ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS

LAW COMMISSION
LAW COM No 226

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The Law Commission

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ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS

Item 10 of the Fifth Programme of Law Reform: Judicial Review

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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LAW COMMISSION

ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS

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LAW COMMISSION

Item 10 of the Fifth Programme of Law Reform: Judicial Review

ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

1.1 In this report we make recommendations for reform of the procedures and forms of relief available in judicial review proceedings. It is the result of our examination of:

> "the mechanism of judicial review, and the connected subject of statutory appeals and applications to quash made to the High Court from inferior courts, tribunals and other bodies"

under our fifth programme of law reform.[1]

1.2 Our 1976 report on Remedies in Administrative Law[2] paved the way for the modern procedure in Order 53 of the Rules of the Supreme Court (RSC). The procedural mechanisms put in place in 1977 and revised in 1980[3] have had to be applied in the context of wide ranging changes in the scope of judicial review, both in terms of the substantive grounds for review and the numbers of applications for judicial review brought before the courts. There have been a number of calls for further reform in this field including those from the Committee of the JUSTICE-All Souls Review of Administrative Law[4] and Lord Woolf,[5] notably in his Hamlyn lectures in 1989. The development of the requirement that as a general rule claims for injunctions and declarations relating essentially to all public law matters must be brought by an application for judicial review (which we call the principle of "procedural exclusivity") has led to concern that needless litigation is generated over procedural issues, rather than the substance of a dispute.

[1] (1991) Law Com No 200.

[2] Report on Remedies in Administrative Law (1976) Law Com No 73.

[3] SI 1977 No 1955; SI 1980 No 2000. See also Supreme Court Act 1981, s 31.

[4] *Administrative Justice: Some Necessary Reforms* (1988).

[5] *Protection of the Public - A New Challenge* (1990) (hereafter *"Hamlyn lectures"*), and "Judicial Review: A Possible Programme for Reform", [1992] PL 221. See also "A Hotchpotch of Appeals - the Need for a Blender" (1988) 7 CJQ 44.

1.3 In our programme we chose not to look at the substantive grounds for judicial review, which we believe should continue to be the subject of judicial development. The recommendations in this report are designed to ensure that continuing development of the grounds for judicial review is facilitated by an effective procedural framework.

1.4 In 1993 we published a consultation paper which reviewed the operation of the judicial review procedure and made a number of provisional recommendations.[6] Our consideration of the issues was set against the background of three policy interests: (i) the importance of vindicating the rule of law, (ii) the need for speed and certainty in administrative decision-making and (iii) the private interest of individual litigants in obtaining a remedy for their grievances.[7] It was also set against the need to take account of the requirements of European Community Law and our international obligations under the European Convention on Human Rights.

1.5 The first part of our consultation paper dealt with judicial review. We did not consider that fundamental changes were needed but sought to suggest improvements to the procedural system which had enabled and indeed facilitated the many developments since its introduction in 1977. Our provisional conclusions favoured broad access to the judicial review procedure and effective and flexible remedies, including interim relief against ministers and government departments, advisory declarations and the extension of the ability to combine private law monetary remedies with an application for judicial review. We made suggestions to reduce technicality including that resulting from the principle of procedural exclusivity. We favoured the retention of the requirement of leave to apply for judicial review but made a number of suggestions to improve its operation in practice. We were very concerned about the delays in applications for judicial review which, at the time our consultation paper was published, were approaching two years in cases for which expedition was not ordered. However, we believed that it would be wrong to narrow the rules governing the availability of judicial review solely to meet problems of delay.

1.6 In the second part of our consultation paper, dealing with statutory appeals, we considered whether there was scope for rationalising the great array of statutory provisions which give access to the High Court on appeal or by case stated or by application from the decision of an inferior court, tribunal or other body.

1.7 Our examination of this area of the law and the issues discussed in that paper attracted wide interest and we received 147 written responses from the judiciary and legal practitioners, central and local government, interest groups and trade unions,

[6] Administrative Law: Judicial Review and Statutory Appeals, Consultation Paper No 126.

[7] *Ibid*, at para 2.3.

regulators and ombudsmen, tribunals and academics. We were particularly grateful for the very full submissions from those with considerable experience of judicial review and other Crown Office proceedings and the large number of responses from local authorities and individuals working in local government. A list of those who responded to our consultation paper appears in Appendix F below.

1.8 Additionally, during the consultation period a conference to discuss our proposals was held at Robinson College, Cambridge and two seminars were held at the Institute of Advanced Legal Studies, London. A list of the papers presented at these meetings and those attending appears in Appendix G below. The consultation paper also attracted attention in the professional and academic periodical literature, some of which was based on material first presented at the conference and seminars.[8] Meetings also took place with some of the nominated judges of the Queen's Bench Division , some of the Chairmen and Special Commissioners at the Combined Tax Tribunals Centre, representatives of the Legal Aid Board, the Lord Chancellor's Department, the Department of the Environment, the Head of the Crown Office and representatives of the Treasury Solicitor's Working Group which responded to the consultation paper.

1.9 The great majority of consultees welcomed and endorsed the general approach of the first part of the consultation paper and the public policy interests upon which we based our provisional proposals. There was, however, less support for rationalisation of the many statutory rights of appeal. In its Annual Report for 1992-93, the Council on Tribunals stated that "the pursuit of uniformity for its own sake is undesirable" and that in "the absence of evidence that the difference in language [between the grounds of appeal from tribunals and challenges to administrative orders and decisions] has given rise to difficulties, we would not lightly interfere with the established grounds of challenge".[9] In the light of these responses, we have only felt able to make very limited proposals in this area.

[8] Among the articles published were: P Cane, "The Law Commission on Judicial Review" (1993) 56 MLR 887; C Emery, "Judicial Review and Statutory Appeals - Options for Reform" [1993] PL 262; M Partington, "Reforming Judicial Review: the Impact on Homeless Persons Cases" [1994] JSWFL 47; L Bridges, "The reform of judicial review" [1993] Legal Action, December, 7; J F Avery Jones, "Tax Appeals: the case for reform" [1994] British Tax Review 3; A Tanney, "Procedural Exclusivity in Administrative Law" [1994] PL 51; A Le Sueur, "Should we abolish the writ of habeas corpus?" [1992] PL 13; M Shrimpton, "In defence of habeas corpus" [1993] PL 24; "Improving the Effectiveness of Judicial Review" New Law Journal, January 29 1993, 119; "Summary of Law Commission Consultation Paper No 126: Judicial Review and Statutory Appeals" (1993) JP 157(7) 110; "Improving the effectiveness of judicial review" (1993) Bus LR 14(3) 67 - 68; "Reform of judicial review procedures" (1993) IBFL 11(10) 112 - 113; A Watson, "Law Commission Consultation Paper No 126 on procedural reform of judicial review" (1993) Lit 12, 248; "Administrative Law: Judicial Review and Statutory Appeals: the main provisions of Law Commission Consultation Paper No 126" (1993) WL 4(5) 143 - 146; "Judicial Review: Comment & Current Topics" (1993) 137 SJ 56.

[9] Para 1.55.

1.10 Since the publication of our consultation paper there have been a number of important developments. The most significant was the House of Lords decision in *Re M*[10] that, in judicial review proceedings, ministers and government departments are subject to the contempt jurisdiction of the court and that interim injunctions can be made against them. There has also been a concerted attempt to deal with the problem of delay although as at the end of July 1994 there is still a projected waiting time of 12 months for hearings before a single judge after the respondents have filed their affidavit evidence in response to the application.

1.11 Another significant development is that we now have more information about the use and operation of the judicial review procedure. The Public Law Project published the first findings of its empirical study of access to and the use of judicial review.[11] This *inter alia* indicated that the requirement of leave to move for judicial review is a significant filter but that it was being operated with considerable variation in approach amongst the judges during the period under review.[12] It also identified the large number of cases[13] that were withdrawn prior to reaching a substantive hearing. In the period of the study over 60% of homelessness cases were so withdrawn. This suggested that the present procedures, and the leave requirement in particular, operate as a disincentive to public authorities to review their decisions at an early stage with a view to reaching settlements with prospective applicants for judicial review. The study also confirmed what many experienced practitioners had known, ie that the "explosion" in the use of judicial review has been limited to two fields in particular, immigration and homelessness, and suggested that the limited use of judicial review in many areas in which it is potentially available may indicate that access to the procedure is a greater problem than is usually assumed.

1.12 Our main proposals for reform are:

- The leave stage of applications should revert to being, as it was always intended to be, an informal stage of the procedure conducted almost entirely on paper.
- The rules on standing should expressly refer to the public interest as well as to the applicant's link with the subject-matter of the case, so that it is clear that in appropriate cases applications may be brought by interest groups as well as by individuals adversely affected by an administrative decision.
- The availability of interim relief against ministers and government departments should be put beyond doubt.

[10] [1994] 1 AC 377.

[11] M Sunkin, L Bridges and G Mészáros, *Judicial Review in Perspective* (1993) Public Law Project.

[12] The Public Law Project data covers the handling of cases first initiated in three periods: 1987, 1988 and the first quarter of 1991.

[13] Ie cases in which leave had been granted.

- There should be a clear statement that the court has jurisdiction to make interim and advisory declarations in appropriate cases.
- There should be a new provision on time limits replacing the present confusing and difficult provisions.
- There should be provision for private law claims in debt and restitution to be available in judicial review proceedings. At present only awards of damages may be made in such proceedings.
- A right of appeal to a court or independent tribunal in homelessness cases should be created.

1.13 We also recommend certain changes of nomenclature in order to make the function and nature of the prerogative orders clear to non-lawyers and to remove any perception that a citizen seeking judicial review is a mere supplicant. Thus, we recommend that prerogative relief should be granted by mandatory, prohibiting or quashing orders, rather than by mandamus, prohibition and certiorari[14] and that the filtering stage, the need for which we accept, should be called "preliminary consideration" rather than "leave".[15]

1.14 The rest of this report is arranged as follows:
Part II deals with a number of general considerations, including public policy, the European dimension and case-load pressure and management.
Part III discusses procedural exclusivity.
Part IV deals with the initial stage of an application for judicial review.
Part V is concerned with the filtering mechanism: it is here that we consider the preliminary consideration of applications, standing, time limits, and the exhaustion of alternative remedies.
Part VI considers interim relief.
Part VII looks at interlocutory proceedings, and in particular discovery.
Part VIII deals with remedies including substitution of an order by the court for that of an impugned decision and the availability of private law claims in debt and for restitution in judicial review proceedings.
Part IX considers renewed applications and appeals.
Part X looks at costs.
Part XI considers the writ of habeas corpus.
Part XII deals with statutory appeals.
Part XIII summarises the proposals for reform contained in Parts I to XII.
Appendices: A: - Draft Bill and Draft Rules; B: - Draft Forms; C: - Case-load management issues and statistics relating to Crown Office case-load as at the end of July 1994; D: - Time limits: EC Law and other jurisdictions; E: - Model for statutory application to quash; F: - List of those who responded to Consultation

[14] See paras 8.1 - 8.3 below.

[15] See paras 5.6 - 5.8 below.

Paper No 126, G: - List of papers presented at Robinson Conference and Institute of Advanced Legal Studies seminars and names of those who attended both.

1.15 In our examination of this subject we have received valuable assistance from Sir Derek Oulton GCB, QC, who acted as our consultant, from John Avery-Jones and Richard Gordon QC for advice on statutory appeals, from Dr Christopher Forsyth and Professor Terence Daintith who organised the meetings at Robinson College and the Institute of Advanced Legal Studies, and from Lynne Knapman, Head of the Crown Office for her invaluable assistance in providing statistics. We are most grateful to them for their advice and help.

PART II
GENERAL CONSIDERATIONS

Public Policy[1]

2.1 The way in which individual aspects of the supervisory jurisdiction by way of judicial review operate in practice, most particularly in relation to procedural exclusivity,[2] time limits[3] and interim relief,[4] shows that policy is a continual theme in the public law sphere. Judicial review often involves values and policy interests, which must be balanced against and may transcend the individual interests, which are normally the subject of litigation between private citizens. It is also a feature of the supervisory jurisdiction that its remedies are discretionary.[5]

2.2 In making our recommendations for reform of the judicial review procedure and its remedies we have had to form a view about the proper balance in relation both to particular matters and overall between the interests of the individuals affected by a decision and public interests. For this reason, the parts of the law that we have reviewed and our recommendations, although in one sense procedural, have an important bearing on the limitations on the substantive relief provided by judicial review.

2.3 The relevant public policy interests include:

(a) the importance of vindicating the rule of law, so that public law bodies take lawful decisions and are prevented from relying on invalid decisions;

(b) the need for speed and certainty in administrative decision-making in cases where the whole community, or large sections of it, will be affected by the decisions of public law bodies;

(c) the private interest of individual litigants in obtaining a remedy for their grievances.

There is also in our view a public interest in the prompt adjudication of disputes through the courts.

[1] This section is largely based on paras 2.1 - 2.7 of our consultation paper. Consultees agreed that we had identified the relevant policy factors.

[2] See Judicial Review and Statutory Appeals, Consultation Paper No 126, section 3.

[3] *Ibid*, section 4.

[4] *Ibid*, section 6.

[5] *Ibid*, section 14.

2.4 The balance between these interests is reflected by the specific requirements of the Order 53 procedure and the approach of the court to the exercise of its discretion to grant or refuse a public law remedy. It may also be affected by the nature and context of a case. Thus, the factor of certainty will be more important (although not necessarily decisive) where the act that is challenged is a general one, such as an administrative rule or a decision affecting a wide range of persons who may have relied on it.

2.5 The public interest in the vindication of the rule of law underpins the very existence of the prerogative jurisdiction and its supervisory role over inferior courts and decision-makers. The conferral of decision-making powers on lower courts, tribunals, ministers and administrators is to a certain extent premised upon the residual jurisdiction of the High Court to supervise and correct errors. It is in our view important for judicial review to be seen as a residual jurisdiction and, save in exceptional circumstances, not one to be invoked where there is an alternative legal remedy.

2.6 Many of the problematic issues concerning the present procedure reflect the tensions between differing interests. Lord Diplock, in *O'Reilly v Mackman*,[6] commented that, both before and after the 1977 reforms, the procedure for judicial review provided respondent decision-making bodies with protection against claims which it was not in the public interest for courts of justice to entertain.

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."[7]

2.7 The public interest in good administration is concerned with the regular flow of consistent decisions, made and published with reasonable dispatch; and in citizens knowing where they stand, and how they can order their affairs in the light of relevant decisions. In *R v Dairy Produce Tribunal, ex p Caswell*,[8] Lloyd LJ stated (in the context of the statutory provision on delay) that for there to be detriment to good administration:[9] "mere inconvenience is not enough. The foreseen consequence must be positive harm".[10] That detriment is a factor does not provide protection against mere inconvenience to the decision-maker or the decision-making

[6] [1983] 2 AC 237, considered in Part III below.

[7] *Ibid*, at 280H-281A.

[8] [1990] 2 AC 738. Delay is considered in Part IV below.

[9] Supreme Court Act 1981, s 31(6).

[10] [1989] 1 WLR 1089, 1100 (CA).

process. It is relevant to look at the wider scene, the impact on others, and the practicability of reopening a decision after a lapse of time.[11] This approach is also relevant to other aspects of the supervisory jurisdiction, in particular the exercise of discretion to grant or refuse a public law remedy.[12]

The European dimension in administrative law reform

2.8 We have also taken account of the principles of European Community law and our international obligations under the European Convention on Human Rights in framing our recommendations.[13]

2.9 By the European Communities Act 1972, directly effective provisions of EC law which give rise to individual rights can be relied on in legal proceedings in the United Kingdom,[14] and questions as to the validity or meaning of a Community provision have to be determined according to EC law principles.[15] National law must not make it impossible or excessively difficult to enforce such rights.[16] Thus, in applying the provisions of RSC, Order 53 and section 31 of the Supreme Court Act 1981, which embody procedures governing access to remedies of substantial significance, EC law principles have to be taken into account in cases involving rights conferred by EC law.

2.10 Although it can be argued that there is nothing wrong in principle with having different rules in cases which involve a question of European law, senior judges have pointed to divergence from EC law as a justification for changing domestic law both in matters of procedure[17] and on questions of substantive law.[18] A majority of those who responded to the consultation paper agreed with our view that differences between the judicial review procedure in domestic English cases and in EC cases

[11] *R v Dairy Produce Tribunal, ex p Caswell* [1990] 2 AC 738, 749-750 (Lord Goff).

[12] See paras 8.17 - 8.21 below.

[13] See paras 2.32, 5.24, 5.33, 5.36, 6.2, 6.5 and Appendix D below.

[14] European Communities Act 1972, s 2(1).

[15] *Ibid*, s 3(1).

[16] Case 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595; Case 222/84 *Johnston v Chief Constable RUC* [1987] QB 129; Case 309/85, *Barra v Belgium* [1988] 2 CMLR 409.

[17] Interim relief against ministers and government departments: *M v Home Office* [1992] QB 270, 306G-307A (Lord Donaldson MR); *Re M* [1994] 1 AC 377, 406-407 (Lord Woolf), and see para 6.3 below.

[18] *Woolwich Equitable Building Society v IRC* [1993] AC 70, 177 (Lord Goff) (restitution of *ultra vires* receipts by public authorities). See also *R v Independent Television Commission, ex p TSW Broadcasting Ltd The Times*, 30 March 1992 (HL) (proportionality *might* be a ground of review where a decision affected fundamental human rights). Cf Jowell and Lester, "Proportionality: Neither Novel Nor Dangerous" in *New Directions in Judicial Review* (1988) 51; Boyron, "Proportionality in English Administrative Law: A Faulty Translation?" (1992) 12 OJLS 237.

need to be justified. None, however, presented any potential difficulties which had not been covered by the consultation paper.[19]

2.11 The European Convention on Human Rights is not enforceable in legal proceedings in the United Kingdom. It is, however, increasingly being regarded as a relevant source of principles or standards where a statute is ambiguous or where the common law is unclear.[20] Although it has been said that the Convention has rarely made a difference to the result at which the Court has arrived,[21] both statute law and common law will be interpreted, so far as possible, with a predilection that such law should conform with its principles.[22] Under the Convention similar considerations to those concerning EC law arise in connection with the entitlement that civil rights and obligations be determined in a fair and public hearing before an independent tribunal within a reasonable time[23] and with the entitlement to an effective remedy before a national authority in respect of rights under the Convention.[24]

Case-load pressure

2.12 When we considered the effect of case-load pressures on law reform options, we pointed to the large increase in applications for leave to move for judicial review

[19] Time limits, interim relief against ministers, and standing were considered.

[20] A Lester, "European Human Rights and the British Constitution" in *The Changing Constitution* (Jowell & Oliver eds)(3rd ed 1994) pp 46-51; N Bratza, "The Treatment and Interpretation of the European Convention on Human Rights: Aspects of Incorporation" in Gardner ed, *European Convention* (1994) p 66.

[21] N Bratza, "The Treatment and Interpretation of the European Convention on Human Rights: Aspects of Incorporation" in Gardner ed, *European Convention* (1994) p 67; C McCrudden and G Chambers, *Individual Rights and the Law in Britain* (1994) pp 573-575. This is sometimes because courts find that a Convention principle is in fact embodied in the common law: eg *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551 (cf [1992] QB 770, 812 per Balcombe LJ); *R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd* [1992] 1 WLR 1289, 1292-1293 (DC).

[22] Eg *R v Miah* [1974] 1 WLR 683 (HL); *AG v Guardian Newspapers* [1987] 1 WLR 1248 (HL).

[23] Article 6(1). There is a large and uncertain body of law on the meaning of "civil rights and obligations". See generally, P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed, 1990), pp 295-307; JES Fawcett, *The Application of the European Convention of Human Rights* (1987), pp 126-199. The term has an autonomous meaning and may include rights not regarded as "private rights" in domestic law. It includes certain rights against public authorities acting as such, for instance concerning the grant, revocation or suspension of a licence to practice a profession or engage in an economic activity (*Konig v Fed Republic of Germany* A 27 (1979-80) 2 EHRR 469; *Benthem v Netherlands* A 97 (1986) 8 EHRR 1) and parental rights against local authorities concerning their children (*O & H v United Kingdom* A 120 (1988) 10 EHRR 82; *W, B & R v United Kingdom* A 121 (1988) 8 EHRR 29, 85).

[24] Article 13. See generally, JES Fawcett, *op cit*, pp 289-294; P van Dijk and GJH van Hoof, *op cit*, pp 294 ff, and 520 ff. It is possible that a requirement of compensation for unlawful administrative action may affect human rights cases before the Strasbourg courts, see imprisonment of non-payers of poll tax cases reported in *The Guardian* July 14 1994.

between 1980 (525) and 1991 (2089) and the delays in hearing cases, which were exceeding two years in 1992.[25] We observed, however, that reform of the procedures for judicial review could only address case-load problems to a limited extent. We invited views on the question whether Parliament ought to provide some form of appeal to a court or tribunal in those types of case where many judicial review applications are now being made because there is no other mechanism for legal challenge.

2.13 On more general questions relating to case-load pressures we invited views on five different options. The first was that the nominated judges of the Queen's Bench Division should regularly sit a minimum of a given number of weeks each year as single judges in the Crown Office List. The second was that more judges in the Queen's Bench Division, or judges in the Family Division or the Chancery Division, might assist with this work. The third was that certain types of judicial review applications would be more appropriately dealt with locally, rather than in London, and could properly be heard by judges other than the nominated judges. The fourth was that certain types of application could properly be dealt with by selected circuit judges and Queen's Counsel sitting as deputy high court judges. Finally, we asked whether certain types of judicial review application might be remitted to the County Court.

2.14 Most of the issues dealt with in the caseload management section of the consultation paper are matters directly concerned with deployment of judicial manpower and relative priorities and, as such, are matters which it is for others to address. Here we set out the responses we received on consultation and express our own views on such issues of principle as arose in this context. We passed on and discussed with the Head of the Crown Office, the lords justices in charge of the Crown Office List and the deployment of high court judges [26] and senior officials at the Lord Chancellor's Department, consultees' suggestions on case-load management issues. We include as Appendix C to this report a more detailed account of some of the case-load management issues we handled in this way.

The Response on Consultation

2.15 There was widespread and almost universal condemnation of the scale of the delays. The periods of delay before a non-expedited substantive hearing were variously described as "completely unacceptable", "intolerable", "reaching scandalous proportions", and "likely to defeat the purpose of taking proceedings". The nominated judges said that they disfigure the present image of judicial review.

[25] Consultation Paper No 126, paras 2.14 - 2.23.

[26] Mann, Kennedy and Simon Brown LJJ.

2.16 In 1993 homelessness (447) and immigration (668) cases made up nearly half the total number of non-criminal judicial review applications for leave.[27] Leave was granted in 40.8% of the homelessness cases, and 23.2% were withdrawn (withdrawal often occurs when the applicant's case is reconsidered).[28] These figures demonstrated the extent to which the resources of the high court (both judges and deputies) were being devoted to homelessness cases because Parliament has provided no other right of recourse to those who were dissatisfied by a local authority's decision.

2.17 A number of consultees, including the Administrative Law Bar Association, the nominated judges and the Lord Chancellor's Department, discussed the desirability of creating an intermediate right of appeal (to a county court or tribunal) in homelessness cases, from which appeal on a point of law might possibly lie to the Court of Appeal. There was also support for a detailed scrutiny of the nature of the immigration cases now coming to the Crown Office. It was put to us that many of them remained disguised appeals on fact, which had nowhere else to go.

2.18 The absence of an internal mechanism of review by a senior official, which can be effective and just,[29] was also identified as contributing to the problems in many types of case where there is no right of appeal. Although reports by the Chief Adjudication Officer and the Council on Tribunals suggest that internal review is not a substitute for an appeal to an independent adjudicative body,[30] it is likely to lead to a better standard of decision-making. In its recent consultation on the right to housing, the Department of the Environment noted that, although local authorities are recommended to have in place arrangements to review their decisions if challenged, they are under no duty to do so.[31] It also stated that the Government

[27] The total was 2414: there were 472 in criminal cases.

[28] According to the Public Law Project's research in the first quarter of 1991 over two thirds of homelessness cases granted leave were subsequently withdrawn. This compares with an overall withdrawal rate of between 27% and 29% over the same period. See M Sunkin, L Bridges, G Mészáros *Judicial Review in Perspective* (1993) p 52.

[29] R Coleman, *Supplementary Benefits and the Administrative Review of Administrative Action* (CPAG Poverty Pamphlet No 7 1970); J Baldwin, N Wikeley and R Young, *Judging Social Security* (1992); G Dallet and R Berthoud, *Challenging Discretion* (1992); T Eardley and R Sainsbury, "Managing Appeals: the Control of Housing Benefit Internal Reviews by Local Authority Officers" (1993) J Soc Policy 461.

[30] Council on Tribunals, Annual Reports, 1989/90, paras 1.2 - 1.14 and (on homelessness) 2.16 - 2.22; 1990/91 paras 1.48 -1.55; 1991/92 paras 1.18 - 1.33; 1992/93 paras 2.92 - 2.93; Annual Reports of the Chief Adjudication Officer on Adjudication Standards (1988/89), (1989/90), (1990/91). See also R Sainsbury, "Internal Reviews and the Weakening of Social Security Claimants" in *Administrative Law and Government Action* (eds H Genn, G Richardson) forthcoming (1994).

[31] Access to Local Authority and Housing Association Tenancies, (Department of the Environment, January 1994), para 16.2.

is considering whether current reliance on judicial review in the High Court should remain the only route of challenge through the courts.[32]

2.19 Some very experienced consultees said that a more sophisticated form of case-based analysis of the Crown Office case-load was needed. It was said that when a particular subject appears to occupy a disproportionate amount of the judges' time, the case for a specialist tribunal to deal with the topic becomes strong if cases are not to be allocated to the wrong level of adjudication.

2.20 Opinions were divided as to whether judicial review cases should be heard outside London.[33] Some consultees pointed to the recent research findings[34] that there was an under-representation of cases from outside London and the South-East and linked this to the unavailability of judges outside that area. Others expressed concerns about inconsistency and the need for a central corps of administrative expertise. Although consultees, on the whole, favoured the use of deputies in planning appeals and homelessness cases, they were reluctant to see their use extended too far and certain weaknesses in the present arrangements were identified.[35] It was suggested that in principle it is more desirable that a full-time judge, specially selected if a circuit judge, should hear these cases, rather than a QC in active practice at the Bar.[36]

Developments since the publication of the consultation paper

2.21 Much has happened since 1992. In particular, seven extra Queen's Bench judges were appointed in 1993, and the Lord Chief Justice has said that he intends to deploy the extra capacity in London to cope with the case-load problems in the Court of Appeal (Criminal Division), the Crown Office and the Employment Appeal Tribunal. He has also put in hand measures designed to reduce the numbers of High Court judges sent on circuit, in order to shift the balance in meeting the needs for judges at this level as between London and centres outside London. During 1994 there has been a regular complement of four single judge courts in addition to two Divisional Courts sitting at any one time and this will continue. The number of nominated judges has recently been increased from 18 to 23, and in January 1994 the nominated judges agreed that appropriate deputies

[32] *Ibid*, para 16.3. We had a meeting with senior officials in the Department of the Environment and the Lord Chancellor's Department in July 1994 to discuss the need to divert cases away from the High Court to a more appropriate intermediate level of review. See, further, paras 2.24 - 2.27 below.

[33] See para 4.1 of Appendix C below.

[34] M Sunkin, L Bridges and G Mészáros, *Judicial Review in Perspective* (1993) Public Law Project pp 21 - 23.

[35] See paras 5.1 - 5.2 of Appendix C below.

[36] See paras 8.20 and 8.21(2) of Appendix C below.

could be appointed to hear any type of Crown Office case, and not merely planning appeals and homelessness cases.

Delay: The Present Position

2.22 The position on 1st January and 31 July 1994, with comparisons with previous years when appropriate, is set out in full in the Appendix on case-load management issues.[37] Broadly speaking, while the numbers of applications for leave to apply for judicial review have continued to climb (2886 in 1993 and 1851 in the first 7 months of 1994 as compared with 1728 in a similar period in 1993), the projected waiting time for a case to be heard, once it has entered Part B of the list[38] has been cut since July 1993 from 21.3 months to 12 months in relation to hearing before single judges, and from 10.2 months to 7.3 months in relation to hearings before a Divisional Court.[39]

Recommendations

2.23 In principle the fact that a particular jurisdiction throws up a large number of judicial review cases is an indicator that a right of appeal or other supervisory review is needed or that, if one exists, it is not regarded as satisfactory by those who use it. Although it is possible that even after the Asylum and Immigration Appeals Act 1993 many asylum and immigration cases remain disguised appeals which have nowhere to go, there is insufficient information for us to make recommendations for reform on this area which has been considered by Parliament recently.

2.24 The position of homelessness cases is different. There is no right of appeal in such cases and the provision of one was supported by many consultees. We accept that the number of homelessness applications for judicial review and their outcome raise serious questions about the standards of decision-making in that area. We also endorse the view that steps should be taken to improve the standard of decision-making and to provide for internal reviews of decisions which are challenged.[40]

2.25 We do not, however, believe that the provision of an internal review can be regarded as a proper substitute for a right of appeal to a court or an independent tribunal. We consider that there should be a right of appeal to a court or an independent tribunal in homelessness cases. This might lie either to an independent tribunal or

[37] See paras 7.1 - 7.6 of Appendix C below.

[38] See Appendix C, para 7.1 B.

[39] See Appendix C, para 7.4.

[40] See para 2.18 above, but note that previous proposals for internal review were described by the Council on Tribunals as "perhaps the least satisfactory arrangement which could be devised in terms either of its adequacy as an appeal mechanism or of its perceived independence": Council on Tribunals, Annual Report for 1989/90, para 2.22.

to the county court.[41] Although there are certain advantages in an appeal to a tribunal, there is no obvious candidate[42] and the cost implications in creating a new tribunal, particularly a locally based one, must be set against the benefits of a tailormade body. The advantages of the county court are that it deals with other housing matters[43] and is a local court.

2.26 The Government has been considering this question as part of its review of the homelessness legislation and has announced that:

> New arrangements for appeal will be established to lessen the present reliance on judicial review. Each local authority will be required to establish a formal mechanism whereby a person can challenge a decision by the authority's officers on the homelessness application. Consideration is being given to how this might relate to any challenge through the courts.

It is not clear whether the formal mechanism proposed is to be an internal review or an appeal to an independent adjudicative body. As indicated, while an internal review is to be welcomed, we do not consider that it can be a proper alternative to an appeal to an independent body. **We recommend the creation of a right of appeal to a court or independent tribunal in homelessness cases.**

2.27 As far as the scope of the appeal is concerned, we believe that, as a minimum, there should be a right of appeal on a point of law, and we so recommend. As an error of law is almost invariably likely to be ultra vires,[44] the effect of this would primarily be a change of forum from the High Court.

Principles relevant to case-load issues

2.28 As indicated, this report is concerned with the nature of the procedural framework for applications for judicial review. Most of the case-load issues raised in the responses to our consultation paper relate to the deployment of judges and relative priorities which are matters for others to consider. Our study of case-load issues, however, also suggested a number of underlying principles which are necessary if the

[41] See M Partington, "Reforming Judicial Review: the Impact on Homeless Persons Cases" [1994] JSWFL 47, 59-62.

[42] It has been said that the obvious candidate would be the Rent Assessment Committees (Partington, *op cit*, at p 60) but those are primarily concerned with determination of rents, questions of valuation, and the terms of statutory periodic tenancies.

[43] Including breach by a local authority of its statutory duty to provide accommodation once the existence of the statutory duty is established: Housing Act 1985, s 65; *Cocks v Thanet DC* [1983] 2 AC 286; *Halsbury's Laws* vol 22, para 513; Partington and Hill, *Housing Law: Cases, Materials and Commentary* (1991) pp 589-597; County Court Practice 1993, p 17.

[44] *Re Racal Communications Ltd* [1981] AC 374. The qualification is needed because of *R v Hull University Visitor, ex p Page* [1993] AC 682 (albeit in the context of domestic visitatorial jurisdiction). See also *Bugg v DPP* [1993] QB 473.

procedural framework is to be effective and which should not be lost sight of. We consider that the system should:

(a) ensure the efficient despatch of business so as to minimise delay;

(b) avoid, so far as practicable, inconsistencies as between different judges in the exercise of discretion, particularly in the operation of the filter to exclude hopeless applications (at present the leave stage); and

(c) be robust enough to ensure not only that the present delays can be reduced to an acceptable level, but that there is no danger of a return to anything resembling the unacceptable position which existed up to the middle of 1993.

We also believe that consideration should be given as to how to:

(d) address the access to justice issues raised by those concerned by the concentration of judicial review in London and the South-East; and

(e) avoid the perceived dangers in the present use of deputy high court judges in the exercise of the Crown Office's jurisdiction.

A number of possible mechanisms to reflect these principles are discussed in Appendix C.

A Duty to Give Reasons

2.29 The continuing momentum in administrative law towards openness of decision making has not yet led to the recognition of a general duty to give reasons.[45] In 1977 the Council of Europe, in a resolution (77(31)) to which the United Kingdom is a party, recommended that reasons be given for administrative acts which adversely affect the rights, liberties, or interests of the person concerned. Since then there have been widespread calls for such a general duty. In 1988 the Committee of the JUSTICE All Souls Review of Administrative Law[46] stated that its absence left "a serious gap in the law". In his Hamlyn lectures in 1989, Lord Woolf stated that he considered that the introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions, would be "the most beneficial improvement which could be made to English administrative law."[47] A number of the consultees to our consultation paper also commented on the importance of a general duty to give reasons. This issue is beyond our remit because it is a question of substantive law.

[45] *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 561, 564-566 (HL). See also *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242, 259, 262. Although it will not be inferred from an absence of reasons that a decision is Wednesbury unreasonable (*R v Secretary of State for Trade and Industry, ex p Lonrho Plc* [1989] 1 WLR 525, 539-540. Cf *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997), bad reasons will invalidate a decision: see eg *R v Criminal Injuries Compensation Board, ex p Gambles The Times* 5 January 1994; *R v Secretary of State for the Home Department, ex p Nelson The Independent* 2 June 1994. See generally M Fordham *Judicial Review Handbook* (1994) P 25.7.

[46] *Administrative Justice: Some Necessary Reforms* (1988) Ch 3.

[47] *Protection of the Public - A New Challenge* (1990) p 92.

2.30 The absence of a general duty to give reasons does, however, affect procedural matters. Because in judicial review proceedings "the vast majority of the cards will start in the authority's hands",[48] the absence of a general duty leads to pressure for greater discovery in judicial review proceedings and makes it more difficult to justify a restrictive approach to discovery.[49] The absence of a general duty may also affect consideration of what form of appeal should lie from a decision. For instance, although there has been criticism of appeals by way of case stated, where, as in the case of the magistrates' court, reasons are not given for decisions, there are clear advantages in the case stated procedure. We therefore welcome the increased willingness by courts to imply a duty to give reasons as part of the duty to act fairly. Moreover, for the reasons given below, we believe that it is likely that there will be further developments in this area.

2.31 The implication of a duty to give reasons may either arise from the circumstances of the individual case[50] or from the shape of the legal and administrative system within which the decision is taken.[51] In the case of courts and tribunals it will readily be made since a duty to give reasons is an incident of the judicial process.[52] The Council of Tribunals has consistently supported the giving of reasons.[53] In the case of administrative decisions the publication of the new Code for Open Government is likely to increase the circumstances in which a duty to give reasons will be implied.[54] One of the stated aims of the Draft Code of Practice on Government Information is:

> to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary.

This is likely to lead to the creation of legitimate expectations that reasons will be given save in the excepted cases.[55] This, together with the fact that courts are

[48] *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941, 945 (Sir John Donaldson MR). See *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 561, 565-566 (HL).

[49] We consider discovery at paras 7.4 - 7.12 below.

[50] *R v Civil Service Appeal Board, ex p Cunningham* [1992] 4 All ER 310 (CA).

[51] *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 561.

[52] *R v Knightsbridge Crown Court, ex p International Sporting Club (London) Ltd* [1982] QB 304. For recent examples, see *R v Snaresbrook Crown Court, ex p Lea The Times* 5 April 1994; *Re a Solicitor (CO/1535/93) The Times* 5 April 1994.

[53] For the most recent comment see Annual Report 1992-93 para 2.94 - 2.103 (in relation to Social Security and Child Support Commissioners).

[54] White Paper on Open Government Cm 2290 (1993).

[55] Even on the narrower approach in *R v Secretary of State for Transport, ex p Richmond-upon-Thames LBC* [1994] 1 WLR 74.

increasingly adverting to the need for there to be an effective means of detecting the kind of error which would entitle the court to intervene by requiring that reasons be given,[56] may mean that there will be little difference in practice from a general duty.[57]

Compensation in Respect of Ultra Vires Acts

2.32 This report does not consider whether public authorities should be liable to compensate those injured by invalid administrative action, although the matter is touched on in the section on interim relief where the absence of compensation for ultra vires action means that it may be more likely that interim relief will be given.[58] The fact that English law does not provide for such compensation has long been the subject of criticism,[59] and a number of factors, including developments in European Community law,[60] suggest that the general unavailability of compensation against public authorities for invalid administrative action[61] requires reconsideration. However, whether compensation should be available and, if so, what its scope should be calls for deeper study than we could conveniently give it in the present exercise. We agree, however, with those consultees to our consultation paper who said that the time is now ripe for such a study.

[56] *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 561, 565-566, (HL).

[57] But cf non-governmental bodies which are not covered by the Code of Practice: *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242.

[58] See para 6.10 below.

[59] For recent examples (although taking different approaches) see the JUSTICE-All Souls Report, *op cit*, ch 11; Woolf, *Hamlyn Lectures*, pp 56-62; *R v Knowsley BC, ex p Maguire* (1992) 90 LGR 653 (Schiemann J). See also, H Street, *Governmental Liability: a comparative study* (1953), pp 78-80; C Harlow, *Compensation and Government Torts* (1982).

[60] Cases C-6/90 & 9/90, *Francovich v Italian Republic* [1992] IRLR 84 (EJC); *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227 (HL). For a more cautious approach to implementation of *Francovich* see PP Craig "*Francovich,* Remedies and the Scope of Damages Liability" (1993) 109 LQR 595 and see *Paola Faccini Dori v Recreb Srl* Case C91/91 (ECJ) *The Times* 4 August 1994.

[61] Eg *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC); *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716. But cf *R v Inland Revenue Commissioners, ex p Matrix-Securities Ltd* [1994] 1 WLR 334, 346 where Lord Griffiths suggested that where a person had spent money in reliance on a clearance which was later withdrawn, fairness required reimbursement and it could be regarded as an abuse of power for the authority, there the revenue, to refuse to do so.

PART III
PROCEDURAL EXCLUSIVITY

3.1 Following the reform of the procedure for judicial review in 1977 the decision of the House of Lords in *O'Reilly v Mackman*[1] six years later introduced what has become known as the principle of procedural exclusivity. Under this principle claims for declarations and injunctions relating essentially to public law matters were, as a general rule, required to be brought under Order 53 and within its procedural constraints.[2] The creation of this principle has given rise to much case law on the boundary between public law and private law rights, including several House of Lords decisions, most recently *Roy v Kensington and Chelsea and Westminster FPC.*[3]

Procedural exclusivity and Order 53's provisions for leave, promptness and discretion

3.2 The requirement of leave and the short time limit under Order 53 which are absent in proceedings by writ or originating summons express divergent policy judgments as to the conditions under which a remedy may be obtained in public law. In our consultation paper we said that it was perhaps inevitable that attempts would be made to prevent the requirements of the prerogative procedure from being circumvented.[4]

3.3 The principle of procedural exclusivity has, however, attracted criticism, in particular:

(a) Any exclusivity rule operates by automatically protecting public authorities, without reference to the actual degree of administrative inconvenience liable to be suffered.

(b) The existence of an exclusivity rule suggests that a sharp distinction can be drawn between private law rights and public law rights which can or cannot be raised in civil litigation. This is not true, and is liable to generate needless litigation over procedural issues, rather than the substance of the dispute.[5]

(c) The exclusivity rule has been justified on the ground that the protection afforded to public authorities by the requirement of leave and short time limits

[1] [1983] 2 AC 237.

[2] The obverse of the rule in *O'Reilly v Mackman* is that judicial review is an inappropriate means of challenging a public authority when that authority is acting in the capacity of a private contracting party, see: *R v East Berkshire Area Health Authority, ex p Walsh* [1985] QB 152; *McClaren v Home Office* [1990] ICR 824.

[3] [1992] 1 AC 624. These decisions were analysed in Consultation Paper No 126, paras 3.5 - 3.15.

[4] Consultation Paper No 126, para 3.4. See also PP Craig, *Administrative Law* (3rd ed, 1994), p 593.

[5] JUSTICE-All Souls Report, *op cit* p 150, para 6.20.

is required to protect public authorities against litigation which prevents them from carrying out their statutory tasks. Although this justification might be thought to be equally applicable to litigation in which the infringement of rights in tort or contract is asserted, public authorities are not accorded special protection from such litigation.[6]

3.4 The majority of those who responded to the consultation paper stated that the present procedure reflected a necessary compromise between the competing public policy interests we had identified.[7] However, a minority[8] considered that a filtering requirement, the need for the applicant to act promptly, and the discretion to refuse relief where there has been delay[9] are neither necessary nor intrinsic to the procedure for making an application for judicial review.

3.5 Those who were dissatisfied with the existing procedure proposed a "unified procedure" under which judicial review proceedings would be commenced by writ and the requirement of leave replaced by a provision enabling a respondent to apply to strike out the application. Although, as will be seen in Part V, we have reservations about the label "leave" and propose a change of nomenclature, we do not favour a "unified procedure". We consider that any "unified procedure" would prevent the expeditious disposal of public law cases by specialist judges and could increase complexity and cost. We also consider that it is essential to filter out hopeless applications for judicial review.[10] A unified procedure with a single criterion of "arguability" and no safeguards might also lead to a more restrictive approach to cases in which the issues are of wide public interest[11] and to a narrower approach to standing.[12] A filter such as the leave requirement gives judges discretion: in a unified procedure such cases might be struck out.

3.6 The abolition of the procedural mechanisms put in place in 1977 and revised in 1980 is not recommended in this report. We are of the view that challenge to the legality of public decisions and acts should be by a separate procedure. It is in the

[6] Eg *Hotson v East Berkshire AHA* [1987] AC 750. See generally, PP Craig, *Administrative Law* (3rd ed, 1994), pp 578-585.

[7] See paras 2.1 - 2.7 above. Although many consultees wished to emphasise that the public policy need to vindicate the rule of law should lie at the heart of any proposed reform.

[8] The most influential of these is Professor Sir William Wade QC, see eg "Exclusivity, Leave and Time Limits" (Cambridge Conference on Law Commission Consultation Paper No 126: Judicial Review and Statutory Appeals - May 1993).

[9] Supreme Court Act 1981, s 31(6).

[10] See further paras 5.1 - 5.5 below.

[11] Eg *R v Environment Secretary, ex p Greenpeace Ltd*, The Independent, 8th March 1994, where leave was allowed even though the criterion of "arguability" was perhaps not met.

[12] *Barrs v Bethell* [1982] Ch 294, 313. On standing outside O 53, see n 17 below, and on standing generally, see paras 5.16 - 5.22 below.

public interest that this procedure emphasises speed, certainty, and the prevention of vexatious litigation. However, we accept that this emphasis may be overridden by an even stronger public interest: that is, the vindication of private law rights where these exist.[13]

3.7 We consider that reform should be by a combination of building on the restrictive approach to the exclusivity principle taken in *Roy v Kensington and Chelsea and Westminster FPC*[14] and facilitating the transfer of issues or proceedings into or out of Order 53 so as to avoid serious detriment to cases involving a combination of public law and private law issues.[15]

The rise and fall of the exclusivity principle

3.8 Before the reforms of 1977, for proceedings to be brought by writ or originating summons there had to be a completely constituted cause of action. Broadly speaking, a plaintiff had to allege the infringement of an individual right, be it contractual, tortious, restitutionary or proprietary, and be it statutory or rooted in the common law.[16] However, plaintiffs were also able to get injunctive relief or a declaration in cases, exemplified by public nuisance, where, although no private right is interfered with, they had suffered special damage peculiar to themselves from interference with a public right.[17] It is arguable that before the 1977 reforms the courts used to stretch this category because of the perceived inadequacies of prerogative relief.[18] However, *O'Reilly v Mackman* was widely taken as doing more than simply reversing this trend because of Lord Diplock's statement that:-

[13] We accept that many of the problems associated with judicial review result from the difficulty in deciding whether or not a statute creates a private law right: see *Cocks v Thanet DC* [1983] 2 AC 286.

[14] [1992] 1 AC 624, 628 - 629 (Lord Bridge), 653 - 655 (Lord Lowry). The factors against the application of procedural exclusivity included: (a) the existence of either a contractual or a statutory private law right which dominated the proceedings; (b) the possibility that the claim (for remuneration) might involve disputed issues of fact; (c) the relief sought (eg payment of money due or restitution) could not be granted in judicial review proceedings; (d) the claim was joined with another claim which was fit to be brought in an action (and had already been successfully prosecuted); (e) the action was not plainly an abuse of process.

