LOCUS STANDI — THE REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

J. A. SMILLIE*

The Public and Administrative Law Reform Committee recently published its *Eleventh Report,* entitled *Standing in Administrative Law.* Although the Committee unanimously favoured reform of the existing law, they could not agree as to the action which should be taken, and the *Report* includes the separate minority view of two members of the Committee.

The Majority View

The majority of the Committee recommend further amendment of the Judicature Act 1908 to include a new section 56D which would provide:[1]

> (1) On an application for review under Part I of the Judicature Amendment Act 1972, or for a writ or order of or in the nature of mandamus, prohibition, or certiorari, or for a declaration or injunction, the Supreme Court, in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.
>
> (2) Subsection (1) of this section shall have effect in place of the rules of law and of practice relating to standing in respect of any such application.
>
> (3) This section shall not limit the provisions of any other enactment under which the Court may grant relief in any proceedings.

The Committee see this provision as establishing "a single test for standing both for applications for review under the Judicature Amendment Act 1972 and the older remedies [available under the Code of Civil Procedure and the Declaratory Judgments Act 1908]."[2] Furthermore, instead of being a threshold question which must be determined in the applicant's favour before the reviewing court embarks upon its consideration of the merits of his case, the recommended provision would make the sufficiency of the applicant's interest in the subject matter of the application merely one factor to be considered by the court in deciding, in the exercise of its discretion, whether to grant any particular form of relief.[3]

The Committee rely upon two broad arguments in support of their recommendation. The first is of a practical, technical nature. One of the Committee's stated purposes is to "strip away unnecessary restrictions on standing, to remove technicalities, and to modernise the law."[4]

* LL.M.(Otago), LL.M., J.S.D.(Yale). Senior Lecturer in Law, University of Otago. The writer wishes to acknowledge the assistance obtained from the work of Mr J. J. Waldron: see Waldron, *The Public Interest Injunction,* unpublished LL.B (Hons.) dissertation, University of Otago, 1978.

1 *Eleventh Report of the Public and Administrative Law Reform Committee* (1978) (hereafter referred to as *Report*) para. 5 and see the Draft Judicature Amendment Bill at pp.33-34.
2 *Report,* para. 53.
3 Ibid., para. 52.
4 Ibid., para. 5.

They see their recommendation as simplifying the law by eliminating existing common law differences between locus standi requirements for the different remedies in favour of a single test of standing. This is declared to be consistent with the general purpose of the Judicature Amendment Act 1972.[5]

The Committee also rely upon a broader constitutional argument in support of their proposal. They clearly intend the new provision to have a liberalising effect upon locus standi requirements, particularly in the area of individual enforcement of public rights. They declare that the role of the courts should not be restricted to enforcement of private rights. Rather "[t]he court's primary concern should be with the alleged illegality committed by the defendant" so that "the plaintiff should not in general have to show he is *specially* affected" by an act in order to have standing to test its legality.[6] Although the Committee do not specifically discuss the role of the Attorney-General, the effect of their proposal would be to remove the exclusive jurisdiction of the Attorney-General to initiate civil proceedings (either personally or by granting his consent to relator proceedings) to prevent interference with public rights which neither causes nor threatens private injury to individual citizens. The proposed amendment would therefore remove the traditional restrictions (recently reaffirmed by the House of Lords in *Gouriet's* case[7]) upon the courts' jurisdiction to grant injunctive and declaratory relief at the suit of a private individual.

The Committee draw support for their recommendation from what they perceive as a disposition on the part of both the courts and the legislature toward liberalising locus standi requirements. In Part IV of the *Report,* the majority point to three statutory provisions (section 3 of the Declaratory Judgments Act 1908,[8] section 12 of the Bylaws Act 1910, and section 60 of the Charitable Trusts Act 1957) as proof of the willingness of the legislature, "when it considers the issue",[9] to confer broad standing rights on citizens to enforce compliance with the law.

In their analysis of the existing common law position, the Committee identify a judicial trend towards both liberalising and standardising locus standi requirements for the different remedies and conclude that "The amendment we propose would do little more than recognise the result of the recent decisions on standing."[10]

This claim may well be justified in respect of the prerogative remedies of prohibition, certiorari and mandamus. Judicial statements as to locus standi requirements for certiorari and prohibition demonstrate considerable confusion and uncertainty. On a number of occasions courts have

5 Ibid., paras. 20, 24. Curiously, the Committee indicates that it envisaged s 4(1) of the Judicature Amendment Act 1972 as having the practical effect of removing the differences between standing requirements for the different forms of relief available on an application for review under the Act: para. 20. Compare Mullan, "Judicial Review of Administrative Action" [1975] N.Z.L.J. 154, 161; Smillie, "The Judicature Amendment Act 1977" [1978] N.Z.L.J. 232, 241.

6 Ibid., para. 15.

7 *Gouriet* v *Union of Post Office Workers* [1978] A.C. 435. See generally infra pp.148-150.

8 As interpreted by Casey J. in *Turner* v *Pickering* [1976] 1 N.Z.L.R. 129, 135, but cf. *New Zealand Educational Institute* v *Wellington Education Board* [1926] N.Z.L.R. 615, 618; *Wellington Municipal Officers' Assn.* v *Wellington City Corporation* [1951] N.Z.L.R. 786, 788.

9 *Report,* para. 38.

10 Ibid., para. 2.

declared that there is no threshold standing requirement for certiorari and prohibition so that the court may, in its discretion, issue the remedies on the application of a mere "stranger" who is not personally affected by the decision in any way.[11] On other occasions courts have stated that locus standi to apply for certiorari and prohibition is limited to persons who are "aggrieved" by the decision.[12] However, it is clear that to qualify as a "person aggrieved" an applicant need not establish any actual or threatened interference with his private legal rights, and the affected interest may be shared by the applicant in common with a large class of persons. It would seem that Lord Denning M. R. accurately stated the present common law position in *R.* v *Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*:[13]

> The writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved", and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him. . . .

Thus any ratepayer has locus standi to challenge a decision which imposes an additional burden on the rates or discriminates between different classes of ratepayers.[14] In the latest *Blackburn* case[15] the English Court of Appeal held that Mrs Blackburn had standing as a ratepayer to seek prohibition in respect of a decision of a local authority which did not involve imposition of any additional financial burden on ratepayers, and a majority of the Court (Lord Denning M. R. and Stephenson L. J.) also seemed prepared to grant standing to Mr Blackburn, who was not a ratepayer, simply on the basis of his residence in the area subject to the council's jurisdiction.

Even more confusion surrounds the standing requirement for mandamus. Some courts have declared that an applicant for mandamus must have a "specific legal right" to performance of the duty — viz. he must show that the duty he seeks to enforce is imposed for the benefit of a specific class of person of which he is a member rather than for the benefit of the public at large.[16] Consequently some courts have said that locus standi requirements for mandamus are much more stringent

11 E.g. *Worthington* v *Jeffries* (1875) L.R.C.P. 379, 382; *Forster* v *Forster and Berridge* (1863) 4 B. & S. 187, 198 per Cockburn C. J. (prohibition); *R.* v *Surrey Justices* (1870) L.R. 5 Q.B. 466, 473; *R.* v *Thames Magistrates' Court, Ex parte Greenbaum* (1957) 55 L.G.R. 129, 132, 135 (certiorari). It has even been stated that the courts have no discretion to withhold these remedies from any member of the public where the lack of jurisdiction is patent: e g. *Farquharson* v *Morgan* [1894] 1 Q.B. 552, 556; *R.* v *Richmond Confirming Authority, Ex parte Howitt* [1921] 1 K.B. 248, 256.

12 See Thio, *Locus Standi and Judicial Review* (1971) 95-102.

13 [1972] 2 Q.B. 299, 308-9. Cf. *Walsh* v *Social Security Commission* [1959] N.Z.L.R. 1113.

14 *R.* v *Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.* [1966] 1 Q.B. 380; *Anderson* v *Valuer-General* [1974] 1 N.Z.L.R. 603; *Waikouaiti County Ratepayers and Householders Assn. Inc.* v *Waikouaiti County* [1975] 1 N.Z.L.R. 600.

15 *R.* v *Greater London Council, Ex parte Blackburn* [1976] 1 W.L.R. 550.

