AUSTRALIA

The Law
Reform
Commission

Discussion Paper No. 4

ACCESS TO THE COURTS — I
STANDING: PUBLIC INTEREST SUITS

This Discussion Paper is the first of three to be published by the Law Reform Commission in relation to its reference Access to the Courts. It has to be brief, with the disadvantage of some oversimplification. For those interested a lengthy Working Paper (Working Paper No. 7) is available. The Commission would like to emphasize that no decisions have been made — the views expressed merely indicate present thinking and will be reconsidered in the light of public reaction. Please assist by your comments which will be carefully considered. All enquiries and comments should be directed to Mr Murray Wilcox, Law Reform Commission, 99 Elizabeth Street, Sydney, 2000, (DX 1165) telephone (02) 231 1733 by 1 April, 1978.

NOTE ON TERMS AND PROCEDURES

The Paper assumes some familiarity with legal terminology and procedures. The following explanations may assist some readers:

TERMINOLOGY

Certiorari: One of the prerogative writs (see below) used to remove proceedings from an inferior to a superior court for review.

Class action: An action brought by one member of a group, on behalf of himself and the other members of the group, in respect of a common complaint. In its modern connotation the term extends to actions for damages arising out of similar breaches of obligation to each member of the group.

Committal for trial: A decision by a magistrate, in criminal proceedings, that there is a sufficient case to justify putting a defendant on trial before a jury.

Constitutional cases: Legal actions, however arising, in which there is a question of interpretation or application of the Australian Constitution.

Crown Prosecutors: Barristers employed by the Crown, often on a full-time salaried basis, to consider whether a person should be put on trial for a criminal offence, to determine the form of the indictment (see below) and to conduct the Crown case at the trial.

Declaration: A formal finding of a court as to the existence of a legal right or duty.

Fiat: A grant of permission by an Attorney-General for proceedings to be taken by some person in his name.

Indictment: A written accusation of a crime, in the name of the Crown, tendered at the commencement of a criminal trial before a jury to inform the accused person and the court of the charge made against him by the prosecutor (in Australia always the Crown).

Injunction: An order of a court whereby a party to an action is required to do, or to refrain from doing, a particular thing.

Interlocutory application: A request for some incidental or temporary order during the course of the action; as distinct from the main order sought.

Legal aid: Financial assistance supplied on an organized basis, usually by a government or the legal profession, to allow people of limited means to take or defend legal proceedings.

Magistrates courts: The term is used in the Paper to include all Courts of Petty Sessions whether constituted by stipendiary magistrates, that is paid full-time magistrates, or justices of the peace sitting on an honorary, part-time basis.

Mandamus: One of the prerogative writs (see below), used to compel a public official to carry out a legal duty.

Nolle prosequi: Termination of criminal proceedings by an Attorney-General exercising his prerogative power.

Police prosecutions: Police officers conducting proceedings, on behalf of the prosecution, in magistrates courts. Police prosecutors are usually specially selected and trained for the role.

Prerogative writs: Writs issued in the name of the Crown by superior courts to control inferior courts and public officials. The various writs take their name from the Latin wording used in the command. Of the original seven writs only four (habeas corpus — a writ to bring a person before a court — certiorari, mandamus and prohibition) are significant today.

Prohibition: One of the prerogative writs (see above) used to restrain an inferior court from an action exceeding its powers.

Prosecution: In the sense used in the Paper the term refers to the commencement and continuation of criminal proceedings.

Public interest suits: In the sense used in the Paper the term refers to actions (civil and criminal) designed to vindicate a public interest, as distinct from the private interest of some person.

Standing: The entitlement of a particular person to commence a particular action.

Statutory appeals: In the sense used in the Paper an appeal from an administrative decision, whether to a court or an administrative body, in exercise of a right given by an Act of Parliament.

Sue: To institute legal proceedings, civil or criminal, against a person.

Summary proceedings: A criminal prosecution finally determinable by a magistrate, that is for an offence not requiring a hearing before a jury.

STEPS IN CRIMINAL PROSECUTION

Commencement: The proceedings are commenced by some person formally accusing another of an offence. Where the person has been, or is to be, arrested the accusation is by a charge noted in the charge book; where arrest is unnecessary an information is filed to enable the court officer to issue a summons commanding attendance at the court.

Magistrates court hearing: Offences are either indictable or summary offences depending upon whether the question of guilt is to be ultimately determined by a jury or magistrate. In either case the magistrate hears the prosecution evidence and any evidence the accused person desires to give. If, in an indictable case, the magistrate thinks that there is a sufficient case to warrant trial before a jury he commits the accused for trial. In a summary case he determines the question of guilt and, if he finds guilt, determines the penalty.

Jury hearing: If a magistrate commits a person for trial for an indictable offence the evidence is considered by a lawyer representing the Crown, usually a Crown Prosecutor, who decides whether the accused shall in fact be put on trial and the precise charge. The trial takes place before a judge and jury. The jury decides the question of guilt or innocence. If the jury finds guilt the judge determines penalty.

"Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged?"

Professors Bernard Schwartz and H. W. R. Wade, Q.C.,
in *Legal Control of Government* (1972), p. 291.

THE IMPORTANCE OF ACCESS

"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement — the most basic 'human right' — of a system which purports to guarantee legal rights."[1]

"Access to the Court" is the ability of the citizen to invoke the machinery of justice, to force some person or instrumentality to do something, to obey the law or carry out a duty. Everyone has access on his own behalf, where some private interest is involved; perhaps to recover a debt or damages, perhaps to restrain a threatened injury to his person or property. But where public interests are involved access is much more restricted. The Anglo-Australian tradition imposes "standing" rules on plaintiffs, only those with the requisite standing interest being able to obtain relief. In their comparative review of American and English administrative law Schwartz and Wade[2] commented:

"The problem of standing, or locus standi, is inherent in all legal systems . . . But in the United States, perhaps because of the constitutional basis which the subject has acquired in federal law it can be discussed as a single topic. In Britain it is a thing of shreds and patches, made up of various differing rules which apply to various different remedies and procedures. It is a typical product of the untidy system of remedies, each with its own technicalities, which all British administrative lawyers would like to see reformed."

Recently, there has been increasing concern at the extent of the restrictions. Controversy has raged[3] in England; in Canada and the United States the old rule has been discarded altogether. Instead the courts have adopted flexible criteria designed to allow any plaintiff with a genuine, not necessarily financial, concern to act in the public interest.

The historical context: Mauro Cappelletti, of the Universities of Florence and Stanford, is the director of an international project entitled "Access to Justice". Cappelletti sees increased access as the next stage in an historical trend. In the liberal states of the late 18th and 19th centuries the procedures for civil litigation reflected the individualistic philosophy of rights then prevalent; a right of access meant the aggrieved individual's formal right to institute or defend a claim. Access might be a natural right but, like other natural rights, it did not require state action for its protection; the rights existed prior to the state, it was enough that the state did not allow infringement by others. In this field, as in others, the state remained passive with respect to the ability, in practice, of a party to use his legal

1. M. Cappelletti, *Rabels Z* (1976) 669 at 672.
2. *Legal Control of Government*, 1972 at 291.
3. *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority* [1973] Q.B. 629; *Gouriet v. Union of Post Office Workers* [1977] 2 W.L.R. 310; (Court of Appeal); [1977] 3 All E.R. 70 (House of Lords).

right. The law was mainly concerned with property and majestically assumed that all had property.

Such notions could not survive 20th-century popular democracy. Widespread literacy, popular education, improved communications and universal suffrage have made obsolete the old concept of a propertied elite; property is more evenly distributed, social welfare programs alleviate individual distress. In legal terms the first fruit was provision of legal aid; a social welfare mechanism to allow all citizens, whatever their financial position, to enforce their private legal rights, to defend their personal liberty, status and property. Legal aid, in Cappelletti's term the "first wave" towards access, put them on a par with their wealthier brethren but it did not affect the interests sought to be protected.

The "second wave" Cappelletti defines as "the reforms aimed at providing legal representation for 'diffuse' interests especially in the areas of consumer and environmental protection".[4] It is an expression of a wider concern; better-educated citizens demand an increasing part in the running of their society and the decisions of their government. A more crowded affluent society has developed ideological causes; racial tolerance, civil rights, environmental and consumer protection. These interests may touch liberty or property but chiefly they are expressions of the values individuals wish their society to respect; the old proprietary interest is of less relevance. The new approach was recently summarized in New Zealand:

> ". . . today it is unreal to suggest that a person looks to the law solely to protect his interests in a narrow sense. It is necessary to do no more than read the newspapers to see the breadth of the interests that today's citizen expects the law to protect — and he expects the court where necessary to provide that protection. He is interested in results, not procedural niceties."[5]

Legal aid has come to Australia but not yet the "second wave"; in Australia, unlike many overseas countries, nothing has been done to liberalize the 19th-century standing rules.