[15] It is in such cases that the exclusivity principle has given rise to most difficulties, see paras 3.10 - 3.14 below.

[16] Personal freedoms are protected by torts such as trespass, false imprisonment, malicious prosecution, and assault, or by statute, such as the restrictions on police powers in the Police and Criminal Evidence Act 1984 and the Interception of Communications Act 1985.

[17] *Boyce v Paddington BC* [1903] 1 Ch 109. Where the plaintiff suffers no special damage peculiar to himself or herself, and no private right is interfered with at the same time as interference with the public right only the Attorney-General can assist him by allowing a relator action: see *Gouriet v Union of Post Office Workers* [1978] AC 435.

[18] *O'Reilly v Mackman* [1983] 2 AC 237, 281-2, 285.

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.[19]

It was this statement that was seen as providing that a person might be prevented from bringing a properly constituted cause of action, or raising a defence in one, where the case raised public law issues.

3.9 The application of this exclusivity principle has been considered by the House of Lords five times since the decisions in *O'Reilly* and in *Cocks v Thanet DC*: see *Davey v Spelthorne BC*,[20] *Wandsworth LBC v Winder*,[21] *DPP v Hutchinson*,[22] *Roy v Kensington and Chelsea and Westminster FPC*[23] and *R v Secretary of State for Employment, ex p Equal Opportunities Commission*.[24] In *Wandsworth LBC v Winder* the exclusivity principle was held not to apply where a defendant sought to defend proceedings brought against him by relying on the invalidity of an administrative decision, and in *Roy v Kensington and Chelsea and Westminster FPC* the House of Lords appeared to favour a more fundamental limitation to the *O'Reilly v Mackman* exclusivity principle. The House considered two approaches: a "broad" approach under which Order 53 would only be insisted upon if private rights were not in issue and a "narrow" approach (more in line with Lord Diplock's formulation) which required applicants to proceed by judicial review in all proceedings in which public law acts or decisions are challenged, subject to some exceptions where private law rights are involved. Their Lordships did not decide which approach was the correct one but appeared to prefer the "broad" approach.[25]

[19] *Ibid*, at p 285D. The decision in this case was handed down together with that in *Cocks v Thanet DC* [1983] 2 AC 286.

[20] [1984] AC 262.

[21] [1985] AC 461.

[22] [1990] 2 AC 783 (in relation to defences in criminal proceedings).

[23] [1992] 1 AC 624.

[24] [1994] 2 WLR 409 (HL).

[25] *Roy v Kensington and Chelsea and Westminster FPC* [1992] 1 AC 624, pp 628-629 (Lord Bridge, whose formulation was similar to the "broad" approach), 653 (Lord Lowry, who much preferred the broad approach). Lord Griffiths, Lord Emslie and Lord Oliver agreed with Lord Bridge and Lord Lowry. It is, with respect, perhaps counterintuitive to describe, as Lord Lowry did, the preferred approach as the "broad" approach because it limits the ambit of *O'Reilly v Mackman* to a greater extent than the "narrow" approach.

3.10 In *Roy* Lord Lowry, who was clearly not happy with the wide procedural restriction,[26] considered that where "individual rights" are in issue the discretionary nature of Order 53 was inappropriate.[27] Although their Lordships did not attempt to define private rights as such, Dr Roy was found to have a private right even where that right arose out of a particular statutory context, and only against a public authority.[28] As indicated, such rights may be contractual, tortious, restitutionary or proprietary, and founded on statute or the common law. *Roy's* case does not address the difficult question of *when* a private right is created by statute; that will remain a matter of construction of individual statutes in their particular contexts.[29] What it does is to provide guidance as to the procedural consequences of finding that such a right exists.

3.11 The effect of *Roy, Wandsworth LBC v Winder*[30] and other cases[31] is that where the plaintiff pleads a properly constituted cause of action there is no need to use the Order 53 procedure even though public law issues are raised which require decision.[32] In a sense this represents the abandonment of the exclusivity principle because, as one consultee[33] stated, "[t]here is no need for any principle of procedural exclusivity to prevent a person bringing something which is not a properly constituted cause of action: he has no right to sue in any event". If no such properly constituted cause of action is pleadable, as was the case in *O'Reilly* and in *Cocks v Thanet DC*, where an appropriate public law decision was a condition

[26] In *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] 2 WLR 409, 425 he stated that he hoped *O'Reilly* would be reconsidered by the House of Lords.

27 [1992] 1 AC 624 at 654. See also in the context of Article 26 of the European Convention on Human Rights, App 12661/87 *Miaihle v France* (1990) 66 ECHR 92; App 15404/84 *Purcell v Ireland* (1991) 70 ECHR 262.

[28] [1992] 1 AC 624 at 653 ie the "right to a fair and legally correct consideration of his claim." *Cocks v Thanet DC* [1983] 2 AC 286 was distinguished in *Roy* on the basis that the plaintiffs in *Cocks* had no private rights because a discretionary decision (concerning the allocation of housing) lay in their way. Once a decision to grant the plaintiffs housing had been made, private rights would arise.

[29] See *M v Newham LBC* [1994] 2 WLR 554 (CA). See also *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] 2 WLR 409 (HL), para 3.12 below, for the contrast between the position of an individual and the Commission.

[30] [1985] AC 461.

[31] See *Lonhro plc v Tebbit* [1992] 4 All ER 280, 288 (CA); *Woolwich Equitable BS v IRC* [1993] AC 70, 200. See also *DPP v Hutchinson* [1990] 2 AC 783; *R v Secretary of State for the Home Department, ex p Adams, The Times* 10 August 1994.

[32] *Roy* at pp 628-629, 639, 640, 643-645 citing *Cocks* (at 292-3), *O'Reilly* (at 274-275, 284-285), *An Bord Bainne Co-op* (at [1984] 2 CMLR 588-589) *Winder* (at 480). *Roy* may, however, indicate an even further inroad into *O'Reilly* since one of the functional factors listed by Lord Lowry (654) as indicating that a case should not be required to proceed under Order 53, that the type of claim may involve disputed issues of fact, is unconnected with the existence of private law rights.

[33] John Howell QC.

precedent to the establishment of the private law duty, the only avenue for relief will be by an application for judicial review.[34]

3.12 The most recent House of Lords decision is *R v Secretary of State for Employment, ex p Equal Opportunities Commission.*[35] In this case an ex-employee (joined to proceedings by the EOC) brought a claim for judicial review of the Employment Secretary's continuing refusal to introduce amending legislation to make the Employment Protection (Consolidation) Act 1978 comply with the relevant provisions of EC anti-discriminatory law. The House of Lords held, upholding the Court of Appeal, that the individual applicant could not succeed in her application as her claim was essentially a private law claim which should be brought in an industrial tribunal. In this case a body which the relevant legislation did not directly affect was able to challenge by way of judicial review, while the individual who was affected was not. This aspect of the case is, however, consistent with the principle, of which we approve, that alternative remedies should be exhausted.[36] The question of the exhaustion of alternative remedies is separate from, and prior to, the issue of standing as raised in this case. It is also separate from and prior to the issue of whether or not to allow transfer into or out of Order 53.

3.13 We consider that the primary rationale for requiring the use of Order 53 is the need to take account of public interest factors in purely public law cases. First, there is the constitutional function of judicial review and the public interest to ensure that public authorities observe the law and are prevented from relying on invalid decisions. Secondly, there is the interest in enabling individuals to obtain a remedy for grievances which are substantiated. Thirdly, there is the need for speed and certainty in administrative decision-making, particularly in cases where a large section of the community will be affected by a decision. In a case involving only public law issues the public policy interest in ensuring speed and certainty in administrative decision-making may be more important than the private interest of the individual litigant in obtaining a substantive hearing and, if appropriate, a substantive public law remedy, and is thought to justify, in particular, a very much shorter time limit.

3.14 On the other hand, where a case involves a properly constituted private law cause of action or where it is necessary to decide whether a person should be prevented from raising a defence in such an action, on the ground that it involves an issue of public law, a more flexible procedural approach is needed to ensure that private law rights are not "trumped" by public law justifications. Where a case involves disputed

[34] *Cocks v Thanet DC* [1983] 2 AC 286.

[35] [1994] 2 WLR 409 (HL).

[36] See paras 3.24 - 3.26 and 5.31 - 5.35 below.

issues of fact[37] use of a writ procedure may also be appropriate. However, we consider that such cases are unlikely to arise frequently.[38]

3.15 The Commission supports development of the "broad" approach identified in *Roy* which it believes offers a principled way forward. **We accordingly believe that the present position whereby a litigant is required to proceed by way of Order 53 only when (a) the challenge is on public law and no other grounds; i.e. where the challenge is solely to the validity or legality of a public authority's acts or omissions and (b) the litigant does not seek either to enforce or defend a completely constituted private law right is satisfactory.**

A procedure for transfer

3.16 One option which received widespread support from consultees was facilitating the transfer of proceedings in to, as well as out of, Order 53.[39] Facilitating such transfers, it was argued, would help eliminate the uncertainty and potential for litigation over procedural issues and the risk of being non-suited where private law rights and issues of public law are intermingled and the applicant/litigant is not sure in which jurisdiction to commence proceedings.[40] This might occur where, as was the case before *Cocks v Thanet DC* in the field of homelessness, it is not clear whether there is a completely constituted cause of action or where, as in the judicial review of homelessness cases since *Cocks*, the law is very complicated.[41] It might also occur in cases arising out of EC law.[42] Although at present proceedings can be transferred out of Order 53 there is no express power[43] to convert actions commenced by writ (or originating summons) into applications for judicial review under Order 53.[44]

[37] This is one of the factors indicated in *Roy v Kensington and Chelsea and Westminster FPC* [1992] 1 AC 624, see n 14, above.

[38] Questions of fact *can* arise in judicial review proceedings. There may, for example, be a dispute as to what considerations were actually taken into account and what procedures were followed. More rarely there may be a dispute as to a jurisdictional fact.

[39] Consultation Paper No 126, paras 3.24 - 3.26.

[40] As there was little support for empowering the court to join two forms of proceedings so that all the issues could be properly determined and the remedies provided in one court (see Consultation Paper No 126, para 3.26) we do not consider this proposal further.

[41] See para 3.20 n 55 below.

[42] See para 3.12 above.

[43] According to Woolf LJ, writing in 1986, the High Court would in certain circumstances give leave and treat material which was before it as fulfilling the procedural requirements of an application for judicial review even though the action had been commenced by writ. See "Public Law - Private Law: Why the Divide?" [1986] PL 220 p 232.

[44] Of those who commented, there was almost unanimous support for a new rule to allow for such a transfer.

Transfer out of Order 53

3.17 Order 53 rule 9(5)[45] provides:

> Where the relief sought[46] is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ..

Where the court decides to convert the application for judicial review into a writ action, it may give consequential directions under Order 28, rule 8,[47] by analogy with converting originating summons proceedings into a writ action.

3.18 It has been argued that Order 53 rule 9(5) cannot be used to correct cases which are struck out as an abuse of process for being commenced under Order 53.[48] For example, it has been held to be a misuse of procedure to seek damages by way of judicial review where the cause of action involves no arguable complaint in public law.[49] We support the logic of this exclusion. However, it has also been held that the court will not exercise its discretion to order the proceedings to continue under Order 53 rule 9(5) where the only remedy sought is an order of certiorari which is inapplicable as a remedy in a civil action.[50] We consider this to be unduly restrictive.

[45] O 53, r 9 was introduced by RSC (Amendment No 3) 1977 (SI 1977 No 1955). A power of transfer was not mentioned in either our Working Paper ((1971) No 40) or Report ((1976) Law Com No 73).

[46] All the prerogative orders are inapplicable as remedies in a civil action and this may be the reason for their exclusion from O 53, r 9(5).

[47] Where an order for transfer to a writ action is made the Court may require pleadings to be served or order that the affidavits stand as pleadings. The parties may be given leave to add to the affidavits standing as pleadings and apply for further and better particulars of the matters they contain: O 28, r 8. However, where there is no indication of the form of the declaration the applicant might seek to make, the court may refuse transfer on the basis that ultimately costs will be saved if fresh pleadings are served. Eg *R v East Berkshire Health Authority, ex p Walsh* [1985] 1 QB 152; *R v Insurance Ombudsman Bureau, ex p Aegon Life Assurance,* QBD *The Times* 7 January 1994.

[48] But see O 2, r 1(3) which states that the court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of the rules to be begun by an originating process other than the one employed.

[49] *R v Secretary of State for Home Affairs, ex p Dew* [1987] 1 WLR 881.

[50] *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 (CA). But see: *R v Northavon District Council, ex p Palmer,* [1994] COD 60, where the court allowed a claim for a declaration to be added, so that the damages being claimed could be granted as ancillary to an O 53 ground of relief.

3.19 We consider that transfer would not be an abuse of process if the remedy sought is in substance transferable. For example, although mandamus or certiorari cannot be granted in private law proceedings, a mandatory injunction or a declaration can.[51] **We recommend that the existing rule should be amended to give the court power to order proceedings to continue as if they had begun by writ provided it is satisfied that the remedy sought is suitable for transfer into one of the forms of relief available in an action begun by writ[52] (Draft Order 53 rule 11(1)).**

Transfer in to Order 53

3.20 Whilst many consultees welcomed the "broad" approach to the exclusivity principle as formulated by Lord Lowry in *Roy v Kensington and Chelsea and Westminster FPC*[53] at least one commentator has argued that it is still difficult to assert with confidence when exceptions to the rule properly apply.[54] Recent case law also suggests that a lax view of exclusivity does not necessarily prevail in housing law cases,[55] perhaps because of the number of such cases that come before the courts and the view of the courts that many of these are disguised appeals.[56] It is important to prevent litigants getting caught in a procedural trap which it was the purpose of the 1977 reforms to remove.[57] Accordingly, we recommend the introduction of a power to enable actions commenced by writ to proceed under Order 53. As indicated above, this might occur where it is not clear whether breach of a particular statutory duty gives rise to a completely constituted cause of action.

3.21 The Master and Head of the Crown Office suggested that in considering whether to exercise a power of transfer into Order 53 the court should apply the principles which would be applicable to the issue if it were raised by way of application for

[51] In *Wandsworth London Borough Council v Winder* [1985] AC 461 the House of Lords expressly approved actions for a declaration of nullity as an alternative to applications for certiorari to quash, where private law rights were concerned.

[52] Another option, which we do not, however, favour, would be that prerogative orders be made available in ordinary actions: see Sir William Wade QC, "Procedure and Prerogative in Public Law [1985] PL 180; *Administrative Law* (6th ed 1988) pp 680-681.

[53] [1992] 1 AC 624.

[54] See, for example, C Emery, "Collateral Attack - Attacking Ultra Vires Action Indirectly in Courts and Tribunals" [1993] 56 MLR 643.

[55] See, for example, *Mohram Ali v Tower Hamlets London Borough Council* [1993] QB 407; *London Borough of Tower Hamlets v Abdi* (1992) 25 HLR 68; *London Borough of Hackney v Lambourne* (1993)) 25 HLR 172. Discussed by D Cowan in "The Public/Private Dichotomy and "Suitable Accommodation" under Section 69(1) of the Housing Act 1985" (1993) JSWFL 236.

[56] We are proposing that there should be an appeal on points of law in homelessness cases, which will ease this particular concern. See paras 2.24 - 2.27 above.

[57] See *Davy v Spelthorne BC* [1984] AC 262, 276 per Lord Wilberforce.

leave to apply for judicial review.[58] We agree with this proposition since, without the application of those principles, an applicant in search of an exclusively public law remedy would be able to bypass the requirement for leave altogether.[59] One difficulty with this requirement relates to delay. Although one consultee argued that transfer should be based on considerations of the wider interests of good administration rather than a strict application of the judicial review time limit, others, including the nominated judges doubted that, in practice, a case with merits would be turned down merely for reasons of delay. **It is recommended that Order 53 rule 9 be amended so as enable an action commenced by writ to be transferred into Order 53 and to continue as an application for judicial review provided the plaintiff satisfies the criteria for the granting of leave or, on our recommendation, for an application being allowed to proceed to a full judicial review[60] (Draft Order 53 rule 11(2)(3)).**

A reference procedure

3.22 The transfer procedure we have described above contemplates the wholesale transfer of cases rather than guidance on a particular point of law. For this reason, some consultees favoured bringing about greater procedural flexibility through the introduction of a reference procedure. This procedure, likened to Article 177 of the EEC Treaty,[61] would enable a court or tribunal to seek a ruling from the Divisional Court or a single judge hearing cases in the Crown Office List on the validity or otherwise of a public action.[62] We have given careful consideration to this proposal but we are of the view that the case for such a unique line of judicial authority emanating from one part of one Division of the High Court, albeit a specialist one, has not yet been made. We also consider that a reference procedure would result in a multiplicity of proceedings, increased costs and further delay. Our recommendations for an improved and extended procedure for transfer in and out of Order 53 (paragraphs 3.16 - 3.20 above) and a new procedure (paragraph 3.23 below) by which a judge may, of his or her own motion, transfer a case to the Crown Office or mark it as appropriate for a nominated judge are designed to avoid

58 In Part V below we recommend that the Rules contain criteria for leave or, if another of our recommendations (see paras 5.6 - 5.8 below) is accepted, for certifying that the application should proceed to a substantive hearing.

59 Eg Goulding J's comments in *Heywood v Board of Visitors of Hull Prison* [1980] 1 WLR 1386 at 1391.

60 See further Part V below.

61 Article 177 of the Treaty gives the Court of Justice jurisdiction to exercise a form of advisory function that is legally binding. A reference to the Court of Justice enables the domestic court seised of a question to stay proceedings before and pending an interpretative decision from the Court.

62 C Emery, "The Vires Defence - "Ultra Vires" as a defence to criminal or civil proceedings" [1992] CLJ, 308-348, has argued that a domestic reference procedure, modelled on that which is adopted for cases with a community law element, would improve operation of the "vires defence" in criminal proceedings and help clarify the precise basis and extent of the ruling in *Wandsworth LBC v Winder* [1985] AC 461.

procedural hardship to plaintiffs who commence proceedings in the wrong court. Transfer would also ensure that, even where cases are not required to proceed under the Order 53 procedure they may be heard by a specialist judge if they raise significant public law points.

Transfer to the Crown Office List and certification of a case as "fit for a nominated judge" without necessarily putting it into the Crown Office List

3.23 We consider that facilitating transfer of cases from the county court to the High Court after an action has begun would assist in the early identification and disposal of either public law or mixed public and private law cases. A similar procedure exists for the transfer of actions to the commercial list.[63] In effect we propose that any party to an action should be able to apply by summons to the district judge or master to transfer the action to the High Court on the ground that it raises issues of public law. It is envisaged that if the district judge or master considers the case a suitable one then it could be "certified as fit for a nominated judge if available" and transferred to the High Court, either, in a case solely raising public law issues, to the Crown Office List, or in a "mixed" case to the Queen's Bench Division. Such a transfer procedure would operate only at the margins in those cases raising a difficult combination of public and private law issues. In view of the likelihood of increased costs[64] we do not envisage that such transfers would constitute a significant proportion of Order 53 cases.

Alternative remedies

3.24 Where alternative statutory machinery exists the governing principle has been that the court will refuse to grant a remedy under Order 53.[65] Alternative remedies to judicial review may involve a number of different types of statutory machinery.[66] It has been argued that there is a need to identify the scope of the rule that a remedy will be denied where an alternative remedy to judicial review is available and the

[63] See O 72, r 5. Rule 6 enables a judge in the commercial court, on his or her own motion or on the application of either party, to order an action in the commercial list to be removed from that list. An order for entry of an action in the commercial list is appealable if the action is not properly a commercial action. If the procedure suggested in this paragraph is adopted, a case transferred direct to the Crown Office List from the county court should be placed before a judge on its arrival there, to enable him to consider whether it is appropriate for that list.

[64] In discussion, the Legal Aid Board pointed out that the Board already funds transfer of cases to or from the High Court in the field of personal injury litigation.

[65] See paras 5.31 - 5.35 below. On this basis the court may, in its discretion, refuse to grant leave to apply for judicial review; it may set aside leave previously given; or refuse relief at the substantive hearing.

[66] These include various statutory provisions for challenge in the High Court, eg case stated, statutory rights of challenge and statutory appeals as well as specific rights of appeal or default powers entrusted to ministers (ranging from a discretion to take over the activity in question to a statutory power to apply to the court for mandamus).

factors which indicate either when it should apply or that an exception should be made.[67]

3.25 While a majority of consultees considered that if an alternative remedy existed, or, if such a remedy existed but the applicant failed to use it, then relief might properly be refused, there was widespread support for the suggestion that an applicant should only be *required* to exhaust an alternative remedy where the remedy available was an adequate one.[68] We consider that it should be the adequacy of the alternative remedy to resolve the complaint at issue which should define the scope of the principle.[69]

3.26 The questions of when and how the exhaustion of alternative remedies should be identified are considered elsewhere in this report.[70] Broadly speaking we consider that an alternative remedy should be regarded as an adequate remedy where it is to a court, tribunal or is a statutory appeal to a minister[71]. Ministerial default powers, while constituting legal alternative remedies, require slightly different treatment in this context. We believe that only appeals to a court or tribunal or a statutory appeal to a minister should normally preclude an application being allowed to proceed to a substantive hearing.[72]

[67] See C Lewis, "The Exhaustion of Alternative Remedies in Administrative Law" [1992] CLJ 138. One local authority consultee remarked that lack of clarity about what constituted an alternative remedy hindered resolution of claims through further discussion, negotiation and consultation.

[68] See Consultation Paper No 126, para 14.14 (c).

[69] An alternative remedy may be inadequate because the reviewing body does not have the power to remedy a complaint fully. Eg the reviewing body may not have the jurisdiction to consider whether a power was improperly exercised, whether there was procedural irregularity; or be able either to quash the decision in question or to construe the validity of a regulation behind it.

[70] See paras 5.31 - 5.35 below.

[71] Eg the National Health Service (Service Committees and Tribunal) Regulations, SI 1974 No 455 provides for a right of appeal to the Secretary of State from a decision of the Family Practitioner Committee on the report of the service committee on a complaint against a practitioner, chemist or optician. The Secretary of State may determine the appeal: reg 11.

[72] See also para 5.35 below.

PART IV
THE INITIAL STAGE

4.1 At present an applicant is required to seek leave to move for judicial review. The application must be made ex parte, to a high court judge by filing in the Crown Office a notice in Form 86A[1] and a supporting affidavit verifying the facts relied upon.[2]

4.2 In the light of consultation and after further discussion with the nominated judges and the Crown Office, we recommend a number of amendments to the existing Form 86A so as to provide more information for the application judge (and the respondent) than is available at present.[3] The fuller information which will be contained on the amended form will help the application judge in deciding whether or not to allow the application to proceed to a full judicial review on the papers alone.[4] The form, as amended, is set out in Appendix B.[5]

A new Form 86A

4.3 Our proposals seek to build on the format of the existing Form 86A[6] but to ask the applicant to provide information concerning: (i) any relief sought, including interlocutory relief; (ii) any alternative remedies; (iii) whether the respondent has been asked to consider the complaint or reconsider the decision; (iv) the reasons for any delay; and (v) the date of any application for legal aid (if relevant), the date

[1] Form 86A must contain a statement of the name and description of the applicant; the relief sought and the grounds upon which it is sought; the name and address of the applicant's solicitors (if any); and the applicant's address for service: O 53, r 3(2)(a). The court has express power to allow amendments specifying different or additional grounds of relief: O 53, r 3(6). The general power to allow amendments also applies: O 20, r 8.

[2] O 53, r 3(2)(b). The applicant is under a duty to disclose all material facts: *R v British Rail Board, ex p Great Yarmouth Borough Council, The Times*, 15 March 1983. Non-disclosure is sufficient ground for refusing leave (*R v Leeds CC, ex p Hendry* (1994) 6 Admin LR 439), the relief sought, or for setting aside the grant of leave, and the applicant may be penalised in costs: *R v Jockey Club Licensing Committee, ex p Wright* [1991] COD 306.

[3] See also paras 4.10 - 4.11 below.

[4] For situations in which it might nevertheless be thought desirable to have an oral hearing see para 5.11 below.

[5] We would like to thank the Forms Design Unit of the Lord Chancellor's Department for their assistance in the design of the forms in Appendix B.

[6] The Head of the Crown Office has informed us that most solicitors who use Crown Office Forms have set up the relevant format on their office computer systems following the precedents provided in the White Book. However, she estimates that 1 in 10 applications are by litigants in person and in these cases Forms would be sent by the Crown Office. To prevent pages from becoming loose or applicants trying to crowd too much information onto a single sheet we propose that the new Form 86A should be in booklet form.

when it was granted or refused and, if granted, the number of the legal aid certificate.

4.4 We believe that where possible the initial application should be concluded without an oral hearing.[7] It will, however, not be possible for the initial stage to be dealt with on the papers alone where the applicant is seeking immediate interlocutory relief at the same time as making his or her application. We understand from the Crown Office that this is likely to occur in about 10% of cases, particularly homelessness cases, where interlocutory relief is nearly always sought. We recommend that applicants who seek interlocutory relief at the same time as they make their initial application should inform the Crown Office at the earliest opportunity so that the court is alerted to the need for a hearing.

4.5 Concern was expressed that delays in making the application were often caused by applicants awaiting a decision on legal aid. The Public Law Project and the Legal Aid Board, however, informed us that delays are not often the result of waiting for the initial legal aid decision. They regarded the main causes of delay to be waiting for the result of an appeal against a refusal of legal aid or the difficulty in legal advisers undertaking any remunerated work before the legal aid certificate is granted. We consider that it would be useful for the Crown Office to be aware of the position concerning legal aid at the outset so that the application judge can have fuller information about the history when considering an applicant's reasons for delay.[8] Where legal aid has been granted the Crown Office ought to be sent a copy of the legal aid certificate,[9] but this would not be included in the papers submitted to the judge who is to consider the matter.

4.6 Alternative remedies are discussed in a number of places in this report.[10] We recommend that the revised Form 86A should include a question which asks the applicant to identify any alternative remedy that has been pursued and the stage it has reached. Similarly, we consider that as internal reviews often result in settlement an applicant should indicate if (within his or her knowledge) any internal review has been undertaken by the respondent.[11]

7 At present although the procedure provides for applications to be decided on the papers alone in practice many hearings are requested. For our proposals see paras 5.8 - 5.11 below.

8 Delay in obtaining legal aid can constitute a good reason under which the discretion to allow an application for leave to be made outside the 3 month time limit can be exercised: *R v Stratford-on-Avon, ex p Jackson* [1985] 1 WLR 1319 (CA). See also paras 5.23 - 5.30 below.

9 Civil Legal Aid (General) Regulations, 1989 SI No 339, r 50(2).

10 Eg see paras 3.24 - 3.26, above, and 5.31 - 5.35, below.

11 In some cases an application judge may wish to send a respondent a request for information which includes questions about internal and other review mechanisms, see paras 4.8 - 4.11 below. If so, as the respondent will be sent a copy of the applicant's

4.7 The question of delay as a relevant criterion in considering whether the application should proceed to a substantive hearing is discussed in Part V below. As we are recommending that applications should be made promptly and, in any event, within three months from the date when grounds for the application first arose, unless the court considers there is good reason for extending the period,[12] we propose that the applicant should give reasons for any relevant delay on Form 86A.

A Request for further information

4.8 For many of those who responded to our consultation paper, the limited nature of discovery in judicial review and the absence of a duty to give reasons for administrative decisions were matters of grave concern.[13] It was argued that a practice of formally asking a respondent at an early stage, before the papers were considered by the application judge, to provide information relevant to the grounds of the decision under challenge would be of assistance to all parties[14] and would further good practice in public administration. It was also argued that clarifying issues at an initial pre-leave stage might encourage internal review of the decision in question by the decision-maker and reduce the need for legal proceedings. Such initial pre-leave procedures, like the requirement of sending a "letter before action",[15] would help make savings in public time and money.[16] For this reason some consultees suggested the use of a questionnaire at the pre-leave stage similar to that used in discrimination law cases.[17] One objection to the use of a questionnaire in *every* application was that in many cases information from the respondent is not needed in order to decide whether or not to allow the matter to proceed to a substantive hearing. In only a proportion of the applications for judicial review (one nominated judge estimated this at about one-third) is such information needed. To require it in all cases would place an unnecessary burden on the

Form 86A, there will be an opportunity to check whether the applicant and respondent agree about the exhaustion of alternative remedies.

[12] See paras 5.23 - 5.30 below.

[13] On reasons, see paras 2.29 - 2.31 above, on discovery see Part VII below.

[14] Eg it would assist the applicant to know whether the grounds upon which he believed he could challenge the decision were apparent or real and give the respondent an opportunity to reconsider a decision without involving the court.

[15] See *R v Horsham DC, ex p Wenman, The Times* 12 October, 1993.

[16] Research by the Public Law Project (see M Sunkin, L Bridges, G Mészáros, *Judicial Review in Perspective* (1993) The Public Law Project) indicates that there is a high rate of settlement or withdrawal between the grant of leave and a substantive hearing. Some consultees considered that this was due to the fact that grant of leave and service of the notice of motion had prompted many respondents to call in the decision in question for a more effective internal review.

[17] See the anticipatory procedures under the Sex Discrimination Act 1975, s 74, and the Race Relations Act 1976, s 65 whereby an aggrieved person may submit a questionnaire (in a form prescribed by the Secretary of State) which seeks material information which in the nature of things the respondent can be expected to have and the complainant cannot.

respondent in the majority of cases where it is clear from the papers that the application should, or should not, be allowed to proceed to a substantive hearing.

4.9 In the "intermediate category" of cases identified by Lord Donaldson MR in *R v Secretary of State for the Home Department, ex parte Doorga*[18] either there is no prima facie case but there is cause for concern to know more about the position, or, alternatively, the judge feels that there may be an easy answer to the applicant's case. We agree with those nominated judges who favoured a method whereby information can be provided following a request of the application judge after Form 86A has been lodged. In their view: "procedures which are presently invoked without formal warrant, often cast a flood of light on that which is obscure or partisan". At present the only way forward in these cases is for the application judge to require a hearing. **We recommend that a "request for information" procedure should be introduced to be used at the discretion of the application judge.** A "request for information" form is set out in Form 86B in Appendix B, and its contents are described in paragraphs 4.10 - 4.11 below.

4.10 The "request for information" form should be available for issue by the Crown Office at the request of the application judge. The party receiving the request (who need not necessarily be the decision-maker) would not be under a duty to complete and return the form but it is thought likely that most respondents would do so.[19] The applicant must then have an opportunity to know what further information has been placed before the application judge and to respond to it within a limited period, say, ten days. The respondent would therefore be directed to send a copy of the completed form to the applicant at the same time as it is sent to the Crown Office. In some cases after receipt of the completed "request for information" form and the applicant's reply the application judge might decide that it is nevertheless necessary to hear legal argument. He or she should then give a direction to that effect, which should be sent to all parties who have made written submissions, and the judge's direction should state whether only the applicant is required to attend, or whether one or more of the respondents are requested to attend as well.

4.11 The proposed form[20] requests information about: (i) procedure prior to the decision; (ii) internal review; and (iii) alternative remedies. It also provides the respondent with an opportunity to inform the court of any reasons why the matter should not be allowed to proceed to a substantive hearing and, if so, on what grounds. Information concerning the application would be provided by the Crown Office by sending the respondent a copy of the completed Form 86A and (at the same time)

[18] [1990] COD 109, 110.

[19] The arrangements for making the applicant's affidavit evidence available to the respondent are discussed in para 4.11 below.

[20] The form is set out in Appendix B below.

by its asking the applicant to send copies of any affidavit(s) and exhibits submitted with the Form 86A to the respondent. Providing that it is practicable to do so, and to prevent unnecessary delays occurring, we also suggest that these documents should be available, on request, for inspection at the Crown Office.[21] The form also contains space for the judge considering the application to ask any supplementary question(s) which are appropriate in the particular case.

Notification of the decision

4.12 At present notification of the decision on the application for leave to apply for judicial review is given on Form JRJ. Although the existing form contains a space for "observations for the applicant" we understand that in a number of cases reasons are not in fact given for the refusal of leave. The amended draft Form JRJ[22] indicates that if the application is not allowed to proceed to a substantive hearing (in the present terminology, if leave is *refused*) the application judge should state that he or she has considered the application and should provide reasons for refusing to allow the application to proceed to a substantive hearing.[23] We consider that the form JRJ should also be amended so that a judge who decides not to permit an application for a preliminary consideration to proceed to a substantive hearing may indicate on the form that, if the application were to be renewed, notice should be given to the respondent.[24]

[21] The Crown Office does not seem to be covered by O 63, r 4 which deals with access to documents filed in the Central Office. We consider that, where the judge has made a request for information to the proposed respondent and directed the applicant to send copies of the documents to the proposed respondent (Draft Order 53 rule 3(3)(b)), if the application is not allowed to proceed then the applicant should bear the cost of sending them, but if the application is allowed to proceed we anticipate that their cost would follow the event.

[22] See Form JRJ at Appendix B.

[23] See also para 5.36 below.

[24] See Form JRJ at Appendix B.

PART V
FILTERING OUT HOPELESS APPLICATIONS: LEAVE OR PRELIMINARY CONSIDERATION

5.1 The purpose of the requirement in Order 53 that no application for judicial review shall be made unless the leave of the Court has been obtained is to filter out hopeless applications. Ill-founded applications delay finality in decision making: they exploit and exacerbate delays within the judicial system and are detrimental to the progress of well founded legal challenges. While this is generally true of litigation, in the case of applications challenging regulations and decisions the public policy factors set out in Part II have been seen as justifying the filter provided by the present leave requirement.

5.2 In its 1971 working paper the Commission stated that the likelihood of frivolous actions to challenge an administrative act or order might be increased by the fact that anyone adversely affected will have standing to challenge it and it was therefore "all the more important to have some procedure for striking down applications without delay and cost for the particular public authorities and tribunals concerned".[1] The leave requirement was originally introduced following the Hanworth Committee's Third Report on the Business of the Courts[2] and support for the need to retain it has been expressly voiced by the higher judiciary, particularly Lord Woolf.[3]

5.3 The Commission's 1976 report recommended the retention of the requirement of leave.[4] Our recent consultation paper tended to the same view but suggested a number of changes to improve the procedures by which the leave requirement presently operates: (i) the introduction of stated criteria for the granting of leave; (ii) the introduction of a power to dispense with leave where both parties agree that there is a serious issue to be tried; (iii) the introduction of provision for potential respondents to make written representations in cases where the judge is in doubt whether leave should be granted or not.[5] Although some of those who responded to our consultation paper, particularly academics, favoured the abolition of the

[1] Remedies in Administrative Law, Working Paper No 40, para 98.

[2] (1936), Cmd 5066.

[3] *Hamlyn Lectures*, pp 19-23; "A Possible Programme for Reform"; [1992] PL 221.

[4] Report on Remedies in Administrative Law (1976) Law Com No 73 paras 37-39.

[5] Consultation Paper No 126, paras 5.8 - 5.14.

requirement of leave, the majority of consultees supported the retention of a filter for eliminating the unarguable case.[6]

5.4 We have also considered the procedures for applying for judicial review in Northern Ireland and in Scotland. In Northern Ireland the procedure is similar to that in England and Wales, except that where leave to apply has not been sought within 3 months, the court may not grant leave or relief unless it is satisfied that such a move would not cause hardship or unfairly prejudice the rights of any person.[7] In almost all cases, however, unlike this jurisdiction, leave is granted and the application is allowed to proceed.[8] The position is complicated by the fact that in Northern Ireland many applications are made by prisoners, and are politically sensitive.[9] Delays before cases are heard are generally much shorter in Northern Ireland, and judicial resources are relatively more abundant, which makes comparisons with the position here difficult. Carswell LJ told us that he considered that leave should be retained in Northern Ireland to prevent entirely vexatious actions from proceeding.

5.5 In Scotland there is no requirement of leave, or special time limit, and the rules emphasise flexibility as regards both procedure and relief, and speed.[10] The petition is brought before the judge ex parte for a 'first order', which is in effect an order for directions on how to proceed. The matter can then be disposed of at the first hearing, or there can be further hearings until the judge is satisfied that he has all the information he wants before him. The small number of applications (114 in 1992, and 158 in 1993) has meant that leave has not been perceived to be an issue in Scotland.

5.6 We have indicated[11] that we consider it essential to filter out hopeless applications for judicial review by a requirement such as leave. We note that a filtering requirement can be a tool for the efficient management of the caseload and that there have been calls for greater judicial management of cases at an early stage in other areas of civil procedure.[12] It is possible that future developments in civil

[6] It was also said to reflect the different considerations which are applicable to public law cases, ie those identified in the consultation paper at para 2.3.

[7] See RSC (NI), O 53, r 4.

[8] 195 applications for leave to apply for judicial review were made in Northern Ireland in 1992, and 155 in 1993. These figures include 2-3 applications for habeas corpus each year. Of the 155 applications, 10 were refused leave.

[9] There were 75 applications for leave to apply for judicial review of decisions concerning prisoners in 1993. Of these, 7 were refused leave.

[10] See 1985 SI 500, creating and inserting Scottish Rule of Court RC 260B.

[11] Paras 3.5 - 3.6 above.

[12] Eg comments of the Master of the Rolls, Sir Thomas Bingham, giving the annual Justice lecture on 7 July 1994; and Lord Woolf as reported in the Observer, 29 May 1994.

procedure will lessen the contrast between the initial stages of an application for judicial review and the initial stages of other proceedings. Be that as it may, we do, however, believe that a change of nomenclature is desirable and that the filtering stage of an application for judicial review should be known as the "preliminary consideration" rather than the leave stage.

5.7 Although some might see this as purely a cosmetic change, we believe it to be important to remove the perception that a citizen seeking a prerogative remedy is at a substantial disadvantage as compared with one asserting a private law right whether as the result of a tort, or under a contract or a statute. In fact, as is shown by the way the courts have broadened the scope of judicial review by recognising new grounds of review and new categories of decision to be reviewable, the contrary could be argued. It has also been said that a filtering requirement may be beneficial to applicants since with relatively little expenditure of time and money an applicant hears from the court itself either that the case has no prospect of success or that it has some prospect.[13] The study published by the Public Law Project[14] supports this argument and indicates that in some areas, for instance homelessness where it appears that many decisions are reconsidered by local authorities after leave is granted, leave in practice serves as a form of summary process.

5.8 **We recommend that the filtering stage of an application for judicial review should be known as the "preliminary consideration" rather than the leave stage.** Subject to the recommendations we make below, the filtering stage should remain as it is, that is, an ex parte written procedure with a right to renew an application where the application judge has decided that the application may not proceed to a substantive hearing. The new terminology is reflected in the heading of Draft Order 53 rule 3.

Written applications

5.9 In relation to those cases described as being "intermediate"[15], the consultation paper invited views as to whether the ex parte procedure should be amended to give respondents an opportunity to put in written representations.[16] While this proposal was supported in principle by a number of consultees there were also a number of

[13] Cf JUSTICE-All Souls Review, *Administrative Justice: Some Necessary Reforms* (1988) p 153 which doubted that the paternalistic attitude implicit in this argument is one the courts ought to adopt.

[14] M Sunkin, L Bridges and G Mészáros, *Judicial Review in Perspective* (1993) Public Law Project pp 49 -53. In 1988 62% of cases in homelessness cases were withdrawn after leave, while in 1989 and the first quarter of 1991 the percentage of withdrawals had risen to over two thirds. Recent figures obtained from the Crown Office suggest no change in this pattern. See also para 1.11 above.

[15] See para 4.9 above.

[16] Consultation Paper No 126, para 5.11.

alternative suggestions put forward which, it was thought, would clarify how to proceed in "in-between" cases. We hope that our proposals in Part IV above will create new procedures which will address these concerns to some extent while taking into account the desirability of avoiding excessive "front-end" costs in what is intended to be simply a filtering mechanism designed to identify and eliminate cases which are not properly arguable.

5.10 The existing rule states that applications for leave should be made by filing Form 86A in the Crown Office,[17] and that the judge may determine the application without a hearing, unless one is requested in the notice of application. In some cases, particularly where an injunction is sought, it may be necessary to make the application very quickly.[18] A number of consultees, including the nominated judges, felt that there were too many cases where applications for leave were determined for the first time at oral hearings, often with both the applicant and the potential respondent represented by counsel. This adds to general time delays, as well as to the expense involved.[19] It was said that in some of these cases an oral hearing is desired in order to get publicity. We consider that it should no longer be possible, as it is at present, for an applicant making an initial application (as opposed to a renewed application) to require a hearing.

5.11 **We recommend that all applications for preliminary consideration (i.e. in the present terminology applications for leave to apply for judicial review) should, in the first instance, be determined entirely on paper, unless the application falls within a recognised category for which an oral hearing might be necessary (Draft Order 53 rule 3(6)). We further recommend that the following categories should be so recognised: (i) where the application includes a claim for immediate interim relief; (ii) where on the basis of the written material it appears to the Crown Office or the judge that a hearing is desirable in the interests of justice[20] (Draft Order 53 rule 3(7)).**

5.12 Renewal of an application for leave to seek judicial review is at present available as of right and in such cases there is an oral hearing.[21] Where a high court judge has

[17] See O 53, r 3 and paras 4.3 - 4.7 above for our proposals as to the composition of a revised Form 86A.

[18] An order for expedition can be obtained from the Judge or the Divisional Court when leave is granted so that the case will then be entered into the expedited list (Part D of the Crown Office List). See *Practice Direction (Crown Office List)* [1987] 1 WLR 232. An application for expedition should be included in the Form 86A.

[19] No statistics for the number of represented hearings are available.

[20] In some cases the application judge may consider it appropriate to send a request for further information form to the respondent. See paras 4.8 - 4.11 above.

[21] If the applicant wishes to renew the application for leave in a criminal matter, he must lodge a notice within 10 days of the judge's refusal: O 53, r 3(5). The application will be heard by the Divisional Court: O 53, r 3(4)(a). Unlike an application relating to a civil

refused to allow an application to proceed to a substantive hearing the lawyers responsible for it will be under a professional duty to consider carefully whether it is reasonable to renew it in the light of the judge's reasons. In the light of this we do not propose any changes in respect of the renewal of applications (Draft Order 53 rule 4). Where, therefore, when at the first preliminary consideration of an application for judicial review, the judge determines that it may not proceed to a substantive hearing, the application may be renewed. As at present, if the preliminary consideration has been on the papers the renewal is to a single judge. In those exceptional cases where there is a hearing for the first preliminary consideration, as at present, the renewed application would be made to the Court of Appeal.

Criteria for permitting an application to proceed to a substantive hearing

5.13 A large number of consultees, although supporting a filtering requirement, criticised the lack of any clear criteria in the Rules for leave being either granted or refused. Concern was expressed about wide disparities in the rates of granting leave as between different subject matters of applications and as between different judges. In the consultation paper we referred to a survey which found that, although the majority of cases were determined on a "quick look" approach, a sizable minority were subjected to what was termed a "good look" with more consideration of the merits of the application.[22] Since then the Public Law Project has published the preliminary results of a statistical analysis of applications for judicial review which confirmed the disparities.[23]

5.14 In their response the nominated judges did not favour having their discretion to refuse leave fettered by legislative prescription. However, the majority of consultees who commented considered that the threshold should be explicitly stated in the Rules. For example, the Administrative Law Bar Association argued that an explicit formulation would remove any opportunity for suspicion that the stringency of the requirement for leave reflected the current state of the Crown Office List. It would also enable those considering making an application for judicial review to know in

matter, the applicant is entitled to renew the application to the Divisional Court even where he was refused leave by a single judge at an oral hearing, but he has no right to appeal or to renew his or her application thereafter to the Court of Appeal. In a civil matter a renewed application will be heard by a single judge in open court, or if the court so directs, by the Divisional Court: O 53, r 3(4)(b). In a civil matter where the first leave application is made at an oral hearing (and also if it is a renewed application at an oral hearing), the applicant must renew the application to the Court of Appeal: O 53, r 3(4); O 59, r 14(3). See further Part IX below.

[22] A Le Sueur and M Sunkin, "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102.

[23] M Sunkin, L Bridges and G Mészáros, *Judicial Review in Perspective* (1993) Public Law Project pp 86 - 97. Eg on initial grant of leave there was, between judges, a range of 64% in 1987, 33% in 1988, and 43% in 1991 (p 88). Annex 1 to Appendix C shows a range of 48% during the first seven months of 1994.

advance the threshold which any application (as a matter of principle) was required to pass. We do not propose departing from the existing grounds for the refusal to grant leave to apply for judicial review but we do consider that these criteria be explicated clearly in the Rules. **Accordingly, we recommend that the Rules should direct the court in exercising its discretion to consider the criteria specified below (Draft Order 53 rule 3(5)).**

(i) An arguable case

5.15 At present leave will be refused if it is clear that the applicant does not have an arguable case.[24] **We recommend that it should be stated in the Rules that unless the application discloses a serious issue which ought to be determined it should not be allowed to proceed to a substantive hearing. (Draft Order 53 rule 3(5)(a)).** This reformulation recognises, inter alia, that one of the main purposes of having a filter is to protect public bodies from unmeritorious applications, which might involve unwarranted delay in implementing decisions. We also recommend that provision is made so as to empower a judge at the preliminary stage to allow the application to proceed on some grounds, while refusing it on others.[25] This would be a discretionary power and we do not anticipate that a judge would be required to consider the arguability of everything in the form 86A every time permission for a case to proceed is granted. For example, the grounds may be closely interrelated. An applicant would not be prevented from seeking either to renew or amend his application at a later date[26] (Draft Order 53, rule 13).