16 E.g. *R.* v *Lewisham Union Guardians* [1897] 1 Q.B. 498; *R.* v *Secretary of State for War* [1891] 2 Q.B. 326; *Environmental Defence Society Inc.* v *Agricultural Chemicals Board* [1973] 2 N.Z.L.R. 758, 762-3.

than for certiorari and prohibition.[17] However, in many other cases the courts have described the interest required of an applicant for mandamus in much more liberal terms.[18] It has been said that an applicant who can show a "sufficient interest"[19] or a "special interest"[20] in the performance of the duty over and above that of the public at large has locus standi for mandamus. In two recent cases where certiorari and mandamus were sought in the same proceedings the "aggrieved person" test was applied in a liberal manner to grant ratepayers standing for both remedies.[21] Thus it would seem that the Committee is justified in concluding that the courts are moving towards equating the locus standi requirement for mandamus with that for certiorari and prohibition. The crucial discretionary area which remains relates, of course, to the question of what interests beyond personal proprietary and financial interests should be viewed as sufficiently legitimate[22] and sufficiently distinct from those of the general public[23] to warrant legal protection by way of the prerogative remedies.

The Need to Liberalise Standing Requirements to Secure Judicial Review of the Exercise of Delegated Governmental Power by Public Officials

The writer agrees with the majority of the Committee that it is desirable to direct the courts to continue and extend the present trend towards both standardising and liberalising locus standi requirements for the prerogative remedies. The prerogative remedies are purely public law remedies designed exclusively to enable judicial review of exercises of delegated governmental power by public officials. Their operation and availability is limited to the exercise of public functions derived from statute or, in rare cases, from exercise of the Crown's prerogative powers.[24]

17 E.g. *Waikouaiti County Ratepayers Assn.* v *Waikouaiti County* [1975] 1 N.Z.L.R. 600, 606; *R.* v *Hereford Corporation, Ex parte Harrower* [1970] 1 W.L.R. 1424, 1427-8.

18 Thio maintains that the more stringent test was designed to emphasise the distinction between a duty owed by a Crown servant to the Crown only, and a duty owed to private citizens — it was not intended as a general test of standing for mandamus: op. cit. 117-118.

19 *The State* v *Dublin Corporation* [1953] I.R. 202, 227; *R.* v *Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, 137 per Lord Denning M. R. (sufficient interest shown if the applicant is "adversely affected" by non-performance of the duty).

20 *R.* v *Manchester Corporation* [1911] 1 K.B. 560, 564; *R.* v *Commissioner of Police of the Metropolis, Ex parte Blackburn,* ibid., 149 per Edmund Davies L. J.

21 *R.* v *Paddington Valuation Officer, Ex parte Peachey Property Ltd.* and *Anderson* v *Valuer-General,* supra, n. 14. See also, with regard to ratepayer standing for mandamus, *McKee* v *Belfast Corporation* [1954] N.I. 122; *R.* v *Hereford Corporation, Ex parte Harrower* [1970] 1 W.L.R. 1424.

22 See e.g. *R.* v *Commissioners of Customs and Excise, Ex parte Cook* [1970] 1 W.L.R. 450: even if the applicant for mandamus could be regarded as having a special interest in performance of the duty over and above that of the community as a whole, his interest (to eliminate business competition) was held to be an ulterior illegitimate interest not deserving of legal protection.

23 E.g. *R.* v *Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, 137, 145, 149: Court of Appeal doubted whether Blackburn, as an ordinary citizen, was sufficiently affected in his personal capacity to have locus standi for mandamus to compel the Commissioner to enforce the gaming laws.

24 E.g. *R.* v *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864.

In the face of ever-increasing government regulation of private action, the only legal protection available to the private citizen against arbitrary, oppressive or misguided use of governmental power lies in his ability to enlist the aid of the courts to compel administrators to comply with the restrictions imposed by Parliament to limit the scope of their discretions. To the extent that restrictive rules of locus standi reduce the opportunities for judicial enforcement of legislative checks upon administrative discretion, they insulate the administration from judicial supervision and increase its effective power. To the extent that liberal standing requirements increase the likelihood of unlawful governmental action being successfully challenged in court, they operate as a deterrent against administrative illegality and enhance the prospects of lawful and accountable government.

Further, standing rules which permit any person who represents an interest relevant to the exercise of a power to seek judicial review of the resulting decision would encourage wider participation and more complete and careful consideration of relevant interests in the initial decision-making process. In order to minimise the possibility of review proceedings, administrative tribunals and officials are likely to extend some form of opportunity for consultation or hearing to representatives of all relevant interests prior to making their decisions, and make a real effort to ensure that their decisions reflect a responsible and equitable balance between the full range of relevant interests. In principle, such expanded participation in the process of administrative decision-making would improve the quality of decisions by extending the range of information, ideas and experience available to administrators, drawing attention to problems and alternatives which might otherwise be overlooked, and making the resulting decisions more responsive to the total range of relevant affected interests. Providing citizens with an increased sense of involvement in the administrative process also tends to allay suspicion that decisions of governmental regulatory bodies tend unduly to favour the organised entrenched interests of the regulated enterprises at the expense of more diffuse and less organised interests such as those of consumers, environmentalists and recreational groups.[25] Judicial acceptance of these broad views is already reflected in the adoption by Commonwealth courts of the concept of "administrative fairness" as a means of securing wider representation of relevant interests in the administrative process by extending implied rights of hearing and consultation. The legislature has also given express recognition to the need to extend opportunities for public participation in the planning process.[26] In the United States, increasing judicial acceptance of this "interest representation" model of administrative decision-making has led to significant expansion of the right to participate in agency proceedings and considerable liberalisation of standing rights to seek judicial review of agency decisions.[27]

25 Such fears have been expressed frequently and forcefully in the United States: see e.g. Cramton, "The Why, Where and How of Broadened Public Participation in the Administrative Process" (1972) 60 Georgetown L.J. 525; Lazarus and Onek, "The Regu'ators and the People" (1971) 57 Virginia L.R. 1069.

26 The Town and Country Planning Act 1977, s.2(3) confers a right to object to all forms of proposed development upon "any body or person affected" and "any body or person representing some relevant aspect of the public interest".

27 See generally Gellhorn, "Public Participation in Administrative Proceedings" (1972) 81 Yale L.J. 359; Stewart, "The Reformation of American Administra-

In their minority report, Professor D. L. Mathieson and Mr E. A. Missen oppose any general liberalisation of standing requirements for judicial review of administrative action on the ground that the advantages are outweighed by the increased opportunities provided for persons who are opposed to administrative programmes to delay their implementation. They question the motives behind many applications for review, commenting that:[28]

> [I]n practice a significant number of applications for judicial review seem to be brought . . . in order to secure the advantages of delay, without any real desire that the questions formally put in issue by the pleadings be resolved by the Court. Such proceedings either are, or border on, an abuse of the Court's procedure.

They claim that this existing obstacle to administrative efficiency will be "magnified if the right to challenge administrative action is granted to all people claiming to have a 'sufficient interest'."[29] Even assuming that this is so, it is obvious that locus standi restrictions cannot operate to distinguish in advance between applications which are genuinely motivated and those which are not. An individual who is threatened with direct economic harm from a decision is just as likely, if not more likely, to resort to using review proceedings for the purposes of delay as a person whose interest is less substantial and more remote. It is submitted that any slight increase in the incidence of such "holding actions" resulting from relaxed standing requirements must be accepted as a necessary cost of ensuring that administrators act within their legal constraints. The courts must be left to deal with the problem of obstructive tactics by exercise of their powers to strike out proceedings for lack of prosecution, or because the pleadings are frivolous and vexatious or disclose no grounds for review.

Thus it is submitted that there is no valid objection to conferring broad standing rights for relief in the nature of the prerogative remedies of certiorari, prohibition and mandamus. The same reasoning applies equally to the purely *administrative law* uses of the declaratory judgment and the injunction as alternative supervisory remedies. Where a declaration or an injunction is used merely as a supervisory remedy to secure judicial review of delegated governmental action (including subordinate legislation), there is no good reason to make any distinction between standing requirements for the different remedies. Thus the writer agrees with the majority of the Committee that there is a need to both standardise and liberalise existing locus standi requirements to secure judicial review of exercises of delegated governmental power by public bodies and officials. In regard to this category of functions, the writer's objec-

tive Law" (1975) 88 Harvard L.R. 1669. The inevitable costs of increased public participation in terms of delay and expense (see Stewart, op. cit. 1770-1776) will be much less in New Zealand than in the U.S. due to (i) the significantly greater flexibility which the fairness doctrine affords New Zealand courts and administrators in tailoring procedures for hearing interested parties before a decision is made, and (ii) the more restricted nature of the substantive grounds for judicial review of administrative action in Commonwealth jurisdictions — provided the administrator applies his mind to all relevant factors and excludes from his consideration all irrelevant matters, the court will be slow to review the relative weight attributed by him to the various relevant factors considered, and his decision will stand unless there is no evidence to support it or the decision is such that no reasonab'e official could ever have come to it.

