

# **Is positive authorisation in law necessary for lawful public body action?**

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## ***1) Introduction***

This dissertation examines whether the actions of public bodies like the police or the Ministry of Health should require positive authorisation in order to be lawful. It ultimately concludes that public bodies should not require positive authorisation for all of their actions. Instead public bodies should be understood as having a residual freedom to act that allows them to act without authorisation as long as their actions do not transgress a law or infringe on an individual's legal rights.

This dissertation examines the arguments for each view put forward in *Malone v Commissioner of Metropolitan Police (No 2)*<sup>1</sup> and the judgment of Elias CJ in *Hamed and Ors v R*.<sup>2</sup> It examines New Zealand and English case law to place these cases in context and further expand the arguments in this debate.

The first chapter outlines the positions for and against requiring positive authorisation and explains the constitutional underpinnings of the decision in *Malone* and similar cases.

The second chapter examines arguments in favour of Elias CJ's favouring requiring positive authorisation. It establishes that holding unlawful the actions of a public body when identical actions would be lawful for a private individual can arguably be justified by analogising Duguit's theory of public service, and the goal of maximising individual liberty.

The third chapter compares the two views. The positions are assessed against the criteria of coherence and fit with the legal system, and the extent to which the views allow the effective functioning of government. Both assessments indicate that public bodies' residual freedom to act should be favoured over requiring positive authorisation.

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<sup>1</sup> *Malone v Commissioner of Metropolitan Police (No 2)* [1979] 2 All ER 620 (QB)

<sup>2</sup> *Hamed and Ors v R* [2011] NZSC 101.

The fourth chapter examines middle grounds between the two positions. The analysis shows that the proposed middle grounds are either unworkable in that they lead to absurdity or the inability of government to function effectively, or the supposed middle grounds are in fact one of the two extreme positions.

The final chapter shows how Elias CJ in *Hamed*, in an attempt to show that positive authorisation is required to protect a legal right ultimately utilises residual freedom reasoning. The chapter concludes by showing how the inability of proponents of positive authorisation to show how a legal right is being protected ultimately eliminates a final possible middle ground.

The conclusion summarises the arguments and uses the findings of this dissertation to ultimately recommend that positive authorisation in law should not be a necessary precondition for the lawful action of public bodies.



## ***II) Chapter One: Two Views, and Justifying Malone***

### *A) Two Competing Views*

#### *1. Malone and government freedom of action*

One view is that no positive authorisation is required by public bodies in order to act. Public bodies have freedom to act unless a law prohibits that action. This is the same principle of liberty under which citizens operate.

This is a long-standing idea but the seminal case for discussion of this principle is *Malone v Commissioner of Metropolitan Police (No 2)*.<sup>3</sup> English police were investigating Mr Malone. They asked the Post Office employees who operated the telephone exchange to allow the police to listen to Mr Malone's telephone calls. The Post Office complied, and the wiretapping produced evidence against Mr Malone that he challenged in court. Mr Malone argued that the actions of the police were unlawful as there was nothing in the law (no statute or principle of common law (including the prerogative)) that allowed police to listen to telephone communications.

The judge in the case, Sir Robert Megarry V-C, acknowledged this argument but also noted that there was no law prohibiting the interception of telephone communications, and no expectation or right of privacy regarding telephone communications. Additionally, the police had not trespassed as Post Office employees had legal access to the exchange. Therefore, no law had forbidden the actions of the police.

His Honour found this latter point more persuasive, writing:

“If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful.”<sup>4</sup>

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<sup>3</sup> Above, n 1.

<sup>4</sup> *Malone v Commissioner of Metropolitan Police (No 2)*, above n 1 at 638.

His Honour did not explicitly analogise the liberty of action enjoyed by the police (or public bodies in general) with the liberty of action enjoyed by a citizen. He did, however, suggest that view by describing England as “a country where everything is permitted except what is expressly forbidden”.<sup>5</sup> The idea of permission to do anything that is not prohibited by law is the same principle of liberty enjoyed by a private citizen.<sup>6</sup> It will be convenient shorthand to consider the *Malone* view as equating public bodies’ freedom to act with that of private citizens.

## 2. *Elias CJ in Hamed supports positive authorisation*

In 2011, the Supreme Court of New Zealand delivered its judgment in the case *Hamed and Ors v R*.<sup>7</sup> The case attracted media attention because it concerned the admissibility of evidence relating to the Urewera anti-terrorism raids. Much of the content of the five judgments is a discussion of police video surveillance evidence gained through trespass, whether these searches were unreasonable, and the admissibility of this evidence in the trials of those arrested. Chief Justice Elias’ judgment partially canvassed deeper constitutional matters.

In her judgment, Elias CJ held the use of video surveillance equipment to carry out a search by the police to be unlawful.<sup>8</sup> They were unlawful because there was no statute or principle of common law that authorised the police as a public body to use video recording equipment.<sup>9</sup> Elias CJ stated that:

“Public officials do not have freedom to act in any way they choose unless prohibited by law, as individual citizens do. The common law position in New Zealand and in the United Kingdom is that, except in matters within the prerogative or as is purely incidental to the exercise of statutory or

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<sup>5</sup> *Malone v Commissioner of Metropolitan Police (No 2)*, above n 1, at 630.

<sup>6</sup> *Halsbury’s Laws of England* (4<sup>th</sup> ed, reissue, 1996) vol 8(2) Constitutional Law and Human Rights at [101].

<sup>7</sup> Above, n 2.

<sup>8</sup> *Hamed and Ors v R*, above n 2, at [9].

<sup>9</sup> *Hamed and Ors v R*, above n 2 at [9].

prerogative powers, the executive and its servants must point to lawful authority for all actions undertaken.”<sup>10</sup>

This statement of the law directly contradicts the view taken in *Malone*. So which is correct? Can both views be justified? Which is to be preferred? Answers to these questions are important. They will affect what and how Parliament legislates. They will affect how public bodies – the police, and central government – operate day-to-day. This dissertation attempts to answer those questions. The first step is to assess the justifications for each view.

## *B) Public Bodies Have Residual Freedom of Action*

### *1. Terminology – public bodies, the Crown, the State, government.*

It is important to be clear about which body or bodies have freedom of action or require positive authorisation. The case law uses different terminology – for example *Malone* talks about the police being free to act as long as it does not transgress any law,<sup>11</sup> whereas Elias CJ in *Hamed* talks about the actions of “public officials”.<sup>12</sup> Her Honour used the terms “the executive and its servants”,<sup>13</sup> and “public authorities”<sup>14</sup> synonymously. Elias CJ also quoted from sources that use the terms “public bodies”<sup>15</sup>, and “public authorities (including the Crown).”<sup>16</sup> Other terms used by judges and commentators in similar instances include “government”<sup>17</sup> <sup>18</sup>or “central government”.<sup>19</sup>

This dissertation uses the term ‘public bodies’ in discussing the question of positive authorisation. The meaning of a ‘public body’ for the purpose of this dissertation is a

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<sup>10</sup> *Hamed (and Ors) v R*, above n 2, at [24].

<sup>11</sup> *Malone v Commissioner of Metropolitan Police (No 2)*, above n 1, at 638.

<sup>12</sup> *Hamed (and Ors) v R*, above n 2, at [24].

<sup>13</sup> *Hamed (and Ors) v R*, above n 2, at [24].

<sup>14</sup> *Hamed (and Ors) v R*, above n 2, at [27].

<sup>15</sup> *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) at 524.

<sup>16</sup> *Halsbury’s Laws of England* (4<sup>th</sup> ed, 1974) vol 8 Constitutional Law at [828].

<sup>17</sup> *R v Ngan* [2007] NZSC 105 at [96] per McGrath J.

<sup>18</sup> B.V. Harris “The ‘Third Source’ of Authority for Government Action Revisited” (2007) 123 LQR 225 at 225.

<sup>19</sup> *R v Ngan*, above at 17, at [95] per McGrath J.

*non-statutory, or not completely statutory organ of government.* Currently this definition encompasses the police and central government departments.

The term 'government' could include central or local government. In reality, this term will almost always mean central government as local government in New Zealand is created by statute.<sup>20</sup>

The requirement that the public body be non-statutory or not completely statutory is necessary because the question of statutory bodies' freedom of action is already settled. A statutory body only has authorisation to act as set out in its empowering statute. If a statutory body acts beyond its authorisation it acts *ultra vires*.<sup>21</sup> That is, positive authorisation at law is necessary for these bodies to lawfully act. Some of these statutory bodies<sup>22</sup> have been conferred the freedom to "do anything that a natural person of full age or capacity may do"<sup>23</sup> as long as it is "for the purpose of performing its functions."<sup>24</sup> Again, the question of positive authorisation is already settled for these bodies; they have the same freedom of action as a private individual, limited by acting for their statutory purpose.

The term 'public body' in this dissertation is distinct from a 'public body' in the normal understanding. For example, the Accident Compensation Corporation (ACC) could be considered a public body in the general sense – it was created by the government and covers everybody in New Zealand. However, the ACC was created by statute,<sup>25</sup> and the Corporation's powers are set out in that statute. Therefore, the ACC would not be a 'public body' in the sense required for present purposes.

With the exclusion of these statutory exceptions, the term 'public bodies' in this dissertation currently applies to central government bodies; the Departments of State

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<sup>20</sup> See generally the Local Government Act 2002.

<sup>21</sup> David Feldman (ed) *English Public Law* (2<sup>nd</sup> edn, Oxford University Press, Oxford, 2009) at [3.95].

<sup>22</sup> See Schedule 1 of the Crown Entities Act 2004 for an exhaustive list. Examples include the Civil Aviation Authority, the New Zealand Transport Authority and the Electoral Commission.

<sup>23</sup> Crown Entities Act 2004, s 17.

<sup>24</sup> Crown Entities Act 2004, s 18.

<sup>25</sup> Accident Compensation Act 2001, s 259(1) which continues the statutory creation of ACC from previous statutes.

and the associated Ministers of the Crown. These are non-statutory organs of government. The New Zealand Police force is also a public body. The Policing Act 2008 neither purports to create,<sup>26</sup> nor completely codifies, the New Zealand Police. The Police are a not completely statutory organ of government.