Class Actions: Widened standing rules may assist consumers in attaining relevant injunctive or declaratory relief but they do not assist in recovering losses inflicted by illegal trading practices, nor do they threaten the illegal trader where he is most hurt, his pocketbook. The most potent legal instrument in that regard so far devised is the modern class action, to some an "engine of destruction", to others a mighty force for good. Consider the New York Commissioner of Consumer Affairs giving evidence before a United States Senate Committee in 1970:[6]

> "A Federal class action law will have more impact on the market places of the nation than all the myriads of laws and ordinances against fraud and deception which are hidden away in the statute books of the 50 States and their various sub-divisions, put together. All these laws make fraud illegal. But they have not made fraud unprofitable. Many of these laws can only be invoked by administrative agencies, which long ago lost their concern for the consumer and their appetite for action.
>
> "A Federal class action law . . . will put the power to seek justice in court where it belongs — beyond the reach of campaign contributors, industry lobbyists, or Washington lawyers — and it will put power in the hands of the consumers themselves and in the hands of their own lawyers, retained by them to represent their interests alone."

Australia has no class action law, available to consumers; yet, in common with the United States, we have an increasing "myriad" of consumer protection laws. Should we then have class actions to enforce consumer rights?

4. Cappelletti, *op cit*, 682.
5. Black, "The Right to be Heard", *New Zealand L.J.*, No. 4, 1977, 66.
6. Evidence of Mrs Bess Myerson, Commissioner of Consumer Affairs of the City of New York, before the Consumer Subcommittee of the U.S. Senate Committee on Commerce, No. 91-48, at 172.

The Reference to the Commission: Against this background the Commonwealth Attorney-General, on 1 February 1977, referred to the Law Reform Commission, for inquiry and report:

"(a) the standing of persons to sue in Federal and other courts whilst exercising Federal jurisdiction or in courts exercising jurisdiction under any law of any Territory; and

(b) class actions in such courts."

The Reference is couched in wide terms involving, as it does, access to the courts in all types of case and involving at least five separate categories of litigation:

(1) civil litigation to enforce public rights under Federal and Territorial law;

(2) appeals from subordinate courts and administrative bodies;

(3) criminal prosecutions in respect of offences under Federal and Territorial law;

(4) litigation to enforce private rights, especially where the person in whom the legal title is vested declines to do so;

(5) class actions to enforce damages claims under Federal or Territorial law.

It is important to note that two separate concepts are involved in the Reference: first, legal standing — the status needed to invoke the aid of the court relevant to categories (1), (2), (3) and (4); secondly some aspects of practical access — in cases where, as in category (4), standing and costs are entwined and in class actions, providing means whereby plaintiffs, without daunting costs risk, may take up the cudgels on behalf of a wronged group. The subject is so large that the Commission proposes to issue three separate discussion papers. This paper deals with proceedings to enforce public interests (categories (1), (2) and (3) above); subsequent papers will deal separately with private interest litigation (category (4)) and class actions (category (5)).

Matters outside the Reference: At the outset some distinctions must be made. First, standing and capacity. Standing is the legal entitlement of a person to invoke the jurisdiction of the court in a particular case; it turns upon the nature of the interest involved. Capacity is the ability to invoke the jurisdiction of the court in any case; it depends upon the personal characteristics of the plaintiff. An infant has standing to recover damages for personal injury; except with the aid of a next friend he lacks capacity. Secondly, standing and conduct of the case. Standing goes to ability to institute proceedings, conduct to the manner in which the action proceeds. The distinction is particularly relevant to criminal prosecutions. Any person, including any policeman, may (in the absence of particular statutory exception) institute a criminal prosecution but no policeman would expect to retain personal control of the conduct of the prosecution. Thirdly, standing and legal aid. Legal aid, of course, provides practical access to the courts. It enables a person who is already entitled to sue, that is who has a standing right, to effectively use his entitlement. It does not affect the legal parameters of the standing right itself; the adequacy of legal aid is not referred to the Commission in this Reference.

Standing and justiciability: There is a vital distinction between standing and justiciability. Standing involves the entitlement of a particular person to invoke jurisdiction in a particular case involving existing rights or duties. Someone, even if only the Attorney-General on behalf of the public at large, will always be able to take those proceedings; the standing problem is whether the actual plaintiff is a qualified plaintiff. Justiciability, on the other hand, depends upon the nature of the suit not the identity of the plaintiff. If, for example, the suit raises hypothetical or non-legal issues it will fail because of its nature and irrespective of the plaintiff.

Constitutional issue: Where the Constitution is involved the first question is not what should be done but what may be done. Federal judicial power extends only to the determination of "matters".[7] It thus excludes hypothetical questions and advisory opinions.[8] If standing were extended to any person to enforce public duties would the resultant action be a "matter", with which Federal courts could deal? It is at this point that the distinction between standing and justiciability is critical. Provided that action raises issues of legal rights or duties it is justiciable, a "matter" within the Federal judicial power.[9] A liberal notion of standing does not change the nature of the action, which could presently be instituted by an Attorney-General at least; it merely allows other persons to be plaintiff.

Commission's approach: To some extent the issues raised by the Reference depend on one's view of the role of courts in society. The Commission should state its approach. The courts exist to serve people in the resolution of legal disputes and in reducing social tension. If they are to remain relevant to society and alternative methods of dispute resolution, including physical violence, are to be avoided they must be, and be seen to be, capable of discharging that task. As a general proposition people ought to be able to submit legal disputes to the courts for resolution and to invoke the aid of the courts in enforcing the law. However, the courts lose, and with them society, if they depart from their proper role of settling disputes according to law; care will always need to be taken that proceedings are properly conducted in the presence of parties genuinely concerned with the merits of the matter.

THE "FLOODGATES" ARGUMENT

> "The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom."[10]

A major expressed reason for limiting standing rights is fear of a spate of actions brought by busybodies which will unduly extend the resources of the courts. No argument is easier put, none more difficult to rebut. Even if the fear be justified it does not follow that present restrictions should remain. If proper claims exist it may be necessary to provide resources for their determination. However, the issue must be considered.

Proponents of change, who doubt the "floodgates" argument, necessarily lack proof. Nonetheless, the difficulty may not be brushed aside; all Australian courts are fully extended and any substantial increase in business will cause further listing problems. What then is the available evidence?

United States' experience: Necessarily, there is no direct evidence but reference to analogous situations should allay fears. First, the American scene. Over recent years successive decisions of the United States Supreme Court have liberalized standing so as to afford a hearing to any person with a real interest in the relevant controversy. Surveying the result in 1973 Professor Scott[11] commented:

> "When the 'floodgates' of litigation are opened to some new class of controversy by a decision it is notable how rarely one can discern the flood that the dissentors feared."

7. *Constitution, Part III.* S.75 itself confers original jurisdiction on the High Court, for some "matters"; under s.76 the Parliament may confer original jurisdiction in other "matters".
8. *Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.
9. *South Australia v. Victoria* (1911) 12 C.L.R. 667 at 675, 715.
10. Prof. K. E. Scott: "Standing in the Supreme Court: A Functional Analysis" (1973) 86 *Harvard Law Review* 645 at 674.
11. *Op cit*, 673.

Professor Scott went on to point out that the liberalized standing rules had caused no significant increase in the number of actions brought, arguing that parties will not litigate at considerable personal cost unless they have a real interest in a matter.

In October 1970 the *Michigan Environmental Protection Act* commenced. That Act gave to any person whatever the right to take legal proceedings against any other person whatever, for the protection of the air, water and natural resources and the public trust therein from pollution, impairment and destruction. Any person could seek the assistance of the court to stop any other person adversely affecting the environment. It is difficult to imagine a wider right. In a State with nine million people, mostly engaged in manufacturing and mining, with the fifth largest city, Detroit, in the United States, and with frontage to four great lakes, one might expect a huge number of actions under such an Act. In fact, in the first three years of the Act, there were 74 actions "widely spread around the State at a steady rate, indicating that many people and groups in Michigan are aware of the statute and perceive it as an available tool".[12] The authors of those words were not concerned to minimize the use of the Act; on the contrary, to demonstrate, by analysis of all actions brought, its utility. They showed that all the actions brought raised serious, socially useful issues, the number well within the judicial competence of the Michigan courts. Of the completed cases about two-thirds had resulted in substantial relief to plaintiffs.

