The Law Commission

(LAW COM. No. 73)

REPORT ON REMEDIES IN ADMINISTRATIVE LAW

ADVICE TO THE LORD CHANCELLOR UNDER SECTION 3 (1) (*e*)
OF THE LAW COMMISSIONS ACT 1965

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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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THE LAW COMMISSION

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Advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965

To the Right Honourable the Lord Elwyn-Jones, Lord High Chancellor of Great Britain

PART I—INTRODUCTION

1. In May 1969 in Law Com. No. 20[1], in the light of the views expressed on Working Paper No. 13 of July 1967[2], we made a Submission to the Lord Chancellor on administrative law under section 3(1)(*e*) of the Law Commissions Act 1965. In that Submission[3] we recommended that an inquiry should be undertaken into administrative law, that the inquiry should cover the five aspects of administrative law, which in question form had been set out in Working Paper No. 13, and that the inquiry should be carried out by a Royal Commission or committee of comparable status, not exclusively composed of lawyers but including members with legal, administrative and political experience.

2. The five questions raised in Working Paper No. 13 and recommended for inquiry in Law Com. No. 20 were:—

(A) How far are changes desirable with regard to the form and procedures of existing judicial remedies for the control of administrative acts and omissions?

(B) How far should any such changes be accompanied by changes in the scope of those remedies—

(i) to cover administrative acts and omissions which are not at present subject to judicial control, and

(ii) to render judicial control more effective, *e.g.*, with regard to the factual basis of an administrative decision?

(C) How far should remedies controlling administrative acts or omissions include the right to damages?

(D) How far, if at all, should special principles govern—

(i) contracts made by the administration,

(ii) the tortious liability of the administration?

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1 (1969) Cmnd. 4059.
2 Printed as Appendix A to Law Com. No. 20.
3 Paras. 3, 5, 9 and 10.

(E) How far should changes be made in the organisation and personnel of the courts in which proceedings may be brought against the administration?

3. On 4 December 1969 in the House of Lords Lord Wade asked a question in the following terms:—

> "To ask Her Majesty's Government what action has been taken following the submission by the Law Commission to the Lord Chancellor on administrative law and in particular whether it is their intention to set up an inquiry as recommended by the Law Commission in Cmnd. 4059 [Law Com. No. 20]".

The reply to that question was given by the then Lord Chancellor, the Right Honourable the Lord Gardiner, and was as follows:—

> "The Government do not consider that this is the right time to undertake the wider inquiry into administrative law which was suggested in the Law Commission's Report. But the Commission has been asked to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure, and I hope this will go a long way towards bringing about the improvements which the Law Commission has in mind"[4].

On 8 December 1969 we were formally requested by Lord Gardiner, in pursuance of section 3(1)(*e*) of the Law Commissions Act 1965,

> "to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure."

On 30 November 1970 the new Lord Chancellor, the Right Honourable the Lord Hailsham of St. Marylebone, confirmed these limited terms of reference.

4. We set up a Consultative Panel[5] to assist us in our work on the reference given by the Lord Chancellor, and in October 1971 we published Working Paper No. 40 on Remedies in Administrative Law. There was a wide response[6] to the Working Paper and the consultative process was not completed until the end of March 1973. Meanwhile, however, we had been informed at the beginning of 1973 of the empirical research into the working of the Queen's Bench Divisional Court which was being conducted by the Legal Research Unit at Bedford College, London, under the direction of Mr. Louis Blom-Cooper, Q.C., and Mr. Gavin Drewry, with the support of the Social Science Research Council. Although at one time[7] we thought that it would be premature for us to prepare this report until the results of the research project were known, we later came to the conclusion[8] that we ought to proceed with our own work, while taking account of those findings of the Legal Research Unit which had been made available to us in advance of the publication of its final conclusions. In considering the

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4 *Hansard*, Vol. 306, Cols. 189–90.
5 For the membership of the Consultative Panel, see Appendix B.
6 For the list of those who commented on Working Paper No. 40, see Appendix C.
7 See *Eighth Annual Report* 1972–73, Law Com. No. 58, para. 54.
8 See *Ninth Annual Report* 1973–74, Law Com. No. 64, para. 37.

problems raised in the Lord Chancellor's reference of 8 December 1969 we have obtained much help from the views of the Consultative Panel, the comments of those we consulted on Working Paper No. 40 and from information made available by the directors of the Queen's Bench Divisional Court Research Project; we wish to record our deep appreciation of the assistance they have given us. We also wish to thank Master Thompson, the Master of the Crown Office, for information he has supplied in the preparation of this report.

PART II—THE SCOPE OF THE REPORT

5. In the light of the history of this reference, we think it important at the outset to emphasize the narrow scope of this report. Our limited terms of reference have made it necessary for us to exclude from consideration the suggestions of the substantial body of commentators on Working Paper No. 40 who took the view that what was required was wide-ranging reform of the substance and institutions, as well as of the procedure, of administrative law in the five fields suggested in Law Com. No. 20 and set out in paragraph 2 above. We should add that in Working Paper No. 40 we ourselves tentatively explored some matters which we now think could not be the subject of satisfactory reform except in the context of the wider inquiry into administrative law. In any event, it would appear that these matters are more closely related to one or more of the questions (B) to (E) in paragraph 2 above, which were not included in the terms of reference we ultimately received.

6. In particular, we have reached the conclusion that we should not in this report attempt to implement the provisional proposal which we made in paragraph 154(12)[9] of Working Paper No. 40 for an examination of "ouster" clauses excluding judicial review of administrative acts or omissions, as it is clearly one which relates to the scope, rather than to the procedures, of judicial review. On the other hand we should like to take the opportunity of pointing out that there was a substantial body of opinion among our commentators who favoured such an examination.