28 *Report*, Minority View, p.35, para. 2.

29 Ibid.

tion to the majority's proposal is that it is by no means certain that their recommended test of standing will achieve the desired result.[30]

The Special Nature of the Injunction and Declaration

However, it is submitted that the Committee's treatment of the injunction and declaration is seriously deficient. First, the Committee is wrong to the extent that it purports to identify any general continuing trend on the part of the courts towards liberalising locus standi requirements for the declaration and injunction, and assimilating standing requirements for these remedies with those for the prerogative orders.[31] Secondly, by extending the application of its recommended test of individual standing to all proceedings for injunctive and declaratory relief regardless of the legal context in which the remedy is sought, the Committee has, in common with the courts, failed to give sufficient consideration to the fundamental distinction between the administrative law uses of the injunction and declaration and the wider uses of these remedies in both public and private law.

The injunction and the declaration bear important differences to the prerogative remedies in terms of their origins, development, ambit of operation and effect, and these differences have been reflected in different standing requirements at common law. Both the injunction and the declaration originated as equitable remedies designed exclusively to protect and declare private legal rights of individuals. The injunction, which is still primarily a private law remedy, did not begin to play a significant role in public law until the nineteenth century, and the potential of the declaration as a public law remedy has been recognised only during the last seventy-odd years.[32]

At first the injunction was issued only to protect private rights in property.[33] One of the earliest incursions of the injunction into the area of public law was for the purpose of restraining the commission of public nuisances, acts which were criminal offences at common law. The courts of equity rationalised this development by treating "the public" as a legal entity exactly analogous to any other legal person, having property rights of its own which could be enforced by an injunction at the suit of the Attorney-General as representative of the public, acting either ex officio or on the relation of an interested citizen.[34] A private individual was recognised as having personal standing to seek an injunction to restrain a public nuisance without the Attorney-General's fiat only if he suffered "special" or "particular" damage over and above that suffered by the public at large. When the remedy finally became available to enforce the full range of non-proprietary legal rights of a public nature, it carried with it the restrictive locus standi requirements developed in the public nuisance cases. The accepted modern statement of these require-

30 See generally infra pp.155-157.

31 See *Report*, para. 26 where the correctness of the decision in *Collins* v *Lower Hutt City Corporation* [1961] N.Z.L.R. 250 denying a ratepayer standing for an injunction is questioned by reference to cases recognising ratepayer standing for mandamus and certiorari.

32 de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973) 383 et seq.

33 See *Gee* v *Pritchard* (1818) 2 Swans. 402, 417 per Lord Eldon.

34 See e.g. *A.-G.* v *Sheffield Gas Consumers Co.* (1852) 2 De G.M. & G. 304, 320 per Turner L. J.

ments is that of Buckley L. J. in *Boyce* v *Paddington Borough Council*:[35] a private citizen has standing to seek an injunction to restrain interference with a public right without securing the Attorney-General's consent only where (a) the conduct complained of also causes or threatens interference with the plaintiff's own private legal right, or (b) although no private right is interfered with, the plaintiff suffers or is threatened with "special" or "particular" damage over and above that suffered by the public generally. Individual standing to obtain a declaratory judgment was held to be governed by the same test.[36]

This traditional rule was challenged by the English Court of Appeal in *Attorney - General ex rel. McWhirter* v *Independent Broadcasting Authority*[37] where Lord Denning M. R. and Lawton L. J. expressed the view that where, in the opinion of the court, the Attorney-General improperly delays or refuses to give his consent to relator proceedings, the court may grant injunctive or declaratory relief in respect of interference with public rights at the suit of a private citizen who cannot satisfy the test of individual standing laid down in *Boyce*. This case is given prominent treatment by the Committee.[38] However, in *Gouriet* v *Union of Post Office Workers*[39] the House of Lords expressly rejected the broad obiter statements in *McWhirter* and reaffirmed the exclusive unreviewable discretion of the Attorney-General to seek an injunction or declaration in respect of interferences with public rights which neither cause nor threaten private injury to individuals.

The particular facts of *Gouriet's* case could not have presented a more unsuitable context in which to argue for liberalised individual standing rights to seek injunctive and declaratory relief. Mr Gouriet, the secretary of an organisation called the National Association for Freedom, sought a declaration that a boycott of postal communications with South Africa proposed by the Union of Post Office Workers would constitute a criminal offence under the Post Office Act 1953, and also claimed an injunction to prevent the boycott being put into effect. No private legal right of Gouriet was threatened by the proposed boycott, and it was not claimed that the boycott would cause him to suffer any "special damage" over and above that suffered by the public at large. The Attorney-General had refused to give his consent to relator proceedings. The case involved a direct conflict of political ideologies — one group, claiming to represent the general public interest, was seeking to use the civil courts' jurisdiction to enforce the criminal law in order to coerce another pressure group into deferring to its political views and desires. These features of the case focused attention on the special nature of the injunction and the special problems involved in allowing private citizens an unrestricted right to enlist the aid of the civil courts to suppress alleged breaches of the criminal law.

First the House of Lords emphasised that the jurisdiction of the civil courts to grant injunctions to enforce the criminal law is "anomalous"

35 [1903] 1 Ch. 109, 114. Approved in *London Passenger Transport Board* v *Moscrop* [1942] A.C. 332, 345 and applied in New Zealand in *A.-G.* v *Birkenhead Borough* [1968] N.Z.L.R. 383.

36 *London Passenger Transport Board* v *Moscrop*, ibid.; *Collins* v *Lower Hutt City Corporation* [1961] N.Z.L.R. 250.

37 [1973] 1 Q.B. 629.

38 *Report*, para. 29.

39 [1978] A.C. 435. See generally Waldron, "Gouriet's Case in the House of Lords" (1977) 4 Otago L.R. 87; Note (1978) 12 U. of B.C.L.R. 320.

and "dangerous" and should be used with great delicacy and caution only in "the most exceptional of cases".[40] Unlike a criminal prosecution the injunction operates prospectively to restrain the defendant's future conduct. Thus an injunction may issue to restrain alleged criminal conduct before the criminal character of that conduct has been established in a criminal court, or even, as in *Gouriet,* before the threatened action has actually been taken. Proceeding by way of injunction deprives the defendant of a number of important procedural safeguards provided by the criminal process. The criminality of the defendant's conduct will be determined by a single judge even though the statute which creates the offence may give the defendant the right to elect trial by jury in a criminal court. The judge will decide the issue by reference to the civil standard of proof rather than the more stringent standard required to support a criminal conviction. The fact that an interlocutory injunction can be obtained at short notice and upon little in the way of proof of a substantive case further disadvantages the defendant. Failure to comply with an injunction exposes the defendant to the double jeopardy of potentially unlimited liability for contempt in addition to the maximum penalty prescribed by the legislature for commission of the criminal offence. But while these considerations may justify denying citizens an automatic claim to an injunction to enforce the criminal law, they do not justify placing exclusive control in the hands of the Attorney-General. The courts are just as well equipped as the Attorney-General to decide whether the dangers inherent in these proceedings are outweighed by an urgent need to suppress criminal conduct in an exceptional case.[41]

However, a second line of argument relied on by their Lordships provides a more convincing justification for investing the Attorney-General with the exclusive right to commence proceedings for injunctions to enforce the criminal law unless an individual plaintiff is specially affected in his private capacity. Frequently, in cases of this kind, the threat to the rule of law involved in appearing to condone criminal acts may have to be balanced against competing public interests of a broadly political character — the risk of provoking or exacerbating political or industrial confrontation, disrupting processes of conciliation or negotiation, furthering the ends of politically motivated pressure groups, or providing opportunities for martyrdom. The House of Lords considered that if the courts are required to make decisions of this kind, they will be forced to perform a function for which they are ill-equipped and unprepared. Lord Wilberforce expressed their Lordships' views as follows:[42]

> The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.