## 2. *The Malone view and its constitutional underpinnings*

Considering the cases that adopted the *Malone* principle shows the accuracy of the definition of a public body for this debate. English cases have held that the Department of Health<sup>27</sup> and the Secretary of State for Local Government<sup>28</sup> do not need to point to a statute or common law power to justify their actions if those actions do not transgress any law. In New Zealand, several cases have focused on action by police officers that had no positive authorisation in law. Police may gather up items from a car crash for safekeeping,<sup>29</sup> or undertake video surveillance,<sup>30</sup> even in the absence of positive authorisation from statute or common law as long as they do not do anything forbidden by law. Similarly, the Crown could establish a trust without any positive authorisation,<sup>31</sup> and State-owned enterprises and Ministers could open or close post office branches when “no specific power [was] given to the companies”.<sup>32</sup>

The *Malone* view has met with wide acceptance. It has been followed in several English and New Zealand cases. It is conclusive law at the Court of Appeal level in both England<sup>33</sup> and New Zealand.<sup>34</sup> Individual judges in the House of Lords<sup>35</sup> and the

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<sup>26</sup> Policing Act 2008, s 7(1).

<sup>27</sup> *R v Secretary of State for Health, ex parte C* [2000] 1 FCR 471(CA).

<sup>28</sup> *R (on the application of Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148.

<sup>29</sup> *R v Ngan*, above n 17, at [93]-[100] per McGrath J.

<sup>30</sup> *Lorigan v R* [2012] NZCA 264.

<sup>31</sup> *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13 at [37].

<sup>32</sup> *Wellington Regional Council v Post Office Bank Ltd* HC Wellington CP720/87, 22 December 1987 at 12.

<sup>33</sup> *R v Secretary of State for Health, ex parte C*, above n 27. See also *R (on the application of Shrewsbury & Atcham Borough Council and another) v Secretary of State for Communities and Local Government*, above n 28, at [49].

<sup>34</sup> *Lorigan v R*, above n 30.

<sup>35</sup> *R (Hooper) v Work and Pensions Secretary* [2005] 1 WLR 1681 at [43]-[47].

Supreme Court of New Zealand<sup>36</sup> have indicated their support for the *Malone* view as well.

The next goal is a constitutional justification for the *Malone* view. The first justification is that the prerogative unique to the Crown confers “the freedom which the government has to do anything that is not prohibited by law.”<sup>37</sup> A public body is described as having a residuary freedom to act. This freedom is residuary in that statute or common law can curtail it; it does not authorise the police to commit a trespass. This residuary freedom has been described as the “third source” of public body power (the other two being statute and common law powers unique to the Crown or prerogative).<sup>38</sup> It is under this third source of power that government can act without positive authorisation in law, as long as no law forbids the action. The ability of a public body to act is “part and parcel of the freedom given by Parliament and the common law to everyone, including the Crown... and other public authorities to make contracts, convey property and manage their own affairs.”<sup>39</sup> On this account, “the Crown, as a natural person, may do all that other natural persons may do; and the government may, in the Crown’s name, do those things too.”<sup>40</sup> This explanation has received judicial endorsement. Justice McGrath accepted the “third source” explanation in *R v Ngan* when he held that police officers could take care of property for safekeeping when the owner was incapacitated.<sup>41</sup> Part of his Honour’s reasoning was that a private individual could have lawfully undertaken the same actions as the police. This explanation reinforces the reason why statutory bodies require positive authorisation; their freedom to act was proscribed by statute and so it cannot be residual.

Further support for the *Malone* principle is the Ram Doctrine. English Parliamentary Counsel Sir Granville Ram first enunciated the Ram Doctrine in a memorandum on

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<sup>36</sup> *R v Ngan*, above n 17.

<sup>37</sup> B.V. Harris “The ‘third source’ of authority for government action” (1992) 108 LQR 626 at 626.

<sup>38</sup> Harris (1992), above n 37, at 626-627.

<sup>39</sup> A. Lester & M Weait “The use of ministerial powers without parliamentary authority: the Ram doctrine” (2003) PL 415 at 419.

<sup>40</sup> Mark Elliot *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001) at 167-168.

<sup>41</sup> Above n 17, at [96], [100].

November 2 1945.<sup>42</sup> It has been described as the “legal basis for current government practice”.<sup>43</sup> The Ram Doctrine states that “in the case of a Government Department, one must look at the statutes to see what it may not do.”<sup>44</sup> It does not directly analogise a public body’s freedom to act with that of a private individual but the advice produces the same effect.

### *C) Making the Case for Positive Authorisation*

In her judgment in *Hamed*, Elias CJ does not argue that public bodies *should* require positive authorisation for lawful action. Instead her Honour contends that this requirement for positive action *already is* the common law position.<sup>45</sup> Her Honour relies on several propositions.

#### *1. The principle in Fewings*

Chief Justice Elias cites Laws J in *R v Somerset County Council (ex parte Fewings)*<sup>46</sup> in support of the proposition that public bodies may only lawfully do what they are authorised to do by some statute or rule of law.<sup>47</sup>

*Fewings* concerned a local council that voted to end deer hunting on council-owned land. A statute set out the exclusive mandatory considerations the council must have when regulating activities on its land. In the High Court, Laws J (as he then was) found that a majority of the councillors were motivated by their moral repugnance to hunting. This was not a factor upon which the statute authorised them to base their decision.

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<sup>42</sup> Sir Granville Ram “‘The Ram Doctrine.’ Ministers of the Crown (Transfer of Functions)” (2 November 1945) UK Parliament Website <<http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldlwa/30122wa1.pdf>>.

<sup>43</sup> Lester & Weait, above n 39, at 415.

<sup>44</sup> Ram, above n 42.

<sup>45</sup> *Hamed (and Ors) v R*, above n 2, at [24].

<sup>46</sup> Above, n 15.

<sup>47</sup> *Hamed (and Ors) v R*, above n 2, at [26].

The passage that forms the basis of the decision and which Elias CJ cites in *Hamed* reads:

“For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that action to be taken must be justified by positive law.”<sup>48</sup>

On this account, a public body would need to point to positive authorisation in law for every action that it takes.

The principle in *Fewings* has been subject to criticism. Subsequent case law and commentators have considered that the principle in *Fewings* was true in the context of local government dealing with statutory bodies.<sup>49</sup> A creature of statute must not exceed its given powers. The principle in *Fewings* supposedly offers “little support for the undermining of the principle in *Malone* which applies to central government.”<sup>50</sup>

This criticism misunderstands Laws J’s account in *Fewings*. The passage quoted above was a general statement about all public bodies, including those that form central government. This broad application is apparent from the language used in the judgment. Justice Laws originally stated his principle as applying to public bodies. His Honour used the term ‘public body’ throughout page 524 as he developed his reasoning and linked this to the facts of the case by giving an example of a public body with the words “such as a local authority.”<sup>51</sup> Justice Laws’ account was broader than the local authority context on which he was required to adjudicate.

The English Court of Appeal upheld Laws J’s decision on appeal. Two of the Lord Justices of Appeal expressed no view on Laws J’s account of the necessity of positive

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<sup>48</sup> *R v Somerset County Council, ex parte Fewings*, above n 15, at 524.

<sup>49</sup> *R v Secretary of State for Health, ex parte C*, above n 27, at [15]-[16].

<sup>50</sup> *R v Ngan*, above n 17, at [95] per McGrath J.

<sup>51</sup> *R v Somerset County Council, ex parte Fewings*, above n 15, at 524.



authorisation for action by public bodies. The remaining judge, Sir Thomas Bingham MR (as he then was), wrote, “As Laws J put it, at p. 524, the rule for local authorities is that any action to be taken must be justified by positive law.”<sup>52</sup> In *Hamed*, Elias CJ contends that Sir Thomas “expressly affirmed”<sup>53</sup> Laws J’s account.

While Sir Thomas’ endorsement of Laws J’s account did not expressly affirm the wide application of the account, neither did it limit it. Sir Thomas agreed that Laws J’s account applies to local authorities. Justice Laws’ account, as written, could apply much more widely. Sir Thomas is silent on that possibility. This is still enough to support Elias CJ’s use of Laws J’s account. There was no express denial of either the principle or its application from any of the three appeal judges. Justice Laws’ account and its wide application were not neutered by the Court of Appeal. The principle in *Fewings* survives to act as case authority upon which Elias CJ can draw.

The statement in *Fewings* therefore supports Elias CJ’s contention that positive authorisation is indeed necessary for lawful action by public bodies.

## *2. Halsbury’s Laws of England*

Chief Justice Elias also refers to older editions of Halsbury’s Laws of England to support her view.<sup>54</sup> Her Honour quotes from the fourth edition to try to illustrate the settled nature of the idea that “...public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute.”<sup>55</sup> Her Honour also relies on near identical statements in the third edition.<sup>56</sup>

These versions of Halsbury predate the decision in *Malone*. By contrast, the 1996 reissue of the fourth edition of Halsbury, which Elias CJ notes at paragraph [32] of her judgment,

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<sup>52</sup> *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 (CA) at 1042.

<sup>53</sup> *Hamed (and Ors) v R*, above n 2, at [26].

<sup>54</sup> *Hamed (and Ors) v R*, above n 2, at [27]-[28].

<sup>55</sup> *Halsbury’s Laws of England*, above n 16, at [828].

<sup>56</sup> *Hamed (and Ors) v R*, above n 2, at [27]-[28].

cites *Malone* with apparent approval.<sup>57</sup> The 1996 reissue of Halsbury is conflicted on this point. As well as its endorsement of *Malone*, it also continues to state the positive authorisation point from previous editions.<sup>58</sup> It contains two mutually exclusive statements of law as the 1996 reissue also notes Laws J's statement in *Fewings* as a contrast to *Malone*.<sup>59</sup>

The versions of Halsbury that Elias CJ relies on are out of date and do not reflect the effect that *Malone* had on this question of positive authorisation. The most up to date version of Halsbury contains contradictions that would not support the point her Honour makes at paragraph [27] of her judgment. What does support Elias CJ is the apparently settled view in favour of necessary positive authorisation in Halsbury prior to *Malone*. It paints *Malone* as challenging an orthodox understanding (at least among Halsbury's authors) that public bodies must have positive authorisation for their actions. It may be that, in terms of case law, *Malone* has been successful in that challenge. But the older versions of Halsbury that support Elias CJ's view provide historical weight, and a grounding that reaches back further than the principle in *Fewings*. They lend support to the idea that the principle of positive authorisation is part of the common law as Elias CJ contends.