(ii) Standing

5.16 In addition to establishing an arguable case on the merits, the applicant is also required to show sufficient interest in the matter to which the application relates.[27] The fluid nature of the requirement of sufficiency means that it is uncertain what precisely is required. Very broadly speaking, there are three possible approaches: to accord standing only where rights are affected; to accord it where, although rights are not affected, the applicant has in fact been adversely affected; and to accord it to all but the officious intermeddler, the "citizen action" approach.

5.17 The predominant trend in the case law since the reform of Order 53 in 1977 reflects a liberal approach which had long been a feature of relief by way of certiorari and

[24] Eg *R v Secretary of State for Home Department, ex p Begum* [1990] COD 107. Note that some important principles of law have emerged from cases in which leave was initially refused: *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574; *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815.

[25] See comments of Laws J in *R v Secretary of State for Transport, ex p Richmond-upon-Thames LBC* [1994] 1 WLR 74, 98.

[26] Ie under the proposed Draft O 53, r 4 or r 7(2).

[27] Supreme Court Act 1981, s 31(3); O 53, r 3(7).

prohibition, going beyond the protection of rights and "injury in fact" but with uneasiness about the treatment of decisions that affect the public in general, or a wide section of it. There are, however, exceptions such as the *Rose Theatre Trust* case,[28] which called into question the ability of pressure groups to institute judicial review proceedings.

5.18 Very few consultees questioned the need to establish standing[29] although a number of those who responded considered that standing should be considered only at the initial or preliminary stage. Others recommended that the judge considering the application should be able expressly to reserve to the substantive hearing any decision on the issue of sufficient interest. Yet others claimed that the reality of an apparent interest cannot be determined until the substantive hearing. It was the view of the House of Lords in the *IRC v National Federation of Self-Employed* case,[30] that 'sufficient interest' at the leave stage was merely a threshold requirement to exclude clearly unmeritorious cases, and that locus standi could be investigated in detail at the subsequent substantive hearing.[31] The question of standing was regarded as inseparable from the substantive grounds and seriousness of the application and we make no recommendations for change.[32]

[28] *R v Environment Secretary, ex p Rose Theatre Trust Co* [1990] 1 QB 504, on which see P Cane, "Statutes, Standing and Representation" [1990] PL 307 and Sir Konrad Schiemann, "Locus Standi" [1990] PL 342. See also *R v Darlington BC, ex p Association of Darlington Taxi Owners, The Times* 21 January 1994 (unincorporated association does not have capacity to bring judicial review proceedings).

[29] One solicitor consultee thought that if parties were sufficiently motivated to raise a legal challenge they should be allowed to do so.

[30] [1982] AC 617, 630, 643-644, 649, 659.

[31] But see *R v Secretary of State for Transport, ex p Presvac Engineering Ltd* (1992) 4 Admin LR 121 and *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763, 774, for the view that the test as to standing used at the substantive hearing really formed part of the exercise of the court's discretion whether to grant relief. Standing was also considered separately at the substantive hearing in *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] 1 QB 504; *R v Legal Aid Board, ex p Bateman* [1992] 1 WLR 711 (DC).

[32] Dicta in this case ([1982] AC 617, 633, 647B, 654, 662) suggest that standing depends to some extent on the seriousness of the illegality alleged, with greater willingness to regard an interest as "sufficient", where grave, or widespread illegality is alleged. The JUSTICE-All Souls Report stated (*op cit*, p 196, para 8.45) that this seemed fundamentally unsound since, subject to a *de minimis* principle, the courts ought to be able to act when a breach of the law by a public authority is drawn to their attention. We agree. Although the *nature* of the power or duty allegedly breached is relevant to the question of standing, the seriousness or widespread nature of the illegality should not be. Quite apart from issues of principle, the more closely the question of the nature of the illegality is tied to the facts of the case, the more difficult it becomes to predict the degree of interest that will be required.

5.19 The liberal trend referred to in paragraph 5.17 above continues[33] and a number of consultees recommended no change to the existing broad approach. However, perhaps because of exceptions such as the *Rose Theatre Trust* case,[34] a substantial number of consultees did favour special provision in cases where the applicant is a representative or pressure group or in cases where no individual has standing but it can be demonstrated that there is a sufficient public interest in the matter being litigated.[35]

5.20 We propose that a two track system of standing be adopted.[36] The first track would cover those who have been personally adversely affected by the decision which is the subject of the complaint.[37] The other track would be a discretionary track and cover, inter alia, public interest challenges. We recommend that except in those cases where a statutory power or duty concerns, or is owed to, an individual or to a narrow range of individuals to which the applicant does not belong,[38] any person who has been adversely affected by a decision should normally be given standing as a matter of course.

5.21 The consultation paper proposed[39] that the provisions as to standing in the Supreme Court Act and Order 53 should expressly refer to public interest challenges, in the light of the decision in the *Rose Theatre Trust* case,[40] which was seen to be going against the present widespread trend to allow public interest challenges under the present general head of "sufficient interest". The issue of public interest challenges

[33] Eg *R v HM Majesty's Inspectorate of Pollution, ex p Greenpeace* [1994] 1 WLR 570 (CA) where it was held that Greenpeace had standing to challenge variation of existing authorizations for the Sellafield site by reason of its membership in the area.

[34] *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] 1 QB 504; and see n 28 above.

[35] One consultee considered that in every case it should be the nature of the issue raised rather than a personal connection with the case which determines the standing of the applicant.

[36] See JUSTICE-All Souls Report, *op cit*, pp 203-204, para 8.62, p 209 and Lord Woolf, "A Possible Programme for Reform", [1992] PL 221, 233.

[37] Eg decisions affecting an individual's legal rights, legitimate expectations, or a refusal to confer some discretionary benefit upon them.

[38] Where the statutory power or duty concerns, or is owed to an individual, or to a narrow range of individuals an application by a person outside the designated category may fail for want of standing even where she or he is affected. Thus, it is possible that only a person who has been dismissed, or has had a licence revoked, will have sufficient interest to challenge the decision *Durayappah v Fernando* [1967] 2 AC 337 (as explained in *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295); *R v LAUTRO, ex p Ross* [1993] QB 17 (CA)). The position of an applicant who is not affected by a decision which has not been challenged by the person affected is even weaker (*R v Legal Aid Board, ex p Bateman* [1992] 1 WLR 711).

[39] Consultation Paper No 126, paras 9.26 - 9.28.

[40] *R v Environment Secretary, ex p Rose Theatre Trust Co* [1990] 1 QB 504.

was raised in two contexts: (i) challenges by individuals and groups in respect of measures which affect the public generally;[41] and (ii) challenges by groups rather than specific individuals where a decision affects a particular individual.[42]

5.22 We have considered whether, as those who have suggested this sort of approach have advocated,[43] the Rules should refer to the factors to be taken account of in public interest challenges. These include:

- the importance of the legal point,
- the chances of the issue being raised in any other proceedings,
- the allocation of scarce judicial resources, and
- the concern that in the determination of issues the courts should have the benefit of the conflicting points of view of those most directly affected by them.

We accept that all these may be relevant in relation to both public interest and group challenges. However, although we carefully considered whether to enunciate criteria such as these in the test of standing in public interest and group challenges, we consider a simple test allowing the application judge a broad discretion is preferable.[44] **Accordingly, we recommend that an application should not be allowed to proceed to a substantive hearing unless the court is satisfied that the applicant has been or would be adversely affected, or the High Court considers that it is in the public interest for an applicant to make the application[45] (Draft Bill, clause 1, new section 31B(1)).**

[41] (1) Group given statutory functions in respect of decision: *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] 2 WLR 409 (HL), para 3.12 above; (2) Group considered appropriate, perhaps because of expertise: *R v Secretary of State for Social Services, ex p GLC, The Times*, 16 August 1984, (in the CA the point was left open, *The Times*, 8 August 1985); *R v Secretary of State for Social Services, ex p Child Poverty Action Group* (1988) [1990] 2 QB 540. See also (3) standing accorded to ratepayers and taxpayers with a reasonable concern irrespective of whether they are affected in a way distinct from the general public: *R v GLC, ex p Blackburn* [1976] 1 WLR 550; *Arsenal FC v Ende* [1979] AC 1; *R v HM Treasury, ex p Smedley* [1985] QB 657.

[42] *R v Chief Adjudication Officer, ex p Bland, The Times*, 6 February 1985 (reduction of benefits to striking miners; cf the TUC whose connection was insufficient); *Royal College of Nursing of the UK v DHSS* [1981] 1 All ER 545, 551B - H; [1981] AC 800 (advice that it was lawful for nurses to carry out abortion where prescribed by a doctor who remained in charge).

[43] JUSTICE-All Souls Report, *op cit*, pp 203-204, para 8.61, p 208; Lord Woolf, "A Possible Programme for Reform", [1992] PL 221.

[44] See the Barbados Administration of Justice Act 1980, s 6 (drafted by Sir William Wade): "The court may on application for judicial review grant relief in accordance with this Act (a) to any person whose interests are adversely affected by an administrative decision; (b) to any other person if the court is satisfied that that person's application is justifiable in the public interest in the circumstances of the case".

[45] It is anticipated that the issue of standing in public interest challenges may, as it is now, be a relevant factor when considering the grant of a remedy at the substantive hearing.

(iii) Time limits

5.23 At present an application for leave to apply for judicial review may be refused on the ground that there has been (1) undue delay, where granting relief would be likely to cause "substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration" or (2) lack of promptness.[46] There was widespread support for the proposition that a specific time limit was necessary to give effect to the principle of certainty.[47] It was also agreed that the co-existence of section 31(6) of the Supreme Court Act 1981 with the provisions of Order 53 rule 4(5) is pointlessly confusing and should be remedied.

5.24 After reviewing the approach adopted in EC law and a number of other systems containing time limits for challenging administrative acts or rules,[48] our consultation paper invited views as to whether the present three month time limit was too short. We suggested that the correct balance lay somewhere between three and six months. The majority of consultees, however, did not favour lengthening the time limit although there was support for abandoning the promptness requirement. We believe that the principle of certainty is particularly important in administrative law decisions, and that a short time limit for initiating the application should continue to be included in the Rules.

5.25 The public policy considerations set out in Part II all tend to justify the provision of special time limits for initiating legal challenges to administrative acts. Different circumstances and the different remedies that are sought do, however, mean that it is important that the court should continue to have discretion at the preliminary consideration stage and be able to exercise its jurisdiction flexibly. We consider that time limits should be dealt with in the Rules of Court rather than in primary legislation and that section 31(6) of the Supreme Court Act 1981 should accordingly be replaced by a provision empowering time limits to be specified by rule.

5.26 **We recommend:-**

(a) that the time limit in applications for judicial review should be prescribed in rules of court (Draft Bill, clause 1, new section 31(B)(2) and should be three months from the date when grounds for the application first arose (Draft Order 53, rule 2(1));

[46] Supreme Court Act 1981, s 31(6) and O 53, r 4(1).

[47] Consultation Paper No 126, paras 4.28 - 4.29. The Administrative Law Bar Association gave the example of contracts entered into to purchase land conditional upon the grant of a satisfactory planning permission as defined by the contract and no challenge having being made within the 3 month period. See the facts of *R v Richmond LBC, ex p Meacock* [1994] EGCS 7.

[48] Consultation Paper No 126, paras 4.16 - 4.22. These are reproduced with minor amendments in Appendix D to this report.

(b) **that the court may refuse an application made within the three month time limit if the application is not sufficiently prompt and, that if the relief sought was granted, on an application made at this stage, it would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration (Draft Order 53, rule 2(2)).**

(c) **that an application may be made after the end of the period of three months[49] if the court is satisfied that there is a good reason[50] for the application not to have been made within that period, and that if the relief sought was granted, on an application made at this stage, it would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration (Draft Order 53, rule 2(3)).**

5.27 Lack of promptness might be good reason for refusing to allow the case to proceed even within 3 months, especially if the applicant was delaying for mischievous reasons, and this remains explicit in the Draft Order 53 rule 2(2)(b) annexed to this report. The court would have discretion to decide in each case whether there was good reason or not. This presumption would give the courts the necessary flexibility to deal with the wide variety of circumstances which they could face. In *R v The Independent Television Commission, ex p TVNI Ltd,*[51] the applicants were refused leave on the ground that their application had not been made promptly, even though it was made within three months. This was a case involving legally sophisticated applicants delaying longer than they should have done, or needed to do.

5.28 "Good reason" could be used to incorporate extensions of time where an applicant has been pursuing an alternative remedy.[52] Also, the need to show good reason for the delay might, depending on the circumstances of the case, mean that the applicant had to show that the application would not substantially cause hardship or prejudice rights or good administration. This would only be necessary in extreme cases; normally such issues should be left to the substantive hearing.[53] Alternatively, if a respondent was invited to give further information, he might be able to show that no remedy would be awarded at the substantive hearing, thereby preventing the

[49] Assuming that any other criteria are met.

[50] The courts have generally been reluctant to define good reason, deciding whether there is good reason or not on the individual circumstances of each case. See, however, *R v Greenwich LBC, ex p Patterson* [1993] 2 FLR 886.

[51] *The Times*, 30 December 1991 (CA).

[52] See paras 5.31 - 5.35 below.

[53] Eg *R v Dairy Produce Quota Tribunal, ex p Caswell* [1990] 2 AC 738, 747; *R v Secretary of State for Health, ex p Furneaux* [1994] 2 All ER 652 (CA).

applicant from making out his or her claim of good reason for being allowed to proceed even though out of time, due to the substantial detriment which this would cause. This would be unlikely to be easily demonstrable on paper in a summary process, and it is anticipated that refusals on this ground alone may be rare. However, good reason would not be confined to this; it would be determined in the circumstances of each case, and we have recommended that the relevant rule continue to refer specifically to promptness.

5.29 The next issue about time limits, promptness and delay arises from the nature of the filter stage of the application, at present leave and, on our recommendation, preliminary consideration. There is concern that applications for leave have become a lesser version of the substantive hearing, rather than an *ex parte* filter. This is why we have proposed[54] that the initial stage of applications should generally be made and considered on paper, preventing the case from in effect being treated as *inter partes* and being argued in full at the leave stage. This will necessarily limit the arguments which can be made either by the applicant or by the respondent,[55] especially where the respondent is required to do no more than complete a "request for further information" form.[56]

5.30 Although compliance with time limits is clearly important in the preliminary consideration of an application,[57] at this stage we think it neither appropriate nor practical for there to be lengthy argument at the filtering stage over, for instance, whether the granting of relief would substantially prejudice third party rights or be detrimental to good administration.[58] This issue is one that can only rarely be dealt with satisfactorily in the absence of the respondent. It is collateral to the issue whether the decision should be reviewed and it should normally influence the exercise of the judge's discretion when deciding whether or not to grant a remedy rather than whether or not to allow the application to proceed to a substantive hearing. We are of the view that this approach fits with the principle that a leave stage or a preliminary consideration filters *applicants*, and that as such it must be primarily concerned with their position.

[54] At para 5.11 above.

[55] Arguing, for example, that there is no good reason for the grant of leave due to undue delay which has been detrimental to good administration, or which would cause substantial prejudice or hardship.

[56] See para 4.8 - 4.11 above.

[57] See Draft O 53, r 3(5)(c), Appendix A below.

[58] See n 55 above.

(iv) Exhaustion of alternative remedies

5.31 In the consultation paper we asked whether the issue of alternative remedies should be raised at the leave stage[59] and whether it should be made clear that, where an alternative remedy is being pursued, the three month time limit should not run.[60] The majority of those who responded favoured the court considering questions of alternative remedies at the initial leave stage. It was argued that this would prevent the loss of time and costs which would occur if consideration of this question only takes place at the substantive hearing.

5.32 We have drawn a distinction between legal alternative remedies (ie remedies available before a court or a tribunal or a statutory appeal to a minister) and other remedies and proposed that the former should be regarded as adequate alternative remedies in this context.[61] We noted that ministerial default powers, while legal remedies, require slightly different treatment. The modern view is that, while the existence of a default power will generally exclude a civil action for damages, it does not exclude the judicial review jurisdiction. However, like other alternative remedies, it is taken account of in the exercise of the court's discretion.[62] The Court of Appeal has stated that a default power should not preclude judicial review unless the central complaint is in reality about the substantive merits of the decision rather than the authoritative resolution of a legal issue.[63]

5.33 While we consider that appeals to courts, tribunals and statutory appeals to ministers should normally *have* to be exhausted before either an application is allowed to proceed,[64] or a remedy is granted, we believe that a more flexible approach is needed in the case of default powers by ministers. It has been said that when exercising obligations under such powers the minister is quite clearly acting in a purely ministerial capacity.[65] Although even in relation to the determination of

[59] Consultation Paper No 126, para 14.6.

[60] *Ibid*, para 14.11.

[61] See paras 3.24 - 3.26 above.

[62] Cf *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387 where it was held that where a duty is imposed by statute and a specific statutory remedy is created for the enforcement of that remedy, the statutory remedy (in that case a complaint to the Local Government Board) is the only remedy available and other remedies (like mandamus) are excluded. However, the existence of default powers was found not to preclude judicial review in eg *R v ILEA, ex p Ali and Murshid* [1990] COD 317; *R v Secretary of State for the Environment, ex p Ward* [1984] 1 WLR 834; *R v Secretary of State for the Environment, ex p Lee* (1987) 54 P & CR 311; *R v Ealing LBC, ex p Times Newspapers* [1987] IRLR 129.

[63] See *R v Devon County Council, ex p Baker and Johns* (1994) 6 Admin LR, 113, 136 per Simon Brown LJ.

[64] If a statutory appeal to a minister takes a very long time it might be thought a good reason for bringing an application for judicial review outside the three month time limit.

[65] *R v Secretary of State for Education and Science, ex p Chance*, Woolf J (unreported 26 July 1982) cited in *R v Secretary of State for Education, ex p Prior* [1994] COD 197.

a legal issue some may prefer to seek the exercise of a default power, for instance on grounds of cost, this can involve considerable delay and, even where there has been ultra vires action, the minister may decide not to intervene unless, for instance, he judges that the dispute raises issues of wider application.[66] We also note that a default power might be regarded as an extraordinary remedy dependent on the discretionary power of a public authority and not therefore an effective remedy for the purposes of Article 26 of the European Convention on Human Rights.[67]

5.34 We have already proposed that both the Form 86A compiled by the applicant and the Request for Information form which may be sent to the respondent should refer to any alternative remedy[68] which has been or is being pursued. Where an alternative remedy is being pursued within the three month time limit the respondent might agree to an extension of time.[69] Alternatively, where a right of appeal lies against an order which is sought to be quashed by certiorari, consideration of whether to allow an application to proceed to a substantive hearing may be adjourned until the appeal is determined or the time limit for appeal has expired.[70] Although some nominated judges consider that this is a satisfactory way of proceeding, if widely used it could have the effect of clogging up the list with applications for preliminary consideration (in present terminology, leave) which might never proceed. We do not consider that an applicant should be obliged to make such an application and then adjourn it until alternative remedies are exhausted.

5.35 We consider that an application ought not to be allowed to proceed to a substantive hearing unless the applicant has exhausted all alternative legal remedies or demonstrates that, despite the existence of such a remedy, judicial review is an appropriate procedure.[71] It is accordingly recommended that time taken in the

[66] Eg *R v Secretary of State for Education, ex p Prior* [1994] COD 197, albeit in the context of a challenge to the minister's refusal to exercise his default power. The original decision was not susceptible to judicial review because it concerned a complaint about a contract of employment (transcript 21 December 1993 pp 13 - 15).

[67] App 14545/89 *Byloos v Belgium* (1990) 66 ECHR 238. See generally Van Dijk and Van Hoof, *op cit*, 88-93.

[68] See para 4.6 above.

[69] A respondent may consent to an extension of time: see *Practice Direction (Crown Office List: Criminal Proceedings)* [1983] 1 WLR 925, 926.

[70] See O 53, r 3(8) which states: where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

[71] A number of consultees were concerned that applicants should be entitled to apply for judicial review both of the appeal and of any matters involved in the original decision which were not adequately remedied by the appeal. This is discussed further in Part IX below.

pursuit of alternative remedies should not normally operate to time-bar applicants from applying for judicial review (this includes legal recourse to ministers). This could be done in two ways: (i) time would not start to run until alternative remedies are exhausted; or (ii) the court would be required to take account of the fact that an alternative remedy was being pursued, as a good reason why an application made after 3 months should be allowed to proceed to a substantive hearing. We prefer the second option as it is simpler evidentially, and fits in with our more general proposals for the matter to be considered when the court decides whether an application should proceed to a substantive hearing. **Accordingly, we suggest that the court should take account of the fact that an alternative remedy was being pursued as a good reason why an application made after 3 months should be allowed to proceed to a substantive hearing.**

Reasons for not allowing an application to proceed to a substantive hearing

5.36 The consultation paper referred to the suggestion, which has been made elsewhere,[72] that reasons should be given for the refusal of leave. This would be in line with the provisions of the European Convention on Human Rights on the entitlement to a fair and public hearing and to an effective remedy before a national authority.[73] There was widespread support for this suggestion, and some experienced practitioners stated that reasons were not always given. We note that under the existing common law professional judges as part of their judicial role should "as a rule" provide reasons for their decisions.[74] We believe that brief reasons for refusal should be given and we think that the layout of the proposed form JRJ[75] notifying the applicant of the decision will make this easier.

Respondent's consent to a substantive hearing of the application

5.37 The consultation paper suggested that in those cases where both the applicant and the respondent agreed that there was a serious issue to be tried the leave stage might be dispensed with.[76] Of those who responded the majority favoured this option. We agree, however, with the nominated judges that in judicial review cases the court should always be satisfied that there was an appropriate issue for consideration by judicial review. The respondent's position, which could be indicated on the

[72] A Le Sueur and M Sunkin, "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102. See Consultation Paper No 126, para 5.12.

[73] Articles 6(1) and 13. Eg App 12275/86 *Les Travaux du Midi v France* (1991) 70 ECHR 47 and see generally para 2.11 above.

[74] See *Eagil Trust Co Ltd v Piggot-Brown* [1985] 3 All ER 119; *R v Knightsbridge Crown Court, ex p ISC Ltd* [1981] 3 WLR 640 and para 2.29 n 43 above.

[75] See para 4.12 above.

[76] Consultation Paper No 126, para 5.13. But cf *R v Durham CC, ex p Robinson* [1992] NPC 5, *The Times* 31 January 1992. One consultee thought that in practice a form of consent operates already ie when an oral application is heard on notice and no objection is made by the respondent.

"request for information" form, would no doubt be a material factor to be taken into account by the court.

Capacity to apply for Judicial Review

5.38 Formerly unincorporated associations were held to be "persons aggrieved" and able to apply for judicial review.[77] Under the Interpretation Act 1978 "person" includes "a body of persons corporate or incorporate". It has, however, recently been held that, not being legal persons, unincorporated associations have no capacity to make such applications.[78] The issue of capacity, it was held, preceded, and was quite distinct from, the issue of sufficient interest, which could not be considered until capacity was established. The reformulation of the test for standing from "person aggrieved" to "sufficient interest", which was made in order to facilitate the adoption of a uniform test for standing, thus appears to have had the effect of narrowing the class of those who may apply for judicial review.

5.39 As a matter of principle, we believe this is unfortunate. Many public interest challenges, and especially group challenges to public acts and decisions may be made by unincorporated associations. Although there are cases in which those interested in bringing judicial review proceedings have formed a limited company specifically for this purpose,[79] it would be a considerable inconvenience and expense if all pressure groups and interested bodies (including trade associations) had to form themselves into limited companies solely for the purpose of making judicial review applications. In cases where urgent relief is sought a requirement of this sort would, moreover, make it impossible in many cases to proceed in time. In other cases the three month time limit would be particularly burdensome. The result is that an unincorporated association appears to be in a worse position in the context of the public law remedies of Order 53 than in other legal proceedings where they can sue and be sued in a representative capacity.[80]

5.40 Although, as we have said, unincorporated associations have been held not to have capacity to apply for judicial review, it was held in the same case that the members of the two associations which brought the proceedings were liable for the costs of

[77] *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators and Liverpool Taxi Owners Association* [1972] 2 QB 299, 308H-309A, 312B-C; (Lord Denning MR, Roskill LJ and Sir Gordon Willmer).

[78] *R v Darlington BC, ex p Association of Darlington Taxi Owners and Another* The Times 21 January 1994.

[79] *R v Hammersmith and Fulham LBC, ex p People Before Profit Ltd* (1981) 80 LGR 322, referred to in *R v Darlington BC, ex p Association of Darlington Taxi Owners The Times* 21 January 1994.

[80] O 15, r 12.

the application even though they were not entitled to be parties to the proceedings.[81] Apart from questions of costs the court will, rightly, be concerned with the ability of an applicant to give a cross-undertaking as to damages in the event of the case going against him where interim relief is sought. We consider that these matters should be dealt with in the same way as they are in representative actions brought under the Order 15 rule.

5.41 **We recommend that unincorporated associations should be permitted to make applications for judicial review in their own name through one or more of their members applying in a representative capacity where the court is satisfied that the members of the applicant association have been or would be adversely affected or are raising an issue of public interest warranting judicial review, and that the members of the association are appropriate persons to bring that challenge (Draft Order 53 r 1(2)).**

[81] *R v Darlington BC, ex p Association of Darlington Taxi Owners and another (No 2) The Times* 14 April 1994. Although Sedley J in *R v London Borough of Tower Hamlets, ex p Tower Hamlets Combined Traders Association* [1994] COD 325 stated that in principle it did not matter that the applicant was an unincorporated association lacking legal personality, he added that nevertheless there were consequential matters, such as the enforcement of costs orders, which made it necessary that the applicant should be a legal person.

PART VI
INTERIM RELIEF

6.1 The availability of interim relief against the Crown has been the subject of much debate in recent years. When the Commission's 1976 report was implemented it was generally accepted that no interim relief could be granted against the Crown or Crown servants,[1] and the Commission's recommendation that courts should be empowered to declare the terms of an interim injunction which it would otherwise have granted, but for the Crown's special position,[2] was left unimplemented. The general view was that the prohibition in section 21(1)(a) of the Crown Proceedings Act 1947 on the court granting an injunction in any civil proceedings against the Crown prohibited both final and interim injunctions.[3] The position has changed radically since the revision of Order 53 in the light of our earlier report.

The Present Position

6.2 In *R v Secretary of State for Transport, ex parte Factortame Ltd* ("*Factortame (No 2)*") the European Court of Justice stated[4] that the principle of full effectiveness of Community law required the national court to set aside any rule of national law which prevented it from granting interim relief which ought otherwise to be available. The House of Lords[5] then held that where European Community rights are involved (even only putative rights), the courts have jurisdiction to grant an interim injunction against ministers of the Crown and also to disapply an Act of Parliament.[6]

6.3 There is also power to grant interim relief in cases which do not involve European Community rights but this result was achieved with more difficulty. In the late 1980s it was argued that the enactment of section 31(2) of the Supreme Court Act 1981 and the introduction of the revised Order 53, rule 3(10) had given courts

1 Report on Remedies in Administrative Law (1976) Law Com No 73, paras 23 and 29. It has always been clear that relief can be obtained against other public authorities such as local authorities.

2 *Ibid*, para 59(i).

3 For a defence of that position, see Sir John Laws in M Supperstone QC and J Goudie QC, *Judicial Review* (1992), pp 253-258.

4 Case C 213/89, [1991] 1 AC 603, 644.

5 [1991] 1 AC 603.

6 In *Factortame (No 2)* it was ordered that "pending final judgment or further order by the court, the operation of Part II of the [Merchant Shipping Act] of 1988 and of the [Merchant Shipping (Registration of Fishing Vessels) Regulations] of 1988 be disapplied and the Secretary of State should be restrained from enforcing it in respect of any of the applicants and any vessel owned (in whole or in part), managed, operated or chartered by any of them so as to enable registration of any such vessel under the [Merchant Shipping] Act of 1894 to continue in being": [1991] 1 AC at 609F.

power to grant injunctions (and hence interim injunctions) against officers of the Crown, and also against government ministers acting under statutory powers in their own name, though not against the Crown itself. This argument, which had support both in the case law and in commentary,[7] was finally rejected by the House of Lords in *R v Secretary of State for Transport, ex parte Factortame Ltd* ("*Factortame (No 1)*").[8] It was held in that case that the court had no power to grant an interim injunction against a minister of the Crown. At that stage there was therefore a difference between domestic cases and Community cases which, in our view, was anomalous.[9]

6.4 Since our consultation paper was published, however, the House of Lords, having heard extensive argument on the historical development of proceedings against the Crown, reconsidered its earlier decision. In *Re M*[10] it held that there is jurisdiction under section 31 of the Supreme Court Act 1981 to make coercive orders such as injunctions and interim injunctions against ministers of the Crown acting in their official capacity. This would appear to be the case for both statutory and prerogative powers.[11] The Crown, on the other hand, is not, as such, susceptible to an order.[12]

6.5 Broadly speaking, the House's reasoning was based on (a) the need to enforce the rule of law,[13] (b) the fact that the Crown Proceedings Act 1947 was designed to preserve pre-existing remedies against the Crown[14] and, (c) the inapplicability of section 21(1) of the 1947 Act's prohibition on injunctive relief to judicial review proceedings because, by section 38(2), Crown side proceedings, including judicial

[7] *R v Secretary of State for the Home Department, ex p Herbage* [1987] QB 872. See also *R v Licensing Authority, ex p Smith Kline (No 2)* [1990] 1 QB 574. See further G Aldous and J Alder, *Applications for Judicial Review* (1985), 42-3, 70-1; R Gordon, *Judicial Review: Law and Procedure* (1985), para 5-09; C Emery and B Smythe, *Judicial Review: Legal Limits of Official Power* (1986), pp 295-6. See, in relation to government ministers acting in their own name, HWR Wade, *Administrative Law* (6th ed, 1988), p 589.

[8] [1990] 2 AC 85.

[9] Consultation Paper No 126, para 6.6. The two tier system was criticised by Lord Donaldson MR as being wrong in principle: *M v Home Office* [1992] 1 QB 270, 306H - 307A; and was said by Lord Woolf in *Re M* to be an unhappy situation: [1994] 1 AC 377, 407 A-B.

[10] [1994] 1 AC 377.

[11] *Ibid*, 417D - E.

[12] *Ibid*, 395D, 415 - 416. In relation to enforcement, there is, however, a difference between Lord Woolf and Lord Templeman, the latter (395E - F) accepting that ministers in their official capacity are subject to the coercive powers exercisable in the contempt proceedings, but Lord Woolf (425D - E), with whom Lords Keith, Griffiths and Browne-Wilkinson agreed, thought that the sanction for a finding of contempt by a government department or minister should be a matter for Parliament. For comment see R Brazier, "Ministers in Court: The Personal Legal Liability of Ministers" (1993) 44 NILQ 317, 323 - 324.

[13] [1994] 1 AC 377, 395, 407.

[14] *Ibid*, 411 - 412, 415.

review, are not civil proceedings.[15] Once section 21 of the Crown Proceedings Act was out of the way, section 31(2) of the Supreme Court Act 1981 and Order 53, rule 3(10) provided positive authority for interim injunctions. The liability of government ministers acting in their own name was seen as analogous to their long established liability to prerogative orders of mandamus and prohibition.[16] The position in England has thus fundamentally changed; the difference between cases involving European Community rights and purely domestic cases has been removed, and it has been made clear that the statutory provisions which were thought to preclude interim relief against ministers and government departments do not in fact have this effect.

6.6 In Scotland the position is different. In *McDonald v Secretary of State for Scotland* the Inner House declined to follow *M*. It stated that an interim interdict is not available against the Crown: there is no equivalent of section 38(2) of the Crown Proceedings Act 1947 to restrict the operation of section 21 in respect of the court's supervisory jurisdiction and an action against the Secretary of State for Scotland was an action against the Crown.[17]

Principles on which interim relief is granted[18]

6.7 The tests generally applicable when a court is considering whether to grant interlocutory injunctions are those enunciated in *American Cyanamid Co v Ethicon Ltd.*[19] The extent to which they required modification where relief is sought against a public authority was first considered in cases involving local authorities.[20] In *Factortame (No 2)*, the House of Lords considered the tests where relief is sought against the Crown. Lord Goff stated that the court had first to consider the availability to either side of an adequate remedy in damages. As public authorities

[15] *Ibid*, 411 - 412, 421B. See also 407A. But note that the words with which s 38(2) begins state that the meanings are only to apply "except in so far as the context otherwise requires": on which see MH Matthews "Injunctions, Interim Relief and Proceedings against Crown Servants" (1988) 8 OJLS 154, 159.

[16] *Re M* [1994] 1 AC 377, 405 - 417. Eg *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

[17] 1994 SLT 692. As the case did not involve the supervisory jurisdiction, strictly this was obiter, but the point appears to have been fully argued. In so far as the reasoning in *M* depended on the view that the Crown Proceedings Act 1947 was designed to preserve pre-existing remedies against the Crown, this case is troublesome because it is stated that it was clear that in Scotland, before the 1947 Act, the Crown and its officers had been regarded as liable to having interim interdict pronounced against them: the Lord Justice Clerk at pp 695, 698; *British Medical Association v Greater Glasgow Health Board* [1989] 1 AC 1211, 1225.

[18] See generally MH Matthews, "Injunctions, Interim Relief and Proceedings against Crown Servants" (1988) 8 OJLS 154, 163-168.

[19] [1975] AC 396

[20] *Smith v ILEA* [1978] 1 All ER 411; *Meade v Haringey LBC* [1979] 1 WLR 637.

are not generally liable in damages in respect of ultra vires acts,[21] this element of the *American Cyanamid* test did not provide much assistance in public law cases. As regards the balance of convenience, the court had to look more widely, taking account of the public in general to whom an authority owed duties. When exercising its discretion, Lord Goff considered that:

> ... the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.[22]

We have referred to the fact that interim relief is nearly always sought and often granted in homelessness cases.[23] In other cases, the grant of leave operates as a stay of the proceedings to which the application relates unless the Court orders otherwise.[24] Although public authorities seeking interim relief may not be required to give an undertaking to pay damages,[25] in dealing with an application for interim relief the court takes account of whether such an undertaking has been offered by an applicant.[26]

Interim relief against the Crown in domestic cases

6.8 The absence of interlocutory relief against the Crown and its officers was said to be "a serious procedural defect in the English system of administrative law".[27] Our provisional view in the consultation paper was that the Crown's continued immunity from interim relief was not sustainable on grounds of legal principle. We, like our predecessors in 1976, were not convinced by the legal arguments for continuing to protect the special position of the Crown. We supported the need for the court to have effective powers of providing interim protection whilst an arguable case for judicial review against a minister in his or her official capacity or against a government department is pending. Our provisional view was overwhelmingly

[21] *Bourgoin SA v Ministry of Agriculture Fisheries and Food* [1986] QB 716; *R v Knowsley MBC, ex p Maguire* (1992) 90 LGR 653.

[22] [1991] 1 AC 603, 674D. See also *R v Secretary of State for the National Heritage, ex p Continental Television BVio* [1994] COD 121 (CA).

[23] Para 4.4 above.

[24] On the availability of stays in respect of administrative acts as opposed to proceedings before courts and tribunals, see para 6.23 below.

[25] *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227.

[26] *R v Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 1 WLR 570 (CA). See also *Scotia Pharmaceutical International Ltd v Secretary of State for Health and Norgine Ltd* [1994] COD 241 (DC). On the position of third parties, see para 6.24 below.

[27] *R v Inland Revenue Commissioners, ex p Rossminster Ltd* [1980] AC 952, 1014H (*per* Lord Diplock).

supported on consultation and as a result of the decision in *Re M*[28] it is now the law.

6.9 Although one consultee said that there was an intellectual argument justifying the different treatment of central government and ministers in European Community and domestic cases, there was no support for the continuation of this distinction even before the decision in *M*. Equally, the Crown never acts save by way of minister or authorised person[29] and, provided the position can be held pending the substantive hearing, there was little if any support for relief being given against the Crown as opposed to the minister acting in his or her official capacity.

6.10 There are three principal arguments in favour of interim relief against the Crown.

(a) The constitutional need to enforce the rule of law.[30]

(b) Where the issue before the court relates to protection of the citizen against unauthorised governmental action, the court needs, as in any other form of litigation, to have adequate powers to maintain the interim position and to avoid irreparable harm. Case law involving public authority respondents, and Crown and Crown officer respondents in EC related cases, has helped to develop principles taking account of the wider public interest and obligations of the respondents.

(c) The unavailability of monetary compensation in respect of ultra vires acts makes it particularly important that the court should be able to grant interim protection. The Crown, and now local authorities charged with enforcing the law,[31] will not be required to give an undertaking to pay damages if it subsequently transpires that an interim injunction to restrain a breach of the law should not have been granted. In any event the possibility of recovering damages is remote.[32]

6.11 The arguments against the availability of interim relief against the Crown are as follows:

[28] [1994] 1 AC 377.

[29] The Crown Proceedings Act 1947, s 17 sets out a list of authorised departments against whom proceedings may be brought. See *Dunn v MacDonald* [1897] 1 QB 555 for the presumption that ministers act as agents of the Crown.

[30] *Re M* [1994] 1 AC 377, 395, 407 (Lord Templeman and Lord Woolf), para 6.5 above.

[31] *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227.

[32] Note, however, that in cases involving EC law, this may be less remote. See further Cases C-6/90 & 9/90, *Francovich v Italian Republic* [1992] IRLR 84 (ECJ) but cf *Paola Faccini Dori v Recreb Srl* Case C91/91 (ECJ) *The Times* 4 August 1994; *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227.

(a) There is a necessary presumption of validity in favour of the decisions taken by the Crown and its officers which should be maintained until shown to be wrong. By granting interim relief, the court would interrupt the carrying out of the duties imposed on the authority, casting doubt on that presumption of validity and overstepping the boundary between adjudication and administration before the issue of the validity of what has been done has been properly determined.[33]

(b) There is a need for the administration to act swiftly if necessary without fear of inappropriate judicial intervention.

(c) Injunctive relief ought generally not to be ordered if the parties are willing to undertake to maintain the status quo pending the full trial.[34] The Crown and its officers will generally give, and will honour, such undertakings. The use of compulsion, where consensus is available, is inappropriate.

(d) The courts are traditionally reluctant to make orders which they cannot enforce. This is particularly relevant in the field of discretionary remedies, whether for specific performance or injunctive relief, or otherwise. The scope for enforcing an order against the Crown is restricted. If the reality is that the court must depend on consensual compliance, that ought to be reflected in the nature of the directions it gives.

6.12 Our reasons for rejecting the second set of arguments are:

(a) The presumption of validity applies to the activities of other public authorities which are not protected against the making of interim orders.[35]

(b) The need for swift action in emergencies is no argument against the need for the availability of interim protection in non-urgent situations and ignores the discretionary nature of such interim relief.

(c) The ability of the Crown to give undertakings which reflect the possibly dubious validity of acts which it has previously executed removes much of the force from the argument that the court should not grant interim relief for a similar precautionary purpose.

(d) Orders of mandamus and prohibition have habitually been made against ministers and the Crown itself is (to some extent, namely in the form of its ministers and servants) subject to habeas corpus.

6.13 We therefore recommend that interim relief should continue to be available against the Crown in domestic cases. In the light of *Re M* it is arguable that further reform and tidying up could be achieved by an amendment to the rules and without amendment to statute. We consider that statutory provision is desirable. First, it

[33] *R v Inland Revenue Commissioners, ex p Rossminster Ltd* [1980] AC 952, 1001, 1027.

[34] As in *M v Home Office* [1992] 1 QB 270 (CA); *Re M* [1994] 1 AC 377 (HL).

[35] MH Matthews, "Injunctions, Interim Relief and Proceedings against Crown Servants", (1988) 8 OJLS 154, 156.

would make the position more transparent. Secondly, the reasoning of the Inner House in *McDonald's* case and the position in Scotland[36] may put into question one of the factors underpinning the decision in *Re M*, the view that the 1947 Act was designed to preserve pre-existing remedies against the Crown, and make that decision vulnerable to further consideration by the House of Lords.[37] There was wide support for our provisional conclusion that the Crown's immunity from interim relief is not sustainable on grounds of legal principle and we consider it appropriate to deal with the matter in primary legislation so as to remove any vulnerability. **We recommend that there should be statutory provision for interim relief against ministers in their official capacity and against government departments in judicial review proceedings. (Draft Bill, clause 1, new section 31B(5)).**

6.14 The following issues now arise for consideration. First, should interim relief be available prior to the preliminary consideration of the application for judicial review?[38] Secondly, should the form of such interim relief be by interim injunction, stay, or interim declaration? Thirdly, is separate provision needed where legislation, whether delegated legislation or, where European Community rights are involved, primary legislation, is impugned? Finally, should the statute or the rules set out the principles upon which interim relief is to be granted? These principles might be set out either in general terms or, if special provision is needed where legislation is impugned, in such cases.

Interim relief prior to the decision to allow an application to proceed to a substantive hearing

6.15 While there have been suggestions that there is an inherent power to grant such relief,[39] this seems inconsistent with the provisions of Order 53, rule 3(10) which expressly states that interim relief may be granted "where leave to apply for judicial review *is granted*" (emphasis added). There was widespread support for the inclusion of a power to order such interim relief, although the Treasury Solicitor's Working Group considered that it would undermine the leave process and that until leave was granted there was no substantive legal process in existence.[40] Interim relief at this initial stage was seen as a power to be used sparingly; i.e. in emergencies. Most of the examples given as to when it would be appropriate concerned

[36] See n 17 above.

[37] See also n 15 above.

[38] Ie prior to the granting of leave.

[39] White Book para 53/1-14/26; *Re M* [1994] 1 AC 377, 421-2.

[40] But costs have been ordered in an "ex parte on notice" leave application on the ground that leave proceedings are "proceedings" within the meaning of Supreme Court Act 1981, s 51: *R v Darlington BC, ex p Association of Darlington Taxi Owners (No 2), The Times* 14 April 1994.

immigration, where the applicant is about to be deported, or homelessness, where the applicant is about to be evicted.

6.16 The Commission agrees with the nominated judges and other consultees that it is not desirable that there should be pressure to grant leave (or, if our recommendations are accepted, to permit the application to proceed to a substantive hearing) in order to be able to maintain the status quo pending further consideration, whether by granting an interim injunction or a stay.[41]

6.17 We consider that interim relief prior to the decision to allow an application to proceed to a substantive hearing should only be granted in cases of urgency where, if interim relief was not granted at this initial stage, a subsequent decision to allow the application to proceed would be rendered nugatory or of much less value. We expect that in practice such relief will only be granted at this stage provided that the process for the preliminary consideration of this matter has been initiated by the applicant or the court receives an undertaking that it will be initiated as soon as is reasonably practicable.[42] **We recommend that it be made clear in the Rules that there is jurisdiction to grant interim relief before it has been decided in the preliminary consideration of an application to allow it to proceed to a substantive hearing (Draft Order 53, rule 5(1)).**

The form of interim relief

6.18 The consultation paper sought views on the relative merits of the different techniques for granting interim relief; stays, interim injunctions and interim declarations. The last of these is at present unknown to English law.[43] The overall result was not conclusive. Consultees accepted that what was needed was an effective way of preserving the status quo and a rationalisation of the different techniques for doing so but some reservations were expressed about interim declarations. It was said to be illogical to declare one day in interlocutory proceedings that an applicant has certain rights and on a later day that he has not[44] and it was suggested that interim declarations were inconsistent with the presumption of legality. Reservations were also expressed about the appropriateness of stays. The advantages and disadvantages of the different methods of granting interim relief are summarised below.

[41] Where this pressure prevails it may then be difficult to set aside the grant of leave: White Book para 53/1-14/33.

[42] The expression "forthwith" is usually used. This means "as soon as possible" and this depends on the circumstances of each case: *Sameen v Abeyewickrema* [1963] AC 597.

[43] *R v Inland Revenue, ex p Rossminster* [1980] AC 952, 1027; *Riverside Mental Health NHS Trust v Fox, The Times* 28 October 1993.

[44] See *R v Inland Revenue Commissioners, ex p Rossminster Ltd* [1980] AC 952, 1027 (Lord Scarman); *International General Electric Company of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784, 790.

