officer of the Crown is not a function

34. Part 13.

35. (1864) 16 C.B.(N.S.) 310; 143 E.R. 1148. This case is discussed in Part 13 Section 2.

36. Part 13 Sections 4, 5.

which is imposed by the will of the Crown. Is this really so? It depends upon what one means by the Crown. There was a time when it "was almost treasonable to separate the capacity of the king as man from his capacity as king".[37] That time is long gone. The modern concept of the Crown, so far as relevant for our purposes, is the concept of the State. What we are concerned with is the acceptance of responsibility by the State for harm done to citizens by State officials in carrying out the will of the State. In this context, legislation of the State is no less an expression of its will than are administrative directions given by the authority of a Minister. Assume that in *Tobin* v. *The Queen* the policy that slavers be seized had been given effect to by the Slave Act providing that the Lords of the Admiralty were authorised to make a general order that commanders of ships of the navy shall seize slavers and by the Lords making that order. If that had been done, it would have been beyond argument that it was by the will of the State that the commander had the duty. It should not have made any difference that precisely the same policy of the State was given effect to by the Act itself requiring commanders to seize slavers. We see no reason why the Crown should be any less liable for what its officers do in the performance, or purported performance, of a function which they are given by the law than it is liable for what they do in the performance, or purported performance, of a function which they are given by the Executive Government. Nor do we consider that it should make any difference whether the function is one conferred by an Act or one conferred by the common law – for Parliament can change the common law where it does not accord with its will.

One of the significant consequences of the reasoning in *Tobin* v. *The Queen* is that the State is not liable for a tort committed by a policeman in the performance, or purported performance, of a function which the law provides that he has by virtue of that office. Thus, in 1906, the High Court, following that reasoning, held in the case of *Enever* v. *The King*[38] that the Crown is not liable for a wrongful arrest made by a policeman. As the then Chief Justice, Sir Samuel Griffith, put it, "the powers of a constable . . . whether conferred by common law or statute law, are exercised by him by virtue of his office, and cannot be exercised on the authority of any person but himself". Another of the judges put it this way "Is a person who is obeying or endeavouring to obey the authority of an Act of Parliament so under the control of the State as to render the State responsible? It appears to me that in order to establish that position it must be shown that the control, if any, under which the person acted was that of the Executive Government of the State. The difficulty of sustaining that position was obvious." It seems to us that the law required the judge to ask himself the wrong question.

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37. Holdsworth, *A History of English Law*, 3rd edn. (1944), Vol. 9 at p. 5.

38. (1906) 3 C.L.R. 969. This case is discussed in Part 13 Section 4. See also Part 13 Sections 8–15.

The question should have been whether the power to arrest was one which the policeman had by the will of the State. It was the will of the State that he have the function to make arrests – albeit that the will of the State was expressed by the law rather than by administrative directions.

The liability which we believe the Crown should have is in harmony with a radical change which has developed in the general law of torts over the last fifty years or so.[39] The courts used to take the view that where a person exercised a function which so depended upon his own personal skill and judgment that no one else could effectively control him in its exercise, that person alone was responsible for any tort which he committed in the performance of that function. Thus a hospital was not liable for the negligence of doctors or nurses on its salaried staff. This is not now the case. The hospital is liable. A new approach, still in the course of development, has emerged. It is this. If a man conducts any business or other activity, and employs a person to act as an integral part of his organisation for carrying on that business or activity, as distinct from that person carrying on his own business or activity, the employer is liable for any tort that person commits in doing his work – and it matters not that the work is of such a nature that the employer cannot effectively supervise or direct him in performance of it. The liability arises not because the employer has done anything personally blameworthy but because he must accept responsibility for what is done by a member of his organisation. It would be going too far to say that this new approach has yet crystallised into a firm rule of law. But it underlies modern decisions. It is a commendable approach. It supports our view that the Crown ought to be liable for all the torts which its officers commit as members of the organisation of the State. It would be unreal to consider that in doing their work as officers of the Crown they are in business for themselves or are carrying out their activities on their own account.

The problem of the liability of the State, which we are here considering, arises not only where the wrongdoer holds what is properly regarded as being an office but also in respect of ordinary public servants. For example, in one case the High Court held that the Crown was not liable for the negligence of a solicitor employed in the State Legal Aid Office.[40] This public servant was dilatory in furnishing a report to the court, in consequence of which the claim of a litigant failed. The basis of this decision was that in furnishing the report the public servant was acting pursuant to a personal obligation which was imposed upon him by statutory authority (the rule of court made under the relevant Act), this obligation arising from the registrar of the court's referring the matter to him for report, and the duty of the public servant being to exercise his own skill and judgment. This was the court's reasoning – notwithstanding that the report related to the

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39. Part 13 Section 21.