40 Ibid., 481, 490-491, 498-499, 520-521.

41 As, for example, *A.-G.* v *Chaudry* [1971] 1 W.L.R. 1614 where the defendant's conduct presented a serious danger to the public. Although the court retains its discretion to refuse the remedy even at the suit of the Attorney-General, this power is seldom exercised: see *A.-G.* v *Bastow* [1957] 1 Q.B. 514, 521; *A.-G.* v *Huber* [1971] 2 S.A.S.R. 142.

42 [1978] A.C. 435, 482.

The plaintiff's attempted analogy between the public interest injunction and the private prosecution as alternative methods of law enforcement was rejected. Although (with rare exceptions) any interested citizen may initiate a private prosecution without the consent of the Attorney-General, this procedure is equally subject to the ultimate control of the Attorney-General through his power to direct that criminal proceedings be stayed.[43] Furthermore, prosecution is the normal method of enforcing the criminal law whereas use of the injunction may impose a prior restraint upon individual conduct without the procedural protection afforded the defendant under the criminal process. This reasoning led the House of Lords to reaffirm the established rule that unless an individual plaintiff can satisfy the test in *Boyce* by showing that he is specially affected in his private capacity, the Attorney-General has the exclusive and unreviewable right to commence proceedings for injunctions and declarations.

While the majority of the Committee appear to concede that on the particular facts of *Gouriet's* case it was appropriate for the court to refuse the plaintiff relief, they were forced, in view of their recommended proposal, to express their "disagreement with some of the broader statements made by members of the House of Lords."[44] It is submitted that the majority are correct in their view that the statements of principle in *Gouriet* are too sweeping in their effect. The special nature of the issues raised where injunctions or declarations are sought in respect of actual or threatened breaches of the criminal law do not apply where these remedies are used to obtain judicial review of governmental action. Where a declaration or an injunction is sought as a supervisory remedy to secure judicial review of delegated governmental action there is no special need or justification for the intervention of the Attorney-General and no good reason to apply the *Boyce* test of individual standing in preference to the more liberal rules applicable to the prerogative remedies. There were indications prior to *Gouriet* that the courts were moving, albeit hesitantly and tacitly, in this direction, particularly in cases where the applicant sought only declaratory relief.[45]

That some courts did, perhaps unconsciously, appreciate the implications for the law of locus standi arising out of the different uses of the remedies can be illustrated by comparing two recent decisions of the English Court of Appeal. In *Thorne* v *British Broadcasting Corpora-*

43 See in N.Z., Crimes Act 1961, s.378; Summary Proceedings Act 1957, ss.173, 77A.

44 *Report*, para. 33.

45 E.g. *London Association of Shipowners and Brokers* v *London and India Docks Joint Committee* [1892] 3 Ch. 252 (subordinate legislation: treated in *Gouriet*, supra, n.39, by Lord Fraser and Viscount Dilhorne as an exceptional decision which merely reflected concessions made by the defendants); *MacIlreath* v *Hart* (1908) 39 S.C.R. 657; *Prescott* v *Birmingham Corporation* [1955] Ch. 210; *Bradbury* v *Enfield London Borough Council* [1967] 1 W.L.R. 1311; *Lee* v *Enfield London Borough Council, The Times*, Sept. 14, 1967 (ratepayers awarded standing in respect of ultra vires acts of local authorities); *Thorson* v *A.-G. of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors* v *McNeil* (1975) 55 D.L.R. (3d) 632 (taxpayers awarded standing to test the constitutionality of legislation); *Charles Roberts & Co. Ltd.* v *British Railways Board* [1965] 1 W.L.R. 396. Compare *Bennett* v *Yately Parish Council* (1965) 63 L.G.R. 29; *Collins* v *Lower Hutt City Corporation* [1961] N.Z.L.R. 250. See generally Zamir, *The Declaratory Judgment* (1962) 273 et seq. and particularly conclusion at 281, and "The Declaratory Judgment Revisited" [1977] Current Legal Probs. 43, 47-48.

tion[46] a private citizen sued for an injunction to enjoin what he alleged to be a campaign of racial abuse by the B.B.C. amounting to a criminal offence under the Race Relations Act. The plaintiff did not allege that he had suffered any private injury as a result of these acts. The Court of Appeal had no hesitation in dismissing the action on the ground that the plaintiff lacked standing, Lord Denning declaring: "It is a fundamental rule that the court will only grant an injunction at the suit of a private individual to support a legal right. . . ."[47] But six years later in *McWhirter's* case[48] a majority of the Court was prepared to grant an interim injunction at the suit of a private citizen who claimed no special private interest in the matter. Although the injunction was later discharged after a full hearing, Lord Denning and Lawton L. J. declared that the court could entertain an application for an injunction or declaration by a private citizen without the consent of the Attorney-General "if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly."[49] Although in both cases the statements of principle extended to all uses of the injunction, one possible explanation for the Court's apparently abrupt change of attitude is that while *Thorne's* case involved an attempt by a member of the public to enlist the aid of the civil courts to suppress an alleged breach of the criminal law, Mr McWhirter was seeking to use the injunction as a supervisory remedy to prevent a public body from acting ultra vires its statutory powers. Thus in *McWhirter* Lord Denning emphasised that "In these days when *government departments and public authorities* have such great powers and influence", it is important that ordinary citizens "can see that *those great powers and influence* are exercised in accordance with law."[50]

It is submitted, therefore, that the broad statements of principle in *Gouriet* were ill-advised and that the House of Lords fell into error in failing to distinguish, for the purpose of standing requirements, between the purely administrative law uses of the declaration and injunction as supervisory remedies, and the private law and wider public law uses of these remedies.

Unfortunately, however, in adopting the extreme opposite position, the majority of the Committee have fallen into the same trap as the Lords in *Gouriet*. Their recommendation that existing standing requirements for all uses of the injunction and declaration as well as for prerogative relief should be replaced by a single test of "sufficient interest" to be applied in the exercise of the court's discretion equally ignores the essential differences between the administrative law uses of the injunction and declaration and their other uses. Although the majority recognise that on the special facts of *Gouriet's* case the House of Lords was right to deny the plaintiff an injunction or declaration, they reject the view that the right of an individual citizen to seek these remedies should ever be a threshold jurisdictional matter dependent upon the intervention of a third party such as the Attorney-General. They are confident that consideration of all the various policy factors which militate for and against the issue of particular remedies in particular circumstances can

46 [1967] 1 W.L.R. 1104.
47 Ibid., 1109.
48 [1973] 1 Q.B. 629.
49 Ibid., 649.
50 Ibid. (emphasis added). See also Lawton L.J., 656-657.

appropriately be left in every case to the courts in the exercise of their existing discretionary powers.[51]

However, it is submitted that the widely varying nature of the different uses of the declaration and injunction do call for different locus standi requirements of varying stringency, and that these should be threshold jurisdictional requirements rather than merely matters for consideration by the courts in the exercise of their general discretionary powers. Recent cases demonstrate clearly that there is merit in the view expressed by their Lordships in *Gouriet* that it is not appropriate to leave it to the courts to determine, in the exercise of their discretion, whether an injunction to suppress threatened breaches of the criminal law should issue at the suit of an individual citizen claiming no injury in his private capacity. The different approaches taken by the Court of Appeal and the House of Lords in *Gouriet* in respect of this crucial matter are poles apart in terms of fundamental political and constitutional philosophy. Nor is the Court of Appeal itself consistent in its approach.[52] It is reasonable to expect even more disparity between the approaches of different judges if standing to bring these sorts of proceedings becomes a purely discretionary matter.

It may be argued that neither of the two broad arguments in favour of limiting the availability of the public interest injunction in support of the criminal law apply to the public interest declaration, and that individual standing for a declaration that conduct constitutes a breach of the criminal law should not be governed by the more stringent rules applicable to the injunction.[53] Because the declaratory judgment is not an executory remedy it has no coercive effect in itself. Nor can a declaration adverse to the defendant create a res judicata for the purpose of criminal proceedings.[54] Therefore the procedural dangers attendant upon the use of the injunction in aid of the criminal law do not apply to the use of the declaration. Similarly, because a defendant's refusal to act in accordance with a declaration of illegality cannot lead to committal proceedings for contempt the issue of such a declaration cannot, in itself, exacerbate a delicate situation involving a threat of civil or industrial unrest. However, even a declaration that threatened conduct is criminal may in some cases disrupt processes of conciliation or negotiation by attracting undue attention to a volatile situation and lead to a direct and well-publicised challenge to the rule of law. In such circumstances it may be preferable for the court to dismiss the action for lack of standing without ever embarking on a consideration of the merits of the claim. Furthermore, it is difficult to see any unique purpose which can be served by a bare declaration of this kind. If it is felt that the defendant

51 See *Report*, para. 42.

52 Compare the Court's decision in *Gouriet* [1977] Q.B. 729 with *Harold Stephen & Co. Ltd.* v *Post Office* [1977] 1 W.L.R. 1172.