6.19 *Interim injunctions*: The advantages of these are that they are familiar, they are coercive and they are targeted at a person who is told what to do or not to do. The principles upon which they are awarded are familiar. The courts would be able to build on the *American Cyanamid* principles as modified in cases concerning public authorities.[45] However, the coercive nature of the remedy continues to be seen as a disadvantage by some, including possibly Lord Woolf and those who agreed with him on enforcement in *Re M*.[46]

6.20 Some commented that as the test for granting an interim injunction in public law cases is satisfaction by the court that the challenge to the administrative or legislative act is "prima facie so firmly based as to justify so exceptional a course being taken,"[47] an interim injunction may inappropriately suggest that the court has already made up its mind as to the likely grant of final relief. Finally, although in *Factortame (No. 2)* an interim injunction was ordered in respect of an Act of Parliament,[48] in the case of legislation such an injunction is not entirely appropriate since it is only addressed to the law maker or those who implement or enforce it, whereas the "law" may be relied on by a wide range of third parties. For instance, in a *Factortame* scenario, if a person made a contract to supply fish caught in British waters to a processor, and that person was prohibited from fishing under the 1988 Act and the regulations made under it, it is not at all clear whether this contract, which was prima facie illegal under the Act and the regulations, would be affected by an injunction addressed to the listed range of persons mentioned above.

6.21 *Interim Declarations*: The advantages of these are that they are not coercive, they specifically address the interim position and are better suited to clarify the position of third parties. There is no reason why they should not be granted on the same basis as interim injunctions. In New Zealand there is provision for interim declaratory relief in judicial review proceedings against the Crown in lieu of injunctive relief which is not available,[49] and such relief is more generally available in Canada.[50] Such declarations would refer to a right or obligation that exists prima

[45] See para 6.7 above.

[46] See n 12 above.

[47] *Factortame (No 2)* [1991] 1 AC 603, 674 D.

[48] See n 6 above.

[49] Section 8(1)(c) and (2) of the Judicature Review Amendment Act 1972, introduced in 1977. Relief under section 8(1)(c), declaring a licence that has been revoked or suspended to continue in force until the final determination of the application for review, is coercive in nature, while relief under section 8(3) merely declares what the Crown ought not to do pending the final determination.

[50] *Ollinger v Saskatchewan Crop Insurance Corp* [1992] 4 WLR 519 (interim declarations in lieu of specific performance and injunctions).

facie and are not therefore illogical.[51] In making a merely interim declaration, the judge reserves his or her right and admits an obligation to re-examine the question after a substantive hearing at the trial.[52] In our view this consideration also meets the argument that a declaration in an interim form[53] may inappropriately suggest that the court has already made up its mind as to the likely grant of final relief.

6.22 We believe that the perceived difficulties arising from the presumption of validity[54] are met by the fact that the burden of proof lies on the party challenging the decision.[55] It was also commented that it might be more difficult to deal with undertakings regarding damages by the applicant where an interim declaration is given.[56] We believe that where it is clear that an activity should be stopped the principles developed in relation to injunctions could be applied or an interim injunction granted. Finally, it was argued by some that if interim injunctions and stays were available in respect of all the matters which could be the subject of an application for judicial review there is little point in an additional remedy: an interim declaration might simply create an overcomplicated and confusing regime. The validity of this argument does, however, depend on acceptance of the availability of stays in respect of administrative and legislative acts, a matter with which we deal below.

6.23 *Stays*: The advantages of these are that they are familiar since they represent the form in which interim relief has hitherto been granted in prerogative proceedings.[57] Stays have been said to be distinguishable from injunctions in being directed to the court or decision maker rather than to a party to litigation and on this ground the Court of Appeal has held that they are generally available to restrain the Crown

[51] *Yotvin v State of Israel* (1979) 34 PD(2) 344 Supreme Court of Israel, set out and discussed in Zamir & Woolf, *The Declaratory Judgment* 2nd ed, p 301. See also *ibid*, p 85.

[52] *Yotvin v State of Israel* (1979) 34 PD(2) 344 (Cohn and Barak JJ) (Zamir and Woolf, *op cit*, pp 304, 306, 308).

[53] This was also said about interim injunctions: paras 6.19 - 6.20 above.

[54] See para 6.18 and (albeit in the context of injunctions) para 6.11(a).

[55] See PP Craig, *Administrative Law* (3rd ed, 1994), p 730 and Zamir and Woolf, *op cit*, pp 85-86.

[56] A party who obtains an interlocutory *injunction* is normally required to give an undertaking to make good to other parties any damage which the latter may suffer as a result of the injunction if it proves ultimately to have been wrongly granted: *Smith v Day* (1882) 21 Ch D 421, 424, 425. The rule may not apply where the plaintiff is legally aided and cannot give a satisfactory undertaking as to damages: *Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252 (CA); or where the Crown, or a public authority on behalf of the Crown, seeks to enforce the law and there is no remedy except the injunction sought: *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227 (HL).

[57] O 53, r 3(10).

pending a substantive hearing.[58] This has, however, been doubted by the Privy Council[59] and if stays are to be used generally it is important that the Rules should resolve the conflict and make it clear that a stay can be given in respect of an administrative or legislative act and its implementation as well as to proceedings before courts and tribunals. As against this it was argued by some consultees that stays are of limited use in respect of administrative and legislative acts and decisions and their implementation since they cannot provide mandatory relief and because of difficulties with third parties similar to those mentioned for interim injunctions.[60]

6.24 *Third parties*: As far as the position of third parties is concerned, it is clear that the court, which takes account of the position of the public in general to whom an authority owes duties, will also take account of the position of identified third parties who would be detrimentally affected by interim relief, whatever its form.[61] It is likely that whatever technique is used to preserve the status quo pending the hearing, the court will have regard to the position of third parties in determining the balance of convenience.

Recommendation on the form of Interim Relief

6.25 Although the essential element in interim relief is to ensure that the court has adequate power to preserve the status quo until the determination of the case, the differences between relief primarily directed at the parties, relief primarily directed at a court or tribunal and the particular problems where third parties, a section of the public or the public in general are affected by the challenge, do suggest that provision for more than one form of interim relief is appropriate.

6.26 In different contexts the court may consider it necessary to restrain the taking of a decision, the implementation of a decision, or the making of a byelaw. It may also consider it necessary to require appropriate action to be taken in such contexts. A stay, as the expression has generally been understood, primarily relates to pending proceedings before a court or tribunal, whether civil or criminal. Now that interim

[58] *R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558, 560-2.

[59] *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 WLR 550. The authorities are discussed in Consultation Paper No 126 paras 6.8 - 6.10. For conflicting views see Sir John Laws and R Drabble in Supperstone and Goudie eds, *Judicial Review* (1992) pp 249-252 and 363-366 respectively supporting and opposing the restriction of stays to the proceedings of lower courts and tribunals.

[60] See para 6.20 above.

[61] For a recent example see *R v Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 1 WLR 570 (CA) in which it was said by Scott LJ that if the real purpose of interlocutory relief in a judicial review case is to prevent executive action by an identified third party being carried out pursuant to the decision under attack, the more suitable procedure would be to have the third party in question joined and then to seek an interlocutory injunction against that party, rather than to seek a stay of the decision.

injunctions are available against ministers acting in their official capacity, we believe there is no longer any need to take a wide view of "proceedings" in Order 53 rule 3(10) or to amend that rule to put it beyond doubt that an administrative decision which has already been made and is in the course of being implemented can be "stayed".[62] In such cases, if it is desirable to make a non-coercive order, an interim declaration might be thought preferable in view of the problems over stays we mention in paragraph 6.23 above. This would leave it open to courts to choose the most appropriate form of interim relief, and it could be that interim declarations would primarily be used in cases in which the court desired to give temporary guidance to third parties. In the Commission's 1976 report it was considered that provision for interim declaration should be contained in primary legislation, as it is in New Zealand. We agree.

6.27 **We accordingly recommend that there should be provision for interim injunctions, interim declarations and stays of proceedings before courts and tribunals in proceedings by way of judicial review (Draft Bill, clause 1, new section 31A(4)(a); Draft Order 53 rule 5).**

Should the principles governing the availability of interim relief be set out in statute or the rules?

6.28 The Treasury Solicitor's Working Group considered that the principles should be set out because of the importance and sensitivity of such relief particularly where given against government ministers. The Lord Chancellor's Department, on the other hand, doubted that this should be done. Although in certain areas we are recommending that guidance should be provided in the rules,[63] for the reasons given below, we do not consider that at this stage the principles governing interim relief should be set out in the rules.

6.29 In over a third of judicial review cases proceedings are brought in respect of the actions of local government[64] and in these cases, where interim relief has been available for some time, there is no evidence that the system is working unsatisfactorily. In the case of interim relief in respect of the decisions of central government or, where European Community rights are involved, primary legislation, there is less experience but the courts appear to be proceeding by analogy with the jurisprudence in the local government cases.[65] Other than the natural fear of the

[62] Ie the decision of the Privy Council in *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 WLR 550 could be allowed to prevail. See para 6.23 above.

[63] Eg see para 5.15 above.

[64] 35.1% of all applications for leave to seek judicial review in the first quarter of 1991 were against local authorities. See M Sunkin, L Bridges, G Mészáros, *Judicial Review in Perspective* (1993) The Public Law Project, p 24.

[65] See the discussion in para 6.7 above.

unfamiliar, there is no evidence that these principles are working in an unsatisfactory manner.[66] Furthermore, we consider that the very fact that this jurisdiction is, in respect of central government and primary legislation, a new one is a reason for not fettering it either by rules or statute. The principles upon which interlocutory injunctions are given in civil proceedings are not set out in Order 29 and we do not believe that they should be in judicial review proceedings.

Where primary or delegated legislation is impugned

6.30 Some consultees considered that greater care is needed before awarding interim relief where delegated legislation or, where European Community rights were involved, primary legislation was the subject of a challenge. The reason generally given for this was the greater impact on third parties. It is undoubtedly the case that courts will be very much more reluctant to make interim orders in such cases. However, the unavailability of monetary compensation in respect of ultra vires acts means that it is likely that in certain cases, such as *Factortame,* it will be necessary to grant interim protection. The question whether special provision should be made for the case of the review of legislative action is linked to the last question considered, i.e. the extent to which the statute or the rules should set out the principles on which the court should act in such cases.

6.31 Although we recognise that there are differences between the review of legislative and administrative powers we do not consider that statute or the rules should create a jurisdictional difference between the two in the context of interim relief. First, it is not only in the case of the review of legislation that third parties are likely to be affected. This is possible in many public law contexts, in particular in relation to planning and other licensing systems, whether for trading or other activities. Secondly, the distinction between "legislative" and "administrative" acts has proved to be as, if not more, difficult than that between "administrative" and "judicial" acts.[67] For these reasons, we do not consider it appropriate to recommend that the power to grant interim relief should not be available in cases where primary or delegated legislation is impugned.

[66] *Ibid.*

[67] Compare *Blackpool Corporation v Locker* [1948] 1 KB 349 and *Lewisham MBC v Roberts* [1949] 2 KB 608. See also *F Hoffmann-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295.

PART VII
INTERLOCUTORY PROCEDURES

Introduction

7.1 At present once leave to apply for judicial review is granted, the application is made by way of originating motion.[1] The motion for hearing must be entered within 14 days after the grant of leave.[2] The application for leave will be made *ex parte* in most cases.[3] A respondent can only make representations at the original leave application if the applicant serves the respondent with proceedings or where the court adjourns the leave application to permit the respondent to make submissions.[4]

7.2 In Part V we recommended that the leave stage should be known as the preliminary consideration and that save in specified categories of cases this should always initially be a paper procedure. We have also proposed that when the application judge considers it appropriate the respondent should be sent a "request for information" form with the applicant's form 86A attached. If there is no "request for information" form or other notice of the application a respondent will not know what relief is being sought and the grounds upon which it is sought, until he is served with the Notice of Motion. Once a Notice of Motion is served the respondent has 56 days to file evidence in reply.[5] The respondent is under a duty to make full and fair disclosure in his or her affidavit which should include the matters that he wants to put before the court for consideration when it is exercising its discretion as to whether to grant a remedy.[6]

[1] The applicant must serve a Notice of Motion (O 53, r 5(3)) and Form 86A (O 53, r 6(1)). Documents should be served on the respondent and all persons "directly affected" (O 53, r 5(3). In cases of difficulty, the applicant should seek directions as to the identity of those who should be served: *R v Minister of Agriculture Fisheries and Food, ex p Roberts* [1991] 1 CMLR 555.

[2] O 53, r 5(5). Before this can be done the applicant must file an affidavit of service (O 53, r 5(6)).

[3] The applicant sometimes serves the respondent with the proceedings so that if the respondent appears there is an ex parte hearing on notice. The court may also ask the respondent to attend the leave application of its own initiative.

[4] The respondent may apply to set aside the grant of leave: *R v Secretary of State for the Home Department, ex p Herbage (No 2)* [1987] QB 1077. See para 9.5 on appeals.

[5] O 53, r 6(4). Before 1989 the time limit for respondent's evidence was 21 days but see *Practice Note* [1989] 1 WLR 358. If the court orders an expedited hearing, it may direct a shorter period for filing evidence in reply.

[6] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941.

7.3 The principles applicable to interlocutory applications in judicial review proceedings are broadly similar to those in writ actions.[7] In appropriate cases it is possible to obtain an order for discovery and interrogatories.

Discovery and Interrogatories

7.4 Order 53, rule 8 makes express reference to applications for discovery under Order 24[8] and interrogatories under Order 26.[9] The criterion for ordering discovery is that:

> "No order ... shall be made ... unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."[10]

The application will be for an order requiring the other party to make and serve a list of documents which are, or have been, in their possession, with an affidavit verifying the list.[11] Alternatively, if any document is referred to in the respondent's affidavit, the applicant may serve a notice requiring production of that document.[12]

7.5 In *O'Reilly v Mackman* Lord Diplock described the discovery of documents as being obtainable in judicial review "upon application whenever, and to the extent that, the justice of the case requires".[13] While this may suggest that discovery is available as in an ordinary writ action it has been argued that in judicial review the circumstances which justify the making of an order for discovery are more

[7] Apart from powers which enable the court to allow an applicant to amend proceedings (O 53, r 6(2) or O 20, r 8) any party can apply to the Crown Office Master to "stand the case out" if the case is being settled or if the parties are not ready.

[8] O 24, r 3. The order may extend to any documents which are or have been in the possession of another party relating to any matter in question in the application for judicial review.

[9] O 26 allows interrogatories without an order to be served not more than twice, although no interrogatories may be served on the Crown without leave.

[10] O 24, r 13(1).

[11] O 24, r 3.

[12] O 24, r 10(1). If this is refused the applicant may apply for an order that the documents be produced for inspection: O 24, r 11(1).

[13] [1983] 2 AC 237 at 282. See also *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 635, 654 (Lord Wilberforce and Lord Scarman), *R v Secretary of State forthe Home Department, ex p Herbage (No 2)* [1987] QB 1007.

restrictive.[14] This is said to flow from the supervisory nature of judicial review which means that normally not all aspects of the decision will be relevant to the issues before the court and it may be more difficult to show that the production of documents is necessary for disposing fairly of the matter. Accordingly, while relevance and necessity are judged to be the issues in both an ordinary writ action and an application for discovery in judicial review proceedings, in the latter it may sometimes only be ascertained by asking whether or not there is material before the Court which suggests the respondent's affidavit or record is not accurate.[15]

7.6 An example of the preferred approach in judicial review proceedings is provided by *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses*.[16] In that case Lord Scarman stated:

> "Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty: and it should be limited strictly to documents relevant to the issue which emerges from the affidavits."

Lord Wilberforce, dealing with the more general principle of preventing abuse of discovery for the purposes of fishing for evidence, said:

> "... if as I think, the case against the revenue does not, on the evidence, leave the ground, no court, in my opinion, would consider ordering discovery against the revenue in the hope of eliciting some impropriety."[17]

7.7 Thus, the court will not order discovery where the applicant claims that a decision is so unreasonable that it must be flawed and seeks discovery in the hope that it might turn up evidence to support another allegation, such as taking into account irrelevant considerations.[18] Although the suggestion that discovery should never be ordered in cases where the ground of challenge is *Wednesbury* unreasonableness or

[14] It has often been said that discovery will not be ordered as a "fishing expedition" ie to see if there was a flaw in the manner of the decision making process, see for example: *R v Secretary of State for the Home Office, ex p Harrison* [1988] 3 All ER 86 (DC) and 10 December 1987 (CA); *R v Secretary of State for the Environment, ex p Doncaster BC* [1990] COD 441. *R v Inland Revenue Commissioners, ex p Taylor* [1989] 1 All ER 906.

[15] *R v Secretary of State for the Home Department, ex p BH* [1990] COD 445; *R v Secretary of State for the Environment, ex p Islington LBC and London Lesbian and Gay Centre,* [1992] COD 67 (CA); *R v Secretary of State for Education, ex p J* [1993] COD 146.

[16] [1982] AC 617, 654E-F.

[17] *Ibid*, p 635H.

[18] *R v Secretary of State for the Home Office, ex p Harrison* [1988] 3 All ER 86, (DC) 10 December 1987 (CA); *R v Secretary of State for the Environment, ex p Islington LBC and London Lesbian and Gay Centre,* [1992] COD 67 (CA); *R v Secretary of State for Health, ex p Hackney LBC and others* (DC) 20 and 25 April 1994.

irrationality has not been accepted,[19] in such cases a restrictive approach is taken. This circumspection, together with a denial of any general duty to give reasons,[20] has created a climate considered unfavourable to applications for discovery in judicial review.[21]

7.8 In our consultation paper we invited views as to whether there should be a more liberal regime for discovery in judicial review proceedings. Approximately a third of those who responded considered that the present approach was fully justified. The introduction of automatic discovery was widely disapproved but two-thirds of those who responded favoured the introduction of a more liberal regime for discovery.[22] Many of those who responded to the consultation paper argued that, given the adversarial nature of the procedure and the fact that typically nearly all the relevant evidence is in the respondent's hands, the present rules relating to discovery operate harshly against applicants for judicial review. It was also pointed out that public interest immunity or confidentiality[23] provide sufficient protection for respondents, usually the state,[24] where matters of public interest are in issue.[25]

7.9 One very experienced member of the Bar proposed that a respondent to an application for judicial review must provide any document that "may fairly lead the applicant to a train of enquiry which may either advance his own case or damage his opponent's".[26] It was also pointed out that now that it is becoming clearer that in some cases an individual may bring or defend an action concerned with public

[19] *R v Secretary of State for Transport, ex p APH Road Safety Ltd.* [1993] COD 150 (Schiemann J).

[20] On the scope of the duty to give reasons and recent developments see paras 2.29 - 2.31 above.

[21] This adverse climate was noted by the *Justice-All Souls Review of Administrative Law in the United Kingdom,* (1988), para 6.32.

[22] A number of consultees favoured developing a questionnaire, along the lines of that used in discrimination law cases (Sex Discrimination Act 1975, s 74 and the Race Relations Act 1976, s 65). Under these procedures the alleged discriminator is warned that any refusal to reply or any evasive or equivocal reply may lead to adverse inferences being drawn. This option was advocated as a form of pre-leave discovery, see paras 5.28 - 5.37 above.

[23] As in *Science Research Council v Nasse* [1980] AC 1028.

[24] Discovery is available against the Crown: see the Crown Proceedings Act 1947, s 28.

[25] The courts will not order discovery where the public interest in the proper functioning of a body performing public functions requires non-disclosure, and that public interest outweighs the public interest in full disclosure to ensure the proper administration of justice: *Burmah Oil Co Ltd v Governor and Company of the Bank of England* [1980] AC 1090; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394; *R Chief Constable of the West Midlands Police, ex p Wiley* [1994] 3WLR 433 (HL).

[26] Robin Allen, "Discovery" (Cambridge Conference on Consultation Paper No 126, Judicial Review and Statutory Appeals - May 1993). See Megarry J in *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 2 All ER 98 quoting Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.

law issues in a writ action[27] it is likely to lead applicants to litigate by a process in which they can expect a broader approach to discovery.

7.10 There is a danger that if the present more restrictive regime is not relaxed, it will eventually be said that the reforms to Order 53 have not remedied the defects in interlocutory process claimed in *O'Reilly* and courts may be forced to re-open the alternative route of civil proceedings for declarations and injunctions.[28] It may thus be counter-productive for courts to emphasise the distinct nature of judicial review proceedings in the context of applications for discovery and other related interlocutory process.

7.11 In practice the requirement, which is mentioned in some recent cases[29] that discovery will only be ordered where material before the court suggests the respondent's affidavit is not accurate constitutes an important limitation on discovery in judicial review proceedings. It is often the case that the only evidence that will enable the accuracy of an affidavit setting out the basis of a decision to be challenged is in the hands of the respondent.[30] Accordingly, normally it will only be possible to challenge the accuracy of the respondent's affidavit where there is a patent contradiction or inconsistency in the respondent's affidavit. While discovery might also be ordered if the respondent has failed to make full and fair disclosure in their affidavit,[31] it may not always be possible to be confident about the quality of the affidavit without the benefit of discovery.

7.12 While accepting that discovery should not be obtained on a contingency basis in judicial review proceedings, we consider that requirements which mean that in practice there must be a contradiction or inconsistency in the respondent's affidavit before discovery is ordered are unduly restrictive and undermine the basic test of relevance and necessity laid down in *O'Reilly v Mackman*. As, however, these requirements are not imposed by Order 53 rule 8(1) (Draft Order 53 rule 9(1)), but

[27] See *Roy v Kensington and Chelsea and Westminster FPC* [1992] 1 AC 624 and see paras 3.8 - 3.11 above).

[28] *Barnard v National Dock Labour Board* [1953] 2 QB 18, 43 was an example of discovery bringing the *ultra vires* nature of a decision to light. For a modern example see *R v Department of Health, ex p Gandhi* [1991] ICR 805 (documents produced in county court proceedings disclosed a procedural impropriety).

[29] See n 18 above.

[30] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, 945 (Sir John Donaldson MR). See also, in the context of discrimination, *West Midlands Passenger Transport Executive v Jaquant Singh* [1988] ICR 614, 618.

[31] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, 947 (Parker LJ). For examples of where the courts have criticised the respondent's affidavits, see *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514, 533 ("...at worst self-contradictory, at best, ambiguous...") and *R v IRC, ex p TC Coombs & Co* [1991] 2 AC 283, 288-289, 290, 300, 302 (per Lord Mackay of Clashfern LC, Lord Jauncey and Lord Lowry).

are the product of recent case law,[32] we do not consider it appropriate to recommend an amendment to the Rules. In any event it would be difficult to amend the existing rule so as to achieve a slightly more liberal application and also to exclude a requirement of contradiction or inconsistency in the respondent's affidavit without distorting the expeditious special procedure which Order 53 was designed to provide. We believe consideration should be given to issuing a Practice Direction on this matter.

[32] But cf *R v Secretary of State for Transport, ex p APH Road Safety Ltd* [1993] COD 150 (Schiemann J was not willing to accept further restrictions).

PART VIII
REMEDIES

Nomenclature

8.1 An applicant seeking judicial review may claim one or more of the following final forms of relief: the prerogative orders of mandamus, prohibition or certiorari, and a declaration or injunction. Damages may also be awarded in certain limited circumstances[1]. None of the modern procedural reforms has altered the nature of the prerogative orders and we do not propose any such reform now. We acknowledge their long history[2] and the importance of the fact that they are "prerogative" and granted at the suit of the Crown as indicated by the title of the proceedings.[3]

8.2 The latin names of the orders (mandamus and certiorari), however, obscure their functions to non-lawyers. By contrast, in a number of Commonwealth jurisdictions, where statute has introduced a modern judicial review procedure, mandamus, prohibition and certiorari have been replaced by a modern review remedy to compel, prohibit or set aside the exercise of administrative power.[4] Although we recognise that there are limits in the extent to which legal terminology can be made accessible to laypeople, we believe it desirable that the function of a legal remedy should be as understandable as it can be.

8.3 **We therefore recommend that the latin titles of the orders be replaced so that the prerogative orders the court would have power to make in judicial review proceedings would be called: a mandatory order, a prohibiting order, and a quashing order.** In judicial review proceedings these orders would be available as well as injunctions and declarations and together with damages and awards for money due and of restitution (see below). Clause 1 of the Draft Bill annexed to this report substitutes a new section 31 of the Supreme Court Act 1981 and subsection (3) of this Bill provides that the High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively. This makes it clear that the modernisation of the titles of the prerogative orders is simply a relabelling, and makes no substantive change at all.

[1] See para 8.5 below.

[2] For the history of the prerogative remedies see *De Smith's Judicial Review of Administrative Action* (4th ed 1980, ed Evans) Appendix 1, p 584.

[3] *O'Reilly v Mackman* [1983] 2 AC 237, 252 - 253 (Lord Denning MR).

[4] Eg Judicial Review Procedure Act 1971 (Ontario), ss 2-8; Judicature Amendment Act 1972 (New Zealand), s 4; Judicial Review Procedure Act 1979 (British Columbia), s 2; Administrative Decisions (Judicial Review) Act 1977 (Australia), s 16. See also Royal Commission into Civil Rights in Ontario (McRuer Commission) 1968 Vol 1 c 325 ff.

Title of cases

8.4 It was suggested to us on consultation that cases should be simply described as "*In the matter of an application for judicial review: ex parte Applicant, R v Respondent*" as this would standardise the title of proceedings, simplify indexing and make cases easier to find. It was also suggested that the title of the action should remain the same between the application for leave (preliminary consideration) and the hearing of the substantive application with an endorsement at the top indicating "*Application permitted to proceed by order of Mr Justice X dated....*" The Commission supports these proposals, which it considers might appropriately be dealt with by the issue of a Practice Direction.

Claims for Restitution and in Debt, and Interest

8.5 At present, although the court may, in an application for judicial review, award damages if there is a right to damages in private law,[5] it cannot make a restitutionary order in such proceedings.[6] There was unanimous agreement with, and support for, allowing restitutionary claims to be joined with applications for judicial review. **We recommend that, as is the case for damages, the court may order restitution in judicial review proceedings provided such restitution would have been granted in an action begun by writ (Draft Bill, clause 1, new section 31B(3) and Draft Order 53 rules 1 and 8).**

8.6 Where there is a private law right to restitution, as there now is in respect of *ultra vires* receipts by public authorities,[7] on the principles set out in Part III above, it should not be an abuse of process to initiate a claim for restitution by action rather than proceeding under Order 53.[8] Accordingly, as in the case of claims for damages, the availability of restitutionary relief within Order 53 should be without prejudice to a claimant's right to proceed by way of writ if he chooses.

8.7 **We also recommend that, as is the case for damages and is proposed for restitution, the court may award a liquidated sum in judicial review proceedings provided such an award would have been made in an action**

[5] Cf O 53, r 7(1)(b) which states that "...if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages" and Supreme Court Act 1981, s 31(4)(b) which uses "would" rather than "could". The Draft Bill annexed to this report uses "would": draft clause 1, new section 31B(3)(b).

[6] In Scotland, the court may order restitution and payment (whether of damages or otherwise) as well as other orders such a reduction, declarator and interdict. See Scottish Rules of Court 260B(4)(b) in the "Parliaments House Book". It is not clear whether RC 260B applies to an action for damages and restitution alone.

[7] *Woolwich Equitable BS v IRC* [1993] AC 70.

[8] *Lonrho plc v Tebbit* [1992] 4 All ER 280; *Racz v Home Office* [1994] 2 AC 45 (HL). It is not an abuse of process to initiate a claim for damages where misfeasance in a public office is alleged.

begun by writ (Draft Bill, clause 1, new section 31B(3) and Draft Order 53 rule 8).

8.8 In cases where, in judicial review proceedings, the court awards damages or a liquidated sum or orders restitution, we consider that it should have the same power to award interest as it would have had in an action begun by writ.[9]

Advisory declarations

8.9 The need for citizens and authorities to 'know where they stand', which is part of the public interest in good administration, may be relevant to the courts' jurisdiction to adjudicate on matters where the exercise of statutory or prerogative power is not being directly challenged. In private law it has been held that the courts' interest in any particular matter is exhausted by the private dispute at issue.[10] In public law, however, the considerations may be different.

8.10 Our consultation paper invited views as to whether the courts should be able to grant declarations when there is no decision to be impugned. We pointed to cases indicating that there may be circumstances in which the court will exercise a discretion to adjudicate even if circumstances have made the issue to some extent moot.[11] The courts have also been willing to review advisory guidance, for instance government circulars[12] and government information leaflets[13] which in themselves have no direct legal effect. However, it has also been held that the court has no jurisdiction to grant a declaration amounting to an advisory opinion, for instance as to the scope of a public body's powers, even though a clear issue of law arose.[14]

[9] Interest is not payable where there is no private claim. Eg where a grant made by a public body in pursuance of its statutory powers is paid late due to an unlawful decision, see: *R v The Secretary of State for Transport, ex p Sherriff & Sons*, *The Independent*, January 12 1988. In that case Taylor J stated that "it seemed unjust that the court had no power to award interest in such circumstances. It might be that justice required further extension to section 35A to enable the court to award interest in the exercise of its discretion." This is part of the question as to whether there should be compensation for ultra vires action and as such is outside the scope of this report, see further para 2.32 above.

[10] *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111.

[11] *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106.

[12] See *Royal College of Nursing v DHSS* [1981] AC 800 and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. See also *R v Secretary of State for the Environment, ex p Tower Hamlets LBC* [1993] QB 632 (CA) (guidelines issued by the Secretary of State).

[13] *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530.

[14] *R v Secretary of State for Education and Science, ex p Birmingham CC* (unreported, 14 May 1991); *R v Secretary of State for Defence, ex p Equal Opportunities Commission* [1992] COD 276.

8.11 There was widespread support for the granting of advisory declarations provided that the jurisdiction was carefully exercised. It was said that some of the cases in which declaratory relief has been given are in fact examples of advisory declarations.[15] It was also suggested that the judges currently have an inherent jurisdiction to make advisory declarations in the exercise of their discretion and that the inhibition on their use is self-imposed and may not apply to the exercise of supervisory jurisdiction by judicial review.[16] While conscious of the numbers of applications to impugn actual decisions and the undoubted caseload pressures on the judicial review jurisdiction,[17] we accept that the power to grant 'advisory opinions' may be of considerable aid to public authorities and individuals faced with the interpretation of complex statutes drafted in very general terms (particularly those stemming from EC law).

8.12 We believe, however, that it is desirable to make the position clear. In view of the long-standing tradition that the courts do not enter into purely hypothetical questions,[18] the clear position in private law cases and the divergence of views as to the position in public law cases, we do not consider that reliance can safely be placed on the inherent jurisdiction of the court. **We recommend that explicit provision be made for the High Court to make advisory declarations in the exercise of its supervisory jurisdiction by way of judicial review (Draft Bill, clause 1, new section 31A(4)(b)).**

8.13 Although many of those who responded gave their warm support to the proposal few indicated the nature of the safeguards that would be required, beyond indicating that without safeguards the court might be faced with a very large number of applications for this kind of relief. It has been suggested that purely academic cases should be prevented from proceeding,[19] as should cases where primary or secondary legislation on the matter in issue is going through Parliament. One option would be to leave it to the courts to develop their own jurisdiction and practice in the use of advisory declarations. Another suggestion was to provide that an advisory declaration should only be made in cases where there is: (i) a serious issue of law to be determined as to the scope of the rights, power or duties of a public body; and (ii) the issue of law is relevant to the performance of the public body's function. These two requirements do not, however, appear to us to be significant safeguards; they would permit an advisory declaration to be made even where the resolution of

[15] See notes 12 - 13 above.

[16] Eg Laws J in *R v Home Secretary, ex p Mehari* [1994] 2 WLR 349, 366 and see Sir John Laws, "Judicial Remedies and the Constitution" (1994) 57 MLR 213.

[17] See para 2.12 - 2.14 above and Appendix C below.

[18] *Re Barnato* [1949] Ch 258, 270 (*per* Lord Greene MR).

[19] See Sir John Laws, "Judicial Remedies and the Constitution" (1994) 57 MLR 213.

the question of law was not *necessary* for the performance of the public body's function.

8.14 We consider that safeguards should be created, that these should reserve this remedy for cases of general importance but that judicial discretion to develop the law must not be unduly hampered. Accordingly, **we recommend that where the judge is satisfied that the application is for an *advisory* declaration, he should also be satisfied that the point concerned is one of general public importance, before he makes the advisory declaration or, at the initial stage, allows the application to proceed to a substantive hearing (Draft Bill, clause 1, new section 31A(5)).**

Power to make substitute orders

8.15 Where the High Court considers that there are grounds for quashing the decision of an inferior court, tribunal or authority, the High Court may, in addition to quashing the order, remit the matter to the inferior court, tribunal or authority, with a direction to reconsider it and reach a decision in accordance with the findings of the Court.[20] Our consultation paper raised the question whether in certain circumstances the High Court should also have the power to substitute its own order for that of an inferior body.[21] There was significant support for this proposal[22] provided that it was restricted to exceptional cases i.e. where it could be said that to remit the decision was a mere formality.

8.16 It would not be appropriate to exercise a power of substitution where a decision is judicially reviewed on the ground of breach of natural justice or abuse of discretion. In such cases there will often be more than one permissible answer open to the lower court or administrative body and a power of substitution would be incompatible with the court's reviewing function. However, where the ground of review is error of law and the error of law is one which, once corrected, necessarily leads to an obvious outcome, an order remitting the case to that court may now appear to be a remnant of an outmoded and unjustified insistence on procedural propriety.[23] In the case of decisions by administrative authorities such as ministers and regulatory bodies the need to make it clear that the exercise of the judicial review jurisdiction is a supervisory one means that we do not recommend in those cases a power of substitution. We do, however, consider that different considerations

[20] O 53, r 9(4).

[21] The present position is that the court can only quash a decision or order and remit it.

[22] Approximately 80% of those who responded supported this proposal.

[23] Although in theory situations in which there is only one possible inference from the primary facts are susceptible to the same argument (see the facts in *R v Rowe, ex p Mainwaring* [1992] 1 WLR 1059 (CA)), a power of substitution could risk the court going beyond its reviewing function.

apply to courts and tribunals. **We recommend that in the case of decisions by an inferior court or tribunal the reviewing court should be empowered to substitute its own decision for the decision to which the application relates provided that: (i) there was only one lawful decision that could be arrived at; and (ii) the grounds for review arose out of an error of law (Draft Bill, clause 1, new section 31(4)(b),(5)).**

Discretionary denial of remedies

8.17 The consultation paper expressed the view that provided that the discretion to grant or refuse remedies is strictly limited and the rules for its exercise clearly understood the mere fact that it exists should not be a cause for concern.[24] The majority of those who responded agreed with the proposition and accepted that a limited discretion to refuse relief should be available. No consultee thought that reliance on discretionary factors had affected the conduct or length of the proceedings. Some concern was, however, expressed about the extent to which the merits of a case may in practice influence a court's willingness to exercise its discretion.

8.18 The factor of merit is sometimes considered under the guise of the inevitability of the outcome,[25] or where there is an issue of natural justice and there are doubts as to the utility of the remedy.[26] Consideration of the merits may in some cases be inextricably linked with the supervisory and appellate elements of the High Court's jurisdiction over inferior courts. In other cases, it may be seen as part of the proper and necessary consideration to be given to the substance of the alleged unfairness. One particular criticism concerning the relevance of considering merit in judicial review, however, is that it contributes to the blurring of the distinction between appellate and review functions. We make no recommendations for reform in this area because we believe the law is clear. In view of the concerns expressed on consultation we consider it important to state that we consider that it is normally incompatible with the court's reviewing function for the merits of a case to be taken into account in exercising discretion whether to grant relief or not.[27]

8.19 We do not propose the introduction of further criteria for the exercise of discretion to grant or refuse relief in judicial review when a ground of judicial review has been established. We have, however, recommended the retention of the criteria now

[24] Consultation Paper No 126, para 14.2.

[25] *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763.

[26] *Glynn v Keele University* [1971] 1 WLR 487.

[27] *John v Rees; Martin v Davis; Rees v John* [1970] Ch 345; *R v Secretary of State for the Environment, ex p Brent LBC* [1982] QB 593.

contained in section 31(6) of the Supreme Court Act 1981 for cases involving what the judge determines to be delay without good reason.[28]

8.20 In cases involving questions of standing or delay the court may exercise its discretion to deny a remedy at the substantive hearing. As it is the intention of our recommendations to return the initial stage of an application for judicial review to a largely ex parte process, conducted on the papers,[29] it is possible that the leave stage (in our terms, the preliminary consideration) will result in applicants in a slightly higher proportion of cases being permitted to proceed to a substantive application for judicial review. Public policy requirements such as certainty, lack of standing or prejudice to good administration will, however, mean that ultimately a remedy may well not be granted, or that relief will only be granted on a prospective basis.[30]

8.21 There was little disagreement with the factors said to be taken into account by the courts at present. These have been established to include waiver, bad faith, and ulterior motives,[31] prematurity, absence of injustice or prejudice, impact on third parties and on the administration, the procedural nature of the error and, exceptionally, the fact that the decision would have been the same irrespective of the error.[32]

Prospective declarations

8.22 We sought views on the desirability of prospective declarations which set out the legal position for the future but only granted on what has been termed "relief on a historic basis".[33] Most of those who responded considered that prospective declarations[34] had a limited but useful role to play in public law. It was considered that such relief would be useful, for example, in cases where because of the impact on third parties it was undesirable to grant other relief.[35] We agree and do not

[28] See paras 5.23 - 5.30 above and Draft O 53, r 2, Appendix A below.

[29] See Part V above for our proposals on the leave stage.

[30] See para 8.21 below.

[31] See for example, *R v Commissioners of Customs and Excise, ex p Cook* [1970] 1 WLR 450.

[32] See n 25 and para 8.18 above.

[33] See Consultation Paper No 126, para 14.5 for a discussion on the types of circumstance where the courts have only granted prospective declarations. See also *R v Panel on Take-overs and Mergers, ex p Guinness Plc* [1990] 1 QB 146.

[34] There was some confusion about the meaning of the phrase "relief on an historic footing". Prospective declarations, as outlined in the case law, are a hybrid of cases where a remedy is refused due to the detriment to good administration but where the court grants declaratory relief as a guide for the future.

[35] Eg in school admissions policy cases or cases involving the regulation of financial markets.

propose limitations on the use or development of prospective declarations, where the court finds these to be the most appropriate form of relief.

PART IX
RENEWED APPLICATIONS AND APPEALS

Renewed applications

9.1 In the consultation paper we invited views as to the scope for making improvements to the arrangements for the initial consideration and renewal of applications for leave (preliminary consideration and preliminary hearing) and for resolving the dispute as to which was the appropriate procedure where there was an overlap between the power to renew and appeal. At present in civil cases a refusal of leave on paper may be renewed but not appealed.[1] In a criminal cause, a refusal of leave (or a grant on terms) made either with or without a hearing can be renewed to the Divisional Court.[2]

9.2 We asked whether the existing arrangements for the initial consideration and renewal of applications for leave operated fairly, or required more explicit justification.[3] The majority of those who commented on the point thought that the present situation was satisfactory.

Appeal against a refusal to allow an application to proceed to a substantive hearing

9.3 At present where the Court of Appeal does not grant leave on a renewed application for leave to apply for judicial review, that is an end of the matter. The House of Lords has no jurisdiction to hear an appeal against the refusal of a renewed application for leave.[4] Where the Court of Appeal grants leave on a renewed application, the application is generally remitted to be heard by a single judge, but the Court of Appeal may, in exceptional circumstances, proceed to hear the substantive application, for example, if an appeal to the Court of Appeal is inevitable because the judge finds herself or himself bound by a judgment of the Divisional Court.[5]

[1] O 53, r 3(4). The application will be heard by a single judge sitting in open court unless the court directs that it should be heard by the Divisional Court: O 53, r 3(4)(b). However, where the first leave application was made at an oral hearing, further applications must be made to the Court of Appeal.

[2] O 53, r 3(4)(a). In a criminal cause the effect of s 18(1)(a) of the Supreme Court Act 1981 it that no appeal can be made to the Court of Appeal (whether in relation to leave or on the substantive application).

[3] Consultation Paper No 126, para 12.10.

[4] *Re Poh* [1983] 1 WLR 2.

[5] *Practice Direction (Judicial Review: Appeals)* [1982] 1 WLR 1375; *R v Immigration Officer, ex p Chan* [1992] 1 WLR 541, 543H.

Setting aside an order permitting an application to proceed

9.4 At present a respondent may apply to have the grant of leave to move for judicial review set aside.[6] The grant of leave will only be set aside if the respondent can show that the judge's decision that the case was fit for further consideration at a substantive judicial review was plainly wrong.[7] It has been said that the procedure should be invoked very sparingly.[8] We consider that the number of applications to set aside will be reduced by the potential for increased respondent participation at the initial stage of an application for judicial review.[9] For this reason we propose that the possibility of a respondent "challenging" an order permitting an application to proceed in this way should be stated in Order 53 but that a time limit on making such application should be imposed. **Accordingly we recommend that it be stated in the Rules that any application by a respondent to set aside an order that an application for judicial review may proceed should be made not later than 28 days beginning with the day on which the respondent is served with the notice of application (Draft Order 53 rule 17(3)).**

Appeal from refusal to set aside an order permitting an application to proceed

9.5 Where a respondent's application to set aside is not successful we consider that it is incompatible with the nature of the initial stage as a filter mechanism to eliminate the unarguable case to allow an appeal to the Court of Appeal.[10] In such cases one judge will have allowed the application to proceed to a substantive hearing either on the papers or at an oral hearing. Another judge will have considered and rejected the respondent's application to set aside the order that the preliminary application may proceed to an inter partes hearing. The respondent will have an opportunity to argue its case again at the substantive hearing on the application for judicial review. In our view to permit an appeal in these circumstances would be productive of delay and cost and turn what is essentially a preliminary filter stage in the proceedings into a summary process. **Accordingly, we recommend that no appeal shall lie to the Court of Appeal from an order made following an**

[6] The court has an inherent discretion to set aside the application of an order made ex parte and revoke the grant of leave (*Becker v Noel (Practice Note)* [1971] 1 WLR 803) in addition to the power under O 32 r 6.

[7] Ie that there was a "clear knock out blow" to the applicant's case: Simon Brown J in *Secretary of State for the Home Department, ex p Sholola* [1992] COD 226.

[8] *R v Secretary of State for the Home Department, ex p Chinoy* [1991] COD 381 per Bingham LJ.

[9] See recommendations in Part IV above.

[10] Cf, however, O 59 r 1A(6)(bb) and the note at para 59/1A/22 of the White Book which states that the grant or refusal of an application to discharge the grant of leave to move for judicial review is an interlocutory order from which an appeal lies. Our recommendations would abolish this.

application to have an application for judicial review set aside (Draft Order 53, r 17(4)).

9.6 In the consultation paper we identified a current difficulty for applicants where the respondent has applied to have leave set aside.[11] There is conflicting case law as to whether a challenge by the applicant in the Court of Appeal to a judge's order setting leave aside constitutes a renewed application for leave to move for judicial review or an application for leave to appeal against the order.[12] Both the Treasury Solicitor's Working Group and the Lord Chancellor's Department considered that the opportunity should now be taken to amend the Rules so as to resolve this question. The nominated judges considered that the correct procedure is for the applicant to renew his or her leave application.[13] An applicant would not therefore be obliged to seek leave or serve a Notice of Appeal. **We agree and accordingly recommend that it be made clear in the Rules that access to the Court of Appeal to challenge an order setting aside a decision to allow a preliminary application to proceed is by way of a renewal of the original application (Draft Order 53 rule 17(4)).**

Appeal from refusal of substantive applications for judicial review

9.7 There was no support for the suggestion made in the consultation paper that in civil cases appeals to the Court of Appeal from the High Court (or to the House of Lords from the Court of Appeal) should be restricted by a leave requirement with a test that the appeal raised a point of law of general public importance.[14] Opinion was more divided about the introduction of some requirement for leave.[15] During the course of our consultation exercise, however, the Rules have been amended following a separate (and rather more limited) consultation by the Lord Chancellor's Department. Since October 1993 it has become necessary to obtain leave to appeal to the Court of Appeal against decisions made at the substantive hearing of almost

[11] Consultation Paper No 126, para 12.7. See O 32 r 6 and *R v Secretary of State for the Home Department, ex p Begum* [1990] COD 107 (CA).

[12] *R v Secretary of State for Home Department ex p Khalid Al-Nafeesi* [1990] COD 262; cf *R v Secretary of State for the Home Department, ex p Begum* [1990] COD 107. See now *R v Secretary for State for the Home Department, ex p Ryoo (Soon Ok)* (1992) 4 Admin LR 330.

[13] The arguments in favour of this included: the desirability in cases like *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 for the Court of Appeal to retain a residual jurisdiction to deal with substantive applications itself, eg where the Divisional Court or single judge was bound by an earlier decision. Those against included: the Court of Appeal is, and should be, a court of appeal and not exercise original jurisdiction.

[14] Consultation Paper No 126, para 12.9.