7. We have taken a similar view in regard to the provisional proposal we made in paragraph 154(13) of Working Paper No. 40 for an examination of all special statutory limitation periods for judicial review. We recognise that periods of limitation might reasonably be considered as a procedural aspect of remedies, but an examination in their differing contexts of all statutory periods of limitation in respect of judicial review could not, we think, be satisfactorily accomplished without regard to much wider issues concerning the machinery of administration generally. Here again, however,

[9] "An examination should be made of those few clauses which purport wholly to exclude judicial review to see whether they now serve any useful purpose in the light of the *Anisminic* case [[1969] 2 A.C. 147] and whether they might not be repealed."

we point out that many of our commentators considered that an examination of all statutory time limits on judicial review should be undertaken. We have, nevertheless, made certain recommendations concerning delay in bringing cases for judicial review before the court where no statutory time limit is involved or the time limit is only imposed by Rules of Court[10].

8. Similarly, we do uot think we could satisfactorily consider within the limited terms of reference of this report the various procedures to be followed by the High Court under Order 94 of the Rules of the Supreme Court in dealing with a variety of matters arising out of the exercise of diverse statutory powers. This order applies to applications for different purposes and to appeals, under a large number of otherwise unrelated statutes, which provide for relief on application to the High Court. Application has to be made to the Queen's Bench Division other than the Divisional Court. The jurisdiction is exercised by a single judge (and exceptionally by a Master) of the Queen's Bench Division. The proceedings must be brought within the time limited by the relevant statute and although, in certain cases, the order provides who should be given notice of the proceedings and, in the case of appeals, who should be made respondent, no preliminary application to the Court for leave to apply to proceed is necessary. We have, however, recommended that a somewhat similar procedure to that available by Order 94, rule 12 in respect of appeals under sections 246-7 of the Town and Country Planning Act 1971 (which requires the Court in certain circumstances not to set aside or vary a decision but to remit the matter to the Minister for rehearing in the light of the Court's opinion on the point of law involved) should be available in appropriate cases on the application for judicial review which we later recommend in this report[11].

9. We have also taken the view that we should not in this report make any recommendation in regard to a new remedy of damages for loss arising from illegal administrative acts or omissions which would not be covered by the existing law of tort or contract. Our terms of reference are limited specifically to review of the "existing remedies". There is also the consideration that the question of damages in this context was dealt with separately under question (C) in Law Com. No. 20[12] and that it was in respect of question (A) that we were eventually given a reference[13]. We recognised in Working Paper No. 40 that the question of a new remedy in damages for administrative illegality lay outside our terms of reference, but we raised the question whether improvements in the form and procedure of existing remedies for administrative illegality would amount to a worthwhile reform without also considering the extent to which the remedy of damages is available in such circumstances[14]. We think that the proposals we are making in this report can be justified on their own merits. We would, however, draw attention to the fact that a substantial body of opinion among the commentators on Working Paper No. 40 were of the opinion that a separate inquiry was desirable into the question of damages as a remedy for illegal administrative action, a view with which we agree

10 See para. 50 below and clause 6 of the draft Bill at Appendix A.
11 See para. 17 (n. 27) and para. 53 below.
12 See para. 2 above.
13 See para. 3 above.
14 See Working Paper No. 40, paras. 145–48, 154(18).

and which has recently obtained judicial support[15]. We should add, however, that in this report we are making certain proposals for improvements in the procedure governing existing actions for damages in respect of illegal acts or omissions[16].

10. In Working Paper No. 40 we prefaced our provisional proposals with a fairly full description of the substantive law which governs the exercise of judicial review of administrative acts or omissions. We took this course in view of the technicality and relative unfamiliarity of the branch of law concerned and in order to explain the broad background against which the provisional proposals in the Working Paper fell to be considered. In view of the limited scope of this report, we do not think it is now necessary to provide a comprehensive and up-to-date account of the substantive law of judicial review, but we draw attention to those aspects of that law which particularly relate to the procedural reforms we are recommending.

PART III—THE PROCEDURE OF JUDICIAL CONTROL CRITICALLY EXAMINED

11. Apart from criminal proceedings and actions for breach of contract, in tort or for breach of trust or other private wrongs committed by an administrative authority, judicial control over the legality of administrative acts or omissions may be invoked at the instance of an individual[17] by five

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[15] See *Hoffmann-La Roche (F.) & Co. A.G.* v. *Secretary of State for Trade and Industry* [1975] A.C. 295. In that case the House of Lords decided that the Secretary of State was entitled to an interim injunction restraining Hoffmann-La Roche from charging any prices in excess of those specified in an order made under s. 3(4) of the Monopolies and Mergers Act 1965, without being required to give an undertaking that he would make good any loss of profits which Hoffmann-La Roche would have suffered in the event of the order being eventually invalidated. Lord Wilberforce, dissenting, would have refused to grant the interim injunction on the grounds that the case should have been referred back to the trial judge to work out a practical solution on the basis of Hoffmann-La Roche's offer to set aside in a joint account any sums received in excess of the price stipulated in the order, pending the final determination of the validity of the order. He said, however, (at pp. 358–359): "It is said that no undertaking should be insisted on unless the effect of the appellants' eventual success were to make the order 'void *ab initio*' – the argument being that otherwise no injustice would result. . . . In truth when the court says that an act of administration is voidable or void but not *ab initio* this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the court is not willing *in casu* to give compensation or other redress to the person who establishes the nullity. *Underlying the use of the phrase in the present case, and I suspect underlying most of the reasoning in the Court of Appeal, is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requires examination rather than some supposed visible quality of the order itself. In more developed legal systems this particular difficulty does not arise. Such systems give indemnity to persons injured by illegal acts of the administration.* Consequently, where the prospective loss which may be caused by an order is pecuniary, there is no need to suspend the impugned administrative act: it can take effect (in our language an injunction can be given) and at the end of the day the subject can, if necessary, be compensated. On the other hand, if the prospective loss is not pecuniary (in our language 'irreparable') the act may be suspended pending decision – in our language, interim enforcement may be refused. There is clearly an important principle here which has not been elucidated by English law, or even brought into the open." (emphasis added)

[16] See para. 54 below.