Canadian experience teaches the same lesson. In January 1974,[13] the Canadian Supreme Court recognized the standing of a taxpayer to challenge the constitutional validity of a Canadian Act. The action has been followed by one other constitutional challenge, to provincial legislation;[14] there is not yet evidence of flood.

More significant, perhaps, is the experience with ratepayers' actions; actions whereby a ratepayer challenges the legal validity of municipal expenditure. Standing to bring such an action was recognized in Canada in 1908[15] and in England in 1955[16], yet, in 1974, Mr Justice Laskin of the Canadian Supreme Court was able to say that such decisions do not "seem to have spawned any inordinate number of ratepayers' actions to challenge the legality of municipal expenditure".[17] Indeed, there have been only a handful of reported cases of that nature.

Australia: An Australian analogy supports that overseas experience. For years there has been agitation to allow objector appeals against the grant of town planning permits. The agitation has been met with "floodgates" predictions, but in each State where appeals are permissible they have proved wrong. Each State has seen a small manageable number of objector appeals, enabling the planning tribunals to deal with objectors' arguments on their merits, without noticeable administrative difficulty. Only in New South Wales did the "floodgates" argument prove persuasive; with the result that New South Wales was the centre of the "green ban" phenomenon. The moral, perhaps, applies; if the courts cannot, or will not, give relief to people who are in fact concerned about a matter then they will resort to self-help, with grave results for other persons and the rule of law.

12. Sax and Di Mento, "Environmental Citizen Suits: Three Years' Experience under the Michigan Environmental Projects Act", 4 *Ecology L.Q.* (1974) 1.
13. *Thorson v. Attorney-General of Canada* (1974) 43 D.L.R. (3d) 1.
14. *Nova Scotia Board of Censors v. McNeil* (1975) 55 D.L.R. (3d) 632.
15. *MacIlreigh v. Hart* (1908) 39 S.C.R. 657.
16. *Prescott v. Birmingham Corporation* (1955) Ch. 210.
17. In *Thorson*, 7.

Some may reply that if there is no evidence of a great increase in numbers there is no evidence of need for enlarged standing rights. The reply would overlook two considerations. One case may have a dramatic effect on behaviour in hundreds of others; this is the whole notion of the legal "test case". Secondly, the mere exposure to possible action is likely to affect the behaviour of persons who presently feel themselves immune from legal control.

STANDING IN CIVIL LITIGATION: PUBLIC INTEREST MATTERS

> "The substantive issue raised by the plaintiff's action is a justiciable one; and, prima facie, it would be strange and, indeed, alarming if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[18]

> "I would, in Australia, think it somewhat visionary to suppose that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible."[19]

The Present Rules

Injunctions and Declarations: Anglo-Australian law postulates two[20] situations in which a private litigant may obtain an injunction against the breach or contemplated breach of a public duty:

(a) Where it can be deduced that the intention of a statute was to give a private plaintiff a cause of action — such cases are relatively rare.

(b) Where the interference with the public right is such that some private right of the plaintiff is simultaneously affected or, although no private right has been infringed, the plaintiff has suffered special damage peculiar to himself from interference with the public right. This is the rule in *Boyce v. Paddington Borough Council.*[21]

Similar rules have been applied to declarations,[22] although recent cases minimize the "special damage" which must be shown in such a case.[23] The usual way of enforcing a public interest is by a relator suit; a suit brought by a private citizen in the name, and by the leave, of the Attorney-General. The relevant Attorney-General, by virtue of his office, has standing to obtain an injunction or declaration to enforce the law. He is not amenable to the courts in any way as to his decision to sue, or not to sue, in his own name or to grant or refuse a fiat for relator action.

Historically, the Attorney-General was the Crown representative to enforce its property interests. Early relator suits dealt with proprietary interests: public rights of way, public nuisances and the like. Only in this century have the courts used the injunction to enforce non-proprietary public law. The relator procedure, without any overt decision to that effect, has been simply adapted to enable private citizens to take action for enforcement of such law.

The office of the Attorney-General has, itself, undergone change with the transfer to Australian conditions. The English Attorney-General and Solicitor-General

18. Mr Justice Laskin in *Thorson*, 7.
19. Mr Justice Gibbs in *Victoria v. Commonwealth* (1975) 50 A.L.J.R. 157 at 172.
20. Until 28 July 1977, when the House of Lords gave judgement in *Gouriet* a third category could have been added: For interim relief only, where the Attorney-General has refused his fiat (*Gouriet*, in the Court of Appeal) or there is insufficient time to obtain a fiat (*McWhirter*).
21. [1903] 1 Ch. 109.
22. In *Gouriet* the House of Lords expressly held that the standing rule for declaratory relief was identical to that for injunctive relief.
23. *Brettingham-Moore v. St Leonards Municipality* (1969) 121 C.L.R. 509; *New South Wales Fish Authority v. Phillips* [1970] 1 N.S.W.L.R. 725; *Mutton v. Ku-ring-gai Municipal Council* [1973] 1 N.S.W.L.R. 233.

are normally leading counsel of established curial reputation. They sit in the House of Commons but they have no administrative responsibilities. Aided by a small professional staff currently consisting of nine persons, they consider top level domestic and international legal issues. They do not advise government departments; departments have their own extensive legal sections. Traditionally, the English Attorney is not a member of Cabinet; there is a conscious policy of divorcing him from day-to-day political issues. By contrast all Australian Attorneys (Federal and State) head considerable departments, administering numerous statutes. The present Commonwealth Attorney-General is responsible for the work of some 2000 officers. His department is the major source of legal advice for other Commonwealth departments and instrumentalities; the very people who may be defendants in a public interest action. Indeed, this occurred in the Black Mountain tower case; the Attorney, with his officers, was considering a fiat application at the same time as other officers in his department were advising the proposed defendant, the Postmaster-General's Department. Finally, Australian Attorneys, much more than their English counterparts, are politicians first: they generally sit in Cabinet. Very often they have made their names as politicians rather than lawyers; some State Attorneys have not been qualified lawyers.

Prerogative Writs: The prerogative writs are orders directed to an inferior court or a public official allowing a superior court to retain control over the performance of public duties. Prohibition and certiorari have a substantially similar function; the quashing of an error by an inferior tribunal. Mandamus is an order directing a public official to carry out a duty.

The standing rules, for prohibition and certiorari, are a little confused but may be summarized as follows:

(a) Where the applicant is a party to proceedings before the inferior court he has standing to obtain the writ unless he actually instituted proceedings which the lower tribunal lacked jurisdiction to determine.

(b) A stranger to the existing proceedings may obtain a writ where the court, as a matter of discretion, thinks this appropriate to protect public interests.

Mandamus is always a discretionary remedy but the courts have insisted upon evidence of some (not necessarily financial) interest in the matter.

Constitutional Cases: Challenges to the constitutional validity of legislation are frequently made, in Australia, in suits for injunctions, declarations or for a prerogative writ. The authorities indicate no overt difference in the standing requirement, though, by their nature, such cases raise policy issues as to the desirable individual interest. Thus Australian law, unlike Canadian, does not permit a mere taxpayer to impugn the constitutional validity of legislation or an inter-government agreement.[24] Payment of tax is not enough. The plaintiff must show some special detriment to his commercial or property interests or a present threat of prosecution under the legislation.[25]

Access Denied: Some Actual Australian Cases

Antarctic Expedition: In 1961 the Commonwealth government called tenders for the supply of helicopters for an Antarctic expedition. There were two tenderers: Helicopter Utilities Pty Ltd and the Australian National Airlines Commission,

24. *Anderson v. Commonwealth* (1932) 47 C.L.R. 50.
25. The High Court, in *Crouch v. Commonwealth* (1948) 77 C.L.R. 339 divided evenly (Starke and Dixon J.J. v. Latham C.J. and Williams J.) as to whether a presently pending prosecution, without more, was enough.

a Commonwealth statutory authority established to run Trans-Australia Airlines. The Commission was the successful tenderer but Helicopter Utilities sought a fiat to restrain fulfilment of the contract on the basis that such a contract exceeded the statutory powers of the Commission. Mr Justice Jacobs held that the contract was outside power but refused an interlocutory injunction, the Attorney-General having declined a fiat.[26]

Sugar Agreement: In 1931 the Commonwealth government and the Queensland government entered into an agreement regarding the marketing of sugar. A consumer, forced thereby to pay more for his sugar, sought a declaration that the agreement was unconstitutional. He failed because he lacked standing.[27] Where a plaintiff seeks to attack an agreement entered into between the governments of his State and the Commonwealth it seems particularly artificial ("visionary") to expect him to obtain the fiat of the Attorney-General of one of such governments.