[15] While some supported Lord Donaldson's suggestion (*R v Foreign and Commonwealth Office, ex p Kalibala, The Times* 23 October 1991 and Annual Report of the Court of Appeal, 1990-91), others, including Carswell LJ, the Administrative Law Bar Association and the Society of County Secretaries, were against any requirement for leave to appeal in judicial review cases.

all judicial review cases.[16] The rule change, while tightening things up, is less restrictive than the reform we suggested. In the light of the recent amendment to the rules we make no recommendations concerning appeals from the High Court to the Court of Appeal.

9.8 At present, if the Court of Appeal makes a substantive order on a judicial review application, there is a right of appeal, with leave, to the House of Lords. In a criminal cause or matter an appeal from the Divisional Court lies direct to the House of Lords, and leave is required (together with a certificate that a point of law of general public importance is involved which ought to be considered by the House of Lords). No evidence emerged on consultation that the absence of a right to challenge a Divisional Court's refusal of a certificate causes any substantial injustice. We therefore make no recommendations for change.

9.9 In the consultation paper we also suggested that in criminal cases it should be possible to appeal to the Court of Appeal as an alternative to the House of Lords, where the High Court certifies that a point of general public importance is involved.[17] The nominated judges, while recognising the anomaly that appeals in criminal cases lie from a Divisional Court to the House of Lords, considered that the pressure of business in the Court of Appeal (Criminal Division) would not permit an appeal to that court in the foreseeable future. Further, they questioned the wisdom of having an appeal from a lord justice and one or two puisne judges to a lord justice and two puisne judges. In the light of this response we make no recommendations for change.

[16] Rules of the Supreme Court (Amendment) Order (SI 1993 No 2133): leave to appeal must be sought in all cases except in a decision made in relation to the Immigration Act 1971, the British Nationality Act 1981, the Immigration Act 1988, the Asylum and Immigration Appeals Act 1993 or "any enactment relating to nationality or immigration which for the time being is in force in any part of the United Kingdom".

[17] The Lord Chancellor's Department, in its response, saw merit in making use of the expertise of the Criminal Division, Court of Appeal in having a supervisory jurisdiction over inferior courts (in Crown courts and magistrates courts) through judicial review and the case stated procedure, as well as aligning the procedure with that in civil cases.

PART X
COSTS

10.1 The rule governing costs in cases in the Crown Office List is the general rule which states that:

> "the costs of and incidental to all proceedings...in the High Court...shall be in the discretion of the court...[and] the court shall have full power to determine by whom and to what extent the costs are to be paid."[1]

The general principle is that costs follow the event although, as stated above, the award of costs is always discretionary.[2] The rules in relation to costs will usually come into consideration after the substantive hearing of an application for judicial review.[3] However, an applicant can obtain costs where leave has been granted and the respondent performs the act for which the order is sought.[4] A respondent can obtain costs where the leave application is successfully opposed[5] or where he successfully applies for an order setting aside the grant of leave.[6]

Costs on the leave application

10.2 The consultation paper[7] invited views on the extent to which costs rules might be used to further the purpose of the leave stage whilst minimising the cost expended.[8]

[1] Supreme Court Act 1981, s 51 as amended by the Courts and Legal Services Act 1990, s 4.

[2] For the principles to be applied see *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615. Issues to be considered may include the conduct of both parties. Eg in *R v IRC ex p Opman International UK* [1986] 1 WLR 568 (DC), Woolf J held that no order for costs should be made because the applicant did not write a "letter before action".

[3] A court granting leave for judicial review may impose conditions as to costs and the giving of security: O 53, r 3(9).

[4] In *R v Liverpool City Council, ex p Newman* [1993] COD 65, per Simon Brown J, it was said that the general rule concerning costs on discontinuance only applied when the discontinuance could safely be equated with defeat or an acknowledgment of defeat both in general civil litigation and in judicial review.

[5] See para 10.2 below. If the leave application is treated by consent as the application of the hearing itself, the respondent will also recover his or her costs in the event the application is dismissed: *R v Chiltern District Council, ex p Roberts* [1991] COD 214.

[6] *R v Darlington BC, ex p Association of Darlington Taxi Owners (No 2)*, Auld J, *The Times* 14 April 1994.

[7] Consultation Paper No 126, para 11.8.

[8] The Public Law Project has estimated that although the applicant's costs will vary according to the complexity of the matter and the stage at which the case is concluded, total costs in obtaining counsel's opinion on merits may be between £500 and £1,000. Completion of an application for leave is likely to cost between £1,500 and £2,500, and to take a case through to a substantive hearing may involve costs of between £7,500 and £15,000

At present the court has jurisdiction to make an order for costs on an *inter partes* leave hearing as this constitutes "proceedings" for the purpose of section 51 of the Supreme Court Act 1981.[9] It follows that where a respondent successfully opposes a leave application (or successfully applies for leave to be set aside[10]) the respondent is prima facie entitled to his or her costs.

10.3 In a case where an application for leave has been lodged at the Crown Office, and the respondent makes such a substantial concession that there is no need for the application to proceed further, an applicant may obtain his or her costs.[11] In Part V we have proposed that all applications for preliminary consideration should be made entirely on paper in the first instance unless the application includes a claim for immediate interim relief or the application judge dealing with the matter considers it desirable in the interests of justice to hear oral submissions.[12] The philosophy underlying our proposals is that this preliminary stage of an application ought not to involve the applicant in having to pay the costs of a respondent when he or she is seeking to surmount for the first time the initial hurdle of arguability, and we consider that normally a respondent should not be entitled to costs in relation to appearing on an oral application for which the court does not request his or her presence. On the other hand, if the applicant renews his or her application in open court after it has been initially rejected by a judge on paper, we see no reason why the normal regime as to costs should not apply, and this discipline should make a party's advisors reconsider the merits carefully before deciding to renew an application. **We therefore recommend that in those cases where an oral hearing is required by the court on its first consideration of an application the court should not normally order the applicant to pay a successful respondent's costs unless the court has specifically requested the respondent to attend: on the other hand if an applicant renews his application after it has been refused on paper the court should have the power to make a costs order in favour of either applicant or respondent.**

[9] *Secretary of State for Wales v Rozhon* [1994] COD 111.

[10] *R v General Medical Council, ex p Popat* [1991] COD 245; *R v Darlington BC, ex p Darlington Taxi Owners (No 2)*, *The Times* 14 April 1994.

[11] In *R v The Royal Borough of Kensington and Chelsea, ex p Ghebreslase Ghebregiogis* (unreported judgment of Brooke J (CO/3624/93) 10 June 1994), the cost of having to apply for leave was awarded against a respondent who failed to act until after the leave application had been made despite the fact that the applicant had already written in clear terms pointing out the relevant provisions that should have been applied to the decision in question.

[12] See para 5.11 above.

The substantive hearing

10.4 It was also provisionally proposed in the consultation paper[13] that, where leave had been granted to allow a challenge to the act or omission of a central or local government body, the usual costs rules should be disapplied because of the Crown's interest in the courts exercising proper supervisory control of decision-making bodies. Of those who commented, the Administrative Law Bar Association and many of the "respondent" consultees considered this argument lacked force, especially where the successful respondent was a local authority which was possibly itself operating under severe financial restraints. However, disapplication of the general rule was favoured by some consultees in cases which raised an important issue which it was for the advantage of the public as a whole (or of a section of it) and of the respondent body to have determined.

10.5 The consultation paper suggested that, where an application brought in good faith in the public interest is unsuccessful, the applicant should not be obliged to pay the other side's costs.[14] A number of consultees disagreed with this proposal and were of the view that costs should follow the event as at present[15]. It was argued[16] that actions brought in good faith and in "the public interest" were not confined to judicial review cases and ring-fencing a relaxed regime on costs in this way would be an oblique method of funding pressure groups. However, many consultees favoured departure from the usual practice in a public interest challenge where the real value of litigation was not the protection of the individual against a public authority but the resolution of a question of public importance. In view of the developing case law[17] we consider that the present discretion to determine "by whom and to what extent costs are to be paid" is sufficient. On the other hand, for the reasons set out in paragraph 10.6 below, we consider that it would be desirable for the court to have the power, in specified types of case, to order that the costs of a successful party should be met, in whole or in part, out of central funds. **Accordingly, we recommend that where a case is allowed to proceed to a substantive hearing on the basis of either a public interest challenge or for**

[13] Consultation Paper No 126, para 11.14.

[14] Consultation Paper No 126, paras 11.9 - 11.10.

[15] It was felt to be particularly unfair in cases where the application judge had granted leave on the basis of a perusal of the papers which the respondent had not seen, and had not had the opportunity to comment on and which might therefore be inadequate. However, in the light of the proposals made in paras 4.5 - 4.11 above we consider this objection loses force.

[16] Eg by the Treasury Solicitor's Working Group.

[17] Eg *New Zealand Maori Council v Attorney General of New Zealand* [1994] 2 WLR 254 (PC), (where no order as to costs was made on appeal); and *R v Secretary of State for the Environment, ex p Greenpeace Ltd, The Independent* 8 March 1994 where, although leave was refused, no order as to costs was made.

the purpose of seeking an advisory declaration,[18] a successful party's costs may be awarded either against the other party or out of central funds[19] at the judge's discretion.

Costs from central funds

10.6 A number of consultees suggested that judges should have power to award costs from central funds[20] in civil cases[21] particularly where there was no other source from which costs could be paid. Another option would be to enable the court to grant legal aid either for the application for leave or for the substantive hearing. On this point we are of the view, after discussing the matter with the Master of the Crown Office, that the task of establishing the means of prospective applicants would be beyond the administrative capabilities of the Crown Office and we therefore do not propose any scheme whereby the court could award legal aid. **However, we do recommend that costs should be available from central funds where a case has been allowed to proceed to a substantive hearing on the basis of either a public interest challenge[22] or for the purpose of seeking an advisory declaration[23] (Draft Bill, clause 1, new section 31B(4)).**

Legal Aid

10.7 Our consultation paper invited consultees to comment on the availability of legal aid for judicial review. In their response the Legal Aid Board predict that the Public Law Project's research will show that the rate of grant of legal aid in judicial review proceedings is, overall, about the same as for civil non-matrimonial cases generally, but that there are regional variations between different types of case.[24]

[18] See paras 5.22 and 8.9 - 8.14, above.

[19] See para 10.6, below.

[20] According to Schedule 1 to the Interpretation Act 1978, 'central funds,' in any enactment providing in relation to the England and Wales for the payment of costs out of central funds, means money provided by Parliament.

[21] In criminal causes the Divisional Court has an express statutory power to order the costs of defendants out of central funds (Prosecution of Offences Act 1985, ss 16(1) and (5)) and for the costs of other parties (*ibid* ss 17, 19 and 21(1)). In *Holden v CPS (No 2)* [1994] AC 22 the House of Lords held that there was no express statutory authority to order payment of a solicitor's costs out of cental funds as jurisdiction to make such payment had been conferred only on the Criminal Division of the Court of Appeal.

[22] See para 5.22 above.

[23] See paras 8.9 - 8.14, above.

[24] This is confirmed by the Public Law Project in informal discussion.

Types of legal aid

10.8 More than one form of legal aid may be involved in a judicial review case: Green Form,[25] an Emergency certificate, and a full Civil Legal Aid Certificate. Advice by way of representation (ABWOR) is not available although some consultees favoured its extension to public law cases. We have been informed that the Crown Office is not always aware of the type of legal aid obtained by applicants. For this reason, and because delays sometimes arise because applicants are appealing against a refusal to grant legal aid,[26] it is proposed in Part IV that applicants should inform the Crown Office on Form 86A of the date of any application for legal aid (if relevant) and the date when it was granted or refused and, if granted, the number of the legal aid certificate.[27]

The test for obtaining legal aid

10.9 The statutory legal aid tests are the same as for any other type of proceedings.[28] One area of concern to consultees was the inadequacy of the legal aid scheme to address situations where there was a public or wider group interest in a decision rather than a specific, identifiable, personal interest.[29] **It is recommended that the Civil Legal Aid (General) Regulations 1989 be amended to enable the Board to consider the wider public interest in having the case heard.** This would assist applicants who, although there was a public interest involved, might otherwise be refused legal aid because it appeared that so far as they were concerned only a trivial advantage would be gained by the application from the proceedings in question[30] or which could not be justified by the costs involved.[31]

[25] In *R v Legal Aid Board, ex p Higgins, The Times*, 19 November 1992, DC, it was held that it was not necessarily an abuse of the Regulations to extend the financial limits of the Green Form scheme in order to commission costly expert reports for the purpose of advising on a case which was outside the scope of the Legal Aid Act.

[26] If an application is refused by the area office, then the client has a right to appeal to the area committee: Civil Legal Aid (General) Regulations 1989, reg 35. If the area committee refuse the appeal, then that decision is final unless the decision itself is susceptible to judicial review. In *R v Legal Aid Area No 8 (Northern) Appeal Committee, ex p Parkinson, The Times*, 13 March 1990, Simon Brown J held that the area committee could be required to give extended reasons for the decision to refuse legal aid, particularly in cases of considerable public interest and importance.

[27] See para 4.5 above, and Draft Order 53, rule 3(2)(e) in Appendix A.

[28] These include: financial eligibility, the legal merits test (Legal Aid Act 1988, s 15(2)), and the general reasonableness test (Legal Aid Act 1988, s 15(3)). *R v Legal Aid Board, ex p Hughes* (1993) 5 Admin LR 623 (CA), established that the test the Legal Aid Board should use in judging whether the applicant's case had legal merits was in essence the same as the judge should apply on the leave application itself. The decision relates only to the application of the "legal merits test" and not the "general reasonableness test", for legal aid.

[29] See the Legal Aid Act 1988, ss 1, 15. *United Dominions Trust Ltd v Bycroft* [1954] 3 All ER 455 (CA).

[30] The Civil Legal Aid (General) Regulations 1989, SI 1989 No 339, reg 29.

10.10 At present the assisted person and/or the Legal Aid Board may have an order for costs made against them but only subject to a number of restrictions and limits.[32] A number of local authority consultees told us that they believed that legal aid was being granted too readily in judicial review cases which lacked any real merit, and that once legal aid had been granted, the effect of this rule placed them at a severe disadvantage in such cases. We do not have the material on which we could judge the reasonableness of this complaint, but we record it here because it was expressed to us with considerable force by a number of responsible local authority respondents. Other consultees, including the Public Law Project, said that, particularly in the area of housing, obtaining legal aid provided leverage in getting respondents to settle. We agree with the view expressed by the Legal Aid Board that there is no reason why judicial review proceedings should be treated differently from other cases in order to enable a respondent to recover costs from the fund if successful against a legally aided applicant.[33]

[31] Eg because the amount of their claim was small, the estimated cost exceeded any benefit to the client or the only matter at stake was the loss of status, dignity or reputation (Legal Aid Notes for Guidance para 6.08).

[32] Legal Aid Act 1988, ss 17, 18. The assisted person can only be ordered to pay what is reasonable having regard to all the circumstances, including the financial resources of all the parties and their conduct in connection with the dispute.

[33] The relevant statutory provisions are set out in the Legal Aid Act 1988, s 18.

PART XI
HABEAS CORPUS

Functions of habeas corpus

11.1 The writ of habeas corpus is "the most renowned contribution of the English common law to the protection of human liberty".[1] It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention[2] and is available in all cases of wrongful deprivation of personal liberty.[3] It is unquestionably available against the executive.[4] In practice today habeas corpus is employed sparingly, mainly in relation to: extradition proceedings, deportation, illegal immigration and detention under the Mental Health Act 1983.

11.2 Although the case law is riddled with contradictions,[5] the modern tendency is to view the writ as a specific application of principles of common law judicial review to cases affecting the liberty of the subject.[6] In *ex p Khawaja* Lord Scarman made this clear when he observed that:[7]

> "There are, of course, procedural differences between habeas corpus and the modern statutory judicial review ... in the instant cases the effective relief sought is certiorari to quash the immigration officer's decision. But the nature of the remedy sought cannot affect the principle of the law. In both cases liberty is in issue. 'Judicial review' under R.S.C., Ord 53 and the Supreme Court Act 1981 is available only by leave of the court. The writ of habeas corpus issues as of right. But the difference arises not in the law's substance but from the nature of the remedy appropriate to the case".

[1] De Smith *Judicial Review of Administrative Action,* (4th ed 1980), p 596.

[2] *R v Earl Ferrers* (1758) 1 Burr 631.

[3] "The great and efficacious writ in all manner of illegal confinement is that of habeas corpus ad subjiciendum": 3 Bl Com (14th ed) 131.

[4] "The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the courts to secure any rights which they may have, whether they are alien friends or alien enemies. [T]his fact ... makes the prerogative writ of the highest constitutional importance", *Halsbury's Laws of England,* 1(1) para 224.

[5] *X v United Kingdom*(1981) 4 EHRR 188 para 19; SA de Smith, *op cit*, p 600. See also PP Craig, *Administrative Law* (3rd ed) p 545; Wade and Forsyth, *Administrative Law* (7th ed), pp 622; Wade and Bradley, *Constitutional Law,* (11th ed), pp 728-729.

[6] R Gordon, *Crown Office Proceedings* 1990 para D1-003; C Lewis, *Judicial Remedies in Public Law* (1992), p 332; Sharpe, *The Law of Habeas Corpus* (2nd ed), pp 21-22, 53; Wade and Forsyth, *Administrative Law* (7th ed), p 618.

[7] *R v Sec State for the Home Dept, ex p Khawaja* [1984] AC 74, 111 B-C. See also Lord Wilberforce, *ibid*, at 105.

Procedure

11.3 Like judicial review, habeas corpus is only available in the High Court. The procedure for obtaining it is contained principally in Order 54. Most applications are made in the Queen's Bench Division, but applications relating to the custody, care, or control of a minor must be made in the Family Division[8] (where a substantially similar procedure applies). Applications are made to a judge in Court if one is sitting,[9] or to the Divisional Court if the Court so directs. An application "has virtually absolute priority over all other court business",[10] which might make it prima facie more suitable than judicial review in cases of emergency, especially with regard to immigration.[11] In a criminal cause or matter, where a single judge does not order the release of the person restrained, he is required to direct that the application be made by originating motion to the Divisional Court.[12]

The response to Consultation Paper 126

11.4 In the consultation paper[13] we invited views on whether some rationalisation and simplification of the various procedures in Order 54 would be desirable.[14] Many consultees felt that there should be no alteration of existing procedures for fear of lessening the constitutional power and importance of the remedy.[15] There was, however, some support for subsuming habeas corpus into the judicial review procedure, where it could operate as a separate form of relief. It was said that certiorari and declarations achieve almost all in terms of remedies that the writ of habeas corpus can achieve, particularly now that interim relief can be granted against ministers of the Crown and Crown servants, who are also subject to the contempt jurisdiction.[16]

[8] O 54, r 11.

[9] Applications may be made to **any** judge of any Division of the High Court and as O 54, r 1(b) provides, to any judge otherwise than in Court when no judge is sitting in Court. Applications on behalf of minors must be made in the first instance to a judge otherwise than in Court (O 54, r 1(c)).

[10] *R v Home Secretary, ex p Cheblak* [1991] 1 WLR 890, 894 (Lord Donaldson MR).

[11] Although it is accepted that most judges would take an urgent application for judicial review immediately (M Shrimpton, "In Defence of Habeas Corpus", [1993] PL 24, 26).

[12] O 54, r 4(2).

[13] Consultation Paper No 126, paras 7.7 - 7.8.

[14] The writ of habeas corpus is a writ of right but will not be granted as a matter of course, and may be refused where there is another effective remedy to question the restraint, eg an appeal against sentence or conviction, or a pending application to a tribunal: *Re Wring* [1960] 1 WLR 138.

[15] A Le Sueur ("Should we abolish the Writ of *Habeas Corpus*?" [1992] PL 13) notes that law reformers, including the Hanworth Committee (Cmd 4265 1933), the Law Commission (Law Com 73 Cmnd 6407 1976), and the JUSTICE/All Souls Review (1988), have consistently excluded the writ from their agendas.

[16] *Re M* [1994] 1 AC 377 (HL).

11.5 It was argued that subsumption of habeas corpus into the Order 53 procedure and the consequent rationalisation would have three advantages.[17] First, it would no longer be necessary to commence two separate forms of proceedings where the challenge to a person's detention was based on both an alleged jurisdictional and non-jurisdictional error. Secondly, the type of application made would no longer have to depend on that often difficult distinction.[18] Thirdly, a single procedure would mean that in *all* cases where the liberty of the person is at stake, the court should act with expedition - whether the application for review is made under Order 53 or Order 54 and whether or not the unlawfulness involves an error of precedent fact. These three reasons are premised on habeas corpus having a different scope of review and on the need to use certiorari-in-aid of habeas corpus.[19]

11.6 We do not, however, recommend the subsumption of habeas corpus into the judicial review procedure. The fact that habeas corpus is used very infrequently[20] suggests that any inconvenience created by the different procedures is likely to be marginal. There are, moreover, a number of powerful arguments against such subsumption which we have found convincing.

11.7 First, as indicated, the arguments for subsumption are premised on habeas corpus having a different scope of review. However, for reasons which we set out below,[21] we have concluded that the remedies of judicial review and habeas corpus are subject to a common principle and that the scope of review should essentially be the same.

11.8 Secondly, the writ's efficacy over its long history stems from its capacity to operate in a very short time and to secure the production of the appellant as of right. This suggests that the discretionary nature of Order 53 procedure would not be suitable for habeas corpus and could be seen as eroding ancient and vital constitutional liberties. It is arguable that within a unified procedure the discretionary nature of judicial review could infect habeas corpus.

[17] A Le Sueur, "Should We Abolish the Writ of *Habeas Corpus*?", [1992] PL 13.

[18] See Sharpe, *op cit*, p 80 for examples of the confused line of demarcation between jurisdictional and non-jurisdictional errors and R Gordon, *Crown Office Proceedings* 1990, D1-018 - D1-022 for examples of situations where the remedy which should be sought is unclear.

[19] Cf A Le Sueur, *op cit* ([1992] PL 13, 19), who states that "Procedural reform of habeas corpus is necessary either because its scope is the same as the application for judicial review, or because it is unjustifiably different".

[20] In 1993 there were 55 applications for habeas corpus as compared with 42 applications (of which 11 were disposed of) in 1992.

[21] See paras 11.10 - 11.20 below.

11.9 Thirdly, there are concerns about the operation of a leave requirement (in our recommended terminology, a preliminary stage) even though the court is likely to take a generous view in cases involving detention or imprisonment.[22] If leave or a preliminary stage formed part of a habeas corpus application in cases of emergency either the substantive or the preliminary stage would be an empty formality, the issues being entirely decided at one or the other hearing. If a judicial decision that the application be allowed to proceed to a substantive hearing was required there might be little advantage in practice over certiorari.[23] It would also be necessary to resolve the question of appeal to the House of Lords. At present an applicant cannot appeal to the House of Lords against a refusal of leave to apply for judicial review[24] but he can, with leave, against a refusal of habeas corpus.

The scope of review in habeas corpus

11.10 Although this issue, concerning as it does the substantive grounds for review, falls outside the Commission's programme item,[25] the case for subsuming habeas corpus into the Order 53 procedure is premised on it having a different scope of review and on the need to use certiorari-in-aid of habeas corpus. It has therefore been necessary for us to form a view on the issue. As indicated, we have concluded that judicial review and habeas corpus are subject to a common principle and that the scope of review of these remedies is and should be essentially the same. Our reasons are set out in the paragraphs that follow.

11.11 The common law and statutory[26] development of habeas corpus was such that in 1983 in *ex p Khawaja* Lord Scarman was able to make the statement quoted in paragraph 11.2 above and Lord Wilberforce to state that he did "not think it would be appropriate unless unavoidable to make a distinction between the two remedies" and that he proposed to deal with both "under a common principle".[27] It was stated in 1989 that in *ex p Khawaja* the court was indicating that "while distinct historically, in practice the two remedies [habeas corpus and judicial review] should

[22] Eg *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74, 109, 122 (Lord Scarman and Lord Bridge respectively).

[23] Interim relief is now available against ministers and government departments, see Part VI above. It was, however, stated by consultees that one crucial difference is that the writ of habeas corpus transfers the custody of the prisoner from the executive to the court (*R v Secretary of State for the Home Department, ex p Muboyayi* [1992] 1 QB 244, 258 per Lord Donaldson MR). This is especially important in immigration cases where the applicant's advisers may need to prevent the removal of the applicant from the country: see further para 11.21 below.

[24] *Re Poh* [1983] 1 WLR 2. See para 9.6 above.

[25] The Law Commission Fifth Programme of Law Reform, Law Com No 200, (1990) Item 10.

[26] Habeas Corpus Acts were passed in 1679, 1816 and 1862. See also Administration of Justice Act 1960, ss 14, 15; Courts Act 1971 Schedule 11, Pt IV.

[27] [1984] AC 74, 99;

be effectively assimilated, and that for the purposes of the scope of review, both could be dealt with under a common 'principle.'"[28]

11.12 The position was changed in 1991 by two decisions of the Court of Appeal. The first suggested and the second held that the scope of habeas corpus was, and should be, narrower than the scope of judicial review. In *R v Secretary of State for the Home Department, ex p Cheblak* Lord Donaldson MR stated that the two forms of relief are "essentially different":

> "A *writ of habeas corpus* will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. *The remedy of judicial review* is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction. In the case of detention, if the warrant, or the underlying decision to deport, were set aside but the detention continued, a writ of habeas corpus would issue."[29]

11.13 In the second case, *R v Secretary of State for the Home Department, ex p Muboyayi*,[30] it was held that where the applicant was not challenging an error of precedent fact on which his or her detention was based, then unless and until that administrative decision was impugned by judicial review, an application for habeas corpus could not succeed. Lord Donaldson MR, with whom Glidewell and Taylor LJJ agreed, stated that the habeas corpus procedure did not allow the reasons for the underlying administrative decision to be challenged. He said that *Cheblak* was to be distinguished from *Khawaja* since, while the right to detain the applicant depended on a series of precedent facts, in *Cheblak* the existence of those facts was not challenged.[31] If it had been (or could have been), habeas corpus would have issued. However, the detainee contended that he **should not** have been refused leave to

[28] Sharpe, *The Law of Habeas Corpus*, (2nd ed 1989) p 53. See also Beldam LJ, dissenting, in *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890.

[29] [1991] 1 WLR 890, 894 (emphasis added).

[30] [1992] 1 QB 244.

[31] [1992] 1 QB 244, 254 - 5. Lord Donaldson accepted "that where the power to detain is dependent upon the existence of a particular state of affairs ("a precedent fact") and the existence of that fact is challenged by or on behalf of the person detained, a challenge to the detention may be mounted by means of an application for a writ of habeas corpus under O 54, even if there are alternative procedures available. If authority is required for this proposition, it is to be found in the decision of the House of Lords in *R v Secretary of State for the Home Department, ex p Khawaja* ... per Lord Wilberforce... Lord Scarman... Lord Bridge... [and] Lord Templeman."

enter and that no question of his removal **should** have arisen. It was thus a challenge to the underlying administrative decision and could only proceed by way of judicial review.

11.14 We respectfully believe that there are a number of difficulties with this narrow view of the scope of review in habeas corpus. First, the important Privy Council decision in *Armah v Government of Ghana*,[32] is authority for a wider scope of review. This decision was not before the Court in *ex p Cheblak* and, although cited in *ex p Muboyayi*, it was not referred to in the judgments.

11.15 Secondly, when determining the scope of review in habeas corpus, in neither case did the Court of Appeal consider issues other than those concerned with precedent facts. A number of these point to a wider scope of review. Thus, the "no evidence" rule is indisputably a head of review in habeas corpus, but, before the developments started by *Anisminic v Foreign Compensation Commission*, it was an error within the jurisdiction of the decision-maker.[33] Again, *Armah v Government of Ghana*[34] shows that error of law on the face of the record (if it exists since *Anisminic*) is also a ground upon which habeas corpus applications can be based.[35] *Armah v Government of Ghana* and cases such as *R v Governor of Brixton Prison, ex p Mourat Mehmet*[36] also suggest that, although not explicitly stated to be a ground for review in habeas corpus proceedings, a test of *Wednesbury* unreasonableness is applied in the case law.[37]

11.16 Thirdly, *ex p Cheblak* and *ex p Muboyayi* appear to proceed on the basis that the only challenge to jurisdiction where the writ of habeas corpus can lie is a challenge to the existence of a precedent fact. Yet the better view is that, since the 1969 decision in *Anisminic v Foreign Compensation Commission*,[38] all errors of law go to jurisdiction.[39] Accordingly, in principle if there is any error of law there is jurisdictional error and the writ of habeas corpus can issue.

[32] [1968] AC 192. This case was also not considered in *R v Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606, which was relied on by Lord Donaldson in *ex p Muboyayi*.

[33] *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (PC); *Davies v Price* [1958] 1 WLR 434 (HL) quoted in Sharpe, *op cit* p 79. *Anisminic* is discussed in para 11.17 below.

[34] [1968] AC 192.

[35] *Ibid*, at 230 - 235 (Lord Reid), 253 - 254 (Lord Pearce), 257 (Lord Upjohn).

[36] [1962] 2 QB 1.

[37] R Gordon, *Crown Office Proceedings*, (1990) D1-021.

[38] [1969] 2 AC 147.

[39] *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56; *Re Racal Communications Ltd* [1981] AC 374; *Chief Adjudication Officer v Foster* [1993] 2 WLR 292. Cf *Bugg v DPP* [1993] QB 473 and *R v Hull University Visitor, ex p Page* [1993] AC 682.

11.17 The approach in *ex p Cheblak* and *ex p Muboyayi* may reflect the difference between lack of jurisdiction in the narrow and original sense of being entitled to enter on the inquiry (i.e. whether there is authority to consider the detention) and the wider sense which encompasses situations in which a tribunal which has undoubted power to enter on an inquiry has done or failed to do something in the course of that inquiry which is of such a nature that its decision (to detain) is a nullity. Accordingly, the scope for habeas corpus was considered only to extend to lack of jurisdiction in the narrow sense, whereas the scope of judicial review, which used to be similarly restricted, has since the 1969 decision in *Anisminic v Foreign Compensation Commission*,[40] widened to include lack of jurisdiction in the wider sense. In practice, however, the errors which may be challenged by habeas corpus have not been confined to the narrow sense of jurisdictional error[41] and certiorari-in-aid has traditionally facilitated rather than broadened review.[42]

11.18 Lord Donaldson, in *ex p Muboyayi*, accepted that habeas corpus had been extended "to include what at that time could also be considered under certiorari" but he did not think that it could "bring in all the considerations which are relevant on an application for judicial review".[43] He stated that:

> "[T]he evolution of the new and extended system of judicial review under R.S.C. Ord 53 with its in-built safeguards would, I think, justify us in confining the ambit of the writ of habeas corpus in the way in which I held that it was confined in my judgment in *Cheblak*'s case."

11.19 There is good authority for the argument[44] that on an application for habeas corpus the court may consider every matter affecting the legality of the detention[45] and that

[40] [1969] 2 AC 147.

[41] For examples see para 11.15 above. See further PP Craig, *Administrative Law* (3rd ed), p 545 - 546; R Gordon, op cit, at D1-019; Rubinstein, *Jurisdiction and Illegality* (1965), p 115; Sharpe, *op cit* pp 21 - 23; Wade and Forsyth, *op cit*, 620-622.

[42] Sharpe, *The Law of Habeas Corpus* (2nd ed 1989), p 53. He cites extradition cases as the best examples of this in operation, where the court freely ranges over the whole record of the proceedings before the magistrate and in no way confines itself to the warrant of commitment. See eg *Armah v Government of Ghana* [1968] AC 192. There may also be European Convention of Human Rights reasons for rejecting the narrow view of the scope of review in habeas corpus: *X v United Kingdom* (1981) 4 EHRR 188; *Brogan v United Kingdom* (1991) 13 EHRR 439.

[43] [1992] 1 QB 244, 257.

[44] See para 11.15 above.

[45] In *R v Halliday, ex p Zadig* [1917] AC 260 even though (*ibid*, 267 per Lord Finlay LC) there was no challenge to the precedent facts a citizen retained the right to have the legality of the order or warrant by virtue of which he was incarcerated (in that case the legality of the regulations authorising the internment without trial of persons of hostile origin) determined in a Court by means of a writ of habeas corpus (*ibid*, 272, 308 per Lord Atkinson and Lord Wrenbury). The House of Lords (Lord Shaw dissenting) held

no further or different proceedings are necessary. In view of the deliberate decision not to reform habeas corpus when the other prerogative remedies were reformed, we believe that those reforms do not and should not affect its scope. Accordingly, we do not accept the arguments for subsumption of habeas corpus into the judicial review procedure.

11.20 Although the law would be conceptually clearer if Order 54 were amended to make it clear that habeas corpus encompasses all matters affecting the legality of the detention, as this concerns the substantive grounds for review, this falls outside our programme item.[46] The result is in effect judicial review without leave and without time limit, but in a very limited circumstance. This is in any case only a restatement of the ancient constitutional rationale that habeas corpus exists to free an individual from unlawful detention.[47]

Habeas corpus and interim relief

11.21 The scope of habeas corpus and the relationship between that remedy and judicial review is also important in the context of interim relief. In our consultation paper we proposed a new form of interim relief to be available at the leave stage in judicial review to allow a detainee who could show strong prima facie grounds of illegality (under Order 53) to be released, pending the substantive hearing.[48] However, if the application is made under Order 53, there is no need for this new form of interim relief. In *R v Secretary of State for the Home Department, ex p Turkoglu*[49] the Court of Appeal held that the High Court has an inherent jurisdiction to grant bail in judicial review proceedings.[50]

11.22 In cases where entrants are detained under the Immigration Acts the position is somewhat different. In *Re Vilvarajah's application for bail*,[51] the Court of Appeal laid

that habeas corpus did not lie because the regulations were authorised by the Defence of the Realm Consolidation Act 1914.

[46] The reform of habeas corpus procedure which is proposed at paras 11.28 - 11.31 below is within the programme item and is not affected by any doubts as to the scope of review in habeas corpus. For our programme item, see n 25 above.

[47] See para 11.2 above. See also *R v Miller*, [1985] 2 SCR 613, 630 - 633, a decision of the Supreme Court of Canada, which explicitly held that habeas corpus lies to determine the validity of a particular form of confinement notwithstanding that the same issue may be determined upon certiorari in the Federal Court.

[48] Consultation Paper No 126, para 7.8.

[49] [1988] QB 398.

[50] Bail may be granted where the court is seized either of an application for leave to apply for judicial review or of a substantive application for judicial review: *ibid*, Sir John Donaldson MR at 401. If bail is refused then that decision is appealable to the Court of Appeal by virtue of s 16 of the Supreme Court Act 1981.

[51] *The Times*, 31 October 1987.

down guidelines for granting bail. If the applicant is being detained pending a decision to grant or refuse leave to enter the UK, then the adjudicator has jurisdiction to grant bail.[52] Where the applicant has been refused admission and is being held pending deportation, and the Secretary of State refuses to allow bail, the court will not grant bail in judicial review proceedings unless the Secretary of State has committed an error in refusing temporary admission or the decision is *Wednesbury* unreasonable.

11.23 Bail can be granted in habeas corpus applications under the inherent jurisdiction of the court. However, in immigration cases (as above) the Court of Appeal has held that an immigrant on whom a deportation order had been served was not to be granted bail pending determination of an application for habeas corpus, for fear that he would abscond if it were granted.[53] But in cases where the detainee's removal from the country is imminent, the court can serve the writ ex parte. This will have the effect that the "gaoler" becomes responsible to the court in place of the authority which ordered the detention,[54] giving the court direct authority over whether or not the detainee actually leaves the country.

11.24 The above analysis points to the existence of two almost equally advantageous routes for unlawfully detained applicants to obtain their liberty. This is not an indefensible luxury, particularly when there are only minutes to spare before an applicant already deprived of his or her liberty is (perhaps irreversibly) removed from the jurisdiction. Either procedure should be (and is) available to counter illegality which may have such serious consequences. If the courts, however, follow the decision in *Muboyayi*, then the applicant (or their advisors) will be limited to making an emergency application for leave to apply for certiorari in relation to the decision to deport. In such a case the judge would be able to grant interim relief, as in *Re M*, to prevent removal from the jurisdiction, until the substantive hearing could be held or proper consideration could be given to the application for leave. We make no recommendations for reform.

Appeals

11.25 The present procedure in habeas corpus is split between two different routes, civil and criminal.

[52] Immigration Act 1971, Sch 2, para 22.

[53] *R v Governor of Haslar Prison, ex p Egbe, The Times*, 4 June 1991.

[54] *R v Secretary of State for the Home Department, ex p Muboyayi* [1992] 1 QB 244, 258 (per Lord Donaldson MR).

11.26 *Civil:* On the civil side appeal lies to the Court of Appeal from the refusal or grant[55] of an order for the release of the person detained by either a single judge or the Divisional Court; in neither case is leave to appeal required. From there appeal lies to the House of Lords, provided leave to appeal is granted.[56]

11.27 *Criminal:* In criminal cases, no **appeal** lies from the decision of a single judge, whether he orders or does not order release.[57] If the judge, however, does not make an order for release, he must direct that the application be made by originating summons to the Divisional Court[58], a provision with similar effect to a right of appeal. In criminal cases, unlike civil cases, an order may be made for the continued detention or bailing of the applicant, pending the appeal in the House of Lords, in which case the applicant's right to liberty will depend upon the final determination on appeal.[59] Such an appeal lies directly to the House of Lords, and requires the leave of either the Divisional Court or the House of Lords.[60] The respondent can also appeal against an order by the Divisional Court for the release of the person detained.[61]

11.28 We consider that there is no need, especially in the light of the very small number of applications for habeas corpus, for the continuation of fundamental differences between civil and criminal appeals. Indeed, in an area of the law where historical anomalies abound, it is prima facie desirable for the procedures within habeas corpus to be made the same, if this can be done without removing existing rights. The small number of cases means that few practitioners will ever become familiar with this area of the law.

11.29 We were minded to recommend that the appeal procedure for both civil and criminal applications should be the same and to achieve this by giving a single judge

[55] Administration of Justice Act 1960, s 15(1). This was, according to Sharpe (*op cit* p. 208), intended purely to allow the authorities to obtain a higher ruling on a point of law in cases of general public importance. It cannot affect the applicant's right to liberty gained on the initial application (Administration of Justice Act 1960, s 15(4).

[56] Administration of Justice (Appeals) Act 1934, s 1(1).

[57] Supreme Court Act 1981, s 18(1)(a), and Administration of Justice Act 1960, s 15(2).

[58] Administration of Justice Act 1960, s 14(1) and O 54, r 4(2).

[59] Administration of Justice Act 1960, s 15(4).

[60] *Ibid*, s 1. In the debate on the bill Lord Parker CJ commented in the House of Lords (*Hansard* 24 March 1960, Vol 222, col 269) that, "[t]he vast majority [of criminal appeals] are made by prisoners serving long terms of imprisonment, serving sentences imposed by a court of competent jurisdiction from which an appeal has led to the Court of Criminal Appeal and which has been refused. Those applications are misconceived."

[61] Administration of Justice Act 1960, s 15(1).

power both to refuse and to grant the application for the issue of the writ.[62] We describe the scheme we favour, and which we sought to develop into a recommendation with draft legislation, below. However, for the reasons set out below, and with some regret, we ultimately concluded that it is not possible to make such a recommendation in the context of the present report.

11.30 *The proposed scheme:* In criminal cases giving a single judge power both to refuse and to grant an application for habeas corpus would have enabled a judge on circuit to deal with the whole of the application more quickly than could be done if he had to refer the case to the Divisional Court in London as it now has to be if he is minded to refuse to release the person detained. If the judge refused to grant the application for the issue of the writ, the applicant would have power to renew this application, which would then be heard by the Divisional Court.[63] This change in procedure would have taken into account the undesirability of adding to the already large caseload in the Court of Appeal (Criminal Division) ("CACD"), while ensuring that the applicant had effectively a "right" of appeal to a court whose members are at least as expert as those of the CACD (indeed the personnel might well be the same). Where an application is refused by the single judge, we thought that an applicant should have power to renew it before the Divisional Court. We also considered that appeals from the Divisional Court should lie with leave to the House of Lords, as they do at present. The applicant would then have had two attempts to persuade an increasingly senior court to order the issue of the writ.

11.31 In cases where the single judge ordered the issue of the writ, we considered the respondent should be allowed to apply to have the order for the issue of the writ set aside as is possible in Order 53 proceedings.[64] Our scheme would have permitted the provision in the Administration of Justice Act 1960, section 15(4), that in criminal cases an order can be made for the continued detention of the applicant, to be retained.

11.32 Although we favour a unified appeal structure, we have, with some reluctance, come to the conclusion that, in the context of the present exercise, it is not possible to recommend the adoption of the scheme outlined above. First, the need to make provision for release on bail in criminal cases, meant that it was not possible to have a completely unified system of appeals without depriving some applicants in civil cases of their existing right to be discharged and to remain at large where the writ is granted. Secondly, one aim of the proposed reform was the simplification of the

[62] The judge need not be a nominated judge - ordinary Queen's Bench Division judges frequently handle cases involving detention.

[63] This would be modelled on O 53, r 3(4)(a), renewal of application for leave to apply for judicial review. It would necessitate reform of the Administration of Justice Act 1960.

[64] See the White Book, paras 53/1-14/33, pp 859 - 860.

present law but during the drafting process we were advised that only a limited amount of simplification was possible in the absence of any wider review of the provisions of the Administration of Justice Act 1960. Thirdly, the present constitution of the Divisional Court was an important element in our scheme for appeals in habeas corpus cases but we understand that consideration may be given to possible changes in the constitution of that court. We therefore make no recommendation for reform but urge the wider review which will make it possible to create the unified system of habeas corpus appeal procedures we favour.

PART XII
STATUTORY APPEALS

Introduction

12.1 In Part B of our consultation paper[1] we asked whether there was any scope for rationalising the different statutory provisions which may create a right of access to the High Court by way of an appeal or application from an inferior court, tribunal or other body. The great diversity of such appeals and applications was one of the main themes of this part of the consultation paper, and was one factor which made it difficult to treat statutory appeals as a single coherent subject for which to propose general reforms. Questions about ways in which reform might proceed were couched in fairly general terms.

Crown Office Rules

12.2 At present the scope of the Crown Office's work is governed principally by Order 57,[2] although Orders 53, 54, 55, 56 and 94 also contain procedural provisions. One reform which we consider would assist all applications for judicial review, habeas corpus, and statutory appeals (as well as the various miscellaneous procedures which constitute residual forms of Crown Office Proceedings[3]) is the consolidation of all such public law procedures into one set of Crown Office Rules. **We do, however, recommend that this is done in order to co-ordinate with Lord Woolf's review of civil rules and procedures, and we do not propose that these Rules are drafted until the results of that review are known.**

Statutory Appeals

12.3 The main focus of Part B of the consultation paper was the potential for rationalising the great array of statutory provisions which give access to the High Court on appeal.[4] These cover an enormous range of situations, from banking, to

[1] Consultation Paper No 126.

[2] O 57 brings together the following general categories of proceedings within the ambit of the Crown Office: any proceedings before a Divisional Court of the QBD; any proceedings in the QBD before a single judge under O 52, r 2, Order 53, Order 54, Order 64, r 4 or Order 79; any proceedings before a single judge of the QBD, being proceedings which consist of or relate to an appeal to the High Court from any court, tribunal or person including an appeal by case stated and the reference of a question of law by way of case stated.

[3] Eg miscellaneous provisions such as applications under the Coroners Act 1988, s 13 (see O 94, r 14); applications under the Supreme Court Act 1981, s 42 (see O 94, r 15) in respect of vexatious litigants; applications under the Administration of Justice Act 1960 (see O 109, r 1) applications under the Drug Trafficking Offences Act 1986 (restraint and charging orders) and Part VI of the Criminal Justice Act 1988 (restraint and charging orders) under O 115 and O 50, r 2 (charging orders).

[4] A list of statutes containing a statutory right of appeal or review to the High Court was provided in our consultation paper at Annex 2.

midwives, to planning. The procedures by which statutory appeals are determined, and the breadth of the grounds on which an appeal may be brought, also vary greatly.[5] Appeals by way of rehearing give the High Court power to reconsider the disputed decision on its merits. Appeals on a point of law provide a forum for correcting errors of law and for keeping inferior courts and tribunals in touch with the general principles of law, legality and natural justice. Case stated provides a somewhat different procedure for appealing against decisions, particularly from decisions of the magistrates' courts or Crown Court.[6] In addition there are a large number of other, miscellaneous, provisions for appeals, such as appeals on questions of fact or law.[7]

Simplification to two procedures

12.4 In our consultation paper[8] we invited comments on the suggestion that all existing forms of statutory appeal could be simplified to two types of procedure. These were, firstly, powers of appeal or reference, whether by the tribunal or by a party, to the High Court on a point of law (including points relating to jurisdiction, legality and procedural propriety) and, secondly, appeals not limited to a point of law.

12.5 There was little support for having an appeal or reference to the High Court on a point of law where this was effectively already the case, and having a residual category of appeals "not limited to a point of law". Those who responded considered that these categories were too general to be applicable to the wide range of specific instances where statutory appeals now exist. In addition, the Crown Office has not told us that any one form of appeal is more difficult or expensive to administer than another. At this stage, therefore, we do not propose that statutory appeals should be simplified into the two types of procedure as suggested in our consultation paper. It may be, of course, that Lord Woolf's review of civil procedure will want to revisit this territory.