[17] The Attorney-General may apply to the courts *ex proprio motu*, that is to say on his own initiative, pursuant to his general power to vindicate public rights. (See S. A. de Smith, *Judicial Review of Administrative Action*, 3rd ed., 1973, p. 403). For example, he may make an application for certiorari to quash the decision of a tribunal (*R.* v. *Gillyard* (1848) 12 Q.B. 527) or for prohibition (*Broad* v. *Perkins* (1888) 21 Q.B.D. 533–35) or institute proceedings for a declaration or injunction.

different methods[18]: by applications for the prerogative orders of certiorari, prohibition and mandamus and by actions for an injunction[19] or a declaration. In addition, a person, who has not a sufficient interest to entitle him to bring an action on his own account for an injunction or for a declaration, may take advantage of the procedure known as the "relator action"; until recently it has been generally understood that under this procedure the person seeking to bring the action must first obtain the consent of the Attorney-General, and if this consent is obtained the action proceeds in the name of the Attorney-General "at the relation of" that person[20].

1. The prerogative orders

12. Certiorari will lie to quash a decision which has already been made by an inferior court or administrative tribunal or other public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice; it will also lie where there is an error of law on the face of the record of the decision of such a tribunal. Prohibition lies to prevent such bodies from acting or continuing to act in excess or abuse of jurisdiction or contrary to the rules of natural justice. Mandamus lies to compel the performance of a public duty.

13. The question who is entitled to make an application for a prerogative order—i.e., who has *locus standi*—has given rise to a very large number of decisions[21]. They have generally been given in the context of an application for a particular order and, although the language used in defining *locus standi* is often similar in respect of different orders, it cannot be said categorically that the test of *locus standi* is identical for all three prerogative orders. However, there is no doubt that the underlying purpose of the three orders is the same in so far as they all aim, not merely at the assertion of a private right, but at the upholding of the law in the public interest; and the trend of more recent decisions is towards the development of a single concept of *locus standi* applicable to all the prerogative orders. Thus, in *R.* v. *Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association*[22] Lord Denning M.R. said: "The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved' and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a

[18] We are not here referring to the prerogative writ of habeas corpus, which may well give rise to an issue of administrative illegality. We referred to habeas corpus in Working Paper No. 40 but we received no suggestions for a change in its procedures (see R.S.C. 0.54) some aspects of which were reformed by the Administration of Justice Act 1960.

[19] It is necessary to make a distinction between injunctions in general (with which we are here primarily concerned) and the injunction which by s. 9 of the Administration of Justice (Miscellaneous Provisions) Act 1938 replaced informations in the nature of *quo warranto*. This remedy enables any person to be restrained from acting in any office in which he is not entitled to act. R.S.C. 0.53, r. 9 provides that the procedure under s. 9 shall be the same as in applications for an order of mandamus; the procedure governing mandamus and other prerogative orders is described in paragraphs 12–21 below. We are not aware of any difficulties which arise in connection with injunctions under s. 9 and we have provided for their continuance within the framework of the application for judicial review which we later recommend. See clause 1(1)(*c*) of the draft Bill at Appendix A.

[20] But as to whether this accurately represents the present position, see n. 39 below.

[21] See paras. 49, 97, 120, 131, 132, 162, 168 and 185 of *Halsbury's Laws of England*, 4th ed., 1973, Vol. I, *sub nom.* "Administrative Law".

[22] [1972] 2 Q.B. 299, 308–9, C.A.

genuine grievance because something has been done or may be done which affects him." With regard to mandamus, a leading authority[23] has said that "the nature of the interest required to support an application for an order of mandamus cannot, in the existing state of the authorities, be defined with any degree of confidence". But after an examination of the authorities he concludes: "Although the preponderance of authority is opposed to the view that the courts are entitled to exercise a free discretion in determining questions of *locus standi* in applications for mandamus, and indicates that an applicant must have a direct interest of his own in the performance of the duty, the courts do in practice exercise a wide discretion in deciding the degree of interest required for the purpose of a particular application. Normally the applicant's interest must be more substantial than the general interests of the other members of the community or interest-group to which he belongs, but it is impossible now to say that this is at all a firm rule."

14. The procedure governing applications for the prerogative orders is regulated by section 10 of the Administration of Justice (Miscellaneous Provisions) Act 1938 and Order 53 of the Rules of the Supreme Court. There are two stages. The applicant must first apply *ex parte* for leave to apply for the order. This *ex parte* application must be accompanied by a statement of the grounds on which relief is sought supported by verifying affidavits. It must be made to a Divisional Court of the Queen's Bench Division, except in vacation when it may be made to a single judge in chambers. If leave to apply for an order of certiorari or prohibition is granted, then it may, if the Court or judge so directs, operate as a stay of the proceedings in question (*i.e.*, a temporary suspension of the effect of the decision challenged or a temporary prohibition on the making of a decision)

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[23] S. A. de Smith, *Judicial Review of Administrative Action*, 3rd ed., 1973, pp. 490–93. A useful comparison may now be made between *R.* v. *Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 Q.B. 118, in which the applicant sought an order of mandamus in respect of the prosecution policy of the police regarding gaming clubs, and *R.* v. *Commissioner of Police of the Metropolis, ex parte Blackburn and Another (No. 3)* [1973] 1 Q.B. 241, where the same applicant sought an order of mandamus to secure enforcement of the law covering the publication or sale of obscene matter. In the first case, there was some reference to the *locus standi* of the applicant: Lord Denning M.R. said (at p. 137): "No doubt the party who applies for mandamus must show that he has sufficient interest to be protected. . . . It is, I think, an open question whether Mr. Blackburn has a sufficient interest to be protected. No doubt any person who was adversely affected by the action of the Commissioner in making a mistaken policy decision would have such an interest. The difficulty is to see how Mr. Blackburn himself has been affected"; Lord Denning however did not decide the question which he raised, as in the circumstances he was prepared to accept the undertaking by the Commissioner that the law would in future be enforced. Salmon L.J. (at p. 139), rejecting the argument that the police are under no legal duty to anyone in regard to law enforcement, said that he had "little doubt that any householder in [a particular district] would be able to obtain an order of mandamus for [a policy instruction that no housebreaker should be prosecuted] to be withdrawn"; but (at p. 145) he said that his only doubt was "whether Mr. Blackburn had a sufficient personal interest in order to obtain an order of mandamus". Edmund Davies L.J. (at p. 149), referring to the legal duty which in his view legal enforcement officers owed to the public to perform their functions, said: "How and by whom that duty can be enforced is another matter and it may be that a private citizen, such as the applicant, having no special or peculiar interest in the due discharge of the duty under consideration, has himself no legal right to enforce it." In the later *Blackburn* case, five years afterwards, counsel for the Commissioner of Police reserved, but did not take, the point on *locus standi*, and the Court of Appeal appears to have assumed that the applicant had a sufficient interest ("Mr. Blackburn has served a useful purpose in drawing the matter to our attention", *per* Lord Denning, [1973] 1 Q.B. 241, 254; "Mr. Blackburn has done a public service in bringing the whole situation into the open", *per* Phillimore L.J., *ibid.*, at p. 258) while unwilling in the circumstances to grant mandamus.