53 See Waldron, "Gouriet's Case in the House of Lords" (1977) 4 Otago L.R. 87, 91. Zamir may also be read as advocating a broad distinction for the purpose of standing between the private law uses and all the public law uses of the declaration: *The Declaratory Judgment* 272-276; "The Declaratory Judgment Revisited" [1977] Current Legal Probs. 43, 47-49. However, his illustrations and his conclusion at 281 of *The Declaratory Judgment* suggest that he would in fact limit the effect of a more relaxed standing rule to the administrative law uses of the declaration as a supervisory remedy.

54 The declaration is in no way conclusive against the defendant if he is subsequently prosecuted since the offence would have to be proved beyond reasonable doubt: Zamir, *The Declaratory Judgment* 225.

harbours genuine doubt as to the legality of his proposed action and would respect the court's view,[55] there is nothing to prevent the court from expressing its considered opinion on the question of legality while at the same time refusing the remedy for lack of standing.[56]

Thus the writer's first major criticism of the reform recommended by the majority of the Committee is that it fails to distinguish between the use of the injunction and declaration as supervisory remedies to check the exercise of delegated governmental power by public officials, and the private law and other public law uses of these remedies. While a liberal test of standing is appropriate where these remedies are used in a supervisory role, it is submitted that individual standing to claim a declaration or an injunction as a private law remedy or in support of the criminal law should continue to be governed by the test laid down in *Boyce* v *Paddington Borough Council.* Inevitably the courts have encountered certain difficulties in applying the test of individual standing laid down in *Boyce.*[57] However, the test is no more uncertain in its application than many other legal formulae, and analogies to assist the courts can be drawn from the law relating to civil liability for breach of statutory duty and the public nuisance cases on "special" damage.

The availability of the injunction and declaration as *private* law remedies now poses few real problems. In the area of private law the courts have shown themselves willing to develop and adapt both remedies in order to provide effective relief where no other remedy is available. In particular the courts have indicated that they are now prepared to issue declaratory and injunctive relief in order to protect the individual's right to work from illegal interference by private vocational associations, even although the plaintiff can show no interference with his contractual or proprietary rights.[58]

The power to grant public interest standing for an injunction or declaration to suppress or declare breaches of the criminal law should not be left to the courts' discretion but rather should be vested in some responsible body or official who is fully familiar with the political and social realities of the particular situation and appreciates the practical implications of the choices open to him. The remaining question is whether the Attorney-General is the most appropriate repository of this power.

55 In *Gouriet* [1978] A.C. 435, 513 Lord Edmund-Davies seemed to consider that a declaration could serve a useful purpose in these circumstances.

56 As in *Gouriet's* case itself.

57 Difficult problems of interpretation have arisen in deciding whether public duties imposed by statutes dealing generally with matters of social or economic regulation are intended to confer private civil rights of action upon affected individuals in terms of the first limb in *Boyce.* The Town and Country Planning legislation has proved particularly elusive in this regard: see *Gregory* v *Camden London Borough Council* [1966] 1 W.L.R. 899; *A.-G.* v *Birkenhead Borough* [1968] N.Z.L.R. 383 cf. *Mundy* v *Cunningham* [1973] 1 N.Z.L.R. 555 (S.C.), [1973] 2 N.Z.L.R. 654 (C.A.). The second limb of the *Boyce* test, requiring proof of "special" or "particular" damage, has also given rise to difficulties of application in practice: see Zamir, *The Declaratory Judgment* 270 et seq.; Thio, op. cit., 163-215; *A.-G.* v *Birkenhead Borough,* ibid.; *Neville Nitschke Caravans (Main North Road) Pty. Ltd.* v *McEntee* (1976) 15 S.A.S.R. 330.

58 *Nagle* v *Feilden* [1966] 2 Q.B. 633; *McInnes* v *Onslow Fane* [1978] 3 All E.R. 211; *Stininato* v *Auckland Boxing Association (Inc.)* [1978] 1 N.Z.L.R. 1, esp. 24-28 per Cooke J. See also *Millar* v *Smith* [1953] N.Z.L.R. 1049: declaration and injunction issued to protect social rights associated with membership of voluntary association.

Public concern about the unrestricted nature of the Attorney-General's powers to consent to relator proceedings and to direct that criminal prosecutions be stayed has focused on the suspicion that because the Attorney-General is both a member of the governing political party and a member of Cabinet his decisions may be motivated by personal or party political advantage.[59] The sole justification for vesting exclusive power to determine public interest standing for an injunction to enforce the criminal law in the Attorney-General rather than in the courts is the belief that the Attorney-General, by virtue of his background and position, is better equipped to balance the conflicting public interest considerations of a broadly political character which may arise in this context. The same considerations apply to the power to stay criminal proceedings. However, it can be argued that it is naïve to expect the Attorney-General to draw a clear distinction between those broad "political" considerations to which he may properly have regard, and those considerations of personal and party advantage which, according to convention,[60] he must entirely exclude from his deliberations. To the extent that the Attorney-General's assessment of what will best serve the public interest in a particular case coincides with party political interests,[61] suspicions of abuse of power will inevitably be aroused and public confidence in the administration of justice undermined.

These considerations may well justify complete reappraisal of the office and functions of the Attorney-General, and a number of possible reforms have been suggested.[62] However, they do not justify the simple expedient of removing the Attorney-General's exclusive control of public interest injunctions and declarations in support of the criminal law. First, a liberal test of standing to secure judicial review of the legality of delegated governmental action by public officials would exclude any involvement of the Attorney-General, and would therefore remove any possibility that considerations of political embarrassment may induce an Attorney-General to refuse his consent to review proceedings against, for example, a fellow Minister of the Crown who is alleged to have acted ultra vires his statutory powers.[63] Secondly, the Attorney-General's power to grant or withhold public interest standing for an injunction to suppress a breach of the criminal law is directly analogous to his power to stay a criminal prosecution. When used for this purpose, the injunction is essentially a coercive and potentially dangerous weapon of law enforcement. Until such time as the Attorney-General's powers to control criminal prosecutions are removed or confined, it is submitted that the Attorney-General should, through the relator procedure, continue to exercise exclusive control over public interest suits for injunctions and declarations in support of the criminal law.

59 For an excellent discussion of the office of Attorney-General in New Zealand, see Brookfield, "The Attorney-General" [1978] N.Z.L.J. 334.

60 The Attorney-General must exclude from his consideration "the repercussion of a given decision on [his] personal or [his] party's or [his] government's political fortunes . . .": Lord Shawcross speaking in the House of Commons in 1951, quoted by Edwards, *The Law Officers of the Crown* (1964) 222-223.

61 As, for example, in *Gouriet's* case, supra n.39.

62 See Brookfield, supra n.59 at 344.

63 Cf. Zamir, *The Declaratory Judgment* 273-274.

Standing to Challenge Delegated Governmental Action by Public Officials: The Alternative Tests Considered

Putting aside the use of the injunction and declaration as private law remedies and their wider public law use to suppress breaches of the criminal law, it is now proposed to assess the value of the alternative tests recommended by the Committee as tests of standing to secure judicial review of exercises of delegated governmental power by public bodies and officials. Finally the writer will advance his own proposal for reform of the law of standing.