Case stated

12.6 Appeal by way of case stated is a useful procedure in cases in which the factual background is complicated, or where the decision-maker is not required to give reasons. It requires the inferior body to set out for the benefit of the High Court the facts it has found and the points of law to which they give rise. It may also be an

[5] These procedures may be specified in the Act which creates the right of appeal. Residual provisions for statutory appeals are mainly detailed in O 55, although O 56 contains the provisions for appeals by way of case stated.

[6] See paras 12.6 - 12.10 below.

[7] See Consultation Paper No 126, paras 18.26 - 18.36 for discussion of other miscellaneous appeal provisions.

[8] *Ibid*, para 19.7.

effective form of appeal where parties are not represented at the original hearing.[9] Appeals by way of case stated are most common in relation to appeals from magistrates' courts and Crown Courts, and from some long established tribunals.[10] In effect it achieves early concentration on the issue under appeal at the cost of additional effort in the process of the formulation of the case.

12.7 Case stated procedures were not abolished by the Tribunals and Inquiries Act 1958,[11] although the Franks Committee recommended their replacement with appeals on a point of law as "... the simplest, cheapest and most expeditious method..." of appeal.[12] Few consultees expressed any very strong opinions on the question of whether the case stated procedure should be retained, retained in part,[13] or completely abolished.[14] While on the one hand it might make the law simpler if case stated could be completely removed, on the other hand removal might substantially deprive appellants (especially those acting in person) of their rights of appeal. One other disadvantage created by abolition might be an increase in the cost of hearings at magistrates' courts and tribunals, if a reasoned, written judgment was required to be given in every instance. Against this, the increasing trend to encourage courts (and tribunals) to give reasons may mean that there is in fact no significant extra expense. It might be that an appellant who can now ask a court or tribunal to state a case for the High Court would not be substantially disadvantaged by having to enter an appeal on a point of law, but this would necessitate substantial changes in practice in cases where reasons are not now commonly given.[15]

The High Court's powers on appeals by way of case stated

12.8 Section 28 of the Supreme Court Act 1981 provides that:

[9] See Consultation Paper No 126, para 18.15.

[10] In 1993, 199 appeals by way of case stated from the magistrates' courts, 37 from the Crown Courts and 3 from other bodies were lodged at the Crown Office. Depending on the statute creating the right of appeal, the procedures which govern cases stated from ministers, tribunals and other administrative bodies may include provision for a case to be stated at an interlocutory stage if the body in question agrees: see Consultation Paper No 126, para 18.24.

[11] Now consolidated as the Tribunals and Inquiries Act 1992.

[12] Report of the Franks Committee on Administrative Tribunals and Enquiries (1957), Cmnd 218, para 113. See Consultation Paper No 126, para 18.13.

[13] The Crown Prosecution Service (CPS) proposed extending the procedure of appeal by case stated in criminal court proceedings so that the advantages and remedies currently available to an applicant seeking judicial review from a magistrates' court or Crown Court would be available on case stated. The CPS considered that judicial review was frequently used when the procedure for appeal by case stated would be an adequate and more appropriate remedy and argued that the opportunity to obtain any or all of the prerogative remedies under one procedure would help to clarify the position.

[14] Of those who did respond, the Combined Tax Tribunals Centre favoured abolition while the Immigration Appeal Adjudicators' response favoured retention of case stated.

[15] See paras 2.29 - 2.31 above.

"(1) Subject to subsection (2),[16] any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court."

12.9 Section 28A of the 1981 Act deals with proceedings on case stated by a magistrates' court.[17] However, neither section 28 nor the new section 28A of the Supreme Court Act 1981[18] provides the High Court with any specific powers of disposal over cases stated from the Crown Court.[19] Before abolition of the courts of quarter sessions in 1971 the High Court had power to draw any inference of fact or make any judgment or order which might have been drawn or made and also the power to remit the case back to the quarter session for a re-hearing.[20] In abolishing the courts of quarter session and replacing them with new Crown Courts the section containing these powers was repealed without being replaced by an equivalent provision.[21] We understand this lacuna to have developed accidentally.[22] **We accordingly recommend amendment of the Supreme Court 1981 so as to confirm statutorily the powers of the High Court on case stated appeals from the Crown Court.**

[16] The exceptions in subsection (2) relate to judgments and orders relating to trial on indictment and certain decisions relating to licensing, betting and local government matters where the decision of the Crown Court is final.

[17] As amended by the Statute Law (Repeals) Act 1993, s 1(2), Sch 2, Pt I. Prior to the 1993 Act the powers given to the High Court in dealing with cases stated from a magistrates' court were those contained in the Summary Jurisdiction Act 1857 - ss 6 and 7 of that Act are now substantively retained in the Supreme Court Act while the rest of the 1857 Statute has been repealed.

[18] As enacted by the Statute Law (Repeals) Act 1993.

[19] For magistrates' courts the statutory appeal provision is contained in the Magistrates' Court Act 1980, s 111(1). This provides that: "any person who was a party to any proceedings before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the Court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices ...to state a case for the opinion of the High Court on the question of law or jurisdiction involved.."

[20] Under the old common law jurisdiction the Divisional Court has the power only to quash or confirm a decision and not to authorise a re-hearing after an appeal by case stated cf the statutory power (now repealed) under the Supreme Court of Judicature (Consolidation) Act, s 25.

[21] See the Courts Act 1971, s 56(4), Sch 11, Pt IV which repealed the Supreme Court of Judicature (Consolidation) Act 1925, s 25.

[22] The Royal Commission on Assizes and Quarter Sessions 1966-69 (Cmnd 4153) which recommended abolishing the jurisdiction of the Quarter Sessions states at para 232 that its recommendations for the separation of criminal and civil business were not intended to affect the jurisdiction of the Divisional Court in such matters as habeas corpus, prerogative orders and cases stated.

12.10 In summary, we agree with the conclusion of the Franks report that appeal on a point of law is a more efficient procedure than case stated. **We consider that, as happened in relation to the Children Act 1989, existing procedures for appeals to the High Court by way of case stated should be replaced in due course by provisions for appeal on a point of law.**[23] **Although at this stage we do not advocate abolition, we do recommend that no new case stated provisions are created in the future. Further, as stated above, we propose that the lacuna which has been left in the statute book following recent statutory changes should be filled so as to identify clearly the powers open to the High Court when it has heard an appeal by way of case stated from the Crown Court (Draft Bill, clause 2).**

Statutory review

12.11 Statute may specifically provide for a particular order or decision of a public body to be challenged by way of an application to the High Court to quash the decision in question. Such statutory provisions usually provide for an application to be made where the order or decision is not one within the power of the Act[24], or where the applicant has suffered substantial prejudice as a result of a failure to comply with any relevant requirement. This is generally known as "statutory review".[25]

Judicial Review or Statutory Review?

12.12 Statutory review is much closer to judicial review than to other forms of statutory appeal. Statutory review provisions are generally enacted where greater certainty and immunity from delayed challenge are needed in administrative decision-making. The only remedy which may be granted is a quashing order, and there are strict time limits within which the application must be made. There are no express provisions for discovery or cross-examination. Nor is it possible to join a claim for damages. The exclusivity created by the ouster clauses which always form part of statutory review provisions, barring judicial review applications in situations where a specific right of review is created by statute, has been reaffirmed recently in *R v Cornwall County Council, ex parte Huntington.*[26] This has important consequences for applicants for judicial review. If they mistakenly apply for judicial review, the strict time limit for statutory review may well mean that they are denied any remedy at all. And the position is further complicated by the fact that there are several

[23] Ie the Children Act 1989, s 94(1) as amended by the Courts and Legal Services Act 1990, s 116, Sch 16, para 23.

[24] Including any error of law rendering a decision ultra vires in judicial review terms.

[25] O 94 sets out the specific procedure for applications to quash.

[26] [1994] 1 All ER 694 (CA). This judgment reaffirms that an order for certiorari cannot be made under O 53 where there is a statutory review clause. This was established in *Smith v East Elloe Rural District Council* [1956] AC 736, and *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122.

instances where, despite the existence of a statutory review provision which would seem to oust Order 53 proceedings, judicial review is still available.[27]

12.13 While statutory review and judicial review are conceptually distinct procedures, so that one is appropriate to quash a specific decision, while the other is appropriate to challenge the reasons underpinning the decision,[28] or where a decision-maker declines to exercise jurisdiction in relation to a matter which would otherwise be justiciable solely under a statutory review clause,[29] the correct route of challenge may be less clear in practice. Applications for judicial review may also sometimes be made where the challenge is to a decision which would ordinarily lead to a further decision to which a statutory review clause would apply but where the applicant is for some reason not obliged to pursue a route leading to statutory review.[30] In such circumstances there is an overlap between the two remedies. The courts, for example, may allow judicial review challenges if they feel that the delay which may occur before a minister determines an application will irredeemably prejudice the applicant.[31] The provision for a statutory review challenge may be seen here as insufficient to provide applicants with an effective remedy, and the courts may be allowing judicial review to be used as a more effective substitute. While not proposing any substantive reform of existing statutory review provisions, the Commission proposes that future statutory review provisions are drafted so as to indicate clearly the extent of the exclusivity thereby conferred.

Systematisation of applications to quash

12.14 Most of those who responded to our consultation paper favoured the creation of one co-ordinated provision covering all applications to quash. At present the procedural steps, the scope of the review, and the powers of the court on application depend in part upon the precise wording of the particular statute. We do not propose at this stage that these existing statutory provisions should be altered. **We do**

[27] This may happen where the courts find it possible to confine the ambit of such provisions restrictively, on the presumption that Parliament does not intend to oust the jurisdiction of the courts. For further discussion see R Gordon, *Crown Office Proceedings*, para G1-022 - G1-026.

[28] *R v Camden LBC, ex p Comyn Ching & Co (London) Ltd* (1984) 47 P & CR 417 (QBD). The statutory review ouster clause will oust judicial review, however, once the order to which it relates has been made, even if that order has not been confirmed. See *R v Cornwall CC ex p Huntington* [1992] 3 All ER 566 (DC).

[29] *Etheridge v Secretary of State for the Environment* (1984) 48 P & CR 35.

[30] This is most likely to be where there is an appeal to a minister, with a statutory review clause allowing a challenge of his or her decision. Delays before such decisions are taken may amount to several years. The applicant, if forced to wait until there is a decision which he can challenge under the statutory scheme specified, may be irredeemably prejudiced before he can even make such a challenge.

[31] Eg see *R v Hillingdon LBC, ex p Royco Homes Ltd* [1974] QB 720.

recommend, however, a model application to quash, for use in future. This model, with explanatory notes, is appended at Appendix E.

The High Court's appellate jurisdiction

12.15 The consultation paper also sought comment on specific procedural questions. In relation to the High Court's appellate jurisdiction we asked whether it was possible to state the criteria for determining whether more than one judge should sit on a particular type of appeal. Also whether the constitution of the court was a matter which should be left to judicial administration or whether it needed to be clarified in primary legislation. Comment was sought too, on the question of whether interlocutory appellate matters could be dealt with by a Master (or District Judge of the Family Division where appropriate) and whether the provisions in all the divisions of the High Court for dealing with interlocutory matters were sufficiently clear and consistent.

12.16 Most of those who responded considered that the number of judges in a case should normally be one, with two or three sitting for issues of general importance and complexity. The nominated judges said in their response that this is what already happens in practice. Many of those who responded wanted the process of determining the constitution of the court in each case to be clarified by primary legislation, but consultees were divided on the question whether the decision in any particular case should be left to judicial discretion. We consider that the judge in charge of the Crown Office List is in the best position to weigh up the relevant factors, such as the availability of judicial manpower and the relative importance of the case, which should determine the constitution of the court, and that it would not be conducive to the efficient administration of justice for his or her discretion to be fettered. The present system is widely accepted to work well in practice. No recommendations for reform are therefore proposed.

Standing

12.17 At present many statutes refer to a category of "persons aggrieved" as having the right to appeal, whilst others identify the category of potential appellants more precisely.[32] Some provisions give the decision-making body involved a special right, in addition to the rights given to any other category of potential appellants, to refer a point of law to the High Court.[33] Reference may also be made in statutes to third parties who may have standing to intervene in an appeal, although they do not have the right to initiate the appeal themselves.[34] This formulation reflects the old

[32] See Annex 3 of Consultation Paper No 126 for examples of these different formulations.

[33] Planning (Listed Buildings and Conservation Areas) Act 1990, s 65; Town and Country Planning Act 1990, s 288; Copyright, Designs and Patents Act 1988, s 251.

[34] See Consultation Paper No 126, paras 19.26 - 19.27 on the issues concerning those directly affected by decisions, who may wish to intervene.

approach to cases of certiorari.[35] In effect it carries it over into statutory procedures which are sometimes referred to as "statutory certiorari".

12.18 Many commentators have expressed the opinion that the expressions "sufficient interest"[36] and "persons aggrieved" are now treated by the courts as meaning the same thing.[37] There was support from consultees for the use of a single term and the replacement of the phrase "person aggrieved". It was argued that this would make the position clearer and more widely understood. This change in vocabulary was not intended to be a change in substantive law. Where there was a more restrictive formulation of the standing requirement replacement was not argued for since if more restrictive provisions were replaced by a universal test, important policy decisions to restrict the range of potential litigants might be unduly exposed to vexatious litigation, contrary to the public interest. As, however, we have recommended that the replacement of the "sufficient interest" formulation by a two limbed test, i.e. the applicant has been or would be adversely affected by any matter to which the application relates, or the High Court considers that it is in the public interest for the applicant to make the application,[38] the simple verbal substitution is no longer possible. It is clear that "person aggrieved" has a wider meaning than "person adversely affected" so that phrase could not be used. As a matter of logic the public interest limb of our proposed general standing requirement includes cases that are now included under the "sufficient interest" formulation. However, the public interest limb does not seem entirely appropriate in the context of specific statutory provisions and may reflect a liberalisation in standing since their enactment. We do not wish to widen the test of standing under these statutes and, in the circumstances, make no recommendations for reform.

Intervention

12.19 In a statutory appeal there is limited scope for participation by third parties.[39] For example, there is no express requirement of service on directly affected third parties.[40] This can be contrasted with an application for judicial review where there is not only an express requirement of service but "any person who desires to be

[35] *R v Thames Magistrates Court, ex p Greenbaum* (1957) 55 LGR 129.

[36] As used currently in judicial review proceedings, from the Supreme Court Act 1981, s 31(3), and O 53, r 3(7).

[37] *Cook v Southend-on-Sea BC* [1990] 2 QB 1, 18. See also R Gordon, *Crown Office Proceedings* (1990), G1-013, P Cane, *An Introduction to Administrative Law* (2nd ed 1992) p 49, n 16; and C Emery and B Smythe, *Judicial Review: Legal Limits of Official Power* (1986), p 312, though the case referred to in the latter text (*Arsenal Football Club Ltd v Ende* [1979] AC 1) does not explicitly discuss any similarity between these two terms.

[38] See Draft Bill, clause 31B(1).

[39] See Consultation Paper No 126, para 19.26 - 19.27.

[40] See O 53, r 5(3).

heard in opposition to the motion or summons, and appears to the Court to be a proper person to be heard" shall be heard, "notwithstanding that he has not been served with notice of the motion or the summons".[41] We consider that there is no justification for this procedural difference between judicial review and statutory appeals. **Accordingly we recommend that Order 55 be amended so as to allow for intervention by a third party (which may include a minister or government department) providing that the court is satisfied that the third party is a proper person to be heard.**[42]

Time limits and power to extend time

12.20 While the general, residual, provision for entering an appeal and serving notice of appeal is 28 days[43], some statutes prescribe different periods, for example six weeks.[44] Most of those who responded to the consultation paper on the question of time limits favoured standardising the time period at six weeks. This would have the disadvantage that any specific policy reasons for having different time limits in different contexts would simply be ignored. **We do not propose, therefore, that time limits should be standardised. We do suggest, however, that a list should be maintained in the proposed Crown Office Rules**[45] **of those statutory appeals where [for good reasons] a different time limit applies, the rest being limited to 28 days in any provision of general effect.**

12.21 There was a division of opinion on the question of when time should start to run. Order 55 rule 4(3) provides that in appeals from the decision of a court time runs from the date of the judgment; rule 4(4), on the other hand, states that in other appeals time runs from the date the decision or (where appropriate) the reasons for it are *given* to the appellant. It is unclear in this context whether time runs from the date the decision is posted, or from the date it is received by the appellant.[46] There was no consensus in the responses as to when time should start to run. Some consultees wanted it to be from the date of posting, citing the ease with which this could be proved. Others considered that the appellant should have 28 days to lodge an appeal, and that time should only run from the date of receipt of the decision or

[41] See existing O 53, r 9(1) and our slightly amended version in draft O 53 r 10(1).

[42] At present where the matter is governed by O 55, and the appeal is against an order etc of a minister or government department, that minister or department is entitled to appear and be heard in the proceedings on the appeal: see O 55, r 8. However, this does not cover cases where the minister or department is closely concerned but is not the respondent to the action.

[43] O 55, r 4(2).

[44] Eg the Planning (Listed Buildings and Conservation Areas) Act 1990, s 63.

[45] See para 12.2 above.

[46] For a discussion of the conflicting authorities, see *Gordon, Crown Office Proceedings (1990)*, E2-004.

reasons. We have noted that in the rules relating to service of documents, the trend has been to calculate time from the moment when a letter would be delivered in the ordinary course of the post.[47] For this reason we consider that it would be sensible to follow this trend and accordingly **we recommend a date of posting (plus a stated number of days) provision.**[48]

12.22 In our consultation paper we commented on the fact that there are differences in the extent to which the court has the power to extend the time for appealing in statutory appeals.[49] In some statutory appeal provisions the time limit is set by statute, and there is no power in the court to extend the period.[50] In other provisions the time is set by rules, and there is a general power to extend.[51] We asked whether the differences were defensible, and whether the court should be able to extend time for statutory review applications, or whether there should be an absolute bar on extending time for all appeals. Most consultees considered that the courts should have some general discretionary power to extend time, although there was less agreement on its extent. It was, for example, suggested by some that the rules for the extension of time in judicial review cases should be adopted.[52] The nominated judges of the Queen's Bench Division suggested that in areas such as compulsory purchase, planning, or housing, if there were no extension of time possible, the court should have a power to award damages where hardship results.[53] This last suggestion, which we are inclined to favour, would, however, require a

[47] Eg where service by post is authorised or required under CCR O 7, it is deemed to have been effected, unless the contrary is proved, at the time at which the letter would be delivered in the 'ordinary course of post'. Subject to proof to the contrary it is taken that delivery in the 'ordinary course of the post' was effected: (a) in the case of first class mail, on the second working day after posting; (b) in the case of second class mail, on the fourth working day after posting. "Working days" are Monday to Friday excluding any Bank Holiday.

[48] See also the changes in the County Court practice introduced by the Courts and Legal Services Act 1990 (promulgated following the recommendations in the Report of the Review Body on Civil Justice (Cmnd 394) published in 1988).

[49] Consultation Paper No 126, para 19.15.

[50] Eg the Taxes Management Act 1970, s 56(4). See *Petch v Gurney (Inspector of Taxes)*, *The Times* 8 June 1994.

[51] O 3 r 5 provides that the court may, on such terms as it thinks just, by order extend the period for bringing proceedings. It may make such an order even after the period for bringing the proceedings has expired (O 3, r 5(2)).

[52] O 53, r 4(1) provides that an application for judicial review shall be made promptly and within three months from the date when the grounds when the application arose unless the Court considers that there is good reason for extending the period. The Supreme Court Act 1981, s 31(6) provides that the court may refuse to grant leave or relief in a judicial review application if the granting of the remedy sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

[53] As was suggested in *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122.

separate law reform exercise.[54] We consider that whether or not time should be extendable is a policy question and must depend on the circumstances and conflicting interests in each type of case. The creation of a general power to extend time would not be able to take account of these interests, and would allow time to be extended where Parliament has decided that it should not be. We do not propose a harmonisation which would result in a general judicial discretion to extend time. **We do recommend, however, that in future the availability or otherwise of an extension of time should be set out clearly in the proposed Crown Office Rules.**[55]

Interim suspension and stay of orders pending appeal

12.23 In the consultation paper[56] we asked whether the present provisions as to stay or suspension could be harmonised.[57] Consultees were largely in favour of a defeasible presumption that a disputed order should remain in force pending the substantive High Court hearing. It was said that this would protect administrative bodies from vexatious applications. **We recommend that the types of appeal where Parliament has provided by statute that the entering of an appeal should act as a stay on the order or decision in question should be listed in the Crown Office Rules.**

Other interlocutory provisions

12.24 We also asked whether all other possible interlocutory applications in statutory appeals[58] could be clarified and rationalised. Consultees agreed that the present interlocutory provisions were not clear or consistent, and should be revised. There was less unanimity, however, about possible solutions. Detailed and time-consuming work would be required to produce a general and comprehensive provision on interlocutory matters for statutory appeals in all divisions of the High Court. There was also uncertainty about the extent to which interlocutory provisions could ever be completely standardised, given the wide variation of statutory appeal procedures which exist. **We propose that interlocutory provisions should be made clear and accessible, in whatever way is most effective, so that appellants may be confident of the procedure in their particular case. This might be done by the inclusion of such provisions in the proposed Crown Office Rules.**

[54] See para 2.32 above in respect of ultra vires action by public authorities.

[55] See para 12.2 above.

[56] Consultation Paper No 126, para 19.16.

[57] Some statutory review provisions allow for the order under challenge to be suspended while the challenge is pending. Others do not. O 55 r 3(3), on the other hand, directs that for statutory appeals the decision subject to appeal may be stayed if the Court by which the appeal is to be heard or the body which made the decision so orders.

[58] See Consultation Paper No 126, paras 19.4 and 19.17.

The orders which can be made on appeal

12.25 Individual statutes usually make express provision as to the orders which the High Court may make on appeal. They thereby indicate the extent to which control over the decisions of an inferior court, tribunal or other body is subject to appeal or review by the High Court.[59] Most of those who responded to Part B of the consultation paper[60] were in favour of an appeals provision of general effect. This is another area where further detailed work would have to be done to see which statutes could not be completely assimilated, and what the forms, both of the general provision and the list or categories of exceptions, should be. **We consider harmonisation desirable in principle, at least for statutory appeals, and recommend that in future such a provision should be formulated as part of the Crown Office Rules.[61] In statutory review, on the other hand, the court only has a power to quash, or not to quash. We do not, therefore, propose such a provision for statutory review.**

Should there be a leave requirement?

12.26 Questions concerning rights of access to the courts raise issues as to whether rights of appeal to the High Court (or to the Court of Appeal[62]) should be as of right or subject to a leave requirement. Case stated provides a further variation in enabling the tribunal to refuse to state a case if it does not think that a point of law is in issue, and empowering the High Court, if it thinks fit, to require the tribunal to do so. In the consultation paper we invited views as to the principles which should govern the right of appeal.[63]

12.27 The issue is whether or not there should be a general leave requirement for appeals to the High Court (or to the Court of Appeal). Many of those who responded were opposed to a general requirement of leave. This, it was said, was unnecessary. It would merely cause delay and the issues in the case would have to be considered twice by a High Court judge. Consultees did advocate a general leave requirement

[59] See Consultation Paper No 126, para 16.6.2.

[60] Including the Treasury Solicitor's Working Group and the nominated judges of the Queen's Bench Division.

[61] See para 12.2 above.

[62] Statutory appeals lie directly to the Court of Appeal from the decisions of a number of tribunals, including the Lands Tribunal, the Social Security Commissioners, the Transport Tribunal and the Immigration Appeal Tribunal (under the Asylum and Immigration Appeals Act 1993).

[63] Consultation Paper No 126, para 19.19.

in cases concerned with land use[64] and public works, since hopeless appeals in this area could impose enormous financial and environmental costs on third parties, not least among whom are taxpayers. **We do not favour a general leave requirement and recommend there should be no alterations to the arrangements for statutory appeals to the High Court which do require leave.**

Allocation of business

12.28 The Value Added Tax Tribunals and the Special Commissioners of Income Tax are now combined administratively to form the Combined Tax Tribunals although each retains its own separate jurisdiction. They share the same building and one third of the Chairmen of VAT Tribunals are also deputy Special Commissioners. At present appeals from the VAT Tribunals on a point of law lie to the Queen's Bench Division, or by a 'leapfrog' procedure, to the Court of Appeal.[65] Appeals from the Special Commissioners are by way of case stated on a point of law[66] to the Chancery Division.[67]

12.29 The Council of Tribunals in its published response to our consultation paper[68] argued that it was anomalous that VAT and income tax appeals should go to different Divisions of the High Court since the appeals are jointly administered and share some of the same personnel up to that point. The Council believes that VAT appeals, like Special Commissioner appeals, should go to the Chancery Division.[69] Other issues concerning the tax tribunals are discussed in the Appendix on case load management.[70] It is said that there is unacceptable delay in such cases and there are concerns about the expertise of the appellate body as compared, for instance,

[64] Enforcement appeals (see the Planning and Compensation Act 1991, s 6(5)) require leave. Detail was given in the Department of the Environment's response. The procedure, it said, weeded out the 30% of applications later found wholly unmeritorious, and prevented those which were directed merely at the object of gaining more time for an unauthorised user of the land.

[65] There are serious delays in VAT appeals being heard by the High Court. Information from the Combined Tax Tribunals Centre shows that the average time between the Tribunal decision and the High Court decision in 1993 was 24.92 months. One recent case (*Customs & Excise Commrs v Kingfisher Plc* [1994] STC 63) was heard by the High Court more than three years after the Tribunal decision.

[66] But see now SI 1994/1811 Special Commissioners (Jurisdiction and Procedure) Regulations 1994, which came into effect on 1 September 1994 and replaces cases stated with decisions. However, the stated case procedure remains in operation for the General Commissioners.

[67] According to the Council of Tribunals (Annual Report 1991/92) case stated is a more costly and complex procedure compared with the ordinary appeal route in such cases.

[68] Annual Report 1993 para 1.66.

[69] See also JT Avery-Jones, "Tax Appeals: The Case for Reform" [1994] British Tax Review p 3.

[70] See Appendix C.

to the expertise in planning appeals.[71] As a matter of principle cases should be heard with due expedition and in the appropriate forum. A Chancery Division judge is more likely to bring expertise in tax matters to VAT appeals, and would also provide additional manpower which would help to cut the delays. We do not at present consider, however, that VAT appeals should be transferred to the Chancery Division. **We suggest that the best solution is that a Chancery Division judge should be assigned from time to time to sit as an additional judge in VAT cases in the Crown Office List as Family Division Judges are now regularly appointed as additional Queen's Bench judges to hear judicial review cases with a family law element. The effect of this change on the efficient dispatch of VAT appeals should be closely monitored, and if the situation does not improve, more radical changes, such as a transfer of the whole of this jurisdiction to the Chancery Division, may prove to be necessary.**

[71] *Ibid*, para 3.3.

PART XIII
SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

In this section we set out a summary of our conclusions and recommendations for reform of the procedures of judicial review and statutory appeals.

GENERAL CONSIDERATIONS

Case-load and delay

With regard to issues of case-load and delay, we believe that there are a number of underlying principles which must be taken into account if the procedural framework is to be effective. We consider that the system should:
(a) ensure the efficient despatch of business so as to minimise delay;
(b) avoid, so far as practicable, inconsistencies as between different judges in the exercise of discretion, particularly in the operation of the filter to exclude hopeless applications (at present the leave stage); and
(c) be robust enough to ensure not only that the present delays can be reduced to an acceptable level, but that there is no danger of a return to anything resembling the unacceptable position which existed up to the middle of 1993. (Paragraph 2.28)

We also believe that consideration should be given to the question of how to:
(d) address the access to justice issues raised by those concerned by the concentration of judicial review in London and the South-East; and
(e) avoid the perceived dangers in the present use of deputy high court judges in the exercise of the Crown Office's jurisdiction. (Paragraphs 2.28; Appendix C)

Homelessness

The provision of an internal review cannot be regarded as a proper substitute for a right of appeal to a court or an independent tribunal. We recommend the creation of a right of appeal on a point of law to a court or independent tribunal in homelessness cases. (Paragraphs 2.26, 2.27)

PROCEDURAL EXCLUSIVITY

We believe that the present position whereby a litigant is required to proceed by way of Order 53 only when (a) the challenge is on public law and no other grounds; i.e. where the challenge is solely to the validity or legality of a public authority's acts or omissions and (b) the litigant does not seek either to enforce or defend a completely constituted private law right is satisfactory. (Paragraph 3.15)

Transfer into and out of Order 53

It is recommended that the existing rule be amended so as enable an action commenced by writ to be transferred into Order 53 and to continue as an

application for judicial review provided the plaintiff satisfies the criteria for the granting of leave or, on our recommendation, for an application being allowed to proceed to a full judicial review. Further, the judge should be empowered to order proceedings brought under Order 53 to continue as if they had begun by writ, provided he or she is satisfied that the remedy sought is suitable for transfer into one of the forms of relief available in an action begun by writ. (Paragraphs 3.21, 3.19, Draft Order 53 rule 11(1)(2))

Transfer to the High Court and certification

We propose that any party to an action should be able to apply by summons to the district judge or master to transfer the action to the High Court on the ground that it raises issues of public law. It is envisaged that if the district judge or master considers the case a suitable one then it could be "certified as fit for a nominated judge if available" and transferred to the High Court, either, in a case solely raising public law issues, to the Crown Office List, or in a "mixed" case to the Queen's Bench Division. (Paragraph 3.23)

THE INITIAL STAGE OF THE APPLICATION

A new Form 86A

We recommend that Form 86A should be amended to ask the applicant to provide information concerning: (i) any relief sought, including interlocutory relief; (ii) any alternative remedies; (iii) whether the respondent has been asked to consider the complaint or reconsider the decision; (iv) the reasons for any delay; and (v) the date of any application for legal aid (if relevant), the date when it was granted or refused and, if granted, the number of the legal aid certificate. (Paragraph 4.3; Appendix B)

A "request for information procedure"

We recommend that a "request for information" procedure should be introduced to be used at the discretion of the application judge. (Paragraph 4.9; Appendix B)

Notification of the decision

We recommend that if the application is not allowed to proceed to a substantive hearing (in the present terminology, if leave is *refused*) the application judge should complete the amended Form JRJ, to state that he or she has considered the application and should provide reasons for refusing to allow the application to proceed to a substantive hearing. (Paragraph 4.12)

FILTERING OUT HOPELESS APPLICATIONS: LEAVE OR PRELIMINARY CONSIDERATION

We recommend that the filtering stage of an application for judicial review should be known as the "preliminary consideration" rather than the leave stage. (Paragraph 5.8; Draft Order 53 rule 3)

We recommend that all applications for preliminary consideration should, in the first instance, be determined entirely on paper, unless the application falls within a recognised category for which an oral hearing might be necessary. We further recommend that the following categories should be so recognised: (i) where the application includes a claim for immediate interim relief; (ii) where on the basis of the written material it appears to the Crown Office or the judge that a hearing is desirable in the interests of justice. (Paragraph 5.11; Draft Order 53 rules 3(6) and 3(7))

Criteria for permitting an application to proceed to a substantive hearing
We recommend that it should be stated in the Rules that unless either the facts or the propositions relied upon by the applicant disclose a serious issue which ought to be determined, or that there ought for some other reason to be a substantive hearing, an application for judicial review should not be allowed to proceed beyond the preliminary consideration. (Paragraph 5.15; Draft Order 53 rule 3(5)(a))

Standing
We recommend that an application should not be allowed to proceed to a substantive hearing unless the court is satisfied that the applicant has been or would be adversely affected, or the High Court considers that it is in the public interest for an applicant to make the application. (Paragraph 5.22; Draft Bill, clause 1, new section 31B(1))

Time limits
We recommend:-

(a) that the time limit in applications for judicial review should be prescribed in rules of court (Draft Bill, clause 1, new section 31(B)(2)) and should be three months from the date when grounds for the application first arose (Draft Order 53, rule 2(1));

(b) that the court may refuse an application made within the three month time limit if the application is not sufficiently prompt and, that if the relief sought was granted, on an application made at this stage, it would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration (Draft Order 53, rule 2(2)).

(c) that an application may be made after the end of the period of three months if the court is satisfied that there is a good reason for the application not to have been made within that period, and that if the relief sought was granted, on an application made at this stage, it would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration (Draft Order 53, rule 2(3)).

We also suggest that the court should take account of the fact that an alternative remedy was being pursued as a good reason why an application made after 3 months should be allowed to proceed to a substantive hearing. (Paragraph 5.35)

Unincorporated associations

We recommend that unincorporated associations should be permitted to make applications for judicial review in their own name through one or more of their members applying in a representative capacity where the court is satisfied that the members of the applicant association have been or would be adversely affected or are raising an issue of public interest warranting judicial review, and that the members of the association are appropriate persons to bring that challenge. (Paragraph 5.41, Draft Order 53 r 1(2))

INTERIM RELIEF

We recommend that there should be statutory provision for interim relief against ministers in their official capacity and against government departments in judicial review proceedings. (Paragraph 6.13; Draft Bill, clause 1, new section 31B(5))

Interim relief prior to the preliminary consideration

We recommend that it be made clear in the Rules that there is jurisdiction to grant interim relief before it has been decided in the preliminary consideration of an application to allow it to proceed to a substantive hearing. (Paragraph 6.17; Draft Order 53, rule 5(1))

The form of interim relief

We recommend that there should be provision for interim injunctions, interim declarations and stays of proceedings before courts and tribunals in proceedings by way of judicial review. (Paragraph 6.27; Draft Bill, clause 1, new section 31A(4)(a); Draft Order 53 rule 5)

INTERLOCUTORY PROCEDURES

We do not make any recommendations for reform of the rules on discovery. (Paragraph 7.12)

REMEDIES

Nomenclature

The latin titles of the orders be replaced so that the prerogative orders the court would have power to make in judicial review proceedings would be called: a mandatory order, a prohibiting order, and a quashing order. (Paragraph 8.3; Draft Bill, clause 1, new sections 31(1) and 31(3))

Title of cases
The description of judicial review cases should be reformed by Practice Direction so that they are titled, "In the matter of an application for judicial review: ex parte Applicant, R v Respondent". (Paragraph 8.4)

Claims for Restitution and in Debt, and Interest
We recommend that, as is the case for damages, the court may order restitution in judicial review proceedings provided such restitution would have been granted in an action begun by writ. (Paragraph 8.5; Draft Bill, clause 1, new section 31B(3); Draft Order 53 rules 1 and 8)

We also recommend that, as is the case for damages and is proposed for restitution, the court may award a liquidated sum in judicial review proceedings provided such an award would have been made in an action begun by writ. (Paragraph 8.7; Draft Bill, clause 1, new section 31B(3); Draft Order 53 rule 8)

Advisory declarations
We recommend that explicit provision be made for the High Court to make advisory declarations in the exercise of its supervisory jurisdiction by way of judicial review. (Paragraph 8.12; Draft Bill, clause 1, new section 31A(4)(b))

We also recommend that where the judge is satisfied that the application is for an *advisory* declaration, he should also be satisfied that the point concerned is one of general public importance, before he makes the advisory declaration or, at the initial (i.e. leave) stage, allows the application to proceed to a substantive hearing. (Paragraph 8.14; Draft Bill, clause 1, new section 31A(5))

Power to make substitute orders
We recommend that the court should be empowered to substitute its own decision for the decision to which the application relates (Draft Bill, clause 1, new section 31(4)(b)) provided that: (i) there was only one lawful decision that could be arrived at; and (ii) the grounds for review arose out of an error of law. We also recommend that the power to substitute its own decision should be limited to cases involving the decisions of courts and tribunals (Paragraph 8.16; Draft Bill, clause 1, new section 31(5))

RENEWED APPLICATIONS AND APPEALS
We recommend that it be stated in the Rules that any application by a respondent to set aside an order that an application for judicial review may proceed should be made not later than 28 days beginning with the day on which the respondent is served with the notice of application. (Paragraph 9.4, Draft Order 53 rule 17(3)).

We also recommend that no appeal lie to the Court of Appeal from an order made following an application to have an application for judicial review set aside (Paragraph 9.5, Draft Order 53, r 17(4)).

We also recommend that it be made clear in the Rules that access to the Court of Appeal to challenge an order setting aside a decision to allow a preliminary application to proceed is by way of a renewal of the original application. (Paragraph 9.6, Draft Order 53 rule 17(4))

COSTS

We propose that in those cases where an oral hearing is required the court should have the power to make a costs order in favour of either applicant or respondent.

We recommend that costs should be available from central funds where a case is allowed to proceed to a substantive hearing on the basis of either a public interest challenge or for the purpose of seeking an advisory declaration. (Paragraph 10.6; Draft Bill, clause 1, new section 31B(4))

We also recommend that the Civil Legal Aid (General) Regulations 1989 be amended to enable the Board to consider the wider public interest in having the case heard. (Paragraph 10.9)

HABEAS CORPUS

We do not make any proposals for reform, but we do urge that a wide review of habeas corpus appeal provisions be undertaken to enable a unified appeal system to be achieved. (Paragraph 11.32)

STATUTORY APPEALS

Crown Office Rules

We recommend that all public law procedures should be consolidated into one set of Crown Office Rules. This should be done, however, in co-ordination with Lord Woolf's review of civil rules and procedures, and we do not propose that these rules are drafted until the results of that review are known. (Paragraph 12.2)

The High Court's powers on appeals by way of case stated

We recommend amendment of the Supreme Court Act 1981 so as to confirm statutorily the powers of the High Court on case stated appeals from the Crown Court. (Paragraph 12.9; Draft Bill, clause 2)

We consider that existing procedures for appeals to the High Court by way of case stated should be replaced in due course by provisions for appeal on a point of law. No new case stated provisions should be created in the future. (Paragraph 12.10)

Statutory Review
We recommend that a model 'application to quash' provision should be used in future for statutory review provisions. (Paragraph 12.14; Appendix E)

Intervention
We recommend that Order 55 be amended so as to allow for intervention by a third party (which may include a Minister or government department) in a statutory appeal providing that the court is satisfied that the third party is a proper person to be heard. (Paragraph 12.19)

Time limits and power to extend time
A list should be maintained in the proposed Crown Office Rules of those statutory appeals where [for good reasons] a different time limit applies, the rest being limited to 28 days in any provision of general effect. (Paragraph 12.20)

When time starts to run in statutory appeals
We recommend that the date from which time should be calculated for statutory appeals is the date of posting (plus a stated number of days), and that this provision should be included in the Rules. (Paragraph 12.21)

Power to extend time
We recommend that in future the availability or otherwise of an extension of time should be set out clearly in the proposed Crown Office Rules. (Paragraph 12.22)

Interim suspension and stay of orders pending appeal
We recommend that the types of appeal where Parliament has provided by statute that the entering of an appeal should act as a stay on the order or decision in question should be listed in the Crown Office Rules. (Paragraph 12.23)

Other interlocutory provisions
We propose that interlocutory provisions should be made clear and accessible, in whatever way is most effective, so that appellants may be confident of the procedure in their particular case. This might be done by the inclusion of such provisions in the proposed Crown Office Rules. (Paragraph 12.24)

The orders which can be made on appeal
We consider harmonisation desirable in principle, at least for statutory appeals, although not for statutory review, and recommend that in future such a provision should be formulated as part of the Crown Office Rules. (Paragraph 12.25)

Allocation of business to the different divisions of the High Court
A Chancery Division judge should be assigned from time to time to sit as an additional judge in VAT cases in the Crown Office List as Family Division Judges

are now regularly appointed as additional Queen's Bench judges to hear judicial review cases with a family law element. The effect of this change on the efficient dispatch of VAT appeals should be closely monitored, and if the situation does not improve, more radical changes, such as a transfer of the whole of this jurisdiction to the Chancery Division, should be considered. (Paragraph 12.29)

(Signed) HENRY BROOKE, *Chairman*
JACK BEATSON
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
9 September 1994

APPENDIX A

Draft
Administration of Justice Bill

ARRANGEMENT OF CLAUSES

Clause

1. Judicial review.
2. Cases stated.
3. Crown application.
4. Consequential amendments and repeals.
5. Short title, commencement and extent.

SCHEDULES:

Schedule 1—Consequential amendments.

Schedule 2—Repeals.

A

BILL

INTITULED

An Act to amend the law relating to judicial review and cases stated. A.D. 1994.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 **1.** For section 31 of the Supreme Court Act 1981 (application for judicial review) there shall be substituted— Judicial review. 1981 c. 54.

"Mandatory, prohibiting and quashing orders. 31.—(1) The orders of mandamus, prohibition and certiorari shall be known instead as mandatory, prohibiting and quashing orders respectively.

10 (2) A person seeking—

(a) a mandatory order,

(b) a prohibiting order, or

(c) a quashing order,

shall make an application for judicial review to the High
15 Court in accordance with rules of court.

(3) The High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before the commencement of section 1 of the Administration of
20 Justice Act 1994, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively.

(4) Where on an application for judicial review the High Court makes a quashing order, it may in addition—

(a) remit the matter to the court, tribunal or authority
25 which made the decision in question with a direction to reconsider it and reach a decision in accordance with the findings of the High Court, or

EXPLANATORY NOTES

Clause 1 replaces section 31 of the Supreme Court Act 1981 with four new sections, sections 31 to 31C.

Section 31 subsection (1) and (3) provide for the replacement of the latin titles of the prerogative orders, without effecting any substantive changes to the orders. Subsections (1) and (3) implement para 8.3 of the report.

Subsection (2) reproduces the existing section 31(1)(a) which requires an applicant for one of the prerogative orders to make an application for judicial review. Subsection (2) implements paragraph 8.3 of the report.

Subsection (4) paragraph (a) is a re-enactment of section 31(5) of the Supreme Court Act 1981.

(b) in a case to which subsection (5) applies, substitute its own decision for the decision in question.

(5) This subsection applies if the decision in question was a decision of a court or tribunal and the High Court is satisfied— 5

(a) that the court or tribunal made that decision as a result of an error of law, and

(b) that there was only one decision which the court or tribunal could properly have reached. 10

(6) A mandatory, prohibiting or quashing order shall be final, subject to any right of appeal.

Declarations and injunctions.

31A.—(1) A person seeking a declaration or injunction may make an application for judicial review to the High Court in accordance with rules of court. 15

(2) A declaration may be made or an injunction granted at any stage in proceedings on an application for judicial review, but only where the High Court considers that, having regard to—

(a) the nature of the matters in respect of which relief 20 may be granted by mandatory, prohibiting or quashing orders,

(b) the nature of the persons against whom relief may be granted by such orders, and

(c) all the circumstances of the case, 25

it would be just and convenient for the declaration to be made or the injunction granted.

(3) The limitation in subsection (2) does not apply to an injunction under section 30.

(4) The power of the High Court to make a declaration 30 on an application for judicial review includes power to make—

(a) an interim declaration, or

(b) an advisory declaration (that is, a declaration as to an issue of law which is made in circumstances 35 where the applicant is not seeking the review of any existing decision).

(5) An advisory declaration shall not, however, be made by the High Court on such an application unless it is satisfied that the application raises a point of general 40 public importance.

Judicial review: supplementary.

31B.—(1) An application for judicial review shall not be made unless—

(a) the applicant has been or would be adversely affected by any matter to which the application 45 relates, or

EXPLANATORY NOTES

Subsection (4) paragraph (b) and subsection (5) give the court an additional power to substitute in limited circumstances its own decision for the decision of an inferior court or tribunal. Subsection (4) paragraph (b) and subsection (5) implement paragraph 8.16 of the report.

Subsection (6) re-enacts section 29(2) of the Supreme Court Act 1981, which is repealed by Schedule 2 of the Bill.

Section 31A implements the Commission's recommendations on declarations and injunctions.

Subsection (1) re-enacts section 31(1)(b) of the Supreme Court Act 1981.

Subsection (2) sets out the conditions which must be satisfied before a declaration can be made or an injunction granted on an application for judicial review, and implements the Commission's recommendation at paragraph 6.17 of the report that interim relief should be available at any stage in proceedings, including prior to the preliminary consideration.

Subsection (3) makes clear that the limitations set out in subsection (2) do not apply to injunctions under section 30 of the Supreme Court Act 1981 restraining persons from acting in offices in which they are not entitled to act.

Subsection (4) confirms and puts on a statutory basis the power of the High Court to make interim and advisory declarations.

Subsection (5) restricts the grant of advisory declarations by requiring that the court shall not grant an advisory declaration unless it is satisfied that the application raises a point of general public importance. Subsections (4) and (5) implement paragraphs 6.27 and 8.12 of the report.

Section 31B implements the Commission's recommendations on standing, time limits, interim relief against the government, ministers and departments, and costs.

Subsection (1) provides that there should be standing to bring applications for judicial review where either the applicant has been or would be adversely affected, or the High Court considers that the application is in the public interest. Subsection (1) implements paragraph 5.22 of the report.