until final determination of the issue; this is in effect a form of interim relief.

15. Although there is no specific rule relating to discovery in Order 53 of the Rules of the Supreme Court there is a general power under rule 3 of Order 24 to order discovery in any "cause or matter (whether begun by writ, originating summons or otherwise)". However, Denning L.J., in *Barnard* v. *National Dock Labour Board*[24], said that there was no discovery in certiorari and certainly we know of no case where it has been ordered. Similarly there is a general power to order interrogatories under rule 1(1) of Order 26 in respect of "any cause or matter", but here again we know of no prerogative order proceedings in which such an order has been made. The general power under rule 2(3) of Order 38 to order cross-examination on affidavits has been used in prerogative order proceedings although very rarely. In *R.* v. *Kent Justices, ex parte Smith*[25] Lord Hewart C.J. said there was no precedent for allowing such cross-examination in the previous fifty or sixty years; and possibly the only case where it has been allowed this century is *R.* v. *Stokesley, Yorkshire, Justices, ex parte Bartram*[26] where the Divisional Court suspected that an attempt had been made to mislead it.

16. The application for the order itself must be made by originating motion to the Divisional Court, except in vacation when it may be made by originating summons to a single judge in chambers. The notice of motion or summons must be served on all persons directly affected; this must be proved by an affidavit which must be filed before the motion or summons is entered for hearing. When service is not effected an affidavit must state why the persons concerned have not been served. Copies of the statements in support of the application for leave must be served with this notice of motion or summons; copies of the affidavits must be supplied on demand and payment of the proper charges. Generally no grounds can be relied on or relief sought at the hearing of the motion or summons except those contained in the statement, but the statement may be amended at the discretion of the Court hearing the application. Moreover, further affidavits may be used to deal with new matter arising from the other party's affidavits as long as the party putting in the further affidavits gives notice of his intention to do this. Order 53, rule 5 of the Rules of the Supreme Court provides that on the hearing of the application any person who wishes to be heard in opposition and appears to the Court to be a proper person to be heard shall be heard although he has not been served with notice of the motion or summons.

17. If a tribunal or other administrative authority has acted in excess or abuse of jurisdiction or contrary to the rules of natural justice, or if there is error of law on the face of the record, the effect of a grant of certiorari will be to quash the decision in question. The Court does not substitute its own decision, nor does it in so many words direct the tribunal or other deciding agency to come to any particular conclusion when the application comes before it again[27]. Certiorari is a remedy on review, not on appeal.

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[24] [1953] 2 Q.B. 18, 43.
[25] [1928] W.N. 137.
[26] [1956] 1 W.L.R. 254.
[27] Compare the duty of the court, on an *appeal* from the Minister under ss. 246–7 of the Town and Country Planning Act 1971, where the court finds an error of law in his decision, not to set aside or vary that decision but to remit the matter to the Minister with the opinion of the court for rehearing and determination by him. See R.S.C., O.94, r. 12.

But, of course, the tribunal or agency will reach its decision in the light of the guidance provided by the Court[28].

18. With regard to time limits, leave will not be granted to apply for an order of certiorari unless the application for leave is made within six months after the decision which it is sought to challenge, or the delay is satisfactorily explained to the Court[29]. Prohibition, of its nature concerned with future action, does not give rise to a problem of time limits. The Rules of the Supreme Court do not prescribe any time limit in respect of mandamus, except that, in the case of an order of mandamus requiring the Crown Court to enter and hear an appeal, the application for leave must be made within two months after the day on which the refusal to hear the appeal took place, unless the delay is satisfactorily explained to the Court[30]. Apart from these specific limits, the Court may—although it has been said that the cases when the power would be exercised are rare[31]—refuse in its discretion to grant a prerogative order, even though it has been applied for within the prescribed limit.

19. The power of the Court in an exceptional case to refuse a prerogative order on the grounds of undue delay falling short of the prescribed time limit is one aspect of the general discretionary nature of the prerogatives orders. For example, although the Court will only grant certiorari " where there is no other equally effective and convenient remedy ", the mere fact that there is an alternative remedy (for instance, by appeal against the questioned decision to the Minister) will not prevent the Court from granting certiorari where " it may be more efficient, cheaper and quicker "[32].

20. It has been said that " Mandamus [will] not lie against the Crown " nor against a servant of the Crown " because in his capacity as such, he is only responsible to the Crown, and has no legal duty imposed upon him towards the subject "[33]. Lord Parker C.J. has, however, pointed out that as a general proposition today this is misleading; there are many cases " which show quite clearly that where by statute an officer or servant of the Crown has also a duty towards a member of the public, then provided that member of the public has a sufficient interest, mandamus will lie "[34]. The possibility of using mandamus in certain circumstances against Crown servants is specifically reserved by section 40(5) of the Crown Proceedings

[28] See *R.* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1951] 1 K.B 711, 724, D.C. (Lord Goddard C.J.).

[29] R.S.C., O.53, r. 2(2). Where the period within which certiorari can be brought is prescribed by any enactment (other than this Order) there is no power to extend the period. But the time fixed by the Rules is, presumably, subject to the general power of extension given by O.3, r. 5.