40. Part 13 Section 17.

entitlement of the litigant to a form of legal aid, and that the public servant was employed in the State Legal Aid Office. The decision accords with the reasoning in *Tobin* v. *The Queen* and other cases which have applied that reasoning. But it is a decision which shocks one's conscience.

Before we proceed to the specific recommendations which we make we deal with a complication. It is this. Cases do occur, although infrequently, in which the law imposes the relevant function not upon an officer or servant of the Crown but upon a servant of a private employer.[41] Our work would not be complete unless our recommendations extend to these cases. A recent decision of the Court of Appeal of this State is a good instance of these cases.[42] The facts were these. A private employer, a local council, had a swimming pool to which members of the public were admitted. A servant of the council supervised the conduct of these people. The council had him appointed a special constable so that he could more effectively do this. The Act under which he was appointed provided that every special constable was to have all the powers, authorities and duties of any constable duly appointed. In reliance upon these powers, authorities and duties, he arrested a schoolteacher for allegedly obstructing the entrance to the pool when marking a roll. The court held that even if the arrest was wrongful, the private employer, the council, was not liable for the tort. It followed the reasoning in *Tobin* v. *The Queen.* The court said that "it matters not whether the person who effects the arrest is in the service of the Crown or of a private body . . .[T]he governing factor is that the act is done by a person in the exercise of an authority vested in him by virtue of an office held by him independently of the nature of his employment even although his appointment to that office may come about by reason of that employment". This is the law. But can it be said to be just?

We come now to our specific recommendations.[43] The substance of them is this: Legislation should be enacted to the effect that where a servant of the Crown, or of any other master, is guilty of a tort in the performance or purported performance by him of a function conferred or imposed upon him by law and the performance or purported performance was

(a) directed to or incidental to the carrying on of any business, enterprise, undertaking, or activity of the master; or
(b) an incident of his service,

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41. Part 13 Sections 20, 23–25, and 29.

42. Part 13 Section 20.

43. The recommendations are set out in full in the draft Bill which appears as Appendix F to the report.

the master shall be liable for the tort. But we would leave no room for the Crown to argue that some of its officers, such as policemen,[44] are not, technically, its servants, even though they are in the service of the Crown. We recommend that it be provided that the Crown shall be liable where a person who is in its service, although not its servant, commits a tort in the course of that service and in the performance or purported performance of a function conferred or imposed upon him by law.

SECTION 13 – *The application of statutes to the Crown*[45]

We have noted, in Section 6 of this Outline, that we have considered, and have found to be unsatisfactory, the law which the courts apply in deciding whether an Act, or a particular provision of an Act, binds the Crown.[46]

The law is this[47] – if the Act expressly provides that the Act, or provision of it, binds the Crown, the Crown is bound; but if the Act does not so provide there is a presumption that the Crown is not bound even though the provisions of the Act, or the provision in question, are expressed generally and are literally every bit as applicable to the Crown as they are to subjects. This presumption is rebutted where it is a "necessary" inference that it was intended that the Crown be bound. This inference can be drawn if the purpose of the Act, or provision of it, would be "wholly frustrated", unless the Crown were bound. It may be taken that general legislation which is as basic to general transactions as is the Sale of Goods Act, 1923, will be construed as binding upon the Crown notwithstanding that it does not expressly state that the Crown is bound by it. Why, it may be asked, would the purpose of the Sales of Goods Act, 1923, be wholly frustrated if that Act did not bind the Crown? The answer may be this: It is of fundamental importance in the conduct of commercial affairs that there be uniform rules of law binding upon all parties to a contract for the sale of goods. An exception in favour of the Crown would destroy the uniformity. The purpose of the Act must be taken to be the prescription of standard rules applicable to all contracts for the sale of goods. Exception of the Crown, therefore, would wholly frustrate this purpose of achieving uniformity. But if this be the explanation, the test of total frustration is otiose. For one has answered the question whether it is intended that the Crown be bound by the very first step in the reasoning – namely that it is intended that the standard rules laid down by the Act are to apply to all contracts for the sale of goods. The test of total frustration may conceal, rather than elucidate, the considerations which influence the courts. But one thing is clear. It is that it is far from easy to persuade the courts that it is a necessary inference that it was intended that the Crown be bound.

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44. Part 13 Section 16.

45. Part 14.

46. The limited extent to which the basic formula of the Claims against the Government Act prevents ensuing justice is discussed in Part 4 Sections 9, 10.