Environmental Controversy: In 1972 there was major controversy regarding the proposal of the Tasmanian Hydro-Electric Authority, a State government instrumentality, to flood Lake Pedder. Conservationists were advised that the proposed action was illegal and sought a fiat from the Tasmanian Attorney-General to allow a challenge. He announced that he would grant a fiat but his Cabinet intervened and instructed him to the contrary. He resigned and was replaced by the Premier who refused a fiat. The courts were given no opportunity to rule on the legality of the work.

Mining of Recreation Reserve: The Mt Etna Recreation Reserve, in Queensland, contains limestone caves. Some time after mining leases were granted conservationists applied to the Queensland Attorney-General for a fiat to enable injunction proceedings. They contended that the grant of such leases in a recreation reserve was in breach of the *Mining Act*. Their application was made in December 1975. The Attorney requested further information. Further information including counsel's opinion as to the various heads of invalidity was supplied. By an Order in Council made on 16 June 1977 and published in the Queensland Government Gazette of 18 June 1977 the reservation of the land, as a recreation reserve, was revoked, thus destroying the basis of the action. On 24 June 1977 the Attorney-General refused his fiat, no reason being stated.

Overseas Developments

United States: The United States inherited the English common law and, with it, the office of Attorney-General. That office is retained in both the Federal government and each State government. However, for many years, private individuals have been able to take proceedings to enforce, in the public interest, general legislation. The court has controlled standing by criteria developed by itself, currently a requirement that the plaintiff have such a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions".[28] There is no requirement of financial interest; it is sufficient that the plaintiff have a genuine concern in the matter to be determined.

26. *Helicopter Utilities Pty Ltd v. Australia National Airlines Commission* [1962] N.S.W.R. 188. This course was consistent with decisions in other competitors' suits: see *California Theatres Pty Ltd v. Hoyts Country Theatres Ltd* (1959) S.R. (N.S.W.) 185; *Tivoli Freeholders Pty Ltd v. Grand Central Car Park Pty Ltd* [1969] V.R. 62.
27. *Anderson v. Commonwealth* (1932) 47 C.L.R. 50.
28. *Baker v. Carr* 369 U.S. 186 at 204 (1962).

Canada: Canada also has, by judicial determination, thrown off the shackles of the common law rule. In *Thorson v. Attorney-General of Canada*[29] the plaintiff challenged the validity of the federal *Official Languages Act.* He alleged no special damage to himself but sued merely as a taxpayer-citizen. The Supreme Court emphasized the difference in the role of an Attorney-General in federal Canada from that in unitary Great Britain and asked whether the courts should "foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned". The court answered this question in the negative, holding that "where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney-General refuses to act, it may choose to hear the case on the merits".

United Kingdom: Gouriet v. Union of Post Office Workers[30] crystallized the relator issue in England. In January 1977 the union announced a one-week ban on postal communication with South Africa. Legislation made it an offence to wilfully delay mail, and also to solicit any other person to commit such an offence. Gouriet, a private citizen asserting no special interest, applied to the Attorney-General for a fiat to obtain an injunction restraining the union from implementing the ban, on the basis that implementation would involve the commission of a criminal offence. His application was refused, no reason being stated. Gouriet approached the Court. The Court of Appeal granted an interlocutory injunction but held that it had no power to grant a final injunction without the consent of the Attorney-General. All members of the Court expressed distaste for the traditional rule.[31] Lord Justice Ormrod described the relator procedure as obsolete:[32]

> "It has the practical advantage of preventing a large number of frivolous, futile or merely mischievous cases coming to the courts, but there are other ways of dealing with that problem. It has the grave disadvantage of putting the Attorney-General into the invidious position of appearing to be the prime mover in litigation conducted by some other person, with motives which might be quite different from his, or forcing him to decide whether to sanction such proceedings as in the present case, and thus to appear to be standing between the private citizen and the court. Quasi legal fictions may be intelligible to lawyers; in the public mind they produce nothing but confusion, and sometimes frustration."

The House of Lords unanimously affirmed the necessity in a public interest injunction suit, for the involvement of the Attorney-General. The Lords diverged on the desirability of the rule. Lord Wilberforce pointed out that there was no necessity for the Attorney-General to filter out vexatious and frivolous cases: "there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely." Nonetheless, maintenance of the rule was "wise". Viscount Dilhorne, a former Attorney-General, claimed that, nowadays, "a good percentage" of applications for fiats were refused. He concluded:

> "In conclusion . . . we were asked not just to extend the existing law but to override a mass of authority and to say that long-established law should no longer prevail. That is a question for the Legislature to consider and in the light of what I have said about the exceptional character of requests by the Attorney-General to the civil courts to come to the aid of the criminal law and of the occasions when that has been given, I must

29. (1974) 44 D.L.R. (3d) 1.
30. [1977] 2 W.L.R. 310 (Court of Appeal); [1977] 3 All E.R. 70 (House of Lords).
31. For the second time in recent years. In *Attorney-General (ex rel. McWhirter) v. Independent Broadcasting Authority* [1973] Q.B. 629 the Court had granted an interlocutory injunction, in the absence of the Attorney-General, because of the urgency of the matter.
32. [1977] 2 W.L.R. 310 at 346.

confess to considerable doubt whether it would be in the public interest that private individuals such as Mr Gouriet should be enabled to make such applications in cases where such interest as they have is in common with all other members of the public and when the object is the enforcement of public rights."

Lord Diplock expressed no view on desirability. Lord Fraser of Tullybelton thought the present rule desirable: "It seems to me entirely appropriate that responsibility for deciding whether to initiate proceedings for injunction or declaration in the public interest should be vested in a public officer, and for historical reasons that officer is the Attorney-General."

Lord Edmund-Davies took a different view:

"I have to say that none of the grounds advanced on behalf of the Attorney-General and Trade Unions have satisfied me that in the circumstances predicated it must necessarily be in the public interest to deny such a claim by a private citizen. For example, it was urged that any change in the present law would open what were called the 'floodgates' to a multiplicity of claims by busybodies. But it is difficult to see why such people should be more numerous or active than private prosecutors are at the present day, and they are few and far between, though this fact may be attributable in part to the power of the Attorney-General to enter a 'Nolle prosequi' in any criminal case or to order the Director of Public Prosecutors to take it over and then to offer no evidence.[33] It was also urged that the granting of an injunction could prejudice the subsequent jury trial of the wrongdoer, turning as it would upon a different standard of proof than that applied in the civil proceedings, and that great complications could arise if (an injunction having been granted, the breach of which could lead to a committal for contempt and might, indeed, already have done so) the defendant was later tried and acquitted of the criminal charge. But exactly the same observations can be made at the present time in, for example, cases of public nuisances (which are crimes), in relation to which the Attorney-General not infrequently seeks and secures injunctions. And it would always be open to the Attorney-General himself to intervene and make representations in civil proceedings brought by a private individual if he considered that the public interest required him to do so."

What lessons should Australia draw from *Gouriet*? In some ways it was an unfortunate case in which to argue for enlarged standing. The proposed injunction was to restrain the commission of a criminal offence, an area where courts have always been cautious.[34] Moreover, the matter stemmed from an industrial dispute; their Lordships made more than one reference to the inappropriateness of the courts making judgements in that area. Events in the Court of Appeal did not help; Gouriet had originally advanced the untenable proposition that the courts could and should exercise supervision over the manner in which the Attorney-General performed his duties. Lord Denning, M.R., in that Court, had made some broad statements which the House went out of its way to rebut.

Two basic reasons were given for the view that the present rule is desirable. First, it was pointed out, there is a fundamental distinction between a public and a private right. Lord Wilberforce thought that the decision to sue, "involving as it does the interests of the public over a broad horizon", is a decision "which the Attorney-General alone is suited to make"; decisions as to the public interest "are not such as courts are fitted or equipped to make", they were "of the type to attract political criticism and controversy". Secondly, the relief sought was an injunction to restrain an anticipated offence which would, if granted, expose the

33. The same observation is true in Australia, where there appears to be no power to "take over" a prosecution. The Attorney may, in a practical sense, supersede the private prosecutor by filing an *ex officio* indictment.
34. The Commission understands that no argument was put on the wider implications of the problem, e.g. in the environmental field. There was, of course, no need, in England, to consider constitutional challenges; indeed *Thorson* and the U.S. Supreme Court decision in *Flast v. Cohen* 392 U.S. 83 (1968) were dismissed as "unimpressive support" by Lord Wilberforce precisely because they were constitutional cases.

defendants to the double jeopardy of both contempt of court and criminal penalties and would be granted without the procedural safeguards inherent in a subsequent criminal prosecution.