[30] R.S.C., O.53, r. 2(1).

[31] See *R.* v. *Inner London Crown Court, ex parte Greenwich London Borough Council* [1975] 2 W.L.R., 310, 314.

[32] *R.* v. *Hillingdon London Borough Council, ex parte Royco Homes Ltd.* [1974] Q.B. 720, 729.

[33] *R.* v. *Secretary of State for War* [1891] 2 Q.B. 326, 339, *per* Lord Esher M.R.

[34] *R.* v. *Commissioners of Customs and Excise, ex parte Cook and Another* [1970] 1 W.L.R. 450, 455. A leading case illustrating this proposition is *R.* v. *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313 C.A. where mandamus was granted to compel the Commissioners to issue orders for the repayment of the amounts of tax certified to be overpaid. Contrast *R.* v. *Commissioners of Inland Revenue, In Re Nathan* (1884) 12 Q.B.D. 461, 472, C.A., where the overpaid money having passed to the Crown, the duty of the Commissioners was only to advise the Crown.

Act 1947. Although authority on the point is meagre[35] it would seem that prohibition is in respect of its availability against the Crown in the same position as mandamus.

21. A final point concerning the prerogative orders, which is of considerable importance in the context of this report, is that an application for a prerogative order cannot be made in conjunction with an application for any other remedy, namely an injunction, a declaration or damages. Thus, if a public authority pursuant to alleged powers which it does not in fact possess has seized a person's land, he cannot join an action for damages in respect of the trespass to any application he makes for certiorari to quash the decision on the basis of which entry on his land has taken place. Similarly, if mandamus is unsuccessfully sought against the Crown, the Divisional Court cannot in those proceedings grant the declaration to which the applicant might be entitled under section 21(1)(*a*) of the Crown Proceedings Act 1947[36].

2. Injunctions

22. The injunction is in origin a remedy in the sphere of private law developed by the Court of Chancery. It is generally only granted in negative form—*i.e.*, it enjoins the person from doing a particular act; but in exceptional circumstances it may take a mandatory form—*i.e.*, it may require that person to do a particular act. To a limited extent, the injunction will lie in respect of the unlawful action or inaction of public authorities. First, it will lie against a public authority, in the same way as it lies against a private individual, in respect of its impending or continuing refusal to fulfil a common law obligation[37]. Secondly, it will lie against a public authority in respect of a statutory duty if the statute is to be interpreted as conferring a right of action on the applicant for the injunction[38]. Thirdly, the injunction is available to secure compliance with a purely public duty if the applicant, having obtained the consent of the Attorney-General, proceeds by way of a relator action[39]. Apart from these clear categories where the

[35] See *Chabot* v. *Viscount Morpeth* (1844) 15 Q.B. 446, 459 where it was held that prohibition would not issue to restrain a person from carrying out the executive orders of the Crown.

[36] On declarations against the Crown see para. 29 below.

[37] *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [1953] Ch. 149, C.A. (injunction granted in respect of pollution of rivers against a commercial company and two public authorities).

[38] *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch.D. 102. But if a public authority owes a duty only to the public the appropriate remedy is by way of mandamus or prohibition.

[39] See *Attorney-General ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] Q.B. 629. In this case Lord Denning M.R. (at p. 649) said that an applicant for a declaration or an injunction in respect of observance of the law by a public authority, to whom the Attorney-General had refused leave to proceed by way of relator action, might bring an action for a declaration or injunction on his own, joining the Attorney-General as defendant, provided he had a "sufficient interest" (which, however, did not apparently mean a personal right, as Lord Denning made it clear that a "sufficient interest" could be "shared with thousands of others", referring in this connection to the interest which the applicant for mandamus had in *R.* v. *Commissioner of Police for the Metropolis, ex parte Blackburn* [1968] 2 Q.B. 118). Lawton L.J. (at p. 657) substantially agreed with Lord Denning, but Cairns L.J. (at p. 654) considered that on balance where a person's "individual interest" is not affected, he should only be able to proceed by way of a relator action for which the Attorney-General's consent had been obtained. In the view, therefore, of the majority in the *McWhirter* case, the injunction has a wider use in the public law field than is indicated in para. 11 above, overlapping at least to a considerable extent with mandamus and prohibition; but the late Professor de Smith (*Judicial Review of Administrative Action*, 3rd ed., 1973, p. 529) made a cautious assessment of the decision, saying only that it "may give impetus to the trend towards placing the injunction alongside the declaration as a public law remedy".

injunction can be used in respect of the unlawful action or inaction of a public authority, there is a further category of more doubtful scope. In *Boyce* v. *Paddington Borough Council*[40] Buckley J. said: "A plaintiff can sue without joining the Attorney-General . . . where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right." It is, however, doubtful whether the special damage needs to be of a pecuniary nature[41].

23. Injunctions do not lie against the Crown nor against Crown servants acting within the course of their duties. It is provided by section 21(1)(*a*) of the Crown Proceedings Act 1947 that: "Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction . . . the court shall not grant an injunction . . . but may in lieu thereof make an order declaratory of the rights of the parties." It is further provided in section 21(2) that the court shall not grant an injunction against an officer of the Crown if the effect of granting that remedy would be to give relief against the Crown which could not have been obtained in proceedings against it. We have pointed out that it is possible to obtain mandamus against a Crown servant when a duty is imposed on him for the benefit of the public[42]; but this is not so where an injunction is sought. The point was argued in *Merricks* v. *Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food*[43], but was rejected by Upjohn J. He said: "It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification."

24. Injunctions may be final or interlocutory. The effect of an interlocutory injunction is to preserve the *status quo* pending the final determination of the issue. The question has arisen whether, in view of the fact that an injunction will not lie against the Crown, where the Crown itself is applying for an injunction, the court may refuse an interim injunction unless the Crown gives the usual undertaking in damages in the event of the issue being finally decided in favour of the other party. In *Hoffman-La Roche (F.) & Co. A.G.* v. *Secretary of State for Trade and Industry*[44] the House

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40 [1903] 1 Ch. 109, 114.