(b) the High Court considers that it is in the public interest for the applicant to make the application.

(2) Rules of court may make provision limiting the time within which applications for judicial review may be made.

(3) On an application for judicial review the High Court may award damages, restitution or the recovery of a sum due if—

(a) the application includes a claim for such an award arising from any matter to which the application relates, and

(b) the High Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making the application, such an award would have been made.

(4) On an application for judicial review the High Court may, if it thinks fit, award costs out of central funds—

(a) where the relief sought was an advisory declaration, or

(b) where the court considers that it was in the public interest for the application to be made.

(5) Nothing in section 21 of the Crown Proceedings Act 1947 (nature of relief available in proceedings by or against the Crown) shall be taken to limit the relief available at any stage in proceedings on an application for judicial review.

1947 c. 44.

Supervisory jurisdiction of High Court.

31C.—(1) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting and quashing orders as it possesses in relation to the jurisdiction of an inferior court.

(2) The power of the High Court under any enactment to require justices of the peace or a judge or officer of a county court to do any act relating to the duties of their respective offices, or to require a magistrates' court to state a case for the opinion of the High Court, shall be exercisable by mandatory order."

Cases stated. 1981 c. 54.

2. For section 28A of the Supreme Court Act 1981 (proceedings on case stated by magistrates' court) there shall be substituted—

"Proceedings on case stated by magistrates' court or Crown Court.

28A.—(1) This section applies where a case is stated for the opinion of the High Court—

(a) by a magistrates' court under section 111 of the Magistrates' Courts Act 1980, or

1980 c. 43.

EXPLANATORY NOTES

Subsection (2) provides for any time limits to be determined by rules of court. At present these are partially dealt with in section 31(6) of the Act. Subsection (2) implements the recommendation made at paragraph 5.26 of the report.

Subsection (3) provides that damages, restitution, or the recovery of money due may be awarded on an application for judicial review. Subsection (3) implements the Commission's recommendation in paragraphs 8.5 and 8.7 that restitution and money due should be capable of being awarded on applications for judicial review if they would have been awarded in an action, as damages are at present.

Subsection (4) provides that on an application for judicial review the court has a discretion to award costs out of central funds in such circumstances as it thinks fit, either where the relief sought was an advisory declaration or where the court allowed the application to proceed to a substantive hearing in the public interest. Subsection (4) implements the recommendation made at paragraph 10.6 of the report.

Subsection (5) is included to make clear that section 21 of the Crown Proceedings Act 1947 does not act to limit the relief available against the Crown in judicial review proceedings. Subsection (5) reflects the Commission's recommendation at paragraph 6.13 of the report that there should be statutory provision for interim relief against ministers in their official capacity and against government departments in judicial review proceedings.

Section 31C re-enacts the provisions contained in section 29(3) and section 29(4) of the Supreme Court Act 1981, relating to the supervisory jurisdiction of the High Court.

Clause 2 replaces section 28A of the Supreme Court Act 1981, which was inserted by paragraph 9 of Schedule 2 to the Statute Law (Repeals) Act 1993. It implements the Commission's recommendations in paragraph 12.10 of the report that the powers of the High Court with respect to cases stated from the Crown Court should be set out in statute. Clause 2 makes provision for the powers of the High Court on case stated from the Crown Court to be the same as the powers of the High Court on case stated from a magistrates' court, as set out in both the new and the existing section 28A.

(b) by the Crown Court under section 28(1) of this Act.

(2) The High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case shall be amended accordingly. 5

(3) The High Court shall hear and determine the question arising on the case (or the case as amended) and shall—

(a) reverse, affirm or amend the determination in respect of which the case has been stated, or 10

(b) remit the matter to the magistrates' court, or the Crown Court, with the opinion of the High Court,

and may make such other order in relation to the matter (including as to costs) as it thinks fit. 15

1960 c. 65.

(4) Except as provided by the Administration of Justice Act 1960 (right of appeal to House of Lords in criminal cases), a decision of the High Court under this section is final."

Crown application.

3. This Act binds the Crown. 20

Consequential amendments and repeals.

4.—(1) The consequential amendments set out in Schedule 1 shall have effect.

(2) The repeals set out in Schedule 2 shall have effect.

Short title, commencement and extent.

5.—(1) This Act may be cited as the Administration of Justice Act 1994. 25

(2) This Act shall come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument; and different days may be appointed for different provisions and for different purposes.

(3) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 3 is included to make clear that the provisions contained in this Act are binding on the Crown.

Clause 4 gives effect to the consequential amendments and repeals set out in Schedules 1 and 2.

Clause 5 deals with the short title, commencement date, and extent of the Bill.

SCHEDULES

SCHEDULE 1

Section 4(1).

CONSEQUENTIAL AMENDMENTS

General

5 1. In each of the following enactments, for the word "mandamus" there shall be substituted "mandatory order"—

section 322(3) of the Public Health Act 1936;	1936 c. 49.
section 99(1) of the Education Act 1944;	1944 c. 31.
section 40(5) of the Crown Proceedings Act 1947;	1947 c. 44.
10 section 11(1) and (2) of the Professions Supplementary to Medicine Act 1960;	1960 c. 66.
section 1(3) of the Public Lavatories (Turnstiles) Act 1963;	1963 c. 32.
section 10(2) of the Public Libraries and Museums Act 1964;	1964 c. 75.
section 9 of the Caravan Sites Act 1968;	1968 c. 52.
15 section 7D(3) of the Local Authority Social Services Act 1970;	1970 c. 42.
section 45(5) of the Health and Safety at Work etc. Act 1974;	1974 c. 37.
section 97(3) of the Control of Pollution Act 1974;	1974 c. 40.
section 1(6) of the Refuse Disposal (Amenity) Act 1978;	1978 c. 3.
section 71(2) of the Public Health (Control of Disease) Act 1984;	1984 c. 22.
20 section 116(2) of the Building Act 1984;	1984 c. 55.
sections 111(2) and 128(3) of, and paragraph 33(5) of Schedule 11 to, the Financial Services Act 1986;	1986 c. 60.
section 84(4) of the Children Act 1989;	1989 c. 41.
section 231(3) of the Town and Country Planning Act 1990;	1990 c. 8.
25 section 40(3) of the Food Safety Act 1990;	1990 c. 16.
section 72(4) of, and paragraph 4(4) of Schedule 3 to, the Environmental Protection Act 1990;	1990 c. 43.
sections 140(5) and 141(4) of the Water Resources Act 1991;	1991 c. 57.
section 57(8) of the Land Drainage Act 1991;	1991 c. 59.
30 section 60(2) of the Clean Air Act 1993; and	1993 c. 11.
section 20(3) of the Welsh Language Act 1993.	1993 c. 38.

2. In each of the following enactments, for the words "an order of mandamus" there shall be substituted "a mandatory order"—

section 111(6) of the Magistrates' Courts Act 1980;	1980 c. 44.
35 section 70(2)(a) of the Road Traffic Regulation Act 1984;	1984 c. 27.
paragraph 5(5) of Schedule 7 to the Criminal Justice Act 1988; and	1988 c. 33.
section 54(3)(a) of the Transport and Works Act 1992.	1992 c. 42.

3. In each of the following enactments, for the word "certiorari" there shall be substituted "quashing order"—

40 section 95 of the Tithe Act 1836;	1836 c. 71.
sections 39 and 44 of the Inclosure Act 1845 (in each place);	1845 c. 118.
section 26 of the Inclosure Act 1852; and	1852 c. 79.
section 11 of the Welsh Church Act 1914.	1914 c. 91.

4. In each of the following enactments, for the words "order of certiorari"
45 there shall be substituted "a quashing order"—

section 25 of the Inclosure Act 1852; and

SCH. 1

1954 c. 70. section 165(2) of, and paragraph 16 of Schedule 3 to, the Mines and Quarries Act 1954.

5. In each of the following enactments, for the words "prohibition or certiorari" there shall be substituted "prohibiting or quashing order"—

1949 c. 74. paragraph 7 of Schedule 1, and paragraph 10 of Schedule 2, to the Coast Protection Act 1949; and 5

1967 c. 10. paragraph 9 of Schedule 5 to the Forestry Act 1967.

6. In each of the following enactments, for the words "an order of certiorari, mandamus or prohibition" there shall be substituted "a quashing, mandatory or prohibiting order"— 10

1974 c. 39. section 170(2) of the Consumer Credit Act 1974;

1975 c. 65. section 62(2) of the Sex Discrimination Act 1975; and

1976 c. 74. section 53(2) of the Race Relations Act 1976.

Slave Trade Act 1843 (c.98)

7. In section 4 of the Slave Trade Act 1843 (evidence taken abroad for 15 offences of slavery) in subsection (1) for the words "award a writ or writs of mandamus" there shall be substituted "make a mandatory order".

Roads Act 1920 (c.72)

8. In section 14 of the Roads Act 1920 (local licensing fees to cease to be chargeable) in subsection (3) for the words "writ of mandamus" there shall be 20 substituted "mandatory order".

Criminal Justice Act 1948 (c.58)

9.—(1) In section 37 of the Criminal Justice Act 1948 (bail where application made for certiorari or leave to apply) subsection (1) shall be amended as follows. 25

(2) For paragraph (b)(ii) there shall be substituted—

> "(ii) who has made an application for judicial review seeking a quashing order to remove proceedings in the Crown Court in his case into the High Court;".

(3) In paragraph (d) for the words from "magistrates' court" to the end there 30 shall be substituted "magistrates' court and has made an application for judicial review seeking a quashing order to remove proceedings into the High Court."

Administration of Justice Act 1960 (c.65)

10. In section 17 of the Administration of Justice Act 1960 (interpretation) in subsection (1)(a) for the words "an order of mandamus, prohibition or 35 certiorari" there shall be substituted "a mandatory, prohibiting or quashing order".

Highways Act 1980 (c.66)

11. In section 228(5) of the Highways Act 1980 (two month limit on appeals etc) for the word "certiorari" there shall be substituted "a quashing order". 40

Supreme Court Act 1981 (c.54)

12. In section 30 of the Supreme Court Act 1981 (injunctions to restrain persons from acting in offices in which they are not entitled to act) in subsection (1) after the words "High Court may" there shall be inserted "on an application for judicial review". 45

13. In section 43 of that Act (power of High Court to vary sentence on certiorari) in subsection (1) for the words "applies to the High Court in accordance with section 31 for an order of certiorari" there shall be substituted "makes an application for judicial review seeking a quashing order".

5 14. In section 81 of that Act (bail) for subsection (1)(e) there shall be substituted—

> "(e) who has made an application for judicial review seeking a quashing order to remove proceedings in the Crown Court in his case into the High Court;".

10 *Local Government Finance Act 1982 (c.32)*

15. In section 25D of the Local Government Finance Act 1982 (power of auditor to apply for judicial review) in subsection (1) the words from the beginning to "without leave)" shall be omitted.

Road Traffic Regulation Act 1984 (c.27)

15 16. In section 93 of the Road Traffic Regulation Act 1984 (powers in relation to bollards) in subsection (4)(a) for the words "order of mandamus" there shall be substituted "mandatory order".

County Courts Act 1984 (c.28)

17. In section 38 of the County Court Act 1984 (remedies available in county
20 courts) in subsection (3)(a) for the words "order mandamus, certiorari or prohibition" there shall be substituted "make a mandatory, quashing or prohibiting order".

18. In section 41 of that Act (transfer of proceedings to High Court) in subsection (2) for "section 29" there shall be substituted "section 31(3)".

25 19. In section 83 of that Act (stay of proceedings where leave granted to apply for certiorari and prohibition) in subsection (1) for the words from the beginning to "county court" there shall be substituted "Where the High Court permits an application for judicial review seeking a quashing or prohibiting order in relation to any county court proceedings to proceed beyond
30 preliminary consideration, that".

20. In section 84 of that Act (prohibition) in subsection (1) for the words from the beginning to "county court" there shall be substituted "Where an application for judicial review is made to the High Court seeking a prohibiting order in relation to any county court proceedings,".

35 *Prosecution of Offences Act 1985 (c.23)*

21. In section 22 of the Prosecution of Offences Act 1985 (time limits in relation to preliminary stages of criminal proceedings) in subsection (13) for "section 29(3)" there shall be substituted "section 31C(1)".

Local Government Act 1988 (c.9)

40 22. In section 19(7)(a) of the Local Government Act 1988 (persons with sufficient interest in judicial review proceedings etc) for the words "the persons who have sufficient interest or, in Scotland," there shall be substituted "the persons who may make an application or, in Scotland, the persons who have".

SCH. 1

Road Traffic Offenders Act 1988 (c.53)

23. In section 40 of the Road Traffic Offenders Act 1988 (power of appellate courts to suspend disqualification where application made for certiorari or leave to apply) in subsection (5) for paragraphs (a) and (b) there shall be substituted "makes an application for judicial review to the High Court seeking a quashing order to remove into the High Court any proceedings of a magistrates' court or of the Crown Court in which or in consequence of which he was convicted or his sentence was passed,". 5

London Local Authorities Act 1990 (c.vii)

24. In section 30(10) of the London Local Authorities Act 1990 (application for judicial review not to be treated as appeal) for the words from "under section 31" to "1965" there shall be substituted "for judicial review". 10

Tribunals and Inquiries Act 1992 (c.53)

25. In section 12 of the Tribunals and Inquiries Act 1992 (supervisory functions of courts not excluded by pre-1958 Acts) in subsection (1)— 15

(a) for the words "order of certiorari" there shall be substituted "a quashing order"; and

(b) for the words "orders of mandamus" there shall be substituted "mandatory orders".

Section 4(2).

SCHEDULE 2 20

REPEALS

Chapter	Short title	Extent of repeal
1981 c. 54.	The Supreme Court Act 1981.	Section 29.
1982 c. 32.	The Local Government Finance Act 1982.	In section 25D(1), the words from the beginning to "without leave)". 25
1993 c. 50.	The Statute Law (Repeals) Act 1993.	In Schedule 2, paragraph 9.

ORDER 53

APPLICATIONS FOR JUDICIAL REVIEW

Applications for judicial review (O.53, r.1)

1.—(1) On an application for judicial review seeking a mandatory, prohibiting or quashing order, or a declaration or injunction, the applicant may—

(a) as an alternative or in addition claim any other of those reliefs, and

(b) in addition claim damages, restitution or the recovery of a sum due,

if that claim arises from any matter to which the application relates.

(2) Order 15, rule 12 shall apply, with the necessary modifications, to an application for judicial review.

Time limits (O.53, r.2)

2.—(1) Subject to paragraphs (2) and (3), an application for judicial review shall be made within the period of three months beginning with the date when grounds for the application first arose.

(2) The Court may refuse an application made within the period of three months if the Court is satisfied—

(a) that the application is not sufficiently prompt, and

(b) that if the relief sought were granted, on an application made at this stage, it would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration.

(3) An application may be made after the end of the period of three months if the Court is satisfied—

(a) that there is good reason for the application not having been made within that period, and

(b) that if the relief sought were granted, on an application made at this stage, it would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration.

(4) Where the relief sought is a quashing order in respect of any judgment, order, conviction or other proceedings, the date when grounds for the application first arose shall be taken to be the date of the judgment, order, conviction or proceedings.

(5) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

Preliminary consideration (O.53, r.3)

3.—(1) An application for judicial review must be made by filing in the Crown Office—

(a) a notice in Form 86A containing a statement of the matters mentioned in paragraph (2), and

(b) an affidavit which verifies the facts relied on in that statement,

for a Judge to determine by order whether or not the application may proceed.

(2) Those matters are—

(a) the name and description of the applicant and respondent,

(b) the relief sought and the grounds on which it is sought,

(c) any alternative remedies available to the applicant and, if they have not been pursued, the reasons why,

EXPLANATORY NOTES

Draft Order 53

Rule 1(1) implements the Commission's recommendation that damages, restitution, or the recovery of a sum due should be able to be claimed in addition to a claim for a mandatory, prohibiting or quashing order, or a declaration or injunction. (Paragraphs 8.5 - 8.8)

Rule 1(2) applies to applications for judicial review the provisions about representative proceedings contained in R.S.C. Order 15, rule 12 (Paragraph 5.41)

Rule 2 implements the Commission's view that the rules about time limits for judicial review applications should be contained in rules of court, rather than in statute. Rule 2(1) implements the Commission's recommendations that the time limit should be three months. (Paragraph 5.26)

Rule 2(2) implements the Commission's recommendation about promptness within the three month period. (Paragraphs 5.26 & 5.27)

Rule 2(3) implements the Commission's recommendations about applications outside the three month period. (Paragraphs 5.26 & 5.28)

Rule 2(4) reproduces the provisions contained in the present Order 53, rule 4(2).

Rule 2(5) reproduces the provisions contained in the present Order 53, rule 4(3).

Rule 3 implements the Commission's recommendations about the procedure for making an application for judicial review. (Part IV)

(d) details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant,

(e) the date of any application for legal aid (if relevant), the date when it was granted or refused and, if granted, the number of the legal aid certificate,

(f) the reasons for any delay in making the application for judicial review,

(g) the name and address of the applicant's solicitors (if any), and

(h) the applicant's address for service.

(3) Before determining whether or not the application may proceed, the Judge may instruct the Crown Office—

(a) to send to the respondent a copy of the applicant's Form 86A and a request for information in Form 86B to be completed and returned to the Crown Office within 14 days, and

(b) to direct the applicant to send copies of his affidavit and any exhibits attached to it to the respondent.

(4) The Crown Office shall send the applicant a copy of the respondent's completed Form 86B with a notice stating that the applicant has 14 days in which to file a further written submission in response.

(5) In determining whether or not the application may proceed, the Judge shall consider all the circumstances of the application and in particular—

(a) whether the application discloses a serious issue which ought to be determined,

(b) whether the application satisfies section 31B(1) of the Act,

(c) whether the application is made in accordance with rule 2, and

(d) whether the applicant has, or the reasons why he has not, pursued alternative legal remedies.

(6) Subject to paragraph (7), the Judge shall determine whether or not the application may proceed only on the basis of the documents which have been submitted under paragraphs (2) to (4).

(7) But where—

(a) the application for judicial review includes a claim for immediate interim relief, or

(b) it appears to the Crown Office or the Judge that a hearing is desirable in the interests of justice,

the Judge may hear submissions in relation to the application.

(8) Once the Judge has made his determination the Crown Office shall send a notification of the determination—

(a) to the applicant, and

(b) to the respondent, if he has returned Form 86B or made submissions at a hearing of the application under paragraph (7).

(9) Where the Judge has determined that the application may not proceed, any notification under paragraph (8) shall include the Judge's reasons for his determination.

(10) Where the application seeks a quashing order to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application until the appeal is determined or the time for appealing has expired.

EXPLANATORY NOTES

Rule 3(5) sets out the criteria for permitting an application to proceed to a substantive hearing. (Paragraph 5.13)

Rule 3(6) implements the Commission's recommendation that the preliminary consideration of an application for judicial review should be decided on paper, subject to the exceptions contained in rule 3(7). (Paragraph 5.11)

Rule 3(7) sets out the categories of applications where there may be a hearing to determine whether the application should be permitted to proceed to a substantive hearing. (Paragraph 5.11)

Rule 3(8) and 3(9) implement the Commission's recommendation that, where the application is not allowed to proceed to a substantive application, the Crown Office is to send a copy of the Judge's reasons for refusing the application to the applicant, and to the respondent if he has responded to a request for information or made submissions at a hearing under rule 3(7). (Paragraph 4.12)

Rule 3(10) reproduces the provisions contained in the present Order 53, rule 3(8).

Renewal of application (O.53, r.4)

4.—(1) Where the Judge determines under rule 3 that the application may not proceed, the applicant may renew the application by applying—

(a) in the case of any criminal cause or matter, to a Divisional Court of the Queen's Bench Division, and

(b) in any other case, to a single Judge sitting in open court or, if the Court so directs, to a Divisional Court of the Queen's Bench Division.

(2) But an application may not be so renewed in any case within paragraph (1)(b) in which the Judge has determined that the application may not proceed after a hearing under rule 3(7).

(3) In order to renew the application the applicant must, within 10 days of being sent the notification of the Judge's determination, lodge in the Crown Office notice of his intention to renew the application in Form 86C.

(4) Without prejudice to its powers under Order 20, rule 8, the Court hearing a renewed application may allow the applicant's statement to be amended (whether by specifying different or additional relief or grounds for relief or otherwise) on such terms, if any, as it thinks fit.

(5) In determining whether or not the renewed application may proceed the Court shall consider the matters referred to in rule 3(5).

(6) Where the renewed application seeks a quashing order to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application until the appeal is determined or the time for appealing has expired.

Interim relief (O.53, r.5)

5.—(1) Where an application for judicial review has been made, a Judge may grant an interim declaration or injunction if he considers it necessary in the circumstances notwithstanding that he has not determined under rule 3 whether the application may or may not proceed.

(2) Where the Court has determined under rule 3 or 4 that the application may proceed—

(a) the Court may at any time grant in the proceedings an interim declaration or injunction, and

(b) if the relief sought is a prohibiting or quashing order and the Court so directs, the determination shall operate as a stay of the proceedings to which the application relates until the final disposal of the application or until the Court otherwise orders.

Mode of proceeding beyond preliminary consideration (O.53, r.6)

6.—(1) Where an application for judicial review of any criminal cause or matter has been allowed to proceed under rule 3 or 4, the applicant shall proceed by notice of application to a Divisional Court of the Queen's Bench Division.

(2) Where an application for judicial review of any other matter has been allowed to proceed under rule 3 or 4, the applicant shall proceed by notice of application to a Judge sitting in open court, unless the Court directs that he shall proceed by a notice of application to a Judge in Chambers or to a Divisional Court of the Queen's Bench Division.

Any direction under this paragraph shall be without prejudice to the Judge's powers under Order 32, rule 13.

(3) The notice of application must be served on all persons directly affected.

EXPLANATORY NOTES

Rule 4 reproduces the provisions about the renewal of applications contained in the present Order 53, rule 3(4) to 3(8).

Rule 4(5) provides that before deciding whether or not to let a renewed application proceed the court must consider the matters set out in rule 3(5).

Rule 5 implements the Commission's recommendations about interim relief.

Rule 5(1) implements the Commission's recommendation that interim declarations and injunctions should be available prior to the determination of the preliminary consideration. (Paragraph 6.17)

Rule 5(2)(a) implements the Commission's recommendation that an interim declaration as well as an interim injunction should be available once an application for judicial review has been allowed to proceed. (Paragraph 6.27)

Rule 5(2)(b) reproduces the provisions of the present Order 53, rule 3(10)(a) about the staying of the proceedings to which the application relates, where the relief sought is a prohibiting or quashing order (formerly an order of prohibition or certiorari) and where the Court has determined that the application may proceed to a substantive hearing (formerly where leave was granted). (Paragraph 6.27)

Rule 6 reproduces most of the provisions about the mode of proceeding beyond preliminary consideration (presently the mode of applying for judicial review) contained in the present Order 53, rule 5. It sets out that the new method of proceeding is by notice of application.

(4) Unless the Court allowing the application to proceed has otherwise directed, there must be at least 10 days between the service of the notice of application and the hearing.

(5) A notice of application must be entered for hearing within 14 days after the determination that the application may proceed.

(6) An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of application must be filed before the application is entered for hearing and, if any person who ought to be served under this rule has not been served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the Court on the hearing of the application.

(7) If on the hearing of the application the Court is of the opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice of application may be served on that person.

Statements and affidavits (O.53, r.7)

7.—(1) Copies of the statement filed under rule 3(1) (or as amended under rule 4(4)) must be served with the notice of application and, subject to paragraph (2), no relief shall be sought or grounds relied on at the hearing except the relief and grounds set out in the statement.

(2) The Court may on the hearing of the application allow the applicant to amend his statement (whether by specifying different or additional relief or grounds for relief or otherwise) on such terms, if any, as it thinks fit and may allow further affidavits to be used by him.

(3) Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.

(4) Any respondent who intends to use an affidavit at the hearing shall file it in the Crown Office as soon as practicable and in any event, unless the Court otherwise directs, within 56 days after service upon him of the documents required to be served by paragraph (1).

(5) Each party to the application must supply to every other party on demand and on payment of the proper charges copies of every affidavit (including any exhibits) which he proposes to use at the hearing, including, in the case of the applicant, the affidavit in support of the application for judicial review (unless already supplied under rule 3).

Claim for damages, restitution or sums due (O.53, r.8)

8. In relation to an application for judicial review which includes a claim for damages, restitution or the recovery of a sum due, Order 18, rules 8 and 12, shall apply to the statement filed under rule 3(1) so far as relating to such a claim as they apply to a pleading.

Interlocutory applications (O.53, r.9)

9.—(1) Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to any Judge or a master of the Queen's Bench Division, notwithstanding that the application for judicial review is to be heard by a Divisional Court.

In this paragraph "interlocutory application" includes an application for an order under Order 24 or 26 or Order 38, rule 2(3), or for an order dismissing the proceedings by consent of the parties.

(2) In relation to an order made by a master pursuant to paragraph (1), Order 58, rule 1, shall, where the application for judicial review is to be heard by a Divisional

EXPLANATORY NOTES

Rule 7 reproduces the provisions about statements and affidavits contained in the present Order 53, rule 6.

Rule 8 reproduces most of the provisions about claims for damages contained in the present Order 53, rule 7, and expands the application of these provisions to claims for restitution or the recovery of a sum due.

Rule 9 reproduces the provisions about interlocutory applications (presently "applications for discovery, interrogatories, cross-examinations etc") contained in the present Order 53, rule 8(1) and (2).

Court, have effect as if a reference to a Divisional Court were substituted for the reference to a Judge in Chambers.

Hearing of application for judicial review (O.53, r.10)

10.—(1) On the hearing of any application for judicial review any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard.

(2) Where the applicant seeks a quashing order to remove any proceedings for the purpose of quashing them, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the application he has lodged a copy verified by affidavit in the Crown Office or accounts for his failure to do so to the satisfaction of the Court hearing the application.

(3) Where a quashing order is made in any such case as is referred to in paragraph (2) the order shall direct that the proceedings shall be quashed forthwith on their removal into the Queen's Bench Division.

Transfer of proceedings for declaration or injunction (O.53, r.11)

11.—(1) Where, on an application for judicial review, the relief sought is a declaration or injunction (whether or not a claim for damages, restitution or the recovery of a sum due is included in the application) and the Court considers—

(a) that the relief should not be granted on an application for judicial review, but

(b) that it might have been granted if it had been sought in an action begun by writ by the applicant at the time of making the application,

the Court may order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply as if the application had been made by summons.

(2) Where any proceedings seeking a declaration or injunction (whether or not damages, restitution or an order for the recovery of a sum due are also sought) are before the High Court (otherwise than on an application for judicial review), then at any stage in proceedings—

(a) any party may apply to a Judge hearing cases in the Crown Office list for an order that the action may proceed as an application for judicial review, or

(b) where it appears to the High Court that the action may be suitable for hearing as an application for judicial review, and any party wishes the action to be so heard, the High Court may adjourn the hearing so that it can proceed before such a Judge and be treated by him as an application for an order that the action may proceed as an application for judicial review.

(3) Rule 3(5) shall apply, with the necessary modifications, for the purposes of the Judge's determination whether or not the action may proceed as an application for judicial review.

(4) Where a Judge makes an order under paragraph (2) allowing an action proceeding in a district registry to proceed as an application for judicial review, he may also order the action to be transferred to the Royal Courts of Justice.

Costs (O.53, r.12)

12. Where—

(a) an application for judicial review is allowed to proceed under rule 3 or 4, or

(b) relief is granted under rule 5, or

(c) an action is under rule 11(2) allowed to proceed as an application for judicial review,

the Court may impose such terms as to costs and as to giving security for costs as it thinks fit.

EXPLANATORY NOTES

Rule 10 reproduces the provisions about the hearing of applications for judicial review contained in the present Order 53, rule 9(1) to rule 9(3).

Rule 11 implements the Commission's recommendations about the transfer of proceedings into and out of the judicial review procedure.

Rule 11(1) reproduces the provisions about the transfer of proceedings out of Order 53 contained in the present Order 53, rule 9(5).

Rule 11(2) and *rule 11(3)* implement the Commission's recommendations about the transfer of proceedings into the judicial review procedure. (Paragraph 3.21)

Rule 11(4) provides that where an order is made allowing a case to be transferred as if it were an application for judicial review and the case is proceeding in a district registry the judge may also order the action to be transferred to the Royal Courts of Justice. (Paragraph 3.23)

Rule 12 implements the Commission's recommendations about costs. (Paragraph 10.3)

Applications etc. allowed to proceed in part (O.53, r.13)

13.—(1) If the Court thinks fit, an application for judicial review may under rule 3 or 4 be allowed to proceed on some of the grounds on which it is made and not on others; and, if the Judge thinks fit, an action may under rule 11(2) be allowed to proceed as an application for judicial review on some of the grounds on which it is brought and not on others.

(2) References in this Order to an application for judicial review proceeding or not proceeding, or to an action proceeding or not proceeding as an application for judicial review, are accordingly references to its doing so whether in whole or (by virtue of paragraph (1)) in part.

Saving for person acting in obedience to a mandatory order (O.53, r.14)

14. No action or proceeding shall be begun or prosecuted against any person in respect of anything done in obedience to a mandatory order.

Proceedings for disqualification of member of local authority (O.53, r.15)

15.—(1) Proceedings under section 92 of the Local Government Act 1972 must be begun by originating motion to a Divisional Court of the Queen's Bench Division, and, unless otherwise directed, there must be at least 10 days between the service of the notice of motion and the hearing.

(2) Without prejudice to Order 8, rule 3, the notice of motion must set out the name and description of the applicant, the relief sought and the grounds on which it is sought, and must be supported by affidavit verifying the facts relied on.

(3) Copies of every supporting affidavit must be lodged in the Crown Office before the motion is entered for hearing and must be supplied to any other party on demand and on payment of the proper charges.

(4) The provisions of rules 6, 7 and 10(1) as to the persons on whom the notice is to be served and as to the proceedings at the hearing shall apply, with the necessary modifications, to proceedings under section 92 of the 1972 Act as they apply to an application for judicial review.

Consolidation of applications (O.53, r.16)

16. Where there is more than one application pending under section 30 of the Act, or section 92 of the Local Government Act 1972, against several persons in respect of the same office, and on the same grounds, the Court may order the applications to be consolidated.

Provisions as to appeals, renewal of applications and setting aside of orders (O.53, r.17)

17.—(1) No appeal shall lie to the Court of Appeal from an order made under rule 3 or 4 on an application for judicial review.

(2) Where the Court has determined that an application for judicial review may not proceed, either—

(a) under rule 3 in a case within rule 4(2), or

(b) under rule 4 in a case other than a criminal cause or matter,

the application may be renewed to the Court of Appeal in accordance with Order 59, rule 14(3).

(3) Where the Court has determined under rule 3 or 4 that an application for judicial review may proceed, any application by a respondent under Order 32, rule 6 to set aside the Court's order shall be made not later than the end of the period of 28 days beginning with the day on which he is served with the notice of application under rule 6 of this Order.

(4) No appeal shall lie to the Court of Appeal from an order made on any such respondent's application to set aside the Court's order under rule 3 or 4; but, where any such application is granted in a case other than a criminal cause or matter, the application for judicial review may be renewed to the Court of Appeal in

EXPLANATORY NOTES

Rule 13 implements the Commission's recommendation that an application may be allowed to proceed on some of the grounds on which it is made and not on others. (Paragraph 5.15)

Rule 14 reproduces the provisions contained in the present Order 53, rule 10.

Rule 15 reproduces the provisions contained in the present Order 53, rule 11.

Rule 16 reproduces the provisions contained in the present Order 53, rule 12.

Rule 17(1) in part reflects the present Order 53, rule 13 and provides that no appeal lies to the Court of Appeal from an order allowing or refusing to allow an application for judicial review to proceed.

Rule 17(2), however, spells out that applications in civil cases may be renewed before the Court of Appeal.

Rule 17(3) implements the Commission's recommendation that a time limit should be introduced for an application by a respondent to set aside a determination under rule 3 or 4 that an application for judicial review may proceed. (Paragraph 9.4)

Rule 17(4) implements the Commission's recommendation that no appeal should lie to the Court of Appeal from an order setting aside, or refusing to set aside, an order made under either rule 3 or 4. (Paragraph 9.5) If an order to set aside is granted then an applicant may renew his application to the Court of Appeal. (Paragraph 9.6)

accordance with Order 59, rule 14(3) (the application for judicial review being regarded for this purpose as having been refused by the Court below).

(5) This Order shall apply, with the necessary modifications, in relation to the renewal of an application for judicial review in pursuance of this rule and to an application so renewed as it applies in relation to the renewal of an application for judicial review under rule 4 and to an application so renewed.

Meaning of "Court" (O.53, r.18)

18. In this Order, "the Court" means (unless the context otherwise requires) either the single Judge or the Divisional Court of the Queen's Bench Division hearing or otherwise dealing with the application for judicial review.

EXPLANATORY NOTES

Rule 17(5) provides for the application of provisions of the Order in relation to an application for judicial review which is renewed to the Court of Appeal.

Rule 18 reproduces the provisions contained in the present Order 53, rule 14.

APPENDIX B

Draft Forms

1. Application for Judicial Review (Preliminary consideration)

2. Application for Judicial Review (Request for information)

3. Application for Judicial Review (Notification of the decision)

Application for Judicial Review (Preliminary consideration)

In the High Court of Justice
Queens Bench Division
Crown Office List

Crown office Ref:

In the matter of an application for Judicial Review

Ex parte

The Queen -v -

You must read the notes for guidance obtainable from the Crown Office. Send the completed form to the Master of the Crown Office, Royal Courts of Justice, Strand, London WC2A 2LL.

The Applicant	Name Address Description	
Legal Aid *(if any)*	Date: Application Date: granted Date: refused Certificate No	
Service *Give the name and address of solicitors for applicant or (if solicitors not acting for the applicant the address at which the applicant is to be served)*	Name Address Ref. Tel No Fax No	
Respondent(s)	Name Address	
Decision *give details including* • *date* • *judgment decision or* • *other proceedings in which relief is sought*		

Relief sought	
Grounds on which relief is sought *(please include an outline of any propositions of law, supported by any authorities and indicate if interlocutory relief is sought)* *Grounds must be supported by an affidavit which verifies the facts relied on. Where grounds have been settled by Counsel they must be signed by Counsel.*	

Alternative remedies *(Please identify any alternative remedies provided by the relevant statute. If these have not been pursued please state why not)*	
Review by respondent(s) *(Please state if the proposed respondent(s) has been asked to consider the complaint made or reconsider the decision in question, if appropriate. If so, please provide details.*	
Delay *(please give reasons for any relevant delay)*	

Signed

Dated

Application for Judicial Review (Request for information)

In the High Court of Justice
Queens Bench Division
Crown Office List

Crown office Ref:

In the matter of an application for Judicial Review

Ex parte

The Queen -v -

An application for Judicial Review has been lodged with the Crown Office by the above named Applicant. A copy of this form 86A is attached.

The Hon. Mr Justice
is considering whether this applicantion should be allowed to proceed to a full hearing.

Please answer the questions on this form and return within 14 days of reciept of the information from the applicant to the Master of the Crown Office, Royal Courts of Justice, Strand, London WC2A 2LL. At the same time you must send a copy of this form when completed to the Applicant. You will find the Applicants address on the front of the attached form.

Take Notice: The Judge has directed that the Applicant (or his solicitors) should send copies of the affidavit(s) and exhibits to you.

Information which The Court Requests	
1. Before reaching the decision which is the subject of challenge, did you offer the applicant the opportunity to make representations to you? • *state yes or no* • *if no state your reasons*	
2. Has the decision which is the subject of challenge been reviewed internally? • *state yes or no* • *if yes state by whom and when*	

3. Do you submit that there is any alternative remedy which the applicant should have pursued or should now pursue before making an application to seek judicial review ? • *state yes or no* • *if yes state what this is*	
4. Do you support the case proceeding to a substantive hearing? • *state yes or no* • *if no state your reasons*	
5. Supplementary information • *Please answer the following information* *(please continue on another sheet if necessary)*	

This request for information is signed on behalf of the Head of the Crown Office

signature *stamp*

date

Application for Judicial Review (Notification of the decision)

In the High Court of Justice
Queens Bench Division
Crown Office List

Crown office Ref:

In the matter of preliminary consideration for Judicial Review

Ex parte

The Queen -v -

Order by the Honourable Mr Justice

Judge's order

The judge made the decision after consideration of the following:

☐ *Consideration of the documents only:*

☐ *Consideration of the documents and oral submissions:*

☐ *by Applicant* *or* ☐ *Counsel in open court*

Form JRJ

Notes for applicant

1. *Where a substantive hearing has been granted, applicants and their legal advisors are reminded of their obligations to reconsider the merits of their application in the light of the respondent's affidavit.*

2. *Where the Judge has refused to allow the application to proceed an applicant or his solicitor may renew his application by completing and returning Form 86A within 10 days of the service upon him of this notice. The application may not be renewed in a non-criminal cause or matter if the Judge has heard oral argument.*

3. *If the Judge has allowed the application to proceed to a substantive hearing the applicant or his solicitor* ***must within 14 days*** *from the grant of leave:*

- *Serve on all persons directly affected - copy Notice of Motion together with Form 86A supporting affidavits and exhibits;*

- *enter in the Crown Office in the original Notice of Motion, together with 2 copies: £50. fee; affidavit of service.*

Sent/Handed to the applicant/ the applicant's solicitors on

Date:

Applicant's Ref No.

Judge's Notes to the applicant

If this application is renewed

I consider/ do not consider *(delete as appropriate)*

that notice should be served on the respondent

Judge's observations to the Crown Office

(Not for applicant)

APPENDIX C

CASE-LOAD MANAGEMENT ISSUES

Introductory

1.1 In 1992, when the consultation paper was being prepared, there was very great public concern about the scale of the delays in the Crown Office List. We therefore asked respondents[1] to consider whether these problems should affect the introduction of procedural changes which might otherwise be thought desirable and to comment on the steps which might be taken to improve the availability of judicial review in terms of quality of service. The issues on which views were sought are described in paragraphs 2.12 - 2.13 of our report.

1.2 Apart from universal condemnation of the delays, there were two main themes which cropped up again and again in the responses to consultation:[2]

(1) The system of nominated judges was generally welcomed, but there were very strong complaints about inconsistency as between different judges in relation to the way in which they exercised their discretion, particularly on the granting of leave. The general effect of the evidence, from all sides, was that the present arrangements were too much of a lottery, and that more must be done to ensure a greater consistency of approach as between different judges.

(2) The unavailability of judicial review outside London was criticised by users, particularly by local authorities more than 75 miles from London.

The nominated judges of the Queen's Bench Division

2.1 There was very strong support for the suggestion that the nominated judges should spend much more of their time hearing Crown Office cases. Many practitioners complained about the inconsistency and unpredictability which were occurring when so many judges, sometimes with no previous public law experience, were sitting for comparatively short periods each year. If these problems, and the problems of delay, could be addressed effectively by fewer nominated judges sitting more often, experienced respondents would favour this course: the inexperienced judge sitting not very often was regarded as inappropriate for this class of work. The Master and Head of the Crown Office felt that 12 judges, nominated for a minimum two-year period, would be all that would be necessary, provided that they were not normally sent on circuit and they sat in London for three week blocks at a time, every other block being occupied by them as a single judge or in the Divisional Court. The need to sit more often on Crown Office cases was also favoured by the nominated judges themselves, by the Administrative Law Bar Association and individual public law Queen's Counsel, by very experienced Court of Appeal judges and by many bodies representing solicitors and court users.

2.2 There was little support for a full-time Administrative Court. The nominated judges, for example, told us that the experience of other disciplines and of the trial process were valuable when taking the Crown Office list, and that none of them would relish working upon the list for more than a stint at any one time: the work is deeply interesting but onerous.

[1] See Consultation Paper No 126, paras 2.14 - 2.23.

[2] See Report, paras 2.15 - 2.20 above.

The use of high court judges from other divisions

3.1 Family Division judges are now regularly appointed as additional Queen's Bench judges to hear judicial review cases with a family law element, and Chancery judges sometimes sit in revenue matters where there is a judicial review application proceeding concurrently with an appeal by way of case stated.

3.2 There was no support for an uncontrolled extension of this practice. It was said that special nominations for appropriate cases should continue to be made on an ad hoc basis, and these might also include the nomination of a commercial judge.

3.3 Strong submissions were received, however, from those concerned with VAT appeals that if the right of appeal is not diverted to the Court of Appeal, Chancery judges should be used more often to hear these appeals. We were told that at present, after an inordinate delay, the case may be listed before a Queen's Bench judge who may have had no previous experience with VAT law; the cases take longer to be heard and decisions are not always consistent. In this context we received very powerful evidence from the President[3] and other chairmen of VAT Appeal Tribunals about the very unsatisfactory nature of the present arrangements, which, they said, are bad for the administration of VAT law.

3.4 Schedules of outstanding appeals produced by Customs & Excise showed the following position:

	JUNE 93	*APR 94*
1990	1	
1991	20	4
1992	49	28
1993	27	54
1994		33
TOTALS	**97**	**119[4]**

3.5 An analysis of the 13 appeals in which the High Court hearing started in 1993 showed the average time since the Tribunal decision to be 24.92 months. An increasing number of cases involved construction of the EEC Sixth Directive, and the delay in the domestic appeal process was resulting in more appellants pressing for references to Europe as being quicker in addition to cutting out the higher tiers of appeal. We have also been told that the delay in appeals being heard has a considerable knock-on effect on other appeals to the Tribunal since many of the issues affect other cases also under appeal.

The availability of judges to hear judicial review cases outside London

4.1 There was a noticeable division of opinion between those who had regular practical experience of the work of the Crown Office judges, whether as judges, lawyers or administrators, most of whom favoured the status quo, and those who spoke for court users who made strong representations about the expenditure of time and money and the general inconvenience involved in having to come to London for all hearings.

4.2 Of the 36 who responded on this issue, 27 supported some (often a very limited) degree of decentralisation, and very often on the basis that only a nominated judge should hear cases outside London. Objections were made by the nominated judges and by the Master and Head of the Crown Office on the ground that decentralisation was

[3] His Honour Stephen Oliver QC.

[4] The statistics in Annex 2 to this Appendix show that on 31st July 1994 there were 133 VAT appeals ready for a hearing.

impracticable, because of the need for a central corps of administrative expertise and first-rate library facilities which could not be matched outside London. Other fears were expressed about inconsistency (particularly if decisions outside London were reported), and strong feelings were expressed that cases against the Crown should be heard in London. Other respondents pointed to the recent research findings[5] that there was an under-representation of cases from outside London and the South-East and linked this to the unavailability of judges outside that area.

The possibility that certain types of judicial review applications could properly be dealt with by selected circuit judges and Queen's Counsel sitting as deputies.

5.1 We referred in the consultation paper to the use of Queen's Counsel as deputy high court judges hearing planning appeals and homelessness cases. At present, only Queen's Counsel with special expertise are being selected for this work. Respondents, on the whole, favoured the use of deputies for those purposes but were reluctant to see their use extended too far. Certain weaknesses in the present arrangements were, however, identified.

5.2 The use of Queen's Counsel was attacked on the grounds that judicial review cases should only be heard by permanent judges who were visibly and irremovably independent of the Crown. There was a danger of creating a closed community in any field of law, where a person might be an advocate one week and a judge the next, and difficulties have arisen when a Queen's Counsel, sitting as a deputy, is assigned a case where a point of law arises on which he has already advised other clients. The problems of a fast track to deputies and a slow track to high court judges were also a cause for concern. Not everyone was enamoured with the present arrangements.

The possibility that the judicial review jurisdiction might be delegated in certain prescribed cases to the County Court

6.1 The principle that the judicial review jurisdiction should remain in the High Court, as the Civil Justice Review Body recommended, received strong support. Local authority respondents, in particular, stressed the public perception of the authority of the High Court, as opposed to the local county court, over decisions of local authorities.

6.2 However, a lot of attention was paid to the desirability of providing a different statutory regime for handling appeals on points of law from certain local bodies, where the county court might well be the appropriate forum. Quite apart from homelessness cases, decisions of Housing Benefit Review Boards and decisions to grant planning permission were identified as possibly meriting special statutory treatment. Environmental groups, in particular, felt quite strongly about the need for challenges to planning decisions to be available in the local county court on grounds of cost and convenience.

6.3 The Lord Chancellor's Department still accepted the view of the Civil Justice Review Body that the judicial review jurisdiction should remain in the High Court. It agreed that part of the way forward for avoiding unacceptable case-load problems in the future should be by creating appropriate machinery which would spot those categories of business which were now coming in large numbers to the Crown Office List on judicial review, and prejudicing the efficient operation of that List, for want of a more appropriate appellate or supervisory jurisdiction being provided at a lower level.

The present position

7.1 We will start our description of the present situation by giving some statistics.

[5] M Sunkin, L Bridges, G Mészáros, *Judicial Review in Perspective* (1993) Public Law Project, pp 21 - 23.