1. The Majority's Test of "Sufficient Interest"

In their minority report Professor D. L. Mathieson and Mr E. A. Missen challenged the majority's recommended test on three broad grounds. Their first objection — that any general liberalising of standing requirements will increase the opportunities available to opposing parties to delay the implementation of important administrative programmes — has already been discussed.[64]

The minority's second objection is more persuasive. They claim that the majority's test of standing "will increase, rather than reduce, the uncertainty in application of the present law",[65] pointing out that the terms of the proposed section 56D of the Judicature Act contain no standards or criteria to guide the courts in their assessment of what is a "sufficient interest in the matter to which the application relates." How would the courts apply this vague, unstructured test of "sufficient interest"? Would the courts simply fall back on the existing case law and inquire whether the applicant's interest would be sufficient at common law? If so, different requirements would continue to apply depending on the nature of the relief sought, and the majority's aim of liberalising and standardising locus standi rules would be defeated. Or would the courts devise new criteria to determine the sufficiency of the applicant's interest? The minority correctly point out that different judges are likely to take different approaches to this question, a problem that is compounded by the fact that at present not all applications for review are assigned to the Administrative Division of the Supreme Court.[66]

The majority report advances only one possible guideline to assist the courts in their assessment of the sufficiency of an applicant's interest. In the concluding section of their report, the majority state that they expect the courts, in applying the new test, to "assess the interests protected by the legislation in issue and the extent of the applicant's involvement with those interests."[67] Two points can be made in respect of this suggestion. First, if the Committee desires and expects the courts to apply the test by reference to this criterion, an express direction to this effect should have been included in the draft Bill. Secondly, such an inquiry bears a strong resemblance to the second limb of the test of standing developed by the United States Supreme Court in a series of recent decisions: in order to establish standing for review the plaintiff must show (i) that "the challenged action has caused him injury in fact, economic or otherwise", and (ii) that "the interest sought to be protected by the complainant is arguably within the zone of interests to be

64 Supra p.146.
65 *Report*, p.36, para. 3.
66 See *Practice Note* [1975] 2 N.Z.L.R. 345.
67 *Report*, para. 50. See also para. 27.

protected or regulated by the statute or constitutional guarantee in question."[68] But although this test has led to a significant relaxation of standing requirements in the United States, the second limb of the test has made little impact. Indeed, the "zone of interests" requirement has been criticised as being so vague and uncertain in its application that many lower courts have given up the attempt.[69] The liberalising effect of the United States test has resulted from the courts' practice of interpreting "injury in fact" to include relatively insignificant injury to intangible non-economic interests such as aesthetic, environmental and recreational interests, and affording "representational standing" to organisations whose members claim to have suffered such injury.[70]

The minority's third major criticism of the majority proposal is that it fails to deal with the important problem of representational standing. There is no certainty that persons or organisations who represent the interests of large numbers of persons who are similarly affected by proposed action will have standing under the majority test. The present position in respect of representative actions is far from clear. There are indications that New Zealand courts may be prepared to grant standing to organisations formed to protect and further material interests shared by their members but distinct from those of the public at large.[71] However, it seems that an organisation such as the Environmental Defence Society which has broad ideological objects will not only be denied locus

68 *Association of Data Processing Service Organisations* v *Camp,* 397 U.S. 150, 153 (1970). See also *Barlow v Collins,* 397 U.S. 159 (1970); *Sierra Club* v *Morton,* 405 U.S. 727 (1972); *U.S.* v *S.C.R.A.P.,* 412 U.S. 669 (1973).

69 Sedler, "Standing, Justiciability and All That: A Behavioural Analysis" (1972) 25 Vand. L.R. 479; Scott, "Standing in the Supreme Court — A Functional Analysis" (1973) 86 Harv. L.R. 645; Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief" (1974) 83 Yale L.J. 425; Davis, *Administrative Law of the Seventies* (1976) ch. 22.02-11.

70 See *Sierra Club* v *Morton,* 405 U.S. 727, 733-734 (1972); *U.S.* v *S.C.R.A.P.,* 412 U.S. 669 (1973). However, the "injury in fact" requirement is not free from difficulty: see Albert, ibid., Davis, ibid., ch. 22; Sedler, "Standing and the Burger Court: An Analysis and Some Proposals for Reform" (1977) 30 Rutgers L.R. 863. Also, the U.S. Supreme Court has refused to grant standing to applicants for review whose interest in the decision under challenge is purely ideological — in *Sierra Club* v *Morton* the club was denied standing on the basis of its purely ideological concern that wilderness areas should be preserved in the interests of the public generally. However, the club was subsequently afforded standing on amended pleadings in which the club alleged that among its members were users of the area in question who would be adversely affected by the decision: 348 F. Supp. 219 (N D. Cal. 1972).

71 See *Waikouaiti County Ratepayers and Householders Assn. Inc.* v *Waikouaiti County* [1975] 1 N.Z.L.R. 600, 606-607 (application for review by ratepayers' association to protect ratepayers' interest in fair representation on elected council); *Water Resources Council* v *Southland Skindivers Club Inc.* [1976] 1 N.Z.L.R. 1, 3 and *Water Resources Council* v *Dalton* [1976] 1 N Z.L.R. 15, 16-17 (the legitimate objects and purposes of a recreational club and an association of commercial oyster farmers were found to be affected in a manner sufficiently different from the effect on the public at large to give those organisations standing as persons "claiming to be affected" by water classifications under Water and Soil Conservation Act 1967, s.26G(1). But cf. *Application of C.S.S.O.; N.Z. Association of Bakers Inc.* v *Secretary of Trade and Industry,* unreported, 9 August 1976, Wellington, M.171/76, Wild C. J. (Combined State Services Organisation denied standing to participate in pricing appeal as a person having a "substantial interest" in the decision in terms of Commerce Act 1975, s.99(2): See now Commerce Act 1975, s.99(2) as enacted by Commerce Amendment Act 1976, s.30(1)); *Victoria University of Wellington Students Assn. Inc.* v *Shearer (Government Printer)* [1973] 2 N.Z L.R. 21, 23-24 (interest of association not to be identified with that of its members).

standi to represent the general public interest in preservation of the environment,[72] but may also be denied standing even as the nominated representative of individual citizens who are personally and materially affected by a decision.[73]

Thus even as a test of standing to secure judicial review of delegated governmental action the majority's formula is deficient in two important respects: (1) the vagueness of its terms raises serious doubt as to whether its application will go any significant way towards achieving the objects of standardising and liberalising existing standing requirements; and (2) it fails to deal with the important question of representational standing.

2. The Minority Proposal

The minority of the Committee would leave individual standing for judicial review to be governed by the existing common law rules. However, the minority recognise the need to make express provision for representational standing to represent aspects of the public interest affected by administrative action, and their proposed reform deals exclusively with this problem.

They recommend a two-stage procedure. First, an applicant seeking standing to represent the public interest would be obliged to make an initial application to the Attorney-General for his consent to relator proceedings. However, in the event of the Attorney-General withholding his fiat, a person seeking review could apply to the court for a "standing order". The court's function on such an application would be defined as follows:[74]

> If the court is satisfied, upon the hearing of an application for a standing order—
>
> (a) that the person claiming to represent the public interest genuinely represents the interest of the public or a significant section of the public; and
>
> (b) that the public or, as the case may be, that section of the public, has or may reasonably consider that it has, a cause of complaint in relation to the exercise, refusal to exercise, or proposed or purported exercise of the statutory power in question (whether or not relief under this Act is likely to be granted); and
>
> (c) that in all the circumstances, having regard to the nature of the statutory power in question and the number of persons who are or may be affected thereby, it is appropriate that the person claiming to represent the public interest should be permitted to commence an application for review,—
>
> the Court shall make a standing order.

The "standing order" procedure would apply to benefit only persons seeking standing to represent "the interests of the public or a significant section of the public." Persons who represent less than "a significant section of the public" would still be required to establish individual standing under the existing common law rules.

72 *Environmental Defence Society Inc.* v *Agricultural Chemicals Board* [1973] 2 N.Z.L.R. 758 (at least in proceedings for mandamus, declaration or injunction).

73 See *Mahuta* v *National Water and Soil Conservation Authority* (1973) 5 N.Z.T.C.P.A. 73, 82; *Environmental Defence Society Inc.* v *National Water and Soil Conservation Authority* (1976) 6 N.Z.T.C.P.A. 49, 58. The question of purely representative actions by environmental organisations was expressly left open by Cooke J. in the *Southland Skindivers Club* case, supra n.71 at 4.

74 *Report*, p.38, para. 7(5). This definition of the court's function would presumably be contained in a further amendment to the Judicature Amendment Act 1972.