41 See *Bradbury* v. *Enfield London Borough Council* [1967] 1 W.L.R. 1311, C.A. where an interim injunction was granted to restrain the implementation of a plan to reorganise a school on a comprehensive basis at the instance of nine plaintiffs, eight of whom were ratepayers and one a limited company representing objectors to the scheme, although the standing of the plaintiffs does not appear to have been discussed. Conflict between certain dicta of Lord Denning M.R. in *Warwickshire C.C.* v. *British Railways Board* [1969] 1 W.L.R. 1117, 1122 and the decision in *Prestatyn U.D.C.* v. *Prestatyn Raceway Limited* [1970] 1 W.L.R. 33, 44 as to the standing of local authorities to claim injunctions in their own name under s. 276 of the Local Government Act 1933 may now have been resolved by s. 222 of the Local Government Act 1972 (see de Smith, *Judicial Review of Administrative Action*, 3rd ed., 1 73, p. 403).

42 See para. 20 above.

43 [1955] Ch. 567, 575–6.

44 [1975] A.C. 295.

of Lords held that the old rule of practice that such an undertaking could not in general be exacted from the Crown was no longer justified since the passing of the Crown Proceedings Act 1947, although in the particular circumstances of the case the majority of the House were unwilling to impose any undertaking as to damages as a condition for granting an interim injunction[45].

3. Declarations

25. Order 15, rule 16 of the Rules of the Supreme Court provides generally that "no action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed". The action for a declaration, although like the injunction it had its origin in a remedy given by the Court of Chancery, in conjunction with other relief sought, against private individuals, is today a very important and widely used method whereby judicial control over the acts or omissions of public authorities can be set in motion[46]. Although it has been suggested that certiorari should, and may in fact, lie to challenge subordinate legislation[47] there is no doubt that the declaration is the only method normally used for this purpose[48].

26. The declaration has certain advantages to the litigant in the public law field over other remedies available to him. In the first place, it is not subject to any specific time limit. Secondly, a declaration may be obtained against the Crown, notwithstanding that neither mandamus nor an injunction will lie against the Crown[49]. Thirdly, there are advantages in the interlocutory procedure applicable to an action for a declaration, which however, as they are shared with the action for an injunction, are separately dealt with in paragraph 30 below.

27. On the other hand, certain limitations on the use of the declaration as a method of controlling the acts or omissions of public authorities have become apparent. First, the criteria to be applied by the court in deciding whether a party has a sufficient interest to entitle him to ask for a declaration

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[45] Lord Wilberforce, dissenting (*ibid.*, pp. 358 and 359) would have refused the interim injunction for reasons summarized in n. 15 above. He drew particular attention to s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which provides that the High Court may grant an interim injunction "in all cases in which it appears to the Court to be just or convenient so to do", such order being made "either unconditionally or upon such terms and conditions as the Court thinks just".

[46] For the historical development of the declaration, see de Smith, *Judicial Review of Administrative Action*, 3rd ed., 1973, pp. 426–28.

[47] See de Smith, *op. cit.*, p. 349.

[48] Thus in the *Hoffmann-La Roche* case (see n. 44 above) there were parallel proceedings by Hoffmann-La Roche for a declaration that the order made by the Secretary of State for Trade and Industry was invalid.

[49] The Court of Exchequer under the Crown Debts Act 1541 had power, however, to make declaratory orders against the Crown. The Court of Chancery after 1830 made declaratory orders against the Crown on a Petition of Right although normally only in conjunction with other relief sought. Whether or not the jurisdiction in this respect of the Court of Exchequer passed to the Court of Chancery under the Court of Chancery Act of 1841 is obscure, but it has been clear since *Dyson* v. *Attorney-General* [1911] 1 K.B. 410 that a declaration may be obtained against the Crown in an ordinary civil action. (See de Smith, *op. cit.*, pp. 426–7). The power to make a declaration against the Crown is preserved by s. 21(1) of the Crown Proceedings Act 1947, but proviso (*a*) to that subsection forbids a court to grant an injunction against the Crown, although it states that a declaratory order may be granted.

may be somewhat stricter than those applicable to the prerogative orders, and in particular to certiorari. Against such cases as *Prescott* v. *Birmingham Corporation*[50], *Brownsea Haven Properties Ltd.* v. *Poole Corporation*[51], and *Lee* v. *Department of Education and Science*[52], where the standing of the plaintiffs to bring proceedings for a declaration appears to have been assumed without argument, may be set the case of *Gregory* v. *Camden L.B.C.*[53]. In the last mentioned case the borough council, as local planning authority, had given planning permission for a school to be built at the rear of the plaintiff's property. In fact the correct procedure had not been adopted and so the grant of permission to build was undoubtedly illegal. But Paull J. held that the plaintiff, although he would no doubt be inconvenienced by the proximity of the intended school, had no legal standing to ask the court to declare the grant of planning permission void. The basis for this decision was that the declaration, unlike the prerogative orders, is a remedy for the protection of personal legal rights; the applicant had no legal rights to protect and therefore he lacked standing to challenge the grant of planning permission. A more liberal approach to standing in declarations appears, however, from the judgment of Laskin J. delivering the majority opinion in the Canadian Supreme Court case of *Thorson* v. *Attorney-General of Canada*[54] where a federal taxpayer was granted standing for a declaration that certain statutes were unconstitutional. Laskin J. said: —

> "In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised . . . Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide . . . that a member of the public . . . is too remotely affected to be accorded standing. On the other hand, where all members of the public are affected alike . . . the Court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney General refuses to act [as in fact he had refused in this case] it may choose to hear the case on the merits."

28. A second limitation on the use of the declaration as a method of controlling the legality of the acts or omissions of public authorities appears from the decision in *Punton* v. *Ministry of Pensions and National Insurance (No. 2)*[55]. The applicants had been refused unemployment benefit by the National Insurance Commissioner and asked for declarations that the

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50 [1955] Ch. 210 C.A., where a ratepayer obtained a declaration that the Corporation's free bus scheme for old-age pensioners was *ultra vires*.

51 [1958] Ch. 574 C.A., where hotel proprietors challenged a one-way traffic order.