### 3. New Zealand case law

Chief Justice Elias cites *Herbert v Allsop*,<sup>60</sup> and *Transport Ministry v Payn*<sup>61</sup> as examples of New Zealand case law that supports the positive authorisation principle.<sup>62</sup> Both cases offer some support for the principle, but neither demonstrates conclusive judicial reasoning on this point.

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<sup>57</sup> *Halsbury's Laws of England*, above n 6, at [6], footnote 3.

<sup>58</sup> *Halsbury's Laws of England*, above n 6, at [101].

<sup>59</sup> *Halsbury's Laws of England*, above n 6, at [6], footnote 3.

<sup>60</sup> [1941] NZLR 370 (SC).

<sup>61</sup> [1977] 2 NZLR 50 (CA).

<sup>62</sup> *Hamed (and Ors) v R*, above n 2, at [27].

In *Herbert v Allsop*, Smith J states that “... public authorities, including the Crown, may only do what they are authorised to do by some rule of law or statute.”<sup>63</sup> Justice Smith did not rely on case authority for this point and cited Halsbury’s Laws of England (6 Halsbury’s Laws of England, 2<sup>nd</sup> Ed. 389) instead.<sup>64</sup> Justice Smith relied on this Halsbury definition and provided no justification for his view. This case does indicate earlier New Zealand judicial acceptance of the requirement of positive authorisation but the reliance on Halsbury (later editions of which would say the opposite) and no discussion of the point limit its precedential weight.

*Transport Ministry v Payn* concerned traffic officers’ power of entry onto private land. The traffic officers’ entry onto private land would normally constitute a trespass. To say that the officers needed positive authorisation to make this action lawful is just as consistent with Elias CJ’s view as it is with the view in *Malone*. On a *Malone* view, the trespass means that the officers could not enter without positive authorisation. On Elias CJ’s view the officers could not enter without a specific statutory or common law power. The logical reasoning in the case supports both Elias CJ and the *Malone* view. The reasoning in the judgment in *Payn* may be equivocal in its support of the positive authorisation requirement but it remains influential. Justice Woodhouse quotes with approval a passage from Professor Heuston that every public body must “...point, if questioned, to some specific rule of law authorising the act which is called in question.”<sup>65</sup> Like the Halsbury definitions, it shows similar thinking by Woodhouse J in the 1970s from which Elias CJ can draw support.

#### D) In Search of Deeper Justifications

Chief Justice Elias can point to case law, judicial support, and textbook authority to support her contention that the common law position requires public bodies to have positive authorisation in order for their actions to be lawful. Proponents of public bodies

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<sup>63</sup> *Herbert v Allsop* [1941] NZLR 370 (SC) at 374.

<sup>64</sup> *Halsbury’s Laws of England* (2<sup>nd</sup> ed, 1932) vol 6 Compulsory Purchase to Constitutional Law at [389].

<sup>65</sup> R.F.V. Heuston *Essays in Constitutional Law* (2<sup>nd</sup> ed, Stevens & Sons, London, 1964) at 34. Cited in *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA) at 62.

having residual freedom to act can do the same thing starting with *Malone* and moving through subsequent case law (which supports the *Malone* view in many more instances than it supports Elias CJ's argument). The *Malone* argument can be justified at a constitutional level by the concept of a public body having a residual freedom to act and the equivalent liberty of action of a public body and a private individual. Without grounding in theory or a constitutional justification, the small cluster of authority to which Elias CJ can point could be dismissed as an offshoot of the common law; a small string of cases that do not relate to our wider legal system. The next chapter considers and assesses the theory and justifications behind the argument for requiring positive authorisation for the actions of public bodies.

### ***III) Chapter Two: Arguments for Positive Authorisation***

#### *A) Positive Authorisation Brings Consistency Between Statutory and Non-Statutory Bodies*

Proponents of the *Malone* view and a 'third source' analysis freely acknowledge that statutory bodies are limited to actions authorised by the statute that creates them.<sup>66</sup> They would contend that central government departments and Ministries – bodies that are not created by statute – are not subject to the same restrictions. Presently existing Ministries have not been created by statute.<sup>67</sup> While statutes may confer functions on Ministries, there is no exhaustive list of powers by which their freedom to act is limited. The result, *Malone* proponents argue, is that the positive authorisation requirement cannot apply to central government.

This is a poor distinction. If freedom to act is determined by whether a body is created by statute then it leads to scenarios where the legality of identical actions by similar departments would differ based solely on whether or not they were created by statute. Central government departments can and have been created by statute with their powers set out in that statute. The Ministry of Transport Act 1968 establishes a central government department of the same name,<sup>68</sup> and contains a list of powers<sup>69</sup> which are to be used for prescribed purposes.<sup>70</sup> During the period that the Ministry of Transport operated under this statute it would have been restricted to the actions it was positively authorised to take, even on the account of proponents of the *Malone* view. If the actions of the Ministry were challenged, they would be assessed against the powers given to the Ministry by the statute.

In 1990 the Ministry of Transport Act 1968 was repealed.<sup>71</sup> The Ministry of Transport still exists today as a central government department<sup>72</sup> but it owes neither its existence

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<sup>66</sup> See for example Elliot, above n 40, at 169.

<sup>67</sup> Schedule 1 of the State Sector Act 1988 lists government ministries for regulatory and administrative purposes but neither creates nor confers powers on ministries.

<sup>68</sup> Ministry of Transport Act 1968, s 3.

<sup>69</sup> Ministry of Transport Act 1968, s 4(4).

<sup>70</sup> Ministry of Transport Act 1968, s 4(1)-(3).

<sup>71</sup> Ministry of Transport Act Repeal Act 1990, s 5(1).

<sup>72</sup> State Sector Act 1988, Schedule 1.

to, nor sources all of its powers from, a statute. The Ministry has responsibilities for administering various Acts, for example the Land Transport Act 1998, and to meet those responsibilities it derives its powers from the Act. But its existence is no longer codified in the way it was in the 1968 statute, and its powers are no longer explicitly and exhaustively stated.

Chief Justice Elias' approach would require the Ministry, at any point in its history, to point to positive authorisation for its actions. Proponents of *Malone* would require this only during periods where the Ministry of Transport Act 1968 or equivalent legislation is in force. When the Act is not in force the Ministry would possess a residual freedom to act; it could act as it wished as long as it did not transgress any laws. On the *Malone* account we are left with the situation where certain bodies of central government can have residual freedom to act one day, and lose it the next with the passing of a statute. Alternatively the situation could arise where the actions of two Ministries with similar powers that affect individuals in similar ways are held to different standards of lawfulness simply because one is created by statute and the other not. This is inconsistent.

This inconsistency of the *Malone* view cannot be justified by reference to parliamentary intent. Proponents of *Malone* might contend that if Parliament wished to restrain the freedom of action of public bodies then it could regulate Ministries in a way similar to the Ministry of Transport Act 1968. They would point to the fact that it has chosen not to do so as evidence that it is content with allowing public bodies residual freedom of action.

However this argument presupposes that a non-statutory public body's residual freedom to act is the accepted norm. Ministries derive powers from multiple statutes that either directly confer individual powers or impose on Ministries responsibilities from which we can infer they must have been conferred the power necessary to fulfil those responsibilities. From multiple statutes a Ministry garners a wide range of specific powers; a power to do this or a responsibility for overseeing that (with a corresponding power to carry out the overseeing). In this way, central government has been authorised to act in these areas. Chief Justice Elias would contend that this positive authorisation is

exhaustive. Proponents of the Malone view would disagree and argue that Ministries have a residual freedom to act. But this is simply repeating their earlier claim. A lack of legislation does not establish that a residual freedom exists. An appeal to Parliamentary intent does not make the *Malone* account any more convincing.

### *B) A Public Body Does Not Have The Same Freedom of Action as a Private Individual*

Chief Justice Elias avoids the inconsistencies of the *Malone* view by focusing on an insistence of positive authorisation for action. The source of the powers must be in positive law in either statute or common law, but the form of the body – statutory or non-statutory – is irrelevant to her analysis.<sup>73</sup> Her Honour would reject analogising a central government department's freedom to act to that of a private individual.<sup>74</sup>

Chief Justice Elias' view denies equivalence of liberty between a public body and a private individual. This means that an action that has no legal significance performed by an individual could have legal significance when performed by a public body.

Consider the video surveillance in *Lorigan v R*.<sup>75</sup> The police suspected Mr Lorigan of drug dealing so they set up video surveillance to gather evidence. The Police obtained the permission of Mr Lorigan's neighbour to place a video camera on the neighbour's property. The camera was pointed at the street and recorded people entering and exiting Mr Lorigan's property.<sup>76</sup> The lawfulness of the police's actions was challenged. There was no statute or principle of common law that authorised the police to use video surveillance. However, a private individual could set up a video camera on their property and record a public street. To do so would not break any law nor would it involve trespass or a breach of privacy.

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<sup>73</sup> Note: I continue to use the term 'public body' as defined in chapter 1 of this dissertation even though Elias CJ's reasoning extends to both statutory and non-statutory bodies. This is because 'public bodies' freedom to act is the main point of contention between the two views.

<sup>74</sup> *Hamed (and Ors) v R*, above n 2, at [24].

<sup>75</sup> *Lorigan v R*, above n 30.

<sup>76</sup> *Lorigan v R*, above n 30, at [9].

On Elias CJ's account, the actions of the police would be unlawful as the police lacked positive authorisation to use video surveillance. The actions of the private individual would be lawful, as that individual has the freedom to act however he or she wants as long as he or she does not transgress any law.

Traditionally, liability of a public body arises from individuals working within that public body acting unlawfully. For example the police will be held to have acted unlawfully if an individual officer trespasses to gather evidence. The unlawful act is the individual's but the public body is also liable. This principle was evident in *Malone*. The individual officers who tapped Malone's telephone did so without breaching any law so no liability attached to the Police.