The second objection is not a proper objection to standing. The difficulty, as Lord Edmund-Davies pointed out, applies equally in a properly constituted suit where the Attorney-General is plaintiff.[35] Those considerations should be seen as requiring sparing exercise of the power to grant an injunction to restrain an anticipated offence, whoever be plaintiff; they say nothing as to the appropriate standing requirement. They are, of course, irrelevant to public interest suits which do not involve a criminal offence — though the House of Lords treated its approach as being of general application.

The major issue is the first one; whether the Attorney-General or the court is best equipped to make a decision about the public interest. The House emphasized that the Attorney-General, in making his decision, must not act "for party political motives". Even in England that view was thought naive. Lord Shawcross, a former Attorney-General, wrote to *The Times*[36] expressing "grave concern" at the implications of *Gouriet.*

> "The fact is that we have moved away from Dicey's age of reasoned democracy into the age of power. Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there, which is the party to which the Attorney-General of the day must belong. One has only to remember the so-called Shrewsbury 'martyrs' and the Clay Cross affair to realise that that party will obviously not criticize the Attorney-General of the day for not taking action which, if taken, might cause embarrassment to their political supporters . . .
>
> "It is naive to observe, as was done in the *Gouriet* case, that the Attorney-General may have regard to political considerations but 'not of course acting for party political reasons'. It is 'of course' exactly the present appearance and the future possibility that he might so act which endangers both existing respect for and the future effectiveness of the rule of law, already sadly eroded in many fields."

If that may be said in England it must apply much more to Australia where the Attorney's role is so different. The sceptical comment of Mr Justice Gibbs that it would be "somewhat visionary" to rely upon the protection of the Commonwealth against unconstitutional action by the Commonwealth is supported by experience; it took 75 years for the first Commonwealth fiat to attack the validity of Commonwealth legislation. That fiat was granted[37] by an Attorney-General to facilitate challenge to electoral legislation after his government had failed to procure a redistribution of boundaries. The success of the suit would not have been unpalatable to him.

The recent resignation of the former Commonwealth Attorney-General, Mr Ellicott, illustrates the latent conflict between Cabinet power and the independence of the Attorney. Some conflict may be inevitable but the danger area should be reduced as much as possible. In an age where many public interest suits are against government the relator procedure increases conflict. It seems better to

35. The South Australian decision *Attorney-General v. Huber* (1971) 2 S.A.S.R. 142 illustrates the problem. This was a relator suit but the Court divided on the issue whether an injunction should be granted to restrain a criminal offence: Bray C.J. arguing that it should not, on grounds of policy.

36. Letters, 3 August, 1977.

37. In *Attorney-General (ex rel. McKinlay) v. Commonwealth* (1975) 50 A.L.J.R. 279; 7 A.L.R. 593. The statement made in the text is taken from the comment in *Labor and the Constitution*, 1977, 206-207 by Patrick Brazil, a First Assistant Secretary in the Commonwealth Attorney-General's Department. As details of unsuccessful fiat applications are kept confidential the Commission has no information on the number of refusals to permit constitutional challenges.

divorce the Attorney-General completely from the plaintiff's interests and allow him, uninhibitedly, to advise the government of which he is a member.

What then of the courts? Are they as unfitted to handle the public interest as Lord Wilberforce suggested? Australian courts habitually hear matters attracting "political criticism and controversy"; most constitutional cases are such. In Australia, unlike England, courts are regularly involved in industrial disputes; here there is nothing unusual in a judge determining whether to make an order against a union in a major industrial dispute.[38]

Whatever the desirable position in England the Commission is of the view that the time has come, in Australia, to provide an alternative to the relator action so as to permit private individuals to approach the court in public interest cases. The procedure should be such as to enable the Attorney-General to intervene and put relevant public interest matters. The courts would, of course, retain their present discretion as to the granting of relief and their present cautious policy in respect of injunctions to restrain anticipated criminal offences.

Constitutional Cases: the Arguments for a different rule: Should there be a different rule? Some argue that relaxed standing rules should not apply to constitutional challenges. They may put, at least, four basic arguments:

Principle — In the Australian federation inter-governmental agreements are not easily obtained. If no government perceives an interest, either on its own account or on behalf of its citizens, to challenge constitutional validity why should some individual be able to do so, perhaps setting at naught the collective judgement of elected leaders? To permit challenge may expose a law or project, perceived as desirable by politicians responsible to the electorate, to destruction by non-elected judges neither typical of, nor responsible to, the general public.

Convenience — The Australian Constitution was drafted 80 years ago, in a very different social climate. It has been strictly interpreted by the High Court, restricting rather than (as in the United States) generating social change. The Constitution has proved difficult to amend; if socially desirable policies are to be fulfilled some circumvention is necessary. Where governments are able to agree on means of by-passing constitutional problems the public can only suffer by individuals being allowed to enforce the strict letter of the constitution. Furthermore the timing of a challenge may be inconvenient, causing administrative problems and even public hardship by delay.

Political questions — A constitutional challenge involves the courts in determining questions of political importance. The maintenance of respect for the courts requires that they be insulated as much as possible from political questions. No step should be taken which will increase their exposure to such controversies.

Personal interests — In constitutional litigation ordinary citizens will tend to represent their own private interests and put forward arguments on the validity of legislation based on these interests; this may result in the court ignoring the interests of the various governments involved and the interests of other segments of the public.

Constitutional cases: The Commission's reply: The last two arguments are weak; they ignore existing realities. Of course constitutional cases have political over-

38. Mostly, of course, in the industrial jurisdictions which have no real counterpart in England. However, the Supreme Courts are sometimes involved: only last year, for example, Taylor C.J. at C.L. in the N.S.W. Supreme Court made orders restricting unlawful industrial activity during a newspaper strike — the actions being brought by a specially damaged plaintiff.

tones; sometimes they touch the heart of party political controversy. Given wider standing rights individual citizens will take proceedings because of political motives. Governments do so now. One can hardly doubt that many constitutional challenges are the product of party politics. The fact is that the High Court has a primary task of construing the Constitution; it cannot be divorced from political conflict. Since federation the court has dealt with some 370 constitutional cases,[39] yet remains high in public estimation; to add a few more cases where all governments are in agreement is unlikely to damage its position. Similarly the personal interests argument; of course litigants will advance the argument which suits their own interests regardless of wider interests. But this is presently true. 42% of all constitutional challenges in Australia have been by defendants responding to prosecution (27%) or civil actions (15%). Suits for a declaration or injunction by persons having the requisite personal standing account for a further 35%.[40] This means that, under the present system, 77% of cases involve a person arguing a case according to a private interest. The safeguard against a too-narrow view, for those cases and any new ones which may follow enlarged standing, is intervention. The High Court has always taken a liberal view on intervention, allowing governments to intervene to ensure that the court is fully appraised of any public interest and to put any necessary additional argument. The 1976 amendments to the *Judiciary Act* accord to Commonwealth and State Attorneys, in constitutional cases, a specific *right* of intervention.[41]

The first two arguments, of principle and convenience, depend less on facts than personal philosophy. The federating colonies decided upon a written constitution, inevitably subjecting elected governments to the decisions of non-elected judges. It is idle to argue whether or not that is desirable; it is the system under which Australian Governments operate. In the last resort the politicians, with public support, can over-ride the fetters; they can by referendum amend the constitution. All that a judicially construed constitution may do is to hold governments to the rules as they are.

Those who argue that amendments are difficult to procure advance a paternalistic view. Essentially they contend that the electors are too conservative, too apathetic or too stupid to know what is good for them, therefore some means must be found to circumvent the existing restrictions in the interests of those same people. The result which the electors do not expressly approve should be imposed on them without any individual right of challenge. The Commission does not share this attitude. Democracy must include the right of the electorate to decide for itself whether, and when, it desires the proposed constitutional change. Moreover, the argument of convenience tends to over-state the rigidity of the constitution. The High Court has recognized the need for flexibility in interpretation so as to take account of current social needs;[42] furthermore the electorate is displaying an increasing readiness to approve constitutional amendments having the support of all major parties.

Concern at inconvenience or hardship arising from the terms of a constitutional challenge is understandable but this is a problem inherent in any litigation; the courts show considerable adaptability in expediting hearings and making inter-

39. G. D. S. Taylor: "Standing to Challenge the Constitutionality of Legislation" in *Standing to Sue* ed. Stein (1977).
40. *Ibid.*
41. See *Judiciary Amendment Act* 1976, ss.78A and 78B.
42. Six major initiatives of the Whitlam Government were challenged on constitutional grounds, only one successfully. Some think the High Court has been too flexible: see Bennett "The High Court of Australia — Wrong Turnings" 51 A.L.J. 5.

locutory orders which will minimize that problem. Temporary inconvenience can hardly justify ignoring constitutional restraints. The Commission sees no virtue, even were it possible,[43] in devising a different standing rule for constitutional cases.