52 (1967) 66 L.G.R. 211 where a governor, parent and assistant master at a school were granted a declaration that the time prescribed by the Secretary of State for Education for making representations in opposition to a comprehensive scheme was too short.

53 [1966] 1 W.L.R. 899.

54 [1974] 1 N.R. 225, 241.

55 [1964] 1 W.L.R. 226, C.A. See also *Barraclough* v. *Brown* [1897] A.C. 615 (declaration refused as to statutory right to recover expenses for clearing a river of sunken vessels where the determination of this right was assigned by the statute to a court of summary jurisdiction).

Commissioner had come to an incorrect determination in law and that they were entitled to the benefit claimed. The National Insurance Act 1946 laid down the conditions for the award of unemployment benefit, to which, of course, the applicants had no right outside the statute, and also instituted the machinery for the determination of claims for an award of benefit. There was no question of the Commissioner in any way exceeding his jurisdiction; the only ground on which supervision could be claimed was error of law on the face of the record. But as Sellers L.J. pointed out the six-months' time limit for applying for certiorari had expired and in his view there appeared to be no good ground for extending it[56]. In these circumstances the Court of Appeal refused to grant the declarations asked for by the applicants. One reason for this decision was that there was no ground for disturbing the trial judge's refusal to give the remedy in his discretion. But the Court of Appeal also held that there was no jurisdiction at all to give declaratory relief. Since the Commissioner's decision was admittedly *intra vires*, it was impossible to declare that there had been no decision. If a declaration had been granted, there would have been two inconsistent decisions, one of the Commissioner and one of the Court; since the Act provided that the decision of the Commissioner (or a lower officer or tribunal) was a necessary condition precedent to an award of benefit and there was no provision for a revision of his determination, the declaration of the High Court would be of no avail to the applicants[57].

29. There is a third drawback of the declaration, which is relevant in cases where a remedy is sought against the Crown. In proceedings against any other authority, interim relief by way of a stay of proceedings can be obtained, if a prerogative order of prohibition or certiorari is in issue under Order 53, rule 1(5) of the Rules of the Supreme Court, and, if an injunction is being sought, by an interlocutory injunction. An injunction, however, does not lie against the Crown, but, in the terms of section 21(1)(*a*) of the Crown Proceedings Act 1947, "the Court . . . may in lieu thereof make an order declaratory of the rights of the parties." Apart from the specific language of the Crown Proceedings Act, which does not envisage anything in the nature of a provisional declaration, it has been suggested by the courts on at least two occasions[58] that anything in the nature of an interim declaratory order would be illogical.

4. Applications for injunctions and declarations

30. Proceedings for an injunction or a declaration may be begun either by a writ or an originating summons. No leave is required but the defendant can

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[56] *ibid.*, p. 235.

[57] This limitation on the use of a declaration does not apply if a declaration is being sought in respect of a right which the applicant for the declaration claims to enjoy at common law and the issue is whether he comes within the purview of an Act taking away or limiting that right. (See Viscount Simmonds in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260, 287). It also does not apply where the declaration is being sought to impugn a decision which is a legal nullity either by reason of the fact that it was reached contrary to the rules of natural justice (see *Fulbrook* v. *Berkshire Magistrates Courts Committee and Another* (1970) 69 L.G.R. 75) or because the error in the decision impugned involves an excess of jurisdiction (see *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147).

[58] *Underhill* v. *Ministry of Food* [1950] 1 All E.R. 591, 593 approved in *International General Electric Company of New York Limited and Another* v. *Commissioners of Customs and Excise* [1962] Ch. 784, 790.

apply to have the proceedings struck out[59], notifying the plaintiff of such an application in order that he may have an opportunity of opposing it. In proceedings begun by writ discovery is automatic[60]. But whether they are begun by writ or originating summons there is power in the court to order discovery[61]. Where affidavits are filed, application may be made to the court to cross-examine defendants[62]; and there is also power to order interrogatories[63]. It should finally be noted that proceedings for an injunction and a declaration can be brought in one action, in which there may also be a claim for damages.

5. The dilemma of the litigant seeking judicial review

31. It will have been seen from the foregoing survey of the methods by which a litigant may obtain judicial review of the acts or omissions of public authorities that he may find himself in a dilemma. The scope and procedural particularities of one remedy may suit one case except in one respect; but another remedy which is not deficient in this respect may well be unsatisfactory from other points of view; and to add to his difficulties he may not be able to apply for both remedies in one proceeding. We may summarize the deficiencies of the present system of remedies as follows:—

(*a*) The declaration may be obtained in respect of the legality of a very wide range of acts, or proposed acts, or omissions of public authorities (including the Crown), and proceedings for a declaration may be initiated without leave, with no fixed limit of time and with the advantages of full discovery. It also enables a litigant to include with his application for a declaratory order a claim for damages or relief by way of an injunction.

(*b*) On the other hand, the declaration only states the legal position; it does not order or prohibit any action, and it cannot quash a decision which a body has made within its jurisdiction. Furthermore, there is considerable doubt as to the standing which a person requires in order to bring an action for a declaration. The declaration also suffers from what may be a disadvantage in proceedings against the Crown in that it cannot be obtained in a provisional form in order to preserve the *status quo* pending final determination of the issue.

(*c*) If a litigant seeks to avoid the disadvantages of the declaration summarized under (*b*) above by resorting to a prerogative order, he may lose some of the advantages of the declaration set out in (*a*) above. Thus, an application for certiorari may be made to quash a decision, even given within the jurisdiction of a deciding authority. The Court may direct that action on the decision in question be

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[59] On the grounds that no reasonable cause of action is disclosed, that the proceedings are scandalous, frivolous or vexatious, that the particular matter objected to may prejudice, embarrass or delay the fair trial of the action or otherwise that the proceedings are an abuse of the process of the court. See R.S.C., O.18, r. 19.

[60] R.S.C., O.24, r. 1. Thus in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, it was on discovery of certain documents in proceedings for a declaratory order that the applicants learned that their suspension from employment was *ultra vires*.

[61] *ibid.*, O.24, r. 3.

[62] *ibid.*, O.38, r. 2(3).

[63] *ibid.*, O.26, r. 1.

stayed pending the conclusion of the final hearing of the application for the order; and a wide range of applicants may apply for leave to bring proceedings for such an order. But leave to apply is necessary, discovery will not in practice be available and, in the case of certiorari, the application must be made within six months of the decision impugned. Moreover, it will not be possible to join to the application for certiorari a claim for damages or relief by way of injunction. Similarly, mandamus and prohibition (where a public body is failing to carry out a duty or is about to act in excess of jurisdiction or contrary to the rules of natural justice) will lie to order or to prohibit action (except against the Crown), but, in respect of leave and discovery, they are subject to the same conditions as certiorari.

(*d*) The litigant, desiring to avoid the particular disadvantages of the declaration that it does not order or prohibit action on the part of a public authority, may, however, have resort to an injunction. This remedy will give him the same advantages as the declaration in respect of absence of leave to apply, discovery and joinder of claims for damages or for a declaration; in addition, in proceedings for an injunction the *status quo* pending final determination of the issue can be preserved by means of an interim injunction. But an injunction does not lie against the Crown, and in a case against the Crown the litigant will have to be content with asking for a declaration with its attendant limitations, as set out in (*b*) above.

32. The unsatisfactory nature of the present position has been succinctly stated by the late Professor S. A. de Smith in his evidence to the Franks Committee[64]: —

> "Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals—remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action."

33. Although a considerable variety of views was expressed in consultation on Working Paper No. 40 there was a general consensus among those whom we consulted, including members of the judiciary, on the desirability of remedying the procedural defects in administrative law to which we have referred above.

PART IV—THE PROBLEM OF REFORM CONSIDERED

1. Ordinary actions raising public law issues to remain unaffected

34. Public law issues concerning the legality of acts or omissions of persons or bodies do not arise only in applications to the Divisional Court

[64] *Report of the Committee on Administrative Tribunals and Enquiries* (1957) Cmnd. 218, Minutes of Evidence, Appendix I at p. 10.

for prerogative orders. They may be the direct subject of an ordinary action for a declaration or an injunction ; and they may also arise collaterally in ordinary actions, or indeed in criminal proceedings. In Working Paper No. 40[65] we tentatively proposed that where, for example, in an action for damages in respect of trespass to land the defence is raised that the defendant was a public authority exercising its legal powers, the issue of public law involved should be referred to the Divisional Court. In the light of our consultation we are clearly of the opinion that the new procedure we envisage in respect of applications to the Divisional Court should not be exclusive in the sense that it would become the only way by which issues relating to the acts or omissions of public authorities could come before the courts.

2. Should the procedure in prerogative order proceedings be assimilated to that of ordinary actions?

35. One possible change, which would help to solve some but by no means all of the difficulties of the present system of remedies, had considerable support in our consultation. The reform would involve the assimilation of the procedure applicable to the prerogative orders to that of ordinary civil procedure begun by writ or originating summons. The *ex parte* hearing for leave to apply for a prerogative order would disappear ; it would be for the defendant to take the initiative if the action was one which ought to be struck out[66]. The ordinary interlocutory process, including discovery, would apply, and it would be possible to join in the action for a prerogative order a claim for an injunction, a declaration or damages.

36. We recognise the attractions of the change which have been summarised in the preceding paragraph. In so far as it would put proceedings in the public law field on the same footing as actions in the private law field it would seem to achieve a simplification. But the truth is that the procedure applicable to private law actions has its own difficulties and, in particular, opportunities for delay and that the present procedure for obtaining a prerogative order is relatively simple, inexpensive and speedy. There are admittedly deficiencies in that procedure, but, if these drawbacks can be satisfactorily remedied, we think that there is much to be said in favour of the prerogative order procedure.

3. Should the necessity to have leave to bring prerogative order proceedings be retained?

37. One of the important differences between prerogative order proceedings and ordinary actions is that only the former require leave to initiate proceedings. In this connection we have had made available to us the preliminary findings of the empirical study undertaken by the Legal Research Unit of Bedford College, London, into the working of the Divisional Court[67]. The first point which is brought out by these findings when considered in conjunction with the official statistics available to us is that the necessity in prerogative order applications to apply for leave removes at the outset a substantial number of cases. In the years 1971 to 1975 inclusive the propor-

65 Paras. 76–82, 154(2).
66 See R.S.C., 0.18, r. 19 (n. 59 above).
67 See para. 4 above.

tion of cases in which leave was refused amounted to a little over one-third of the applications made[68]. Secondly, since 1947[69] applicants for leave to bring prerogative orders have been able to appear in person and a not insignificant number of applications have been made in this way. Thirdly, it appears that, as the affidavits which have to be filed before the application for leave is heard are usually read by the Court in advance of the hearing, the actual hearing is relatively short; thus in 1972, for example, of the applications for leave which were granted, only approximately 10 per cent, and of those refused only approximately 15 per cent, took more than twenty minutes.

38. A procedure which provides an expeditious method whereby the Court can sift out the cases with no chance of success at relatively little cost to the applicant and no cost to any prospective respondent would seem at first impression worthy of retention. Whether the cases where leave is refused are in fact unarguable, however, cannot be determined without regard to the fate of those cases where leave is given and to the extent to which appeals are successfully brought in the Court of Appeal against refusal to grant leave. In fact of the cases where leave is granted, even allowing for those which are withdrawn, only about one-half succeed at the substantive hearing; and although exceptionally there are some cases, where leave has been refused by the Divisional Court, the applicant appeals to the Court of Appeal, is given leave and succeeds on the substantive hearing before that Court[70], such cases are too rare to affect the significance of the proportion (*i.e.* one-third) where leave is refused by the Divisional Court. It is true that even in ordinary proceedings a defendant can apply to have the action struck out under Order 18, rule 19 of the Rules of the Supreme Court[71], but in contrast with the application for leave this procedure, if it is successful, necessarily involves the plaintiff in expense and the defendant in at least the inconvenience of making the