On Elias CJ's account, a public body would still be acting unlawfully for some actions that do not arise from the fault of an individual. The actions that would be unlawful are those that are not positively authorised by law. An individual police officer that undertakes video surveillance when the police have not been positively authorised to do so is not acting unlawfully because as a private individual the officer is free to use video recording devices. Chief Justice Elias argued in *Hamed* that, even if the individual actions of the officers were lawful, the Police would still be acting unlawfully if they could not point to positive authorisation for video surveillance.

Chief Justice Elias is making two claims. The first is that private individuals and public bodies should be held to different standards of lawfulness. The second is that that difference in lawfulness should be the ability to act with or without positive authorisation. This raises two questions that will be examined in turn. Can an argument be made for holding public bodies' actions unlawful when an individual's identical actions would be lawful? And if an individual's lawful actions can be unlawful if performed by a public body, why should positive authorisation determine unlawfulness?



*C) On What Basis Can Public Bodies' Actions Be Held Unlawful When a Private Individual's Identical Actions Would be Lawful?*

*1. Duguit and his application to a New Zealand context*

Leon Duguit wrote about the purpose and liability of the State in French administrative law in late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>77</sup> The State, as opposed to the Crown or public bodies, is an unnatural concept for New Zealand and United Kingdom legal thought. We do “not know the state as a legal entity”.<sup>78</sup> However, Duguit’s arguments about the obligations and guiding principles of the State apply equally to the public bodies with which we are concerned. The State that Duguit began examining was conceptualised as a personality that had sovereignty over individuals. The State forms a government as a way to effect its sovereignty.<sup>79</sup> His work focuses on attacking this conception of the State, and he ultimately denies the State the freedom of action that an individual possesses.

Chief Justice Elias is interested in a similar idea. The terms her Honour uses to describe the entity or entities that would need positive authorisation, include the ‘State’,<sup>80</sup> ‘public authorities’,<sup>81</sup> and ‘public bodies.’<sup>82</sup> These terms are contrasted with an ‘individual citizen.’<sup>83</sup> The terms used in *Hamed* indicate that Elias CJ is dealing with similar concepts to Duguit. Therefore, a consideration of Duguit’s theories is instructive when considering Elias CJ’s arguments.

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<sup>77</sup> Leon Duguit, *Law in the Modern State* (George Allen & Unwin Ltd, London, 1921).

<sup>78</sup> *A v Lord Grey School* [2004] All ER 629 at [3].

<sup>79</sup> Duguit, above n 77, at xxxvii-xxxviii.

<sup>80</sup> *Hamed (and Ors) v R*, above n 2, at heading of [33].

<sup>81</sup> *Hamed (and Ors) v R*, above, n 2, at [27].

<sup>82</sup> *R v Somerset County Council ex parte Fewings*, above n 15, at 524 cited in *Hamed (and Ors) v R*, above n 2, [26].

<sup>83</sup> *Hamed (and Ors) v R*, above n 2, at [24].

## 2. Public service as a guiding principle

Duguit argued that the State exists to serve its citizens.<sup>84</sup> A system of duties is “imposed on officials by virtue of their power, which power exists only to ensure the realization of a public service.”<sup>85</sup> Duguit conceded that an all-encompassing definition of the ‘public service’ is difficult,<sup>86</sup> and offers examples of national defence, law and order, and public utilities as institutions that form part of the public service. Duguit eventually settled on a definition of “[a]ny activity that has to be governmentally regulated and controlled because it is indispensable to the realisation and development of social solidarity is a public service so long as it is of a nature that it cannot be assured save by governmental intervention.”<sup>87</sup>

Duguit rejected the idea that the State could have its own personality and argued “the State is not a person distinct from individuals.”<sup>88</sup> This account would contradict the ‘third source’ argument used by commentators like Harris<sup>89</sup> to explain *Malone* that certain public bodies possess a residual authority to act derived from the legal personality of the Crown. If public bodies are empowered to act solely towards beneficial social ends then they cannot possess any residual freedom.

Similarly, the idea of public bodies acting solely towards the goal of public service challenges our standard conception of public body liability. Both the public body as a whole and the individuals that work within that public body operate towards a goal of public service. Both the public body and its employees “have a character in common that is derived from the purpose by which they are determined.”<sup>90</sup> This characteristic would make the State liable when it breaches its obligation to achieve the social benefit resulting from public service, regardless of whether a harmed plaintiff could point to the act of an individual that constitutes a legal wrong, or if no such individual wrong could be identified. Ultimately, if “state action results in individual damage to particular

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<sup>84</sup> Duguit, above n 77, at 39.

<sup>85</sup> Martin Loughlin “The Functionalist Style in Public Law” U.T.L.J. 55 (2005) 361 at 371.

<sup>86</sup> Duguit, above n 77, at 44-45.

<sup>87</sup> Duguit, above n 77, at 48.

<sup>88</sup> Leon Duguit “The Law and the State” in *Harvard Law Review* 31 (1917) 1 at 8.

<sup>89</sup> Harris (1992), above n 37.

<sup>90</sup> Duguit, above n 77, at 50.

citizens, the state should make redress, whether or not there be a fault committed by the public officers concerned.”<sup>91</sup>

### *3. The effects of Duguit on Elias CJ’s argument*

Duguit’s arguments show a method by which we could hold the actions of public bodies unlawful, even when the same actions by a private individual would be lawful. If public bodies or the State are considered as working towards the ends of public service then it distinguishes public bodies from private individuals in terms of their respective duties. The ideal of public service denies public bodies the freedom to act as long as they do not transgress any law. A private individual would retain this freedom. On this understanding a private individual could act in any he or she wishes – including in a way that is not in the public interest – as long as he or she does not break any law. By contrast, a public body could not carry out otherwise lawful acts that were not geared towards public service. For a public body, to do so would be to be acting unlawfully.

This theory of constitutional law shows how it is possible that a public body could act unlawfully when a private individual would be acting lawfully. The motive of public service also allows a public body to be held liable even when no individual officer of that public body has committed an identifiable unlawful act.

### *D) Why Should Positive Authorisation Be the Factor That Determines Unlawfulness?*

#### *1. The next step to support Elias CJ*

The previous paragraphs provide a basis by which it is possible to ascribe different consequences in law to identical action by public bodies and private individuals. However, Duguit’s arguments only take us so far. In order to support Elias CJ’s argument in *Hamed* it must be shown that requiring public authorities to point to positive

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<sup>91</sup> Leon Duguit *Traite de droit constitutionnel* (3<sup>rd</sup> edn, Fontemoing Paris, 1927) at 469.

authority in law for their actions, instead of public service, is a defensible basis by which to make this ascription.

Chief Justice Elias never makes direct use of the idea of public service as a justification for differences in liability between public bodies and private individuals. Instead her Honour distinguishes on the basis of a requirement of positive authorisation in law for actions. This positive authorisation requirement is different to public service but is used as an explanation in the same way as public service is used by Duguit.

## *2. Positive authorisation for the actions of public bodies*

Chief Justice Elias states that “liberty [equivalent to a private individual] for public authorities would destroy private liberty”<sup>92</sup> and describes the lack of equivalence as a “necessary condition for the liberties of the subject.”<sup>93</sup>

Underlying this statement is the idea that the maximisation of individual liberty and autonomy is a worthy aim. Writing extrajudicially, Sir John Laws (the judge in *Fewings*) stated: “In the good constitution the principle of minimal interference is compulsory, because its refusal would cripple or destroy the autonomy of every individual.”<sup>94</sup> It is an understanding of an individual’s freedom in negative terms. Video surveillance is a useful example. An individual has a freedom from warrantless video surveillance by the police if the police have not been positively authorised to undertake that video surveillance. If the police were to have the same liberty as a private individual then an individual does not have the freedom discussed. It is on this basis – a protection of individual liberty – that Elias CJ argues that public bodies should not have the same liberty as private individuals.

This is a negative conception of Duguit’s public service. Public service placed a positive obligation on the State to act in the interests of the public. As a result of this additional

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<sup>92</sup> *Hamed (and Ors) v R*, above n 2, at [28].

<sup>93</sup> *Hamed (and Ors) v R*, above n 2, at [28].

<sup>94</sup> Sir John Laws “The Constitution: Morals and Rights” (1996) PL 622 at 627.

obligation the State and the individual no longer had equivalent freedom to act. This justifies treating differently identical acts performed by the State and an individual. Chief Justice Elias would place a restriction on the public bodies: do not act if you have not been positively authorised to do so. As a result of this restriction, public bodies and individuals would not have equivalent freedoms to act. This would similarly justify treating differently identical acts performed by the public bodies and individuals.

### *3. Is positive authorisation necessary to protect the liberty of the individual?*

Duguit's key premise was that the State exists to further public service. For Duguit, this premise was based on sociological examination and an understanding of the State that he claimed was "the expression of our actual situation".<sup>95</sup> The reader must accept that premise in order to reach his conclusion. The same can be said about Elias CJ's statement that positive authorisation is necessary to protect the liberty of the individual.

There is support for the idea that if public bodies were to have the same liberty as individuals then individual liberty would be greatly diminished. The basic argument is that previously expressed. This idea is supported by Halsbury's Laws of England,<sup>96</sup> the Proclamations Case<sup>97</sup> in the context of unchecked executive power, and part of Dicey's definition of the rule of law that warns against any "wide discretionary authority on the part of the government."<sup>98</sup> Requiring positive authorisation means that public bodies would not infringe individuals' existing liberties. Pre-existing legislation or common law rules would have already authorised the public body's action, thus the individual cannot be said to have had the liberty to be free from that particular action. By requiring them to point to positive authorisation for their actions we can be reassured that any infringement by a public body has been endorsed through a democratically elected Parliament.

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<sup>95</sup> Duguit, above n 77, at 32.

<sup>96</sup> *Halsbury's Laws of England*, above n 6, at [101].

<sup>97</sup> *Case of the Proclamations* [1610] EWHC KB J22.

<sup>98</sup> A.V. Dicey *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, Macmillan, London) at 202.