Desirability of a single rule: Modern cases blur the distinction between causes of action; relief is often now obtained by way of declaration or injunction where, in earlier days, a prerogative writ would have been used. Injunctive orders are frequently now made in positive terms commanding the doing of an act; as such they are little different from mandamus orders. If the right of standing is to be enlarged there is virtue in adopting a single standing rule, applicable to any of the relevant forms of relief and obviating any technical difficulty in a court fashioning the most appropriate order.[44]

The English Law Commission has recommended such a course; it would replace the prerogative writs and public law injunctions and declarations by "judicial review". A single, highly flexible, standing right is proposed; the court is not to grant relief for judicial review "unless it considers that the applicant has a sufficient interest in the matter to which the application relates".[45]

Alternatives available: If the existing standing rules are liberalized three possibilities arise. The first is to adopt an "open door" policy; to allow any person whatever to take proceedings in the public law area, relying on the discipline of costs to limit actual cases to those where someone is actually concerned. The second alternative is to use a general formula such as that recommended by the Law Commission, or that currently in use in the United States, so as to enable the courts to screen plaintiffs as part of their determination of a case; adapting standing requirements to particular circumstances. The third alternative is to provide some preliminary screening procedure whereby standing is determined in advance of the substantive issues.

An Open Door Policy: The public law is the legitimate concern of all citizens; all are affected by disobedience of it. Why should not any person take proceedings to enforce the law? Leaving aside the "floodgates" argument there is a possible, though slight, worry that a succession of actions, perhaps quite hopeless, might be brought to harrass a defendant or delay some action. Worry would be eliminated if, following the Michigan *Environmental Protection Act*, the result of the case made the matter res judicata, i.e. conclusively binding in law, against subsequent plaintiffs. Care must be taken to ensure that the first action was a genuine one; otherwise a defendant might put up a "dummy" plaintiff to take proceedings designed to fail and bind subsequent genuine challengers. An "open door" rule must be safeguarded by a provision allowing a court summarily to dismiss a suit where it is satisfied that the issues sought to be litigated have already been determined on their merits in an action brought by a plaintiff genuinely concerned to obtain relief. "Open door" does not, of course, oblige the court to grant relief, that is always a matter of judicial discretion; but it will require that the discretion be exercised according to the substantial merits of the case not the interest of the plaintiff.

43. The discussion assumes that there can be a different rule for constitutional cases, a very doubtful assumption. If a court is asked to construe a statute, so as to determine whether a person acted within power, it may inevitably have to consider the constitutional validity of the statute itself. This in fact occurred in *Commonwealth and Attorney-General (ex rel. Edwards) v. Commonwealth Shipping Board* (1926) 39 C.L.R. 1. A fiat was granted limited to non-constitutional aspects but the court itself embarked upon a consideration of constitutional validity.
44. There may, of course, be special cases where special rules are required.
45. Report on Remedies in Administrative Law, 1976, Cmnd. 6407, 32.

Consideration of Standing as Part of Determination: It has been said, notably by the Supreme Court of Canada,[46] that standing should properly be considered as part of the determination of the case, when the facts are all in and the merits argued. If this course be taken it would be desirable to use some general formula enabling a court to determine the sufficiency of the plaintiff's interest but ensuring a break with the tradition of special financial interest. The generality of the Law Commission formula "sufficient interest" may insufficiently convey that intention. Dr G. D. S. Taylor has proposed a general formula that the issues be "matters of real concern to the plaintiff". He points out:[47]

> "'Concern' is a word without definite legal connotations such as those possessed by 'interest'. Use of 'real', emphasizes that busybodies are not to have standing and the word is itself a flexible one which may operate as a regulator in this context; it transforms the concept of 'concern' into one which is clearly objective."

If some standing formula is needed this formula seems as good as any. It may be better expressed negatively, so as to limit restrictive interpretation, i.e., relief is not to be denied on standing grounds unless the court is satisfied that the issues sought to be raised are of no real concern to the plaintiff. The legislation should make clear that "concern" is not to be judged by traditional rules and, particularly, that no property interest is necessary.

Preliminary determination

By an official: The third possibility is a preliminary determination of standing. At the present time this is, in effect, done by the Attorney-General in proceedings for injunction and declaration. One alternative would be the creation of a public official charged with the task of screening public interest suits and allowing them to proceed. However, no advantage is obtained over the present system unless such an officer is free, and seen to be free, from government control. He would have to be a statutory appointee independent of government, not involved with government administration. Not many fiats are sought of the Commonwealth Attorney-General; applications run at about one per year. Even if applications increase in the belief that suits might be more readily brought against government it is difficult to see sufficient work for such an official. Furthermore, there is a question of principle as to whether a public official, sitting behind closed doors, is the appropriate person to make this type of decision. There would probably be pressure to have a right of appeal from his decision to the Administrative Appeals Tribunal or a court. Once that right is admitted it seems better to go straight to the alternative, screening by a court, rather than incur the expense of a separate public officer.

By a court: This leaves the alternative of preliminary screening by a court. A person lacking standing under present rules could be required to apply to the court for leave to commence a "public interest" suit. Procedures could be devised allowing the court to direct notice to other interested persons so as to enable them to investigate the proposed plaintiff and his suitability to represent the relevant interest. Such procedure would enable the court to consider any problem of multiplicity of suits and to refuse leave where the issue had already been determined on its merits in prior proceedings. The procedure has the attraction of enabling the court to deal with standing at an early stage and promptly dispose of any case brought by a person lacking sufficient interest; to the advantage of the defendant and with a saving in judicial time. There are, however, disadvan-

46. *Nova Scotia Board of Censors v. McNeil* (1975) 55 D.L.R. (3d) 632 at 633-634.
47. G. D. S. Taylor: *Defence of the Public Interest in Civil Litigation*, Report to the Australian Attorney-General, 1974.

tages. The first is that the court would be obliged to deal with standing as an issue separate from the substantive merits of the case, probably an undesirable course. Secondly, there will be cases where the plaintiff's standing under present rules is obscure pending investigation of the facts and, possibly, rulings on law. The suggested preliminary procedure necessarily requires the plaintiff to form a judgement as to whether he has standing under the present rules; if he has such standing he brings the action in his own name, if not he seeks leave to bring a public interest suit. The consequences of a mistaken judgement may be serious; requiring the court to dismiss a suit because of the lack of preliminary certification. If the plaintiff takes the cautious view and decides to seek certification he gives away what, in truth, may be a private standing right. Thirdly, public interest actions will often be brought by, or on behalf of, small groups, interested in particular causes, environmental, consumer, racial discrimination and the like. If a court were empowered to grant standing on application it would have to be empowered to impose conditions. Defendants could be expected to seek security for their costs and this would probably defeat such actions at the outset. Few such groups could raise the requisite security. Finally, the procedure represents yet a further step in the litigation, an extra day in court, extra paperwork, and, therefore, extra expense. Litigation is expensive enough; the best way to reduce costs is to reduce work. The disadvantages of the preliminary application procedure would appear to outweigh the advantages.

STANDING IN CIVIL LITIGATION: STATUTORY APPEALS

> "For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."[48]

Statutes allowing appeal to a superior court from a decision of an inferior court or statutory tribunal generally provide a standing qualification, "person aggrieved", "person dissatisfied", "person interested", and "person affected" are the most common. What do they mean? Are they appropriate formulae?

Person Aggrieved: Traditionally "person aggrieved" has been interpreted to mean "a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something or wrongfully affected his title to something".[49] Recently, however, the Privy Council has taken a more liberal approach, saying that the words "include a person who has a genuine grievance because an order has been made which prejudicially affects his interest".[50] In that case the Attorney-General was held to have standing "as a guardian of the public interest" to appeal against an order relating to the misconduct of a legal practitioner. The term "person aggrieved" normally includes any principal party in litigation in the inferior tribunal and, frequently, an intervener. Thus the Victorian Supreme Court recently held the National Trust (Victoria) to be a "person who feels aggrieved" so as to have standing to challenge the grant of a planning permit to which it had objected; the objects of the Trust being relevant in determining its interest.[51] Generally speaking a non-party will not be a "person aggrieved", though there

48. Milton, *Aeropagitica.*
49. *Ex parte Sidebotham* (1880) 14 Ch.D. 458, 465, at 465, per Lord Justice James.
50. *Attorney-General of Gambia v. N'Jie* [1961] A.C. 617 at 634.
51. *National Trust of Australia (Vic.) v. T. & G. Mutual Society* [1976] V.R. 592.

are a few cases where a non-party has brought himself within the formula by showing that some pecuniary interest was affected by the impugned decision.[52]

Person Dissatisfied: This phrase has not often been considered; the decisions conflict and none are recent. Thus there is doubt whether the phrase is wider than, or equivalent to, "person aggrieved". The cases have all required some legal or property interest but the phrase has not been judicially construed since *N'Jie* and the *National Trust* case recognized non-property interests as sufficient to constitute grievance; presumably they would also amount to dissatisfaction.