While the minority report accurately identifies the weaknesses of the majority proposal, its own recommendation is subject to important disadvantages. First, the minority's view of the proper role of the Attorney-General is both ambivalent[75] and misguided. The availability of the standing order procedure would seem to be limited to applications for judicial review of exercises of "statutory power"[76] as defined in the Judicature Amendment Act 1972.[77] It has already been argued that where an applicant merely seeks judicial review of delegated governmental action by a public body the preliminary exclusionary jurisdiction of the Attorney-General is neither necessary nor desirable, and there is no valid objection to conferring broad public interest standing rights without any involvement of the Attorney-General.[78]

Secondly, the required prerequisites for grant of a standing order seem unnecessarily complex. The minority concede that the requirement that an applicant represent "a significant section of the public" introduces a vague term which will be difficult to apply in practice. In any case, it is submitted that the actual number of persons sharing the represented interest is a relatively unimportant consideration. The essential requirement should be that the represented interest is one which is relevant to the exercise of the power in question, and is therefore required to be taken into account by the administrator in making the decision under challenge.

The second requirement for grant of a standing order would seem to run counter to one of the minority's fundamental principles. While they emphasise the need to preserve the preliminary threshold nature of the court's inquiry into locus standi, and declare that "Upon the hearing of an application for a standing order it would be no part of the Court's function to guess at the likelihood of the application for review being successful",[79] their second requirement for entitlement to an order would necessarily seem to call for some consideration of the merits of the applicant's complaint. Further, the minority express confidence that their direction to the court to have "regard to the nature of the statutory power in question"[80] would involve consideration not only of "the scheme of the statute, its general objectives, [and] the criteria prescribed for decisions made under it", but also "the ambit and likely practical effect of the decision."[81] This suggests that the minority envisage the court deciding an application by determining whether the complaint is sufficiently widely held and well-founded in law to justify the inconvenience to the administration which would result from delaying (and perhaps preventing) implementation of an important or well-advanced project.

Consequently it is submitted that the minority's two-stage procedure to secure public interest standing for review of administrative action is unnecessarily complex, cumbersome and time-consuming.

75 The minority appear to see a real distinction between *review* of the Attorney-General's discretion to withhold his fiat (which they consider to be undesirable), and the courts' function in granting a "standing order" which would "supersede" the Attorney-General's decision: *Report*, p.39, para. 9.
76 See *Report*, p.38, para. 7(5)(b).
77 As amended by the Judicature Amendment Act 1977, s.10. See generally Smillie, "The Judicature Amendment Act 1977" [1978] N.Z.L.J. 232.
78 Supra pp.146, 150.
79 *Report*, p 40, para. 11.
80 Ibid., p.38, para. 7(5)(c).
81 Ibid., p.40, para. 13.

3. An Alternative Proposal

It has already been argued that individual standing for a declaration or injunction as a private law remedy or as a public law remedy to declare or suppress breaches of the criminal law should continue to be governed by the test laid down in *Boyce* v *Paddington Borough Council,* and the power to grant public interest standing should be vested in some responsible official or body other than the courts. On the other hand, standing requirements for a prerogative remedy or a declaration or injunction to secure judicial review of an exercise of governmental power by a public body or official should be significantly liberalised. In order to give practical effect to this view it is necessary to (a) find a workable procedural basis for distinguishing between the purely administrative law uses of the injunction and the declaration and the other uses of these remedies, and (b) draft realistic and workable rules which will liberalise the standing requirement to secure judicial review of exercises of power by public officials.

(a) Confining the application of a liberal standing rule to the prerogative remedies and the purely administrative law uses of the declaration and injunction.

The English Law Commission recognised that the obvious way to achieve this end is to restrict the operation of the liberal standing rule to their recommended "application for judicial review" procedure, that procedure being available only to secure judicial review of exercises of delegated governmental power by public bodies.[82] The minority of the Public and Administrative Law Reform Committee also gives tacit recognition to this approach by limiting the availability of their "standing order" procedure to applications for review of exercises of "statutory power" under the Judicature Amendment Act 1972. However, the simple expedient of linking a liberal standing rule with the application for review procedure created by the Judicature Amendment Act would not achieve the writer's object. The availability of the application for review procedure is limited to exercises of "statutory power" and this term, as defined in section 3 of the Act, does not embrace all exercises of delegated governmental power by public officials.[83]

Two alternative approaches to reform are available. First, the definition of "statutory power" can be further amended to include all exercises of delegated governmental power,[84] and retained either as a limitation upon all forms of relief under the Act, or (preferably) as in Ontario,[85] used only to limit the availability of injunctive and declaratory relief under the application for review procedure.[86] Alternatively, the Judicature Amendment Act 1972 could be amended along the lines of the new Order 53 of the English Rules of the Supreme Court which implemented

82 Law Commission, *Report on Remedies in Administrative Law* (1976) Cmnd. 6407.

83 See Smillie, supra n.77.

84 The definition should be amended to include (i) exercises of non-statutory prerogative powers of a reviewable nature delegated by the Crown to public officials, and (ii) automatic statutory consquences which involve no exercise of discretion. See Smillie, ibid., 232-234.

85 Judicial Review Procedure Act 1971 (Ontario).

86 One or other variant of this approach would be necessary if it were felt desirable to make the advantages of the statutory procedure, together with the liberalised standing rule, available to persons seeking review of decisions of domestic bodies.

the recommendations of the Law Commission.[87] Order 53 creates a new procedure called an "application for judicial review" by which application may be made for any one or more of the remedies of mandamus, certiorari, prohibition, injunction or declaration. The availability of the new procedure is not limited by reference to any such term as "statutory power", and it is therefore clear that the procedure is available in every situation in which one of the prerogative remedies was available at common law. However, injunctive and declaratory relief under the new procedure is limited to the administrative law uses of those remedies. Order 53 rule 1(2) provides that the court may grant an injunction or declaration on an application for review if it considers that it is "just and convenient" to do so having regard to: "(a) the nature of the matters in respect of which relief may be granted by way of orders of mandamus, prohibition or certiorari, (b) the nature of the persons and bodies against which relief may be granted by way of such orders, and (c) all the circumstances of the case."

By limiting the availability of declaratory and injunctive relief under the new procedure to functions and bodies in respect of which the prerogative remedies were available at common law, the English Law Commission has restricted the operation of its new "sufficient interest" test of locus standi (Order 53, rule 5(3)) to prerogative relief and the supervisory, administrative law uses of the declaration and injunction.[88] The possibility of an application being dismissed because an applicant mistakenly sought to use the new procedure to secure declaratory or injunctive relief in respect of a private law matter or to suppress a breach of the criminal law is covered by rule 9(5) which gives the court power to deal with an application for judicial review as if the proceedings had been commenced by writ or summons.

The only objection raised by the majority of the New Zealand Committee to limiting the operation of its recommended test of standing to applications for review under the Judicature Amendment Act was that this would "create problems where a litigant sought relief in the alternative — under both the Judicature Amendment Act 1972 and the earlier law."[89] This objection would seem to have little force.

(b) A liberal test of locus standi for applications for review under the Judicature Amendment Act 1972.

Some commentators have argued for abolition of all locus standi requirements. They maintain that personal litigation costs and the risk of an order to pay the respondent's costs, together with the courts' existing "avoidance" powers to strike out vexatious or hypothetical proceedings and deny relief in the exercise of their discretion, provide sufficient checks against officious meddlers.[90] While the writer would preserve

87 S.I. 1977, No. 1955. See generally, Beatson and Matthews (1978) 41 M.L.R. 437.

88 Any fear that such a provision would prevent use of the statutory procedure to obtain a declaration or injunction in respect of invalid subordinate legislation (see Zamir, "The Declaratory Judgment Revisited" [1977] Current Legal Probs. 43, 55) would seem to be groundless in New Zealand due to s.4(2A) of the Judicature Amendment Act 1972 (inserted by the Judicature Amendment Act 1977, s.11(1)).

89 *Report*, para. 5.

90 E g. Scott, "Standing in the Supreme Court — A Functional Analysis" (1973) 86 Harv. L.R. 645, 692 and "Standing, Participation and Who Pays?" (1974) 26 Ad.L.R. 42; Albert, supra n.69; Williams, "Environmental Law — Some Recurring Issues" (1975) 3 Otago L.R. 372, 379- 383.

existing standing requirements for the private law and wider public law uses of the injunction and declaration, he sees no real objection to complete abolition of all locus standi restrictions upon applications for review of exercises of governmental power by public officials under the Judicature Amendment Act.

However, it is appreciated that such a proposal may be politically naïve. Consequently the writer feels obliged to attempt to draft realistic and workable rules which would provide (1) a single test of individual standing which would effect significant extension of standing rights to safeguard legitimate personal interests affected by governmental action, and (2) a simple but reasonably clear test which would extend locus standi to representatives of relevant public interests affected by administrative decision-making. It is submitted that inclusion in the Judicature Amendment Act 1972 of a provision along the following lines should secure these objectives.