A. **The position at the beginning of 1994, with comparisons with previous years when appropriate, was as follows:**

	1990	*1991*	*1992*	*1993*
Applications for leave to apply for Judicial Review	2129	2089	2439	2886
Cases stated	196	199	189	239
Planning and other Statutory appeals and applications	454	580	505	510
TOTALS	**2779**	**2868**	**3133**	**3635**

B. **Total case-load of Crown Office as at 1st January 1994**

	1992	*1993*	*1994*
Part A	813	805	1439
Part B	1192	1055	1184
Part E	51	94	190
TOTALS	**2056**	**1954**	**2813**

CODE:
Part A Cases awaiting leave, filing of affidavits etc[6]
Part B Substantive cases ready to be heard
Part E Substantive cases with fixed dates

C. **Waiting times (from entry into Part B) for substantive cases determined in 1993:**

Determined in	*Divisional Court*	*Single Judge*	*Planning Deputy*	*Housing Deputy*
12 weeks	112	79	19	38
24 weeks	82	41	42	17
52 weeks	238	33	72	11
over 52 weeks	77	85	24	9
TOTALS	**429**	**238**	**157**	**75**

7.2 We have been furnished with statistics relating to the period from 1st January to 31st July 1994, which show very little change from the equivalent period in 1993:

	Jan-Jul 93	*Jan-Jul 94*
Applications for leave to apply for judicial Review	1728	1851
Cases stated	155	141
Planning and other Statutory appeals and applications	308	269
TOTALS	**2191**	**2261**

6 In Part A there is no differentiation between cases awaiting leave and cases where leave is granted but which are not yet ready to be heard.

7.3 The Head of the Crown Office has also supplied us with her estimates of projected waiting times (from entry into Part B of the List) as at the end of July 1994.[7] The present estimates (with the projected waiting times at the same time in 1993 in brackets) are:

Divisional Court	7.3 months	(10.2 months)
Single Judge	12 months	(21.3 months)
Planning List	5.6 months	(9.6 months)

7.4 We have described the developments since 1992, and in particular the steps taken to cope with case-load problems, in paragraph 2.21 of the Report.

7.5 In addition, a Crown Office Users' Association has now been formed, which met for the first time in July 1994. The "waiting time" for a single judge in Part B of the Crown Office List has been reduced from 23 months in April 1993 to 12 months in July 1994, and we have been told that there is a general aim to reduce this still further to 10 months by the end of 1994. We have also been told that an Annual Report on the state of the List, similar to the one issued each year by the Master of the Rolls in relation to the Court of Appeal, is likely to be produced at the end of this year.

Other developments and proposals

8.1 The nominated judges favoured the introduction of the arrangements we are recommending by which all applications are normally first sent to them to decide on paper. The Head of the Crown Office believes that this change would result in a saving of two out of every four days at present allocated for oral applications.

8.2 During 1994 we have kept closely in touch with the senior judiciary, senior officials of the Lord Chancellor's Department and the Head of the Crown Office in order that the main points raised by respondents could be brought to their attention long before we reported and that this part of our report could be as authoritative and up to date as possible. We were told during these discussions that there was general agreement that targets should be set for management purposes for the different stages of handling a case, and that targets along the following lines should be adopted:

> 10 days between receipt of papers and sending them to the single judge;
> 14 days for the single judge to consider the papers and return them to the Crown Office;
> 70 days for service of the notice of motion and receipt of respondents' affidavits;
> Five and a half months (maximum, except for unusual cases) between entry into Part B of the List and the hearing date.

8.3 This would represent a target of nine months from receipt to final disposal at first instance.[8] We were told that the aim would be to reach this target by stages. As we have said, a target of ten months for the final stage of the procedure is being suggested as a realistic target for the end of 1994. A more tentative target, based on workload and

[7] These are based upon allocated sittings of 2 Divisional Courts and 3.5 single judge courts. The average disposal rate is currently 2.7 cases per day per court. This figure includes consent order pronouncements.

[8] This summary leaves two important situations out of account:
(a) Renewal of leave, after refusal on paper. The target might be two months from refusal of leave to oral hearing.
(b) Renewal of leave thereafter to the Court of Appeal. This would be a matter for the authorities in the Court of Appeal.

available judgepower remaining at their present levels, of eight months for the end of July 1995 has also been recently suggested. The target thereafter would be proportionately lower, and so on, until the ideal target was reached, and then maintained.

8.4 In the second half of 1993 four judges handled more than half the leave applications on paper (323 out of 615) and another four handled a quarter of them (154); and in the first seven months of 1994 eight judges handled nearly 70% of them (520 out of 779).[9] We raised the question in our discussions whether in the interests of speed and consistency it would be preferable to have a regular smaller cadre of judges handling paper applications, because inconsistency in decisions on leave applications was the single issue which, apart from delay, had caused most concern to our respondents. The findings of the Public Law Project had merely confirmed many respondents' own experience of inconsistencies as between different judges, and it is quite clear from the 1994 statistics we show in Annex 1 that these inconsistencies are continuing, if not in quite such a marked manner as before. Greater consistency might be achieved by the deployment of fewer judges on paper applications.

8.5 Mann LJ[10] told us that he favoured this proposal, provided that the judges in question could be relieved of their obligations in relation to paper applications under the Criminal Appeal Act 1968, except as volunteers. The numbers to be selected would have to take into account the numbers of leave applications being made if a reliable two-week service was to be maintained. For example, if a judge was to handle 12 applications a fortnight for 44 weeks a year, he would only be able to deal with 264 applications a year, and if he was asked to do more, he might not be able to achieve a two-week turnround if he had to do the work entirely in out-of-court hours.

8.6 The Head of the Crown Office told us that she considered that the present arrangements for the management of the Crown Office List, whereby she consults the judge in charge of the Crown Office List whenever she considers it necessary, work very well for internal management purposes.[11]

8.7 We mention this because we received unsolicited evidence from some judges and others with great experience in successful judicial management of case-loads who suggested that the Commercial Court, the Jury List and the Non-Jury List provide different examples of what can be achieved in this field if greater attention is paid to the need for strong judicial management of a list. They thought that the judge in charge of the list should have a proactive role, liaising with the bodies from whom appeals and applications are customarily brought, and with other court users, to ensure that the quality of the court's service was maintained and that it was adequately resourced. The publication of an annual report would enable LCD to study trends and to provide additional resources where necessary.

8.8 If arrangements are working well, there seems no good reason to alter them. We have already mentioned the major steps forward which have been taken since our consultation paper was published, and the new Users' Association and the new Annual Report will keep the state of the list firmly in the public domain. We were impressed, however, by evidence which suggested that there is a need to identify more clearly in the public eye the member of the judiciary, as opposed to the staff of the Crown Office, whom outside

9 See Annex 1 to this Appendix.

10 The judge in charge of the Crown Office List until the summer of 1994.

11 Mann LJ shared these views.

bodies and individuals should approach if they are concerned with any deterioration in the quality of service, or if they wish to make suggestions for its improvement.

8.9 We will mention one example of this. We encountered a good deal of ignorance about the existence, let alone the identity of the judge in charge of the List. We hope the new arrangements will make it clearer that he is accessible to important non-parties, such as the Heads of Tribunal Groups, who may wish to suggest that particular test cases need to be expedited because uncertainty in the law is causing substantial detriment to the administration of justice in tribunals or to good public administration at central or local level. If leading cases on new branches of the law can be decided after an expedited hearing, this, too, has the potential for reducing the size of the overall case-load.

8.10 At the end of 1993 there was a trend towards deploying much of the available nominated high court judgepower in court to dealing with leave applications. For substantive hearings there is still a much faster track for disposal by deputies, and a much slower track for disposal by high court judges.[12] There was general agreement during our discussions in 1994 that waiting periods ought to be identical in any coherent system.

8.11 Kennedy LJ, who is now responsible for the deployment of Queen's Bench judges, told us that every nominated judge will now, as a general rule, sit as a single judge for half of every half-term he sits in London. In other words, he will sit as a single judge at least 9-10 weeks every year, even if he is out on circuit for half each term, and if he spends a full term in London, he will spend half that term on single judge work. We share the views expressed by senior judges that the work is physically and intellectually demanding, and that it is not desirable for a judge to sit as a single judge for more than three or four weeks at a time. These changes represent a very marked improvement on 1991 when two out of the 18 nominated judges sat as single judges for a combined total of three weeks in the whole year.[13]

8.12 The Head of the Crown Office told us that she estimated that if the case-load continued at its present level it would require a regular allocation of six single judges from January 1995 onwards before the delays could be brought within a target of six months in Part B. Kennedy LJ told us that he could see no way of making more than four single high court judges available at any one time, in addition to the nominated judges who are deployed to sit in the Divisional Court if a Lord Justice who was not himself a nominated judge is sitting there. Even if circuit judges are invited to sit in the Court of Appeal (Criminal Division) once the new Criminal Justice Bill becomes law, he told us that there is very great unsatisfied demand for high court judgepower in other parts of the system which would be likely to absorb any judgepower released from the Court of Appeal under the new arrangements. We are aware that discussions are going on about the possibility of using single judges more often instead of two-judge Divisional Courts, but this change would not ease the problems at all, so far as high court judgepower is concerned.

8.13 This necessarily means that the use of deputies would have to be extended to bring the backlog down to acceptable proportions and for the new target times to be adopted and maintained. This could not be achieved so long as the present budgetary constraints on the engagement of deputies continue. During the first quarter of 1994 there were nine deputies approved for hearing planning appeals and eight approved for judicial review (particularly homelessness cases). The present budget permits the engagement of

[12] See the statistics under para 7.1 above, under Item C.

[13] See Consultation Paper No 126, para 2.17.

deputies for only 45 sitting days in each of the four legal terms. LCD told us that the funding of a greater use of deputies would not be a problem, because expenditure that can be shown to reduce waiting times from unacceptable levels is given priority. However, it is apparently proving extremely difficult to arrange for the approved non-planning deputies to sit at all frequently in termtime.

8.14 It was suggested during our discussions that the problems relating to VAT appeals would be mitigated if a judge of the Chancery Division could be assigned to hear VAT appeals as an additional judge of the Queen's Bench Division for, say, three weeks each term. If this could be done, the other changes which will be taking place ought to reduce the overall scale of the delays there, and the identification and acceleration of leading cases ought also to improve things in this field. If they do not, more radical measures, such as the transfer of the jurisdiction to the Chancery Division, might have to be considered. We did not favour the creation of a direct right of appeal to the Court of Appeal, because very often the most important legal issues have not properly crystallised at the tribunal level. This is not for any fault of the very experienced tribunal chairmen, but because skilled counsel are very often not engaged by the parties until an appeal reaches the High Court.

8.15 The Lord Chancellor's Department also wished to see sufficient judges sitting at any one time to justify a floating list for Crown Office judges, instead of a fixed list which does not allow for last-minute settlements. The Head of the Crown Office considered that there was a need for a minimum of four single judges at any one time for a floating list to operate satisfactorily. The senior judiciary, however, was opposed to the introduction of a floating list: the case-load of a single judge is extremely heavy during his 3- or 4-week stint, and if cases do go unexpectedly short he has plenty of reading (or writing reserved judgments) to do. They did not want to have arrangements under which a hearing could not be guaranteed on the day the parties were brought to court. We can see the force of these objections.

8.16 We were persuaded that there were strong arguments for retaining the main elements of the present arrangements by which cases in the Crown Office List are handled centrally in London. It may be that if particular items (homelessness, possibly housing benefit review cases)[14] could be diverted in the first instance to local county courts or independent tribunals, the strength of the feeling that on cost and convenience grounds there should be access points outside London might be reduced. It would be quite impracticable to divert a nominated high court judge on circuit away from heavy criminal and civil cases onto judicial review cases: any nominated judge would have to go as a Crown Office judge for Crown Office cases to a major circuit town if any worthwhile experiment was to be made. Kennedy LJ told us that if a nominated judge was in a town on circuit, there was no reason in principle why, subject to liaison with presiding judges and listing officers, he should not hear Crown Office cases there, although he did not suggest that this would make a substantial contribution to the problem.

8.17 We accept the view of the Head of the Crown Office that there must be a central registry in London at which all Crown Office applications are lodged, and that all orders, too, should be issued from London even if substantive hearings took place before

[14] The statistics in Annex 2 to this Appendix show that there are now 66 housing benefit cases in Part BII of the Crown Office List: this is a figure which should be carefully monitored, as at present the decision of Housing Benefit Review Boards are not subject to an appeal or review by a tribunal or inferior court. The only supervisory jurisdiction is by way of judicial review in the High Court. The same Table shows that there are now 163 cases in the List categorised as "Rates/Community Charge/Council Tax" and this is another figure which should be carefully monitored.

nominated judges on circuit. She told us that the Crown Office would be able to identify substantive cases which could be heard more conveniently at centres outside London if such an experiment was considered desirable.

8.18 The strength of the evidence was such that we consider that it might be worthwhile exploring the feasibility of a Crown Office List centre outside London, starting with one, and possibly two major circuit centres. This experiment would require an adequate local library and adequate staff training, and almost certainly a specially selected and trained circuit judge, whose efforts would be complemented by visiting High Court judges from the Crown Office List for 2-week or 3-week stints away from London as necessary. This would be in addition to any arrangements which might be made for nominated judges to hear Crown Office cases as part of their list when they are out of London at other circuit centres.

8.19 The Lord Chancellor's Department's view was that while there would be many practical problems in creating a Crown Office List at, say, Manchester, a pilot experiment might be very valuable. Any such experiment would have to be closely monitored, and managed by the judiciary, to ensure proper attention to consistency and predictability and quality of judicial service.

8.20 It is presumably now unrealistic to expect any significant increase to the numbers or availability of high court judges for Crown Office work, although the evidence shows that the problems of delay and quality of service will not be adequately addressed, on the present caseload levels, unless there is a slightly larger cadre of high court judges appointed to do this work at any one time: in other words, five single judges as a general rule instead of four. Kennedy LJ made his view quite clear to us that with the present complement of judges no more high court judges can be released for Crown Office work. Deputies must therefore be used, if only on pragmatic grounds, at any rate so long as the case-load remains at its present level and the present delays continue. There should, however, be clearly defined criteria for their use, and the arrangements must be closely monitored.[15]

8.21 The following issues seem to be relevant:

(1) There must not be a fast-track and slow-track system. Such arrangements have already cut high court judges out of hearing any planning appeals at all, they are having the same effect with homelessness cases, and there would be similar encroachments onto other areas of Crown Office work, so far as substantive hearings are concerned, unless the suggested reforms to the procedure for leave applications were implemented.

(2) In principle it is much more desirable that a full-time judge, specially selected if he or she is a circuit judge, should hear these cases, rather than a Queen's Counsel. It has been suggested that if it was known that a selected circuit judge would be hearing Crown Office cases for a significant part of his or her working year, it might be possible to recruit as judges some of those who have the requisite expertise but who are now staying at the Bar because they are unattracted by the present mix of work which circuit judges handle. This would be a natural extension of special selection of circuit judges for murder and rape cases; for the commercial lists outside London; for official referees' business; for Children Act cases; and for patent cases. Any extension of the present use

[15] As we have indicated, there are considerable problems over the present arrangements for non-planning deputies, because some of those on the list have exceptionally busy practices, and there are also great difficulties in identifying suitable deputies.

of Queen's Counsel as deputies in the field of judicial review raises, in our opinion, well-justified objections on constitutional grounds.

(3) Provided that suitable deputies can be identified and their deployment is under the control of the senior judiciary there should be no objection to the use of deputies for all types of hearing, if appropriate cases are identified as being suitable for a deputy. The paper applications should be restricted to the nominated high court judges. The use of deputies should be confined, as the nominated judges suggest, to cases whose interest is limited to the interests of the parties to the particular case.

8.22 We were told that the Lord Chancellor's Department would willingly explore the possibility of deploying more circuit judges for Crown Office work. Experience has taught the Lord Chancellor's Department that developments of this kind are usually more successful if they have the encouragement and approval of the senior judiciary, and we detected a great willingness on all sides to find mutually acceptable solutions to the present difficulties.

8.23 We are satisfied that no case has been made out for transferring any part of the High Court's supervisory jurisdiction to the county court. On the other hand, there is a case for exploring, on a continuing basis, whether special statutory mechanisms should be introduced for appeals on points of law to the county court (and, thence, with leave, to the Court of Appeal) in particular types of case for which no appeal at all is provided at present. A more extensive regime for analysis of the case-load and a greater degree of judicial management of the Crown Office List would lead to the identification of categories of case where the introduction of a special statutory appeal mechanism would be desirable. This would mean that cases could be heard at more convenient local centres, without the necessity of all of them having to go to the High Court in London.

Conclusion

9.1 We believe that if all these developments take place, they should set the stage for a regime in which delays are brought down to an acceptable level, and are not then permitted to rise again. We believe that the secrets for success will lie in an approach which combines the following features:

(1) The agreement and achievement of target times for the management of judicial business in the Crown Office List.

(2) The identification and removal of avoidable pinchpoints:
(i) Judges being wastefully used in hearings in court when they could handle the business more efficiently on paper in the first instance;

(ii) A smaller cadre of judges being picked to handle all the preliminary consideration of applications (i.e. leave) on paper, thereby achieving greater consistency and predictability and eliminating unnecessary oral hearings;

(iii) Continuous monitoring of the case-load to identify areas of business which are overloading the High Court for want of a review procedure at an appropriate level;

(iv) The acceptance by Government of the need to provide alternative appeal procedures in such cases to avoid the wasteful deployment of limited High Court judgepower on them;

(v) The dissemination of a greater degree of understanding of the problems facing the Crown Office List, by Annual Reports, a User group, the publication and regular updating of relevant statistics, and other comparable techniques.

(vi) The continuation of the present collaborative approach between the senior judiciary, the Lord Chancellor's Department and the senior staff in the Crown Office towards finding ways of ensuring that the unacceptable delays of the recent past are eradicated and that they are not allowed to recur.

ANNEX 1

Nominated Judges: Rates of Grant of Leave (1st January to 31st July 1994)

Judge	Table Applications				Oral Applications			
	Total	%Grant	%Refuse	%Adjourn	Total	%Grant	%Refuse	%Adjourn
A	55	67	25	8	43	49	33	18
B	108	65	26	9	30	50	47	3
C	27	63	-	37	-	-	-	-
D	26	50	27	23	9	44.5	44.5	1
E	55	42	45	13	57	35	47	18
F	84	42	49	5	59	36	54	10
G	51	41	43	16	10	40	60	-
H	30	40	50	10	36	44	53	3
I	45	36	56	8	25	36	40	24
J	19	32	58	10	51	43	47	10
K	67	33	52	15	13	38	54	8
L	23	30	61	9	26	46	46	8
M	20	30	50	20	66	45	45	10
N	46	28	63	9	26	23	58	19
O	19	21	53	26	21	57	24	19
P	20	20	30	50	79	42	45	13
Q	54	19	65	16	72	15	74	11
R	9	11	78	11	56	48	45	7
Others								
(i)	-	-	-	-	17	35	53	12
(ii)	14	21	79	-	10	30	50	20
(iii)	6	66	17	17	10	30	70	-
(iv)	1	-	-	100	16	44	50	6
(v)	-	-	-	-	10	40	50	10
Totals	779				742			
Overall %		42%	44%	14%		39%	49%	12%

Note: Entries in smaller print indicate that the judge in question handled less than 30 applications of that particular type during the period.

ANNEX 2

CROWN OFFICE LIST - Caseload as at *end July 1994*

TOPIC	**PART A** *Pre Leave*	*Post Leave*	**PART *BI***	**PART *BII***	***TOTAL***
Agriculture & Fisheries	1	4		8	13
Animals	1		1	1	3
Armed Forces			2	2	4
Bail			1		1
Bind over		1			1
Broadcasting	1	2		2	5
Bye-Laws					
Caravans and Gypsies				4	4
Committal for trial					
Companies					
Contempt	1	2			3
Coroners		3	3		6
Costs & Legal Aid	2	5	5	13	25
County Court	2			1	3
Criminal Injuries Compensation Board	2	5	3	15	25
Criminal Law generally	18	32	3	15	68
Crown Court	3				3
Customs & Excise	2	3	1	3	9
Disciplinary Bodies	2	1	1	3	7
Drug Trafficking					
E.C			2	1	3
Education	8	13		8	29
Elections					
Employment	1	4		5	10
Evidence			4		4
Extradition		1	6		7
Family, Children & Young Persons	1	4		10	15
Firearms			1		1

CROWN OFFICE LIST - Caseload as at *end July 1994*

TOPIC	*PART A* Pre Leave	Post Leave	*PART BI*	*PART BII*	*TOTAL*
Food & Drugs and Consumer Protection		1	5	3	9
Health & Safety				1	1
Highways				13	13
Housing	18	46	4	84	152
Housing Benefit	4	14		66	84
Immigration	57	61		61	179
Inquiries (Planning)					
Jurisdiction/(Crown Office)					
Land		1		22	23
Licensing	4	1	1	13	19
Local Government	2	2		9	13
Magistrates' Courts Procedure	5	2	4	1	12
Mental Health	1	1		1	3
PACE					
Planning Permission, Enforcement Order	10	23			33
Police	3	7		5	15
Pollution				3	3
Prisons	4	6	16	1	27
Public Health	2	8		10	20
Public Order Act					
Public Utilities (incl OFTEL etc)				2	2
Rates/Community Charge/ Council Tax	8	40	7	108	163
Registered Homes		1		2	3
Road Traffic Act	3	1	38		42
Sentencing		1	4		5
Social Security		17		10	27
Solicitors Discipline		5	10	2	17

CROWN OFFICE LIST - Caseload as at *end July 1994*

TOPIC	*PART A* Pre Leave	Post Leave	*PART BI*	*PART BII*	*TOTAL*
Sunday Trading, Trade		4	2	11	17
Tax		2		5	7
Terrorism					
Town & Country Planning generally	8	24	1	111	144
Trade Descriptions					
Transport - Not RTA	1	1		3	5
VAT		1		113	114
Vexatious Litigants					

APPENDIX D

Time Limits: EC Law and Other Jurisdictions

I. Further light may be cast on the judicial understanding of the concept of good administration by comparison with the approach adopted in EC law to limiting the time within which administrative acts or rules laid down by EC institutions may be challenged. There is a central principle of legal certainty. The European Court of Justice has stated that:

> "The limitation period for bringing an action fulfils a generally recognized need, namely the need to prevent the legality of administrative decisions from being called into question indefinitely, and this means that there is a prohibition on reopening a question after the limitation period has expired."[1]

II. It has also been suggested that such time limits meet the need to avoid any discrimination or arbitrary treatment in the administration of justice.[2] On the expiry of the time limit, usually between one and three months[3] from the publication or notification of the measure in question, a measure becomes formally valid, rendering it inadmissible to bring an action to challenge the validity of the measure.[4]

III. In Scotland there is no special time limit.[5] In Northern Ireland, RSC (NI) Order 53, rule 4 states that where leave to apply has not been sought within three months, the court may not grant leave or relief unless it is satisfied that such a move would not cause hardship to or unfairly prejudice the rights of any person.[6]

IV. In Canada, most jurisdictions do not impose a strict time limit, preferring to leave the question of delay to the court's discretion. In Nova Scotia and in Alberta, on the other

[1] Case 3/59 *Federal Republic of Germany v High Authority* [1960] ECR 53, 61. See also Case 156/67 *Commission v Belgium* [1978] ECR 1881, 1896.

[2] Case 209/83 *Ferriera Valsabbia Case* [1984] ECR 3089.

[3] For a fuller account of the position relating to time limits, see HG Shermers and DF Waelbroeck, *Judicial Protection in the European Communities* (5th ed 1992), pp 54 - 56. Under Article 26 of the European Convention on Human Rights, the period is six months from the date of a final decision, on which see P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, (2nd ed 1990), pp 98 - 104.

[4] For exceptions to the principle of formal validity see J Schwarze, *European Administrative Law* (1992) p 1044-1054.

[5] cf *Hanlon v Traffic Commissioners* 1988 SLT 802 (where 3 weeks was undue delay ie "mora" in a case involving taxi fares). For the position in Scotland generally see: N Collar "Mora and Judicial Review" 1989 SLT (News) 309; I Cram "Delays in judicial review" 1993 NLR 1198; CMG Himsworth "Judicial Review in Scotland" in M Supperstone QC and J Goudie QC, *Judicial Review* (1992) pp 421 - 422; *Stair Memorial Encyclopedia of the Laws of Scotland* (1987) vol 1, pp 59 - 196.

[6] The Northern Ireland case law is analysed by B Hadfield, "Delay in Applications for Judicial Review - A Northern Ireland Perspective" (1988) 7 CJQ 189 and "Judicial Review in Northern Ireland: A Primer" (1991) 42 NILQ 332.

hand, there is a strict six month time limit regarding an application for certiorari.[7] The court may refuse an application made within the six month period on the ground of undue delay, and the primary considerations here too are said to be the need for effective and reliable administration, and hardship and prejudice to third parties who have acted in good faith on the strength of an apparently valid decision.[8] The Law Reform Commission of Canada has recommended that periods for applying for and proceedings within judicial review should be fairly short but that the court should retain the power to extend the time.[9]

V. In New Zealand there is no express time limit, but the court has discretion to refuse relief if there has been undue delay. In Australia, the time limit varies: for the Commonwealth of Australia the period is generally 28 days, although the court has a wide discretion to extend it.[10] In New South Wales, there is no time limit. The Law Reform Commission of Western Australia has recommended a primary requirement that an applicant must commence proceedings promptly and in any event within six months, and that the six month period may be extended if there is good reason for doing so.[11]

VI. In the United States, time limits are generally dealt with in the context of specific statutes rather than in administrative procedure Acts. At the Federal level, many statutes are modelled on the Federal Trade Commission Act 1914 which requires proceedings to be instituted within sixty days after the service of an order[12] although periods of thirty days are not uncommon.[13] As far as State law is concerned, it is commonly provided that petitions for judicial review of orders must be filed within thirty days, but, in the case of action other than orders or rules, that the period will be extended while the petitioner is exhausting administrative remedies.[14] The general review Statute in New York provides that all review actions must be instituted within four months.[15] In the case of administrative rules, the Model State Administrative Procedure Act 1981 provides no time limit on challenges to the substance of rules but a two year limit on challenges to their procedural adequacy.[16]

7 Rule 56.06 of the Nova Scotia Civil Procedure Rules 1971 and Rule 742 of the Alberta Rules of Court.

8 DP Jones and AS de Villars, *Principles of Administrative Law* (1985) pp 373-4; JM Evans, HN Janisch etc *Administrative Law, Cases and Materials* (3rd ed 1989), p 1075.

9 Report 14, *Judicial Review and the Federal Court* (1980), Recommendation 6.4.

10 Commonwealth Administrative Decisions (Judicial Review) Act 1977, s 11; DC Pearce, *Commonwealth Administrative Law* (1986) p 139 para [355].

11 *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons* (1986), Project No 26 - Part II, ch 7, Recommendations 6-8.

12 15 USCA para 45. See generally, Schwartz *Administrative Law,* (3rd ed 1991) p 472.

13 Eg Federal Communications Commission Act 1934, 47 USCA para 402 and Clean Air Act 1970, 42 USCA para 7401.

14 WR Andersen, "Judicial Review of State Administrative Action - Designing the Statutory Framework", (1992) 44 Admin L Rev 523, 539-40.

15 NY Civ Pr L & R, para 217.

16 Sections 3-113(b), 5-108.

VII. A question may be raised as to the time limits applicable where an applicant seeks to rely on directly enforceable EC rights in domestic courts. It is clear that national courts are required to protect rights arising from directly enforceable provisions of EC law.[17] It has been held that it is for the domestic legal system of each member state to determine the procedural conditions, including those relating to time limits where none has been laid down by Community law.[18] Time limits must be "reasonable" and should not be less favourable than those relating to similar actions involving purely domestic issues.[19] Where national authorities have failed to comply with a directly enforceable EC provision they are in any case prohibited from relying on any domestic time limit for the bringing of an action until their compliance is made good.[20] Similar considerations apply to rights under the European Convention on Human Rights,[21] although these are not directly enforceable in United Kingdom courts and the impact of such rights on procedure can only be indirect.

17 Article 5 EEC Treaty.

18 See Case 45/76, *Comet* [1976] ECR 2043, 2053.

19 See Case 33/76, *Rewe* [1976] ECR 1990, 1998. But it may be queried whether the presumption in favour of domestic legal certainty in *Rewe* and *Comet* is due to the fiscal context in which they arose.

20 See *Cannon v Barnsley MBC, The Times,* 24 June 1992, applying Case No 208/90, *Emmott v Minister for Social Welfare* [1991] 2 EC Cas 395. In *R v Minister of Agriculture, Fisheries and Food, ex p Bostock* [1991] 1 CMLR 687 leave was granted out of time where doubt had been cast on a decision by a subsequent EC instrument.

21 Articles 6(1) and 13.

APPENDIX E
Statutory Appeals

STATUTORY REVIEW (APPLICATION TO QUASH) MODEL

XX.—(1) Any person aggrieved by an act or decision specified above (below) and who desires to question its validity on the ground—

(a) that it is not within the powers of this Act; or

(b) that any of the relevant requirements of this Act have not been complied with,

may, within six weeks of the relevant date, make an application to the court.

(2) Where an application is duly made to the court under this section, the court—

(a) (OPTIONAL) may by interim order suspend the act or decision either generally or in so far as it affects the applicant until the final determination of the proceedings and;

(b) if satisfied upon the hearing of the application—

(i) that the act or decision is not within the powers of this Act; or

(ii) that the interests of the applicant have been substantially prejudiced by any relevant requirements of this Act not having been complied with,

may quash the act or decision either generally or in so far as it affects the applicant.

(3) Except as provided by this section, the validity of any of the acts or decisions specified above (below) shall not be questioned in any legal proceedings whatsoever.

(4) In this section, "the court" means—

(a) in relation to England and Wales, the High Court;

(b) (IF RELEVANT) in relation to Scotland, the Court of Session;

(c) (IF RELEVANT) in relation to Northern Ireland, the High Court.

(5) (OPTIONAL) Except by leave of the Court of Appeal or the High Court, no appeal shall lie from the High Court to the Court of Appeal in proceedings under this section.

MODEL STATUTORY REVIEW PROVISION

NOTES

Standing (Subsection (1))

1. Most respondents were in favour of the provisions for standing being made the same as those for judicial review, namely "sufficient interest". However, in the light of the recommendations made in pargraphs 5.22(**a**) of this Report we recommend that the category of those with standing in statutory appeals remain "person aggrieved" unless the particular statutory context requires potential appellants to be identified more precisely.

(**a**) See also paragraphs 12.17 - 12.18 above.

Time limits

2. Most existing statutory review provisions specify a period of six weeks (or 42 days) for applications to quash to be made. In view of the fact that in almost all Acts noted so far applications to quash are strictly limited to the time period specified, prima facie the time limit for making applications should be as long as is consistent with the public interest(**a**). Six weeks should be the time period, except where the public interest in certainty demands that a shorter period be specified. (This might be so, for example, in planning applications).

When time should start to run (Subsection (1))

3. Different statutes specify that time should run

(i) from the date of the first publication of the notice (of the order) (in the London Gazette)

(ii) from the date the order becomes operative (e.g. under the Statutory Orders (Special Procedure) Act 1945)

(iii) from the date the decision is made

(iv) from the date the order is confirmed (if it is of a type which needs confirmation to become operative)

(v) from the date a copy of the statutory instrument containing the order is laid before Parliament

(vi) from the date on which the act was done

(vii) from the date of service on the applicant of a copy of the order under challenge (only where standing is limited(**b**)).

4. One possible formulation for a standard rule in statutory review would be the formulation in Order 53, rule 4(2), which specifies when time starts to run for certiorari. Where a quashing order is sought in respect of any judgment, order, conviction, or other proceeding, time runs from the date when grounds for the application first arose. This would, however, be rather unwieldy. We propose that the model should merely state, as at present, that time should run from the relevant date, and leave the individual Act or rules to list or specify the appropriate date.

Interim Suspension (Subsection (1)(a))

5. Some statutory review provisions allow for interim suspension of the act or decision in question until the final determination of the application. Other procedures for the making of orders specify that they do not come into effect until after the 28 day period for challenge has expired. The variety of circumstances in which orders subject to statutory review can be made means that it is not possible to state whether interim suspension should be universally available or not.

(**a**) The Coroners Court Act 1988, s 13, contains the only statutory review provision so far examined which does not specify six weeks as the period for making applications. No provision as to time is made in the Act. However, the provision on standing limits applications to those made "by or under the authority of the Attorney-General". In such circumstances there is no danger of the court's procedures being abused by vexatious litigants.

(**b**) Eg Airports Act 1986, s 49, where standing is limited to an "airport operator", or the Land Powers Defence Act 1958 Sch 2(8).

Procedural v Substantive Ultra Vires (Subsections (1)(b) & (2)(b)(ii))

6. The ground in draft subsection (1)(a) is normally known as "substantive ultra vires"; the ground in (1)(b) as "procedural ultra vires". The classic formulation of the extent of the former was given by Lord Denning MR in *Ashbridge Investments Ltd v Minister of Housing & Local Government* [1965] 1 WLR 1320, 1326, where it was held to include "no evidence", "unreasonableness", "wrong interpretation [of] the words of the statute", or taking into consideration matters which ought not to be taken into account, or vice versa. "It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law". This formulation suggests that substantive ultra vires encompasses all the heads of challenge under the modern judicial review procedure, and that procedural ultra vires is a subset of it(**a**).

7. Procedural ultra vires is still treated, however, as an independent basis of review, despite questions of whether it is subsumed into substantive ultra vires, and confusion over the extent to which the two grounds overlap(**b**). The position is further confused by the fact that some review provisions omit any reference to the substantial prejudice requirement normally imposed on the procedural ultra vires provision(**c**). It seems likely that procedural ultra vires provisions are intended to be concerned with 'directory' requirements of a statute, while substantive ultra vires provisions are intended to refer to mandatory requirements (neglect of which renders an order null and void). The procedural ultra vires provision has been retained in order to ensure that no rights to bring review applications are lost.

The Scope of the Power in "procedural ultra vires" (Subsection (1)(b)(ii))

8. Some of the provisions examined allow review if any requirement under a certain section has not been complied with. Others allow it if a "relevant procedural" requirement has not been complied with. We favour a model provision merely having "relevant requirement". The court will be best placed to determine whether there are substantive grounds for the application.

The Scope of the quashing order (Subsection (2))

9. Some of the provisions allow for the act or decision under challenge to be quashed only in so far as it affects the applicant, if the court so directs. Others merely state that the court may quash the act, decision or order. In many cases, however, the act, decision or order being quashed will only relate to the applicant (for example, decisions affecting only a large landowner). It would seem sensible to allow the court discretion to quash as it sees fit in all the circumstances, as it will be in a position to hear argument on what the best remedy is. (For example, a Government department could be represented, joined to the respondent if not already the respondent, and argue that the scope of the quashing should be limited, in the wider public interest.)

(**a**) See Gordon, Crown Office Proceedings, para G1-015.

(**b**) See eg *Gordondale Investments Ltd v Secretary of State for the Environment* (1971) 70 LGR 158, 167, per Megaw LJ.

(**c**) See eg the Cycle Tracks Act 1984, s 3(6).

Ouster Provisions (Subsection (3))

10. Ouster provisions are almost universal in statutory review provisions. Two provisions(**a**) specify additionally that the order made is not to be questioned by prohibition or certiorari. These extra restrictions are unnecessary, especially in view of recent caselaw,(**b**) and it is notable that they are not used in recent formulations. It is accepted that the public policy interest in certainty, coupled with wide powers to quash the decision for even directory breach, justifies the existence of an ouster provision.

Leave to appeal (Subsection (5))

11. Some statutory review provisions contain a leave requirement for appeals to the Court of Appeal. Most do not. Without further research it would not be possible for a model provision to state that such a requirement was or was not justified. Responses to our consultation did not constitute a significant body of opinion either for or against a leave requirement.

(**a**) Forestry Act 1967 (compulsory purchase), and Coast Protection Act 1949.
(**b**) *R v Cornwall CC, ex p Huntington* [1994] 1 All ER 694 (CA).

APPENDIX F

List of persons and organisations who commented on Consultation Paper No 126

GOVERNMENT BODIES

The Crown Office, Master McKenzie QC & Lynne Knapman
The Crown Prosecution Service
The Department of the Environment
The Departments of Health and Social Security
The Home Office
The Government Legal Service (Treasury Solicitor's Group)
The Legal Aid Board
The Lord Chancellor's Department

JUDICIARY AND PRACTITIONERS

(i) Judiciary

Sir Thomas Bingham MR
Lord Justice Carswell
Lord Donaldson of Lymington
Judge Edward, European Court of Justice
Lord Justice Glidewell
Lord Jauncey of Tullichettle
The Nominated Judges of the Queen's Bench Division
Mr Justice Sedley

(ii) Barristers

Lord Alexander of Weedon QC
Andrew Arden QC
Peter Bibby
Sir Louis Blom-Cooper QC
David Dethridge
Sir Denis Dobson QC
Roger ter Haar QC
Lancelot Henderson
R A Henderson QC
John Howell QC
Francis Jacobs QC
Michael Kent
Nigel Macleod QC
Judith Maxwell
G E Moriarty QC
David Pannick QC
Nigel Pleming QC
Peter Prescott QC
Michael Shrimpton
Malcolm Spence QC
Roger Toulson QC
David Watkinson, Housing Law Practitioners, 2 Garden Court
Frances Webber, Immigration Group, 2 Garden Court

(iii) Solicitors

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Clifford Chance (Richard Thomas)

Denton Hall (Stephen Ashworth)
Freshfields (SJ Archer)
Peter Liell
Lovell White Durrant (Jennifer McDermott)
Nelsons (J Roberts)
Sharpe Pritchard (Trevor Griffiths)
Sturtivant & Co (Karen L Sturtivant)
Walker Martineau (E J R Hill)
Winstanley-Burgess (David Burgess)

(iv) Legal Organisations
Administrative Law Bar Association
Belfast Law Centre
City of London Law Society
Environmental Law Foundation
Hounslow Law Centre
The Institute of Legal Executives
JUSTICE
Law Centres Federation
The Law Society
The Law Society's Revenue Law Committee
London Solicitors Litigation Association
The Public Law Project
UK Environmental Law Association

(v) Other Lawyers
Roger Bronkhurst, Tottenham Neighbourhood Law Centre (personal capacity)
H Levenson, Chairman, Independent Tribunal Service (personal capacity)

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Professor Stephen Bailey, University of Nottingham
Nicholas Bamforth, Wadham College Oxford
Professor John S Bell, University of Leeds Law Faculty
Professor Patrick Birkinshaw, University of Hull
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A P Le Sueur, University College London

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Dr Christopher Vincenzi, University of Huddersfield
Sir William Wade QC, Gonville & Caius College Cambridge
S M Wright, University of Surrey
Professor I Zamir, Hebrew University of Jerusalem

FROM LOCAL AUTHORITIES

(i) Response on behalf of an Authority

Society of County Secretaries, GD Gordon
Croydon Borough Council, Mrs DM King
Royal Borough of Kingston, Miss S Jackson
Tower Hamlets Borough Council, Ms Ann Drake

(ii) Response from an individual member of a Local Authority

E J Andrews, Northavon District Council
Helmut Cartwright, East Sussex County Council
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Clive Grace, Southwark Borough Council
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A R Sykes, City of Bradford Metropolitan Borough Council

INTEREST GROUPS AND TRADE UNIONS

Child Poverty Action Group
Council for the Protection of Rural England
English Heritage
Family Health Services Appeal Unit
Greenpeace, with the Anglers Co-operative Association, the RSNC-Wildlife Trusts Partnership, the World Wide Fund for Nature, the RSPB, and Friends of the Earth
Liberty
National Consumer Council
The Newspaper Society
Police Federation of England and Wales
The Royal Town Planning Institute
Transport and General Workers Union

REGULATORS AND OMBUDSMEN

Parliamentary Commissioner for Administration, W K Reid CB
The Commission for Local Administration in England, D C M Yardley
The Commission for Local Administration in Wales, E R Moseley
Mental Health Act Commission
Securities and Investments Board

TRIBUNALS
The Council on Tribunals
The Immigration Appeals Adjudicators
The President and Vice Presidents of the Immigration Appeal Tribunal
Stephen Oliver QC, Presiding Special Commissioners of Income Tax and the Chairmen of VAT Tribunals

OTHERS
Mrs V Cornish
Dr Christopher John Eaglen

APPENDIX G

Participants at the Seminars held at the Institute of Advanced Legal Studies on Monday 10th May 1993 and Tuesday 11th May 1993, and at the Conference Held at Robinson College Cambridge on 15 May 1993, to discuss Law Commission Consultation Paper No.126, Administrative Law: Judicial Review and Statutory Appeals

THE INSTITUTE OF ADVANCED LEGAL STUDIES MONDAY 10TH MAY 1993

CHAIRMAN: Mr Justice Brooke

Papers were given by:

Professor Jeffrey Jowell QC, *Professor of Public Law, UCL*
Consultation Paper No.126: Notes for Discussion

Dr Clive Grace, *Director of Law and Administration, Southwark Council*
An Administrator's Notes on the Consultation Paper

Jan Luba, *Barrister*
The Leave Stage: A Practitioner's Perspective

Lee Bridges, *the Public Law Project*
Empirical Data on the Leave Stage

THE SEMINAR WAS ALSO ATTENDED BY:

Charles Blake
Dr A N Brice
R C H Briggs
J A Catlin
Ms L Christian
Professor R Cranston
W S Crow
Professor T C Daintith
Ms R Davies
Professor A L Diamond QC
Ms J Elek
Master Eyre
Professor D Foulkes
Professor H Genn
S Grosz
S Homewood
A Le Sueur
Ms J Mayhew
W Million
Professor G Morris
David Pannick QC
S Payne
W K Reid
Ms G Richardson
David Seymour
G Smith
Lord Justice Steyn
M Sunkin
A Tomkins
Ms P Wood

TUESDAY 11TH MAY 1993

CHAIRMAN: Lord Archer of Sandwell QC

Papers were given by:

Professor David Foulkes, *Council on Tribunals*
The View of the Council on Tribunals

Robert Carnwath QC, *Barrister*
Statutory Appeals Procedures - Models or Principles

Professor Anthony Bradley
Judicial Review and Statutory Appeals

Alan Moses QC
Statutory Appeals and Revenue Law

THE SEMINAR WAS ALSO ATTENDED BY:

Charles Blake
Dr A N Brice
R C H Briggs
M Cornwall-Kelly
W S Crow
Professor T C Daintith
Professor A L Diamond QC
P Fletcher
Professor H Genn
Professor C Harlow
Mrs G Hedley-Dent
S Homewood
G A Hosker QC
A Le Sueur
Ms J Mayhew
Professor G Morris
Master N Murray
Professor T M Partington
S Payne
David Seymour
D Thomas
A Tomkins

ROBINSON COLLEGE CAMBRIDGE SATURDAY 15TH MAY 1993

CHAIRMAN: The Rt Hon the Lord Woolf of Barnes PC

Papers were given by:

Richard Gordon, *Barrister*
Difficulties with the Crown Office List

Sir William Wade QC, *Caius College, Cambridge*
Exclusivity, Leave and Time Limits

The Honourable Mr Justice Laws
Procedural Exclusivity

Ms Sandra Fredman, *Exeter College, Oxford*
Professor Gillian Morris, *Brunel University*
The Costs of Exclusivity: the case of Public Employees

Dr Timothy Jones, *Manchester University*
Judicial Review - The Queensland Approach to Reform

Clive Lewis, *Selwyn College, Cambridge, Barrister*
Interim Injunctions: the European Perspective

Charles Blake, *Department of Health, Department of Social Security*
Discretionary Denial of Remedies

Professor Anthony Bradley, *Barrister*
Standing to Seek Review

Robin Allen, *Barrister*
Discovery

Carl Emery, *University of Durham*
Statutory Appeals and Related Matters

Professor Martin Partington, *University of Bristol*
Housing and Social Security: Some Preliminary Observations

THE CONFERENCE WAS ALSO ATTENDED BY:

T Allan
Dr J Allison
The Rt Hon the Lord Bridge of Harwich
L Bridges
R Buxton
P Cane
S Catchpole
N Cheffings
E Cooper
P Craig
L Crawford
Dr Y Cripps
Professor A L Diamond QC
C Dyment
P Eden
Patrick Elias QC
Ms A Foster
C Glasser
S Grosz
James Goudie QC
Ms E Grey
Professor C Harlow
D Hogg
J Howell
R Jackson
R Jay
Professor J Jowell
Mrs L Knapman
S Kovats
A P Le Sueur
Anthony Lester QC
Ms N Lieven
J McBride
R McManus
G Moon
The Rt Hon Lord Neill
Sir Derek Oulton GCB,QC
T J B Pallister
Dr S Palmer
Nigel Pleming QC
K Qureshi
J Rabinowitz
M Radford
R Rawlings
The Hon Mr Justice Schiemann
The Hon Mr Justice Sedley
M Shaw
M Sinclair
Dr A T H Smith
M Spence
A Sriharan
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A Tanney
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I Walker

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