### *E) The Response of the Malone View*

Proponents of the *Malone* view contend that positive authorisation is not necessary to protect the liberty of the individual. Harris argues that sufficient safeguarding of individual liberty can be achieved by passing legislation that forbids interference with individual liberty by public bodies,<sup>99</sup> and by post-action controls such as judicial review, Parliamentary inquiry or resort to the Ombudsman.<sup>100</sup>

The benefits and drawbacks of Elias CJ's approach in *Hamed* and the approach in *Malone* are considered in Chapter 3. The protection of individual liberty is only one factor in comparing the views. For now, though, we are interested in assessing Elias CJ's claim about the necessity of positive authorisation to protect individual liberty, in order to determine whether her approach can stand as an argument against *Malone*. The post-action controls suggested by Harris are concessions that individual liberty can be negatively affected by allowing public bodies the liberty of an individual. If his proposition that legislation restricting public bodies' actions was enough to ensure individuals' liberties were not interfered with then there would be no need for post-action controls. As for the legislative fence at the top of the cliff, often the cases that raise the question of a public body's freedom to act are those where there has been no legislative protection. These are cases where it seems in retrospect that there should have been a statute prohibiting the action. Examples include the police's ability to make video recordings of individuals,<sup>101</sup> to tap telephones (when no privacy legislation existed),<sup>102</sup> and a government department's ability to maintain a list of health workers' convictions and disciplinary offences and inform potential employers.<sup>103</sup> While legislative protection could potentially suffice to protect individual liberty, these cases show that it is unlikely to ever practically be enough to absolutely protect individual liberty. The areas that have not been identified as needing legislative protection may be small but they exist. The arguments suggested by proponents of *Malone* fail to convince

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<sup>99</sup> Harris (2007), above n 18, at 228.

<sup>100</sup> Harris (2007), above n 18, at 229.

<sup>101</sup> *Hamed (and Ors) v R*, above n 2; *Lorigan v R*, above n 30.

<sup>102</sup> *Malone v Commissioner of Metropolitan Police (No 2)*, above n 1.

<sup>103</sup> *R v Secretary of State for Health, ex parte C*, above n 27.

that individual liberty is capable of complete protection by a method other than requiring positive authorisation. Requiring positive authorisation in order for public bodies to act is necessary to protect individual liberty.

*F) Impact on Elias CJ's Argument*

Chief Justice Elias' argument that positive authorisation is needed in order for public bodies to act requires an explanation of how her Honour justifies holding public bodies liable for actions that attract no liability when performed by a private individual. This can be achieved by using a methodology similar to Duguit. With positive authorisation necessary for the protection of individual liberty, Elias CJ's argument puts different duties on public bodies and private individuals, and therefore provides a basis by which one could hold some public bodies' actions unlawful, when a private individual would be acting lawfully.

#### ***IV) Chapter Three: Comparison***

In Chapter Two it was shown that Elias CJ's view requiring positive authorisation for public bodies' actions can be supported. The same was shown for the *Malone* view in Chapter One. This chapter examines the benefits and drawbacks to each view in order to work towards an endorsement of one view over the other.

This chapter defines criteria by which we could say that one view is better than the other. It then assesses the two views by against these criteria and examines further criticisms against the positions.

##### *A) Coherence and Fit Within the Existing Legal and Constitutional Framework*

One way we could say that one view is better is by identifying which view coheres with and fits more comfortably within existing legal and constitutional arguments and arrangements. If one view necessitates a radical legal and constitutional shift whereas the other coheres well with familiar legal concepts then the interests of certainty and predictability speak strongly (but not conclusively) in favour of the less radical option.

The effect of holding unlawful any action by a public body that had not been positively authorised is a challenge to our legal system. Holding administrative powers unlawful "simply because they have no statutory basis is essentially foreign to the English legal system."<sup>104</sup> Chief Justice Elias' view in effect creates a new way to hold unlawful an administrative action. Unauthorised action by a public body would be a type of administrative tort; a wrong able to be committed only by a public body and not by a private individual. Traditionally there is no Crown liability in tort except where an action by one of its servants was itself tortious.<sup>105</sup> As was discussed in Chapter 2, in Elias CJ's conception there is no need for an individual government servant to be liable in tort

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<sup>104</sup> Margit Cohn "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive" (2005) 25 OJLS 97 at 112.

<sup>105</sup> Crown Proceedings Act 1950, s 6(1).



for the public body's action to be held unlawful. This consequence of Elias CJ's view presents major challenges to our current legal framework.

### *1. The creation of administrative torts*

The acceptance of some kind of administrative tort may challenge New Zealand and English legal thought but the concept is familiar in other jurisdictions. One administrative wrong is the *faute de service* in French administrative law. The *Blanco*<sup>106</sup> decision established that the state was liable for the fault of its servants, and that "administrative liability should be subject to rules which were separate and distinct from those of the *droit civil*".<sup>107</sup> In many cases if some fault in the operation of the public service can be shown then the French administrative body is liable, even if an individual's fault cannot be identified.<sup>108</sup> Applying this to the issue of positive authorisation, the effect of Elias CJ's approach would be to hold public bodies liable for actions that had not been positively authorised.

Chief Justice Elias' approach of protecting private individuals from the public bodies or the state, rather than from other individuals also coheres with rights-protection legislation like the New Zealand Bill of Rights Act 1990 (NZBORA). NZBORA confers protections against the state or those people or bodies carrying out public functions but not against private individuals.<sup>109</sup>

Despite these parallels, Elias CJ's approach would represent a serious change to our legal system. One question that will need to be answered is: If an unauthorised action by a public body is unlawful then what is the remedy? The answer will be clear when the unlawful action occurs within a framework that already offers a remedy. For example, an unlawful action by the police to gather evidence can be remedied by the exclusion of the

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<sup>106</sup> *Blanco* (8 February 1873) Tribunal des Conflits.

<sup>107</sup> L. Neville Brown *French Administrative Law* (5<sup>th</sup> ed, Clarendon Press, Oxford, 1998) at 176.

<sup>108</sup> Eva Steiner *French Law – A Comparative Approach* (Oxford University Press, Oxford, 2010) at 272.

<sup>109</sup> New Zealand Bill of Rights Act 1990, s 3.

evidence<sup>110</sup> and an unauthorised action that results in the breach by the executive of a right in the New Zealand Bill of Rights Act 1990 could result in monetary compensation.<sup>111</sup> But where these frameworks run out, the question of remedy remains.

## *2. Why not protect the interest by making it a tort?*

The inconsistent treatment of a private individual and a public body in terms of requiring positive authorisation for actions has already been discussed and arguably justified. The difficulty is in justifying this difference in regard to the legal system as a whole. Proponents of positive authorisation justify its need by arguing that individual liberty is maximised when the state's liberty is restricted. That is perhaps stating the issue at too high a level. Critics would argue that what Elias CJ really thinks is wrong is the interference by the State in a private individual's liberties. The interference in Mr Lorigan's liberty from surveillance, or Mr C's liberty from having his name on a list are not impacted by a public body having the freedom to act in this way.<sup>112</sup> Rather, those interests are impacted when the public body actually acts in this way with no legal consequence.

This is a fine distinction but it becomes clearer when we consider this criticism of Elias CJ's view. Requiring positive authorisation for a public body's actions does not affect the ability of one private individual to infringe on another private individual's rights in the same manner while acting entirely lawfully. Put another way, if proponents of positive authorisation wish to protect private individuals' wider rights then they can do so by making any infringement of one of those interests into a tort or crime. Following this *Malone* type method the private individual's interest is protected against infringement from everybody – both public bodies and private individuals. Examples of the expansion of the law of tort to protect individuals' interests have been evident in the creation of the torts of privacy<sup>113</sup> and most recently intrusion into seclusion.<sup>114</sup>

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<sup>110</sup> Evidence Act 2006, s 30.

<sup>111</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) (*Baigent's Case*).

<sup>112</sup> Whether what is actually being affected is a right or a liberty or something of no legal consequence whatsoever is discussed in Chapter 5.

<sup>113</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA).

Elias CJ's view struggles to be justified on the basis that public bodies are simply larger, have more resources, and are more persistent than other private individuals. Therefore greater protection is needed from public bodies and this justifies making their actions unlawful but keeping equivalent action by private individuals lawful. This argument still confuses public bodies' freedom to act with the actual infringement of individuals' interests by those public bodies. As well, the designation 'private individuals' includes large corporations that can rival government resources and persistence. Therefore protection of individuals' interests is required both from public bodies and from other private individuals. This cannot be accomplished through requiring positive authorisation of public bodies. Rather, protection through tort and crime in a manner that affects both public bodies and private individuals will achieve this end. This approach is entirely consistent with the Malone view. It conforms to familiar legal thinking about tort liability, and does not require creation of administrative torts.

*B) The Extent to Which the Approaches Allow the Effective Functioning of Government*

I consider the effective functioning of government to be an important assessment criterion as the question of positive authorisation fundamentally affects government's ability to act. Government carries out necessary functions for the good of society. If its ability to do this were hampered by one view then that would be a reason not to favour that approach. By effective functioning of government I mean the ability of government to easily carry out day-to-day operations and transactions. Each view will be assessed as to how well they facilitate this.

A recurrent criticism of the positive authorisation view is that that it would be unworkably restrictive on the day-to-day functioning of government. DeSmith observes that public bodies "must surely be able to employ staff, convey property and buy stamps and cleaning equipment and may not need a specified power for that kind of activity

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<sup>114</sup> *C v Holland* [2012] NZHC 2155.

(although it is sometimes granted).”<sup>115</sup> Many claim that adopting the approach in *Fewings*, on which Elias CJ’s view is based, “would leave the Crown powerless to perform certain tasks, such as leasing a building [or] entering into contracts...”.<sup>116</sup> This claim will be examined in the context of public body contracting.

### *1. How does the current system work?*

Ministers of public bodies created at common law possess the contractual capacity of the Crown.<sup>117</sup> The individuals within these public bodies – either the Ministers, or through delegation, lower-ranking officials – have the capacity to enter contracts and bind the Crown without prior Parliamentary approval.<sup>118</sup> Those contracts that these public bodies enter are only paid for if Parliament grants appropriations of money to pay for them.<sup>119</sup> Parliament usually grants this in the form of appropriations bills that limit how much can be spent and on what.<sup>120</sup> This is the theoretical arrangement. As a matter of practice the appropriations bills are passed before the expenditure is incurred. Imprest supply bills, which authorise spending up to a certain amount but do not detail what it must be spent on, cover government shortfalls between appropriations bills.<sup>121</sup>

### *2. Effects of a change*

Requiring public bodies to receive positive authorisation for their contracting actions is a major theoretical change. Of more concern is the serious restrictive consequences such a change would have on the effective functioning of government. The Crown would be restricted to entering into contracts that Parliament had approved. Parliament’s approval would be required to make the contract lawful as well as able to be paid for.