> Standing to make application for review
>
> (1) Any person who claims that his interests may be affected by the action to which the application relates shall have standing to make an application for review under Part I of this Act.
>
> (2) In order to establish standing under subsection (1) of this section it shall not be necessary for an applicant for review to show that the nature of the interest which he claims may be affected by the action to which the application relates is distinct from interests shared by the public generally, or that the effect of the action on his interests will be different in kind or degree from the effect of the action on the interests of the public generally.
>
> (3) Any person who has standing under subsection (1) of this section may authorise any other person to make an application for review on his behalf.
>
> (4) Notwithstanding the foregoing provisions of this section, the Court may grant standing to make an application for review under Part I of this Act to any person who, in the opinion of the Court, will genuinely and competently represent an aspect of the public interest relevant to the action to which the application relates.

A broad definition of the term "interests" should be included in the definition section of the Judicature Amendment Act 1972: e.g. " 'Interests' includes economic, property, educational, environmental, recreational, aesthetic, and spiritual interests." The term "person" is already defined broadly in section 2 of the Act as including "a corporation sole, and also a body of persons whether incorporated or not."[91]

A provision of this kind should effect a considerable expansion of standing rights to challenge governmental action by public bodies and officials. The crucial elements of subsections (1) and (2) dealing with personal standing are the wide definition of "interests" and the express direction that provided the action in question may affect the applicant's broad interests, it is immaterial that the public at large may be affected in the same manner and to the same degree. The use of the terms "claims" and "may be affected" makes it clear that an applicant is not required to show that the action under challenge will *necessarily* affect his interests, or even that such an effect is *substantially certain.* However, the courts are likely to insist that the applicant's claim is "reasonable",[92] in the sense that an effect upon the applicant's interests is at least likely.

91 See also Acts Interpretation Act 1924, s.4.

92 See *Blencraft Manufacturing Co. Ltd.* v *Fletcher Development Co. Ltd.* [1974] 1 N Z.L.R. 295, 314 per Cooke J.

A relatively wide area of discretion is left to the courts by use of the word "affected". The courts will be left to develop cut-off standards to exclude applicants whose interests are affected in a manner too remote or insubstantial to warrant judicial intervention. As the President of the Australian Administrative Appeals Tribunal observed in relation to a statutory test of standing similar to that recommended by the writer:[93]

> [A] decision which affects the interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripple of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which affection of interests by a decision should be regarded as too remote. . . .

With regard to the degree or extent of effect necessary to satisfy the test, the express recognition that an applicant may have standing even although the effect of the action on his interests is no different from the effect on every other member of the community should be sufficient to make it clear that it is not necessary for an applicant to show a serious or even a substantial effect on his interests. However, the courts are likely to insist that the claimed effect on the applicant's interests is "appreciable",[94] or at least "perceptible".[95]

Paragraph three of the proposed test makes express provision for representational standing by permitting any person who can establish standing under paragraph one to authorise any other person to make an application for review on his behalf.[96]

Paragraph four makes express provision for the grant of standing to responsible and competent persons and organisations whose interests, although legitimately relevant to the action under challenge, are purely ideological rather than personal. A broad right of public interest standing is also necessary in order to ensure that a restrictive interpretation of the test of personal standing to require a direct adverse effect on the applicant's interests by the decision under challenge[97] does not prevent concerned individuals from compelling public authorities to at least consider alternative proposals which may positively promote public interests

93 *Re McHattan and Collector of Customs* (1977) 18 A.L.R. 154, 157 per Brennan J. considering Administrative Appeals Tribunal Act 1975 (Cth), s.27(1). In that case the judge held that the applicant's interest must be affected by the actual decision impugned — it is not sufficient that his interest may be promoted or affected by the *review* of that decision. This requirement seems similar to the gloss placed upon s.23(1) of the Town and Country Planning Act 1953 by Woodhouse J. in *Rodgers* v *S.T.C.P.A. Board* (unreported) in a passage quoted by Turner P. in his Court of Appeal judgment [1973] 1 N.Z.L.R. 529, 539 — the proposal must have "some direct influence" upon the objector's interests; standing to object cannot be based upon "some disappointed claim that the proposal could be adjusted to produce a better result or that it fails to give effect to expectations of a benefit. An actual effect on the existing situation is the qualifying factor and not the denial of an advantage to which there is no present entitlement." Although Turner P. and Wild C. J. refrained from approving this statement of principle, Woodhouse J.'s comments were treated sympathetically by Cooke J. in *Blencraft*, ibid., 303.

94 This is the gloss added by the New Zealand courts to the requirement that a person be "affected" by a planning proposal in order to have standing to object under the Town and Country Planning Act 1953: *Rogers* v *S.T.C.P.A. Board*, ibid., *Blencraft* case, supra n.92.

95 See *U.S.* v *S.C.R.A.P.*, 412 U.S. 669, 688-689 (1973).

96 Para. 3 should overcome the problem highlighted in the *Mahuta* and the *Environmental Defence Society* cases, supra n.73, and referred to by Cooke J. in the *Southland Skindivers Club* case, supra n.71.

97 See supra n.93.

relevant to the exercise of the power. Paragraph four therefore gives the court a discretion to grant locus standi to persons or organisations who claim to represent aspects of the public interest relevant to the decision under challenge even although they either cannot, or choose not to, rely upon any specific effect upon their own personal interests or the interests of any individual whom they are authorised to represent.[98]

With regard to the requirement of relevance, it has already been argued that while the number of people sharing the particular aspect of the public interest relied upon is largely immaterial, the important matter is that the represented public interest should be one which is legally relevant to the exercise of the function under challenge and must therefore be taken into account by the official in reaching his decision. The main purpose of granting standing under this head is to ensure that such relevant public interests are not ignored by the administrator. The requirement that the applicant will genuinely and competently represent the particular aspect of the public interest relied upon will enable the court to deny locus standi to an applicant who seeks to use public interest standing to further personal interests which are insufficiently substantial or direct to give him individual standing. Where the applicant is an organisation this is unlikely to pose any difficulty — the court can simply inquire whether there is a reasonable congruence between the defined objects of the organisation and the particular public interest it seeks to represent.

Summary and Conclusion

In its *Eleventh Report* a majority of the Public and Administrative Law Reform Committee has recommended adoption of a single statutory test of locus standi for all the public law remedies. The proposed reform would empower the court, in the exercise of its general discretion, to deny relief if it considers that the applicant "does not have a sufficient interest in the matter to which the application relates." It seems that the Committee's aim is to both standardise and liberalise existing locus standi requirements.

While the writer agrees with the majority of the Committee that a more liberal test should apply to determine standing to obtain judicial review of the legality of delegated governmental action by public officials, it is submitted that the majority's proposal is deficient in two broad respects.

1. The majority of the Committee fail to distinguish between the purely administrative law uses of the injunction and declaration as supervisory remedies to secure judicial review of exercises of delegated governmental power by public bodies and officials, and the private law and wider public law uses of these remedies. While a liberal test of standing is appropriate where these remedies are used as supervisory remedies, it is submitted that individual standing to claim a declaration or injunction as a private law remedy or to suppress breaches of the criminal law should continue to be governed by the more stringent test laid down in *Boyce* v *Paddington Borough Council*. Public interest standing to obtain a declaration or injunction in support of the criminal law should not be left to the discretion of the courts but should be vested in a responsible official who is more likely to appreciate the broad political and social

98 This provision should overcome the problem faced by the plaintiff in *Sierra Club* v *Morton*, supra n.70.

implications of his decision. Until such time as the Attorney-General's analogous powers to stay criminal prosecutions are removed or confined, the Attorney-General should continue to exercise exclusive control over public interest suits for declarations and injunctions in support of the criminal law.

2. Even as a test for determining locus standi to challenge delegated governmental action by public officials, the majority's test of "sufficient interest" is unsatisfactory in two important respects: (a) its terms are so vague and imprecise that it may not achieve the object of standardising and liberalising existing standing requirements; and (b) it fails to deal with the problem of representational standing.

The alternative test proposed by the minority of the Committee deals exclusively with the problem of public interest standing and is restricted in its application to the prerogative remedies and the administrative law uses of the injunction and declaration. However, it is submitted that the minority's proposal is unnecessarily complex and cumbersome.

Finally, the writer has drafted his own alternative formula in an attempt to give practical effect to the views advanced in this paper.