Person Interested: The requisite interest must be a real, definite and substantial interest, not merely arising out of something that the opponent proposed to do; it seems, however, that a property interest is unnecessary. An employer has been granted standing, as a "person interested", to seek deregistration of a union, of which its striking employees were members;[53] a relative to obtain a coronial enquiry into a death.[54]

Both the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) accord standing to any person whose "interests" are affected by a challenged decision but they do not define "interests"; the Acts leave unanswered the question whether some material interest is needed.

Estate or Interest: Where, on the other hand, the qualification is an "estate or interest" in land an actual real property interest is necessary. Thus the High Court recently held[55] that this phrase did not allow bushwalkers and naturalists a right to object to the grant of mining leases in a wilderness area of Tasmania proposed for inclusion in a national park.

Person Affected: It might be expected that this formula would provide a more liberal standing right than some others but the cases indicate the contrary. Thus a defendant was denied standing to appeal against an order granting leave to the plaintiff to proceed *in forma pauperis.* He argued that this would affect him since the court normally refused to order costs against such a plaintiff, but this detriment was held too indirect and remote.[56] In a New Zealand case an objector to a planning application was held not to be a "person who claims to be affected" by approval; it was necessary that the objector have a greater interest in the application than that of the general community.[57]

The Problem: The authorities on standing in this area are in disarray; they represent a myriad of single instances with little attempt to evolve any general principle and less discussion of the policy considerations behind the various formulae. Inconsistencies abound; thus one court held the Official Receiver entitled to appeal against a decision of the Registrar in Bankruptcy[58] whilst another denied the standing of a liquidator to appeal against directions as to distribution of the

52. In *Dentry v. Scott* [1947] V.L.R. 462 a tenant was able to obtain review of proceedings between a claimant for possession, under the National Security Regulations, and the owner. See also *Brown v. Mayor of Footscray* (1869) 6 V.L.R. (L) 165 and *Scott v. City of Castlemaine* (1972) V.R. 570, both rating cases involving other people's land.
53. *Metropolitan Coal Co. v. Australian Coal and Shale Employees' Federation* (1917) 24 C.L.R. 85.
54. *Bilbao v. Farquhar* [1974] 1 N.S.W.L.R. 377.
55. *Stow v. Mineral Holdings (Australia) Pty Limited* (1977) 51 A.L.J.R. 672.
56. *Miamo v. Lehmann* [1961] V.R. 690.
57. *Blencraft Manufacturing Co. v. Fletcher Development Co.* [1974] N.Z.L.R. 295.
58. *Ex parte Official Receiver; in re Reed, Bowen & Co.* (1887) 19 Q.B.D. 174.

company's assets.[59] The formulae create real problems in the case of administrative decisions; the persons actually affected may not be parties, in the formal sense, at all; an administrative body will often act on its own initiative, affecting the interests or concerns of persons previously uninvolved.

The development of the declaration has created an alternative method of challenging an administrative or inferior court decision; a qualified plaintiff may simply obtain a declaration that the impugned decision is invalid. If the standing formula for statutory appeals were the same as for declaratory relief the court could grant appropriate relief without regard to distinctions as to standing.

Public Interest Suits: Tentative Recommendation: Two considerations compete. On the one hand the rule of law would be best served, in public interest litigation, if the courts were free in all cases to enforce public duties without being concerned as to the status of the plaintiff. On the other hand a single standing rule, applicable alike to injunctions, declarations, prerogative writs and statutory appeals, is desirable. The "open door" approach is attractive, and would be appropriate if, in all such proceedings, public interests were predominant. However, the range of fact situations covered by any common formula for statutory appeals is immense; in some cases the issue will be one of widespread public importance, in others it will affect only a few individuals. Even a particular type of case may fall within either category. Thus a planning appeal may have implications for thousands of people or only two adjoining owners; *N'Jie* may be regarded as affecting standards of legal practice generally or, being confined to its own facts, the fate of a single practitioner; a decision to refuse a social service pension may prejudice thousands of persons in like situations, or none. These considerations incline the Commission towards the view that the best solution would be the second alternative, a single standing formula empowering the court, in all public interest matters, to reject action on standing grounds as part of the determination of the suit if satisfied that the plaintiff has no real concern with the issues.

The effect of such a change: It is important to put such a change in perspective. In suits for injunctions or declarations the result would be to remove the Attorney-General's veto; that and that only. The Attorney-General could, and no doubt would, still sue in appropriate cases, but private persons would not be dependent on him if they had the requisite "concern". The action, of whatever kind, would still have to raise justiciable issues, that is it would have to allege some legal right or duty, not a mere abstract or hypothetical question. The courts would continue to insist, and perhaps legislation should make this clear, that the suit be properly constituted with all interested parties as defendants. Finally, and most importantly, the courts would continue to exercise their discretions as to relief. Granting an audience to a litigant is not necessarily the same as granting him relief. On the positive side the suggested formula would enable the courts to free themselves from the shackles of precedent which presently compel them to sometimes deny audience and relief to concerned persons on public issues.

59. In *re Australian Deposit and Mortgage Bank (In Liquidation)* (1901) 27 V.L.R. 139.

STANDING IN CRIMINAL PROCEEDINGS: THE PRIVATE PROSECUTION

> "The criminal law . . . should not be used as a weapon in personal vendettas between private individuals."[60]

A criminal prosecution is a vindication of a public, not private, interest. Nonetheless, particular individuals often have a special interest in the enforcement of the law, or evince particular concern that the law enforcement authorities are neglecting their responsibilities. For this reason the common law has always allowed a private prosecution. Unless there is a statutory provision to the contrary effect, in the particular case, any person may prosecute. In England he may pursue the matter before the magistrate and, if the defendant is committed, file an indictment framed by him (though in the name of the Queen) and prosecute before the jury to verdict. Mrs Mary Whitehouse did this last July: counsel instructed by her appeared and obtained a jury conviction of a publisher and editor on a charge of blasphemous libel. Where police prosecute they retain control at all stages; solicitors retained by the police instruct counsel at the trial. In Australia legislation, in all jurisdictions, restricts the power of laying indictments to the relevant Attorney-General and authorized Crown prosecutors. A private individual may prosecute, to verdict, a summary matter but indictable offences only to the point of committal; after that the Crown must decide the appropriate course.

In both Australia and England the vast majority of prosecutions are instituted by the police, a lesser number by other government and local government officers, and a small, but significant, minority by ordinary citizens. Mostly, "truly private" prosecutions are for assault, predominantly domestic.

Scotland has a very different system. For hundreds of years, since long before any police force, it has had a public prosecution system controlled by the Crown agent. Currently the country is divided into six Sherriffdoms, in each of which there is a Procurator-Fiscal responsible for all prosecutions. He is assisted by Procurators-Fiscal deputes, all qualified lawyers. The police arrest, charge, and arrange bail but they do not appear to prosecute. The police pass all statements and exhibits to the Procurator-Fiscal prior to the first court appearance. He may direct the police to carry out further investigation; he may amend, add to, or withdraw charges. In England the police have control, and the lawyers act on their instructions; in Scotland the exact reverse applies.

In England anyone, subject to particular statutory exceptions, may prosecute; in Scotland, subject to a few exceptions, only the Procurator-Fiscal or his deputy may do so. The exceptions are of two kinds — a traditional power of the civil court to issue a Bill of Criminal Letters, upon the application of a direct victim of a crime which the Procurator-Fiscal declines to prosecute, and statutory exceptions in favour of some government and local government authorities. No Bill of Criminal Letters has issued for over 60 years; it is regarded as a most exceptional remedy. For practical purposes ordinary citizens may not prosecute.

A prosecution authority? From time to time English lawyers have looked over the border and advocated a public prosecution system on the Scottish model. They urged this on a House of Commons Select Committee in 1856. Twenty-three years later, in response to further agitation, Parliament created the office of Director of Public Prosecutions. The purpose was to ensure more rigorous prosecution policies but staff was so limited that the Director was only able to interest

60. Lord Shawcross, former U.K. Attorney-General, in *The Times*, 26 May, 1977, 20.

himself in particularly difficult or delicate cases. Even today the police handle the overwhelming majority of cases; last year the Director prosecuted 4.9% of the indictable matters in England and Wales.