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<sup>115</sup> Lord Woolf and others *DeSmith’s Judicial Review* (6<sup>th</sup> ed, Sweet & Maxwell, London, 2007) at [5-022].

<sup>116</sup> P.A. Joseph *Constitutional & Administrative Law in New Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington, 2007) at 628. See also: Harris (1992), above n 37, at 649.

<sup>117</sup> Paul Craig *Administrative Law* (6<sup>th</sup> ed, Sweet & Maxwell, London, 2008) at [5-037].

<sup>118</sup> Janet McLean “The Crown in Contract and Administrative Law” (2004) 24 OJLS 129 at 137.

<sup>119</sup> Bill of Rights 1688, Article 4.

<sup>120</sup> Public Finance Act 1989, ss 8-9.

<sup>121</sup> Joseph, above n 116, at 319.

This idea has been criticised. Baroness Scotland in the House of Lords stated that requiring parliamentary authority for all action “either would impose upon Parliament an impossible burden or produce legislation in terms that simply reproduced the common law”.<sup>122</sup>

The impossible burden criticism described by Baroness Scotland involves the idea that Parliament does not have the time or resources to give authorisation every time someone in the Ministry of Justice wishes to buy paperclips for the office. This may seem a trivial example but it can highlight the difficult position in which those favouring positive authorisation find themselves. They contend that prior authorisation by Parliament introduces democratic oversight into the actions of public bodies and legitimises any action by a public body that affects our rights or liberties. Authorisations by Parliament authorising a public body to enter into contracts for office supplies up to a certain total each year would theoretically preserve some measure of flexibility for the public body. The result would be that the public body would not require specific authorisation in every individual instance it buys paperclips during the year.

This immediately invites the question: how detailed would the positive authorisation of public bodies need to be? Positive authorisation for literally every action taken by a public body – contracting for services, the use of equipment by the police, the renting of premises for government offices – will be unworkable. An untold number of actions are taken every day by public bodies and no legislature could keep up. By contrast, recognition of a third source and adoption of a *Malone* type principle of residual freedom would allow public bodies “to respond quickly, flexibly and relatively unhindered with the action [they consider] appropriate to meet, sometimes unexpected, societal needs”.<sup>123</sup> When considering the two positions at their extremes then, the *Malone* view provides for the effective functioning of government in a way that requiring positive authorisation does not.

But what if positive authorisation was not required for every action and instead some less extreme position could be taken, like what was suggested above? Is there some

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<sup>122</sup> (February 25, 2003) 645 GBPD HL column WA12.

<sup>123</sup> Harris (2007), above n 18, at 237.

principled way to do this? Or could the Malone view be similarly tempered? The next chapter examines these questions.

## V) Chapter Four: In Search of a Middle Ground

Chapter Two showed how Elias CJ's view in *Hamed* which requires public bodies to point to positive authorisation for their actions is supported by case law and textbook authority, and can be justified with regard to constitutional theory. The view in *Malone*, and subsequently adopted in New Zealand by cases like *R v Ngan*, can be supported and justified by similar factors as shown in Chapter One. Judges and authors on both sides of the positive authorisation debate claim that the view that they favour not only should be the law, but is the law.<sup>124</sup> The positive authorisation view is expressed in its most extreme form in *Fewings*,<sup>125</sup> which is quoted by Elias CJ in *Hamed*.<sup>126</sup> The requirement for positive authorisation for actions by public bodies is stated as an absolute. Any "...action to be taken must be justified by positive law."<sup>127</sup> As described in Chapter One, the *Malone* view is stated at its most extreme as applying to all action by government that is not codified and confers a residual freedom to act.<sup>128</sup> It is worthwhile, then, to examine whether the two views can be reconciled and whether some middle ground position can be created. If a middle ground position can be achieved then the divergent case law in this area could be unified and the courts could take a consistent position in future decisions.

### A) The view of Sir Edmund Thomas

Sir Edmund Thomas, a former Court of Appeal judge wrote a blog post on the New Zealand Supreme Court Blog expressing his views on the existence of a third source of residual freedom that would support the principle in *Malone*.<sup>129</sup> All of Sir Edmund's discussion is focused on the police rather than public bodies generally and some of his arguments about common law powers apply particularly well to the police in particular,

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<sup>124</sup> *Hamed (and Ors) v R*, above n 2, at [24]; *Lorigan v R*, above n 30, at [37]; *Malone v Commissioner of Metropolitan Police (No 2)*, above n 1, at 630.

<sup>125</sup> *R v Somerset County Council, ex parte Fewings*, above n 15.

<sup>126</sup> *Hamed (and Ors) v R*, above n 2, at [26].

<sup>127</sup> *R v Somerset County Council, ex parte Fewings*, above n 15, at 524.

<sup>128</sup> *R v Ngan*, above n 17, at [94].

<sup>129</sup> Sir Edmund Thomas "Sir Edmund (Ted) Thomas: *Hamed* and the Common Law" (7 November 2007) New Zealand Supreme Court Blog <<http://nzscblog.com/2011/11/sir-edmund-ted-thomas-hamed-and-the-common-law/>>.

but his position can apply to all public bodies. Sir Edmund also focused on the use of the common law as a source of positive authorisation for the actions of public bodies. Sir Edmund was “unwilling to endorse the third source in its full panoply, that is, that the police can do anything that the positive law does not prevent them from doing”<sup>130</sup> but at the same time acknowledged its existence and public bodies’ ability to derive a residual freedom to act from it. He outlines his positions on a number of aspects of the debate, often taking a halfway approach that might form a possible middle ground by which a requirement for positive authorisation could be reconciled with a residual freedom to act.

Sir Edmund would not allow the third source to authorise “coercive powers of the police which interfere with the basic rights of citizens.”<sup>131</sup> Proponents of the third source would deny that the third source is at risk of allowing this interference.<sup>132</sup> To the extent that either statute or common law protects a private individual’s basic rights, public bodies are not free to act in a way that contravenes them. In New Zealand NZBORA and the common law – chiefly through the torts of trespass and privacy – provide a fairly comprehensive prohibition on public bodies using a residual freedom to act in a way that would infringe people’s basic rights. Interference with an individual in a way that is not forbidden by the law is not interfering with that individual’s protected legal rights. A public body does not have the ability to use coercive powers that interfere with the rights of citizens. Supporters of Elias CJ would agree with Thomas J’s statement. The gaps in the protective legislation occasionally allow cases like *Hamed* or *Ex Parte C* where actions by a public body are such where it seems like the individual’s personal freedom should be protected.<sup>133</sup> Maximising individual liberty by restricting public bodies’ liberty is ideal and requiring positive authorisation for public bodies’ actions can achieve this. Sir Edmund is therefore not saying anything new. Rather, it is a restatement

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<sup>130</sup> Sir Edmund Thomas “Sir Edmund (Ted) Thomas: Hamed and the Common Law” (7 November 2007) New Zealand Supreme Court Blog <<http://nzscblog.com/2011/11/sir-edmund-ted-thomas-hamed-and-the-common-law/>>.

<sup>131</sup> Sir Edmund Thomas “Sir Edmund (Ted) Thomas: Hamed and the Common Law” (7 November 2007) New Zealand Supreme Court Blog <<http://nzscblog.com/2011/11/sir-edmund-ted-thomas-hamed-and-the-common-law/>>.

<sup>132</sup> *R v Ngan*, above n 17, at [97].

<sup>133</sup> Whether this is a legitimate concern is discussed further on in this Chapter, and in Chapter Five.



of the way in which those who hold different views on the question of positive authorisation approach the issue.

### *1. The common law as a source of positive authorisation*

Sir Edmund champions the use of the common law as a source of positive authorisation. This is entirely consistent with the view of Elias CJ. Chief Justice Elias' view is that the actions of public bodies must be authorised by "some rule of law or statute."<sup>134</sup> The term 'rule of law' in this context includes common law. In *Hamed*, Elias CJ discounted the possibility of the common law authorising the police to use video surveillance. Her Honour disagreed with prior case law that had allowed video surveillance.<sup>135</sup> Sir Edmund correctly points out that Elias CJ did not consider the common law basis of police officers' duties. This oversight is immaterial however, as he concedes that police officers' common law duty to keep the peace has not yet extended to encompass video surveillance. Ultimately, Sir Edmund's focus on the common law cannot work as a useful middle ground. His position is similar to that of Elias CJ with a greater focus on the common law as a source of positive authorisation.

### *2. Abeyance of residual freedom in the face of extensive statutory powers*

Sir Edmund's approach would deny public bodies the freedom to act in matters where similar powers have been "extensively proscribed by statute."<sup>136</sup> In the context of the video surveillance in *Hamed*, Thomas J pointed to the extensive statutory powers that control the police's ability to carry out searches and enter property. It would be "incongruous" to allow a video surveillance to be carried out on the basis of the police's residual freedom to act, because the surrounding legislation points to the police only having the powers that have been specifically conferred. The appeal to Parliamentary

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<sup>134</sup> *Hamed (and Ors) v R*, above n 2, at [27].

<sup>135</sup> *Hamed (and Ors) v R*, above n 2, at [32].

<sup>136</sup> Sir Edmund Thomas "Sir Edmund (Ted) Thomas: *Hamed* and the Common Law" (7 November 2007) New Zealand Supreme Court Blog <<http://nzscblog.com/2011/11/sir-edmund-ted-thomas-hamed-and-the-common-law/>>.

intent has been discussed previously in Chapter Two. The argument's presupposition of one outcome remains a reason to discount this aspect of Thomas J's argument. The argument also introduces a difficult grey area that both Elias CJ's view and the *Malone* view lack. What degree of existing legislation is necessary before one can infer that Parliament did not intend that public bodies should be free to act in an area? This is not an impossible question to answer. Certainly the courts are familiar with the method of inferring Parliament's intent from a statutory framework. If Thomas J's view were adopted, the courts would probably be capable of determining whether a matter had been so legislated that a residual freedom in that area had been extinguished. This approach has parallels to the abeyance of the royal prerogative in matters that have been legislated in *Attorney-General v De Keyser's Royal Hotel*.<sup>137</sup>

However, this particular point does not function as a middle ground. Instead it merely serves as a supplement to the *Malone* view. It is an argument to consider if the *Malone* view is favoured rather than an approach that reconciles residual freedom and positive authorisation.

Sir Edmund's suggestions do not work as useful compromises. The next option to consider is limiting the residual freedom of public bodies.

### *B) Placing Purpose Limits on Residual Freedom*

Another possible middle ground is that public bodies have a residual freedom to act without positive authorisation, but only in ways that are "for the public benefit, and for identifiably 'governmental' purposes within limits set by law".<sup>138</sup> This position would give public bodies the same capacity to act as a private individual, but they would be limited in how they may use that capacity.

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<sup>137</sup> [1920] AC 508.

<sup>138</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government*, above n 28, at [48].

Lord Justice Carnwath suggested this approach in the *Shrewsbury Borough Council*<sup>139</sup> case. That case involved the Secretary of State for Local Government wanting to merge different levels of local government across England. The Secretary of State needed specific legislation to gain the power to do this. Before the legislation was passed she issued 'invitations documents' to local councils inviting them to make submissions based on given criteria as to how the new councils should be organised. The Secretary received some submissions and stated she was 'minded to implement' them once the legislation had been passed. Some councils that were to be abolished under the Secretary's finalised proposals challenged the Secretary's actions. One of the grounds on which they challenged was that the Secretary did not have any authorisation to issue the 'invitations documents' without statutory authority.<sup>140</sup> The case was another instance of whether a person within a public body had freedom to do whatever they wished as long as long as it was not unlawful, or whether positive authorisation was required. The English Court of Appeal in *Shrewsbury* was bound by the decision in *Ex Parte C*<sup>141</sup> – the case involving the Department of Health's employment register – that held that a public body may act in any way that does not transgress any law. The Secretary's actions in issuing and considering the invitations documents were found to be lawful.

In his judgment, Carnwath LJ proposed that a public body's freedom to act should be recognised but restricted to acting for the public benefit or for governmental purposes. His Honour offered no further elaboration of what the public benefit or governmental purposes might be except to say that the Secretary's actions in issuing invitations documents "were undoubtedly 'governmental' and undertaken for the public benefit as she perceived it."<sup>142</sup> This focusing of a public body's residual freedom to act has parallels with Duguit's concept of public service (see Chapter Two). Such a principle changes the question from "Is there freedom to act?" to the equally difficult "Is the act governmental or in the public benefit?" It is hard to see where a generally applicable line can usefully be drawn. Certainly allowing a Minister to gather as much information as possible in

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<sup>139</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government*, above n 28.

<sup>140</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government*, above n 28, at [17].

<sup>141</sup> *R v Secretary of State for Health, ex parte C*, above n 27.

<sup>142</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government* [2008], above n 28, at [49].

order to make an informed decision as happened in *Shrewsbury* is for the benefit of the public. However the same can arguably be said about the keeping of the list in *Ex Parte C*: it was of public benefit that employers knew about potential employees' history of disciplinary offences in order to protect children. The same argument can be made about the surveillance in *Hamed*: that the video surveillance was required as part of the police's investigation of serious crimes which was of benefit to the public. All of the instances of action by public bodies from which concern about intrusion into individual liberty might arise can be described as being of public benefit. Some might argue that these kinds of actions involve so much interference with individuals that public bodies should be prevented from acting, even in the public interest, without positive authorisation. That may not have been the case in the actions in the *Shrewsbury* case, but the consequence of the approach suggested by Carnwath LJ does not result in an effective limitation on public bodies' residual freedom to act.

Indeed, the second requirement that Carnwath LJ's principle would place on a public body's use of its residual freedom may end up limiting the most useful aspects of that residual freedom. The use of the term 'governmental' was not given further definition by His Honour, but the issuing of invitations documents was described as meeting this criterion.<sup>143</sup> A public body's residual freedom usefully allows it to purchase paperclips or carry out any other number of everyday private tasks for which it has not been given positive authorisation. Restricting a public body's residual freedom to 'governmental' tasks would eliminate its ability to carry out the everyday non-governmental tasks that enable its smooth operation. For example, the purchasing of paperclips or the renting of office space are non-governmental tasks; vastly different to the consultation of local government,<sup>144</sup> or undertaking law enforcement activities.<sup>145</sup> Importantly, this only limits public bodies' freedom to act to tasks that are governmental when carried out by those public bodies. There is no converse principle for private individuals. A private individual has the freedom to send out his or her own consultation documents to a council, and to buy paperclips. It is only public bodies that would be limited. Under

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<sup>143</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government* [2008], above n 28, at [49].

<sup>144</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government* [2008], above n 28.

<sup>145</sup> *Lorigan v R*, above n 30.

Carnwath LJ's approach, a public body's residual freedom would not extend to the purchase of paperclips. The public body would need positive authorisation to do this.

Lord Justice Carnwath's approach would not restrict public bodies' residual freedom to maintain lists or undertake video surveillance as these arguably have public benefit. At the same time, his Honour's approach would prohibit public bodies from using their residual freedom to undertake useful and necessary private functions. In *Shrewsbury*, Richards LJ expressed concern that Carnwath LJ's approach "would have to be so wide as to be of no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government."<sup>146</sup> This is certainly the case. Limiting a public body's residual freedom to act without positive authorisation to instances where the action is for the public benefit and governmental in nature does not serve as a useful middle ground between the two poles of the question. Lord Justice Carnwath conceded that *Ex Parte C* was binding and that whether public bodies have a residual freedom to act "is not a debate which can be continued usefully at this level."<sup>147</sup> When the debate is continued Carnwath LJ's approach should not be adopted.

### *C) Positive Authorisation Except For Incidental Functions*

DeSmith would allow public bodies be able to carry out "incidental functions that are not in conflict with its statutory powers" while also endorsing the principle in *Fewings*.<sup>148</sup> Chief Justice Elias proposes a similar, very restricted freedom of action when she states that positive authorisation is necessary "except... as is purely incidental to the exercise of statutory or prerogative powers."<sup>149</sup> The term 'incidental function' will be used to describe this possible exception to the positive authorisation requirement.

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<sup>146</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government*, above n 28, at [79].

<sup>147</sup> *R (on the application of Shrewsbury and Atcham Borough Council and another) v Secretary of State for Communities and Local Government* [2008], above n 28, at [49].

<sup>148</sup> Lord Woolf and others *DeSmith's Judicial Review* (6<sup>th</sup> ed, Sweet & Maxwell, London, 2007) at [5-025].

<sup>149</sup> *Hamed (and Ors) v R*, above n 2, at [24].

### 1. What is an 'incidental function'?

Neither DeSmith nor Elias CJ offer any elaboration as to what they mean by incidental functions. The different phrasings allow for two possible ways in which to conceive the term. Chief Justice Elias would restrict the exception to functions incidental to the exercise of identified powers. That is, a chief power must first be positively conferred by statute or common law before a function incidental to that power could be construed. A public body would then have freedom to act to fulfil that function on the basis that the true power has been positively authorised by a statute or the common law.

In contrast, DeSmith's conception does not tie the incidental function to the exercise of a positively authorised power. Instead, it would merely restrict incidental function to those functions that are not in conflict with statutory powers. It is difficult to see what DeSmith means by this. With its negative phrasing it ends up resembling the *Malone* principle. The freedom this would confer would completely contradict the general positive authorisation requirement that DeSmith supports. Taking the two aspects together, on DeSmith's account a public body could only act in a manner positively authorised by law *and* may carry out any incidental function as long as it does not conflict with its positively authorised powers. This is combining both the *Fewings* principle and the *Malone* principle, but in a way that leads to absurdity rather than a workable middle ground. Where a public body has not been authorised to act it may have freedom to act, but in an area where it has been authorised it must restrict itself only to those powers. Unlike Elias CJ's conception of incidental function there is no tying of the incidental function to a power that has been positively authorised. The result is an entirely contradictory combination of the two possible approaches.

### 2. DeSmith's account as incidental to a power's purpose?

In order to be workable, DeSmith's incidental function exception needs something to which it can be incidental. On DeSmith's account, incidental functions cannot be incidental to the authorised powers; saying that the incidental function must not conflict specifically rejects this idea. One possible interpretation is to say that the functions that

a public body may carry out without positive authorisation are those that are incidental to the purpose of the powers conferred. This ends up very similar to Elias CJ's incidental function exception. Asking whether a function is incidental to a power entails examining that power's purpose.

### *3. The trouble with a function incidental to a power's purpose*

The use of incidental function as a middle ground encounters one of the same difficulties as Carnwath LJ's approach. Allowing action in relation to a purpose creates problems when we attempt to define which actions are related to the purpose and which are not. The *Malone* view requires positive authorisation if a legal right would be infringed by the action of a public body since "[r]esidual freedom to act can never justify a breach of protected rights."<sup>150</sup> From this, the *Malone* view would define incidental functions as those that do not infringe upon the rights of a private individual. The positive authorisation view, concerned with a broader protection of individual liberty, would insist that the *Malone* definition of a legal right is not one that would confer sufficient protection. The final chapter examines this point of contention between the two views.

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<sup>150</sup> *R v Ngan*, above n 17, at [97].

## ***VI) Chapter Five: Towards a Malone Framework***

### *A) No Infringement of Rights*

Proponents of the Malone view argue that a public body's residual freedom to act without positive authorisation will not override common law rights in the event of conflict<sup>151</sup> and nor will they override statutory rights. For example, a public body's residual freedom cannot justify its servants committing a trespass or a crime. Therefore, argue proponents of the Malone view, allowing public bodies residual freedom does not mean they can infringe upon any legal rights of a private individual. The legal rights an individual possesses are only those that the law forbids or provides a remedy against. In *Hamed*, the Supreme Court was unanimous that on most occasions the police had acted unlawfully when they trespassed on land to maintain and retrieve their video surveillance.<sup>152</sup> Justice Tipping, taking the residual freedom approach from *R v Ngan*, took no issue with the police's use of covert video surveillance.<sup>153</sup> A private individual could do this, it was not against any law, and the use of video surveillance did not offend any individual's rights because the law did not recognise this action as a crime or tort.

Chief Justice Elias held that the use of covert video surveillance by the police without positive authorisation meant that the search was unlawful. This point is easily lost as her Honour also agreed with other members of the Supreme Court that that the use of covert video surveillance in this case constituted unreasonable search and seizure.<sup>154</sup> However, for the purposes of isolating the line of reasoning really at issue, consider a situation where the use of covert video surveillance search was held to be a reasonable search. The use of video surveillance in this instance did not contravene the s 21 right to be free from unreasonable search and seizure. Further, the police did not commit a trespass in their use of the video surveillance, nor did they infringe any of the suspects' other rights protected at common law. The final factor is that there was no privacy legislation forbidding the use video surveillance so no rights derived from statutory protections are being infringed. In this scenario Elias CJ struggles to identify a legal right within our

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<sup>151</sup> Harris (1992), above n 37, at 627.

<sup>152</sup> *Hamed (and Ors) v R*, above n 2, at [87].

<sup>153</sup> *Hamed (and Ors) v R*, above n 2, at [217].

<sup>154</sup> *Hamed (and Ors) v R*, above n 2, at [8].



domestic law that is infringed solely by virtue of the police using video surveillance in an otherwise lawful way.

Similarly in *Ex Parte C*<sup>155</sup>, there is no infringement on legal rights by the Department's creation and maintenance of the list. Mr C had no right to employment which could be infringed.<sup>156</sup> The most that could be said was that "a stigma of some sort"<sup>157</sup> would attach to Mr C.

This is the strongest point that can be made about the intrusion by public bodies into a private individual's non-legal interests. People might feel a sense of unease at the idea that a government department might be able to maintain a list such as the one in *Ex Parte C* without some kind of authorisation (and therefore oversight) by a representative body like Parliament. But if there is no legal consequence – no infringement of an individual's legal rights – then it is a sense of unease that the law does not currently address.

The terms 'infringing' and 'intruding' are used specifically. The leasing of office space or the entering of a contract under the auspices of a residual freedom affects the rights of an individual. A contract confers and removes the private legal rights of an individual. However, in these instances the individual's rights are affected consensually. It is for this reason that, on the *Malone* account, the ability for a public body to act in this way is described as "neither politically nor legally controversial"<sup>158</sup> and such actions do not even invite the same sense of unease as actions infringing an individual's rights.

Proponents of positive authorisation still have a broad argument for their principle. The reasons why positive authorisation could be necessary for lawful public body action was discussed in Chapter Two. That is, the maximization of the liberty of the individual is a valuable and this can be achieved best by restricting the liberty of the state. The most effective way to accomplish this is through denying equivalent liberty to the state and requiring public bodies to identify positive authorisation for their actions. But this is a

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<sup>155</sup> *R v Secretary of State for Health, ex parte C*, above n 27.

<sup>156</sup> *R v Secretary of State for Health, ex parte C*, above n 27, at [21].

<sup>157</sup> *R v Secretary of State for Health, ex parte C*, above n 27 at [31].

<sup>158</sup> Lester & Weait, above n 39, at 419.

broad, policy-based argument. One can agree or disagree that individual liberty is best achieved by requiring positive authorisation for public body action. To move from a political justification to a legal justification for their view, those in favour of positive authorisation must point to some legal wrong that *Malone* would allow but that positive authorisation would solve. What, then, can be said in support of the idea that allowing public bodies residual freedom of action creates some legal wrong?

## *B) Elias CJ's Response*

### *1) NZBORA*

Chief Justice Elias' response to this question is to argue that "Section 21 [of NZBORA] is properly interpreted to require authority of law for State intrusion upon personal freedom."<sup>159</sup> Her Honour contends that this means that positive authorisation is required for the police to undertake a search using video surveillance.

### *2) Does s 21 protect a general interest of personal freedom?*

Chief Justice Elias begins her argument by claiming that there is "no material difference"<sup>160</sup> between the wording of s 21 NZBORA and Article 17 of the International Covenant on Civil and Political Rights<sup>161</sup> (ICCPR) and Article 8 of the European Convention on Human Rights<sup>162</sup> (EConHR). Article 17 ICCPR guarantees protection from "arbitrary or unlawful interference with ... privacy" and Article 8 EConHR guarantees "no interference [with the right to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society". By contrast, s 21 NZBORA guarantees that "[e]veryone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

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<sup>159</sup> *Hamed (and Ors) v R*, above n 2, at [36].

<sup>160</sup> *Hamed (and Ors) v R*, above n 2, at [34].

<sup>161</sup> International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976).

<sup>162</sup> European Convention on Human Rights (signed 4 November 1950, entered into force 3 September 1953).

The ambit of the articles of the international instruments is considerably wider than s 21. Justice Blanchard in *R v Gardiner* stated that broader privacy concerns and personal freedoms are not encompassed by s 21, which is restricted solely to unreasonable searches and seizures.<sup>163</sup> The infringement of privacy can inform unreasonableness but “it is a much longer step to argue that either this country’s ratification of the Covenant or the enactment of the Bill of Rights which does not adopt the same relevant language has rendered video surveillance (otherwise ungoverned by domestic law) unlawful.”<sup>164</sup>

### 3) Acceptance of a *Malone* framework by Elias CJ

Chief Justice Elias disagreed with the decision in *Gardiner* and argued that a protection of personal freedom is necessary to meet New Zealand’s obligations.<sup>165</sup> Reading s 21 in this way arguably challenges Parliament’s specific wording of the section. The legitimacy of this judicial interpretation can be put to one side however because this argument still does not assist proponents of positive authorisation. Chief Justice Elias has switched to a *Malone*-type argument. Actually, a legal right exists to prevent searches using video surveillance, her Honour claims. Therefore, the police cannot rely on residual authority to transgress this right, and must instead point to positive authorisation.

When Chief Justice Elias takes this position she operates within the framework of *Malone*. The only effective difference between her Honour’s position and that of a proponent of *Malone* is that they differ at how wide they cast legal protections. That disagreement may produce different legal results as judges differ in their attitudes to the interpretation of legal sources like NZBORA. All of those results, however, are being produced on the understanding that public bodies have a residual freedom to act without authorisation in a manner that does not infringe any individual’s legal rights.

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<sup>163</sup> *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 134.

<sup>164</sup> *R v Gardiner*, above n 163, at 134.

<sup>165</sup> *Hamed (and Ors) v R*, above n 2, at [36].

### *C) The Effect on the Search for a Middle Ground*

At the end of Chapter Four a definition of ‘incidental function’ was needed. The goal was to stake out a middle ground where positive authorisation is needed for every action by a public body except those that are merely incidental functions, as suggested by Elias CJ in *Hamed*.<sup>166</sup> Chief Justice Elias looked to NZBORA and international instruments as a method of constructing a broader interest in liberty to be protected, which would have had the effect of shrinking the class of incidental functions. Her Honour’s attempts to do this were unsuccessful and saw her accepting *Malone* reasoning. The result is that the definition of incidental function is entirely consistent with the *Malone* view. An incidental function is only that which does not infringe an individual’s legal rights. The middle ground proposed by Elias CJ, then, does not function as a middle ground between the two views. In reality it is a complete concession that public bodies have a residual freedom to act.

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<sup>166</sup> *Hamed (and Ors) v R*, above n 2, at [24].

## ***VII) Conclusion***

This dissertation began by describing and evaluating two different views in the positive authorisation debate. The *Malone* view holds that public bodies have a residual freedom to act without positive authorisation in a way that does not transgress the law or infringe an individual's legal rights. The positive authorisation view proposed by Elias CJ in *Hamed* requires positive authorisation in law as a precondition for lawful action by public bodies.

The *Malone* view, unlike the positive authorisation account, allows the effective functioning of government. It also fits well within the accepted legal and constitutional framework. By contrast the positive authorisation account is unworkable in its absolute form, and any softening of either view to form a middle ground does not produce a compromise. Rather, the middle grounds are actually restatements of one of the two views.

The major failing of the positive authorisation view is its inability to identify individuals' legal interests that require protection from infringement by public bodies. The residual nature of public bodies' freedom to act prevents that freedom from being used to infringe upon individuals' legal rights. Chief Justice Elias argues that NZBORA protects a broad interest in personal freedom. To make this argument is to accept the *Malone* view however, as the *Malone* view insists on positive authorisation if public bodies are to infringe individuals' legal rights.

By failing in this argument, Elias CJ also fails to justify her proposed middle ground – that positive authorisation is necessary for public bodies to act lawfully except where such actions are merely incidental functions. The definition of 'incidental function' is an act by a public body that does not infringe the legal rights of any person. This is exactly what the residual freedom authorises. Chief Justice Elias' middle ground is therefore an acceptance of the *Malone* view.

Proponents of positive authorisation can still insist on no middle ground. That is, all actions taken by a public body must be positively authorised. However, this position is political rather than legal one. It relies on the acceptance of the idea that positive authorisation is the most effective method to maximise individual liberty. The positive authorisation view does not solve any legal wrong. Its failure to do so means that legal decision-makers should not implement the positive authorisation view. Instead, the *Malone* view, which has previously found more favour with judges, should continue to be applied by the courts.

If there is disquiet that public bodies have the freedom to act in a certain way then Parliament can intervene and pass legislation either restricting their actions, or positively authorising them to act. For example, since the decision in *Hamed*, the police have been authorised by Parliament to use video surveillance.<sup>167</sup>

However, the *Malone* view is not perfect. Chapter Two demonstrated that the *Malone* view is capable of producing seemingly inconsistent results based on whether or not a body was created by statute. Although such occasional inconsistencies might be construed as undesirable consequences of the *Malone* view, these are still outweighed by its benefits. In particular, the *Malone* view provides for the effective functioning of government and the adequate safeguarding of individuals' legal rights all within a model that fits within the current understanding of the legal liability of public bodies.

Public bodies should be understood to have a residual freedom to act. They should not require positive authorisation for every action.

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<sup>167</sup> Search and Surveillance Act 2012, ss 5(a), 49.

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