47. Part 14 Sections 1–6.

Relatively little legislation is of the character of the Sale of Goods Act, 1923. In general, where legislation does not expressly state that the Crown is bound, the presumption that it is not bound is almost irrebuttable. It is not enough that the provisions are expressed in general terms, without any statement that the Crown is to be exempt, and that the provisions are "manifestly intended to secure the public welfare". For the Privy Council[48] has declared that "every statute must be supposed to be for 'the public good', at least in intention". Thus, in *Downs* v. *Williams*[49] the High Court held that notwithstanding that the Factories, Shops and Industries Act, 1962, provides in general terms that the occupiers of factories shall fence dangerous machinery, and notwithstanding that the beneficent purpose of the provision is that workers be protected from injury, the Crown is not bound by that provision.

It would seem that Parliamentarians have assumed, on many occasions, that the legislation would be construed by the courts as binding on the Crown whereas, in fact, it has not bound the Crown.[50] As we have already pointed out, debate on the Factories, Shops and Industries Act, 1962, suggests strongly that this was the case in respect of the statutory duty to fence dangerous machinery. In respect of other legislation amendments subsequently made suggest that, at the time when the original legislation was enacted, it was not appreciated that the Crown would not be bound (or, at least, that it would be doubtful whether the Crown was bound).[51] Two examples suffice. The Compensation to Relatives Act, 1897, which provides for the recovery by dependent members of the family of a person wrongfully killed of damages for their financial loss, was not expressed to bind the Crown. In 1928 the Act was amended to provide expressly that the Crown is bound by it. Likewise the Scaffolding and Lifts Act, 1912, was not expressed to bind the Crown. In 1948 the Act was amended to provide expressly that the Crown is bound by it. It is not surprising that Parliamentarians have assumed, wrongly, that the courts would be far readier than in fact they are to infer that an Act, expressed in language as apt to apply to the Crown as it is apt to apply to subjects, is meant to bind the Crown. The law does not, in this regard, accord with the reasonable expectation of those not versed in its subtleties. Injustice to subjects has ensued. The law should be reformed.

The substance of our recommendations for reform is this: The presumption that it is not intended that the Crown be bound by a legislative provision unless either it is expressly stated that the Crown is to be bound or it is a necessary inference that it is intended that the Crown be bound should be abolished. In place of this presumption legislation should be enacted to the effect that where, but for the former

48. In *Province of Bombay* v. *Municipal Corporation of Bombay* [1946] A.C. 58 at p. 63.

49. (1971) 126 C.L.R. 61.

50. Part 14 Section 11.

51. Part 14 Section 32.

presumption, a legislative provision would bind the Crown, it shall be construed as binding the Crown except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to –

(a) the foreseeable extent to which the provision, if binding the Crown, might impede it in any activity and the foreseeable extent to which that impediment might be against the public interest;
(b) the foreseeable extent to which the provision, if binding the Crown, might burden it in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision, in respect of any property; and
(c) the foreseeable extent to which the purpose or any of the purposes of the provision might fail if the Crown were not bound and the foreseeable extent to which that failure might be against the public interest.[52]

In short, the Crown should be bound unless, having regard to these matters, the reasonable inference is that it is unlikely that it would have been intended that the Crown be bound.[53]

We consider that these recommendations, if implemented, would prevent recurrence of the injustices which have ensued from the present unsatisfactory law, yet afford to the Crown all the special protection which it can reasonably expect the law to give it. If, in any particular case, it desired greater protection, or were not prepared to leave the matter to the courts, there would be nothing to stop it from having an express provision in the legislation in question that the Crown is not bound.

These recommendations provide for radical reform. We consider that nothing short of radical reform meets the need. But if they are not acceptable we recommend that at least one modest reform be made. It is that if the present rule is to be retained – namely that it is presumed that the Crown is not bound unless it is expressly stated that it is bound or it is a necessary inference that it is intended that it be bound – it should be provided that the rule does not apply in respect of any statutory duties breach of which would entitle a person thereby suffering harm to recover damages.[54] Such a provision would prevent a recurrence, in respect of legislation to which it applies, of injustice of the type that occurred in *Downs* v. *Williams*.

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52. The recommendations are set out in full in Part 14 Section 14. It is discussed in Part 14 Sections 15–26.

53. If, of course, it were expressly provided that the Crown were bound there would be no room for the inference.

54. The recommendation is set out in full in Part 14 Section 30. It is discussed in Part 14 Section 31.

Neither our recommendations for radical reform nor the modest recommendation, referred to in the last paragraph, would apply to existing legislation. They would apply only to legislation enacted after they were implemented. We recommend, therefore, that a body be established to review existing legislation. There are strong grounds for believing that it is only because of oversight or misunderstanding that some of the existing legislation, which does not bind the Crown by necessary implication, does not expressly provide that the Crown is bound. It is desirable that, if this body is established, it also keep under review future legislation. We consider it essential that it do so if our recommendations for radical reform are not implemented.