The position of the Attorney-General: An Attorney-General directly, or through Crown Prosecutors responsible to him, becomes involved in all Australian prosecutions for indictable offences: the Crown must decide whether to file an indictment to put the accused on his trial. In some cases the Attorney becomes involved, and personally so, at an earlier stage. Some cases are referred to him for a decision as to initiation of proceedings; perhaps because of the nature of the offence, the identity of the accused, the difficulty of the case or the delicacy of the circumstances. In some cases the prosecution may not be launched without his written consent, or the written consent of some other Minister or a public servant. The miscellany of statutes containing consent provisions disclose little symmetry. One can perhaps understand why there should be need for consent to a prosecution under some defence establishment legislation[61] or the *Social Services Act*[62] but it is less easy to see the need for the consent of the Attorney for the prosecution of an offence under the ownership and control provisions of the *Broadcasting and Television Act*[63] or of the Minister for a prosecution under the *Trade Practices Act.*[64] The restriction exposes the Minister to accusations, however unjustified, of yielding to partisan or commercial pressures.

Sometimes consent to prosecute is vested in a person other than the Attorney-General; in such a case the decision is taken by a person lacking the status and traditional independence attaching to the first Law Officer. If the Attorney finds difficulty in divorcing himself from party political considerations, as Lord Shawcross suggests, the position must be worse for another Minister or a public servant subject to Ministerial direction. The position of the Attorney-General has already been discussed; the fact is that some prosecutions do raise political, and party political, issues and embarrassments. There may be merit in divorcing the Attorney, as much as possible, from personal involvement in such cases.

An Independent Body: A former Attorney-General has suggested an independent prosecuting authority to take control of all public prosecutions, absorbing the prosecution role of the police.

> "[The Authority] should be all-embracing and independent and report direct to Parliament. The appropriate Minister (presumably the Attorney-General) should have statutory power to give written directions to the Authority that may be specified as general but they would have to be presented to the Parliament within, say, seven days of being given to the Authority. This would give independence in all cases except those where the Minister believed that were sufficient reasons to intervene and override the independence and was prepared to face the accompanying publicity and the examination of Parliament."[65]

Commencement of Proceedings: In the criminal field standing issues arise at two stages. The first stage is the institution of the original proceedings, by charge or information; the second, in indictable cases, the right to lay an indictment and

61. See the *Approved Defence Projects Protection Act* 1947 and the *Defence (Special Undertakings) Act* 1952. There is no similar requirement in the *Defence Act* 1903 itself.
62. See s.139 of the *Social Services Act* 1947.
63. See *Broadcasting and Television Act* 1942, ss.90R and 92KA — note also s.118.
64. See *Trade Practices Act* 1974, s.163. The 1976 Annual Report of the Trade Practices Commission (para. 2.86) reveals that the Minister refused leave to prosecute five cases in which the Commission had directed prosecution subject to his consent. The Minister has taken the view that reasons should not be stated and that the merits of individual cases ought not be debated in Parliament.
65. Enderby, *Proceedings of Second Symposium on Law and Justice,* Canberra, 26 March 1977, A23.

put a person on trial before a jury. The general rule, at the present time, is that anyone may commence proceedings and prosecute in the magistrate's court. The argument for retention of that right arises at either end of the spectrum — the great cases and the frequent, petty cases. The great cases are those touching government itself — a Watergate or a Poulson. However independent they may legally be any public officials, police or prosecuting authority, must be subject to some government supervision and be dependent on government funds; its officers will inevitably have personal links with government. They will be part of the "establishment". There may be cases where a decision not to prosecute a case having political ramifications will be seen, rightly or wrongly, as politically motivated. Accepting the possibility of occasional abuse the Commission sees merit in retaining some right of a citizen to ventilate such a matter in the courts.

Petty cases are frequently privately prosecuted; domestic assaults and trespasses, damage to property and the like. Usually the facts are in a small compass, often word against word. The police are traditionally and understandably reluctant to prosecute such cases; they feel uncertain as to where the truth lies. An independent prosecuting authority would have the same difficulty,[66] yet the criminal law does provide a quick, efficient method of dealing with those cases; binding over or punishing defendants with or without compensation to the informant.

The Commission is presently of the opinion that a private right to prosecute, in the sense of initiating proceedings and conducting them in the magistrate's court, should be retained. It need not necessarily be retained in the present unqualified form. Perhaps some concept of "a person concerned" could be applied to criminal actions as to civil; after all, the dividing line between remedies is becoming more blurred with development of the injunction. If a prosecuting authority were established it could perhaps be given a power, similar to that accorded the English Director of Public Prosecutions, to take over — whether to continue or terminate — any private prosecution.

Indictment stage: The more acute standing problem arises at the indictment stage. In Australia, but not in England, a private prosecutor drops out of the picture on committal for trial. Future action depends upon the Attorney-General, or a Crown Prosecutor subject to his direction. Effectively a political person has a monopoly of the right to put a person on trial before a jury. The tradition is that an Attorney-General will not give reasons for the way he has exercised his discretion.

Options available: Three options are open. The present system could be maintained, the English system of private indictment could be adopted or an independent prosecuting officer could be established to make the decision as to whether a person should be indicted, taking the pressure off the Attorney-General. There are arguments for and against each possibility.

Present system: Some will argue that it is appropriate that an elected officer, accountable to Parliament, make the decision whether to file an indictment. They may point to the comparative rarity of complaints that the discretion has been influenced by political motives or favouritism. Others will reply that political and parliamentary checks are now mainly theoretical; that such an important discretion is best entrusted to a permanent statutory officer.

66. This problem does not occur in Scotland because Scots law requires corroboration of any fact before it is deemed proved. Hence "word against word" cases could not anyway be prosecuted with success.

English system: Private indictments: The second option is the English system which would permit a private citizen to file an indictment. Abuse would be limited by the fact that, before an indictment may issue, the defendant must have been committed for trial by a magistrate. Nonetheless, private indictment does allow an individual, perhaps for malicious reasons, to subject another to a very substantial ordeal, trial before a jury for a serious offence. This is, perhaps, an ordeal different in kind from that involved in being prosecuted for a summary offence or being sued in a civil court. Although a magistrate will have found a prima facie case the evidence, or offence, may be such that an experienced, independent prosecutor would not have filed an indictment. Private indictment leads to inconsistent treatment of defendants. In England, of course, the potential injustice is mitigated by the ability of the Director of Public Prosecutions to take over, and terminate, an unjustified indictment.

An independent officer: This leaves the third possibility; the establishment of some independent officer with, at least, the role of determining whether indictments should issue and thereafter prosecuting. He would, no doubt, operate through Crown Prosecutors as the Attorney-General does now. He would exercise similar discretions but he would be a permanent, non-political officer. Provision could be made for his independence by requiring Ministerial directions to be tabled in Parliament. The appointment would be a senior one, likely to attract applicants of proven ability and legal standing.

The establishment of such an officer need not affect, in any way, the control of proceedings in the magistrates' courts; prosecutions could be handled either by police officers or by lawyers or be brought by private individuals. There would be opportunity to invest the new officer with power to take over particular prosecutions, perhaps a useful safeguard against unjustified private prosecutions, but this is simply an additional option. The new officer could also be substituted as the person to authorize prosecution where, for special reasons, this is thought desirable; thus removing that responsibility from the political arena.

The Commission has formed no definite view as to the comparative merit of these three possibilities. It is concerned at the conflict of interest in which, under the present system, Ministers, and particularly the Attorney-General, are placed. Consistent with its desire to relieve the Attorney-General of the conflict of interests inherent in the fiat system, in civil cases, it sees virtue in removing the Attorney-General from the decision to file an indictment. At the same time an untrammelled right of private indictment could lead to abuse and serious hardship on accused persons. There would appear to be merit in establishing an independent statutory officer charged with the duty of determining what indictments are to be laid; giving him, in other words, sole standing at that stage. For the earlier stage, commencement of proceedings, private rights should remain subject, perhaps, to a reserve power in the statutory officer to take over any private prosecution if he is of the opinion that this is desirable.

IN A WORD

• **Public interest civil actions:**	• Abolish need for Attorney-General's fiat.
	• Any person to have standing unless not "a person concerned", in non-property sense.
• **Criminal proceedings:**	• Retain private right to prosecute in magistrate's court.
	• Only independent statutory officer to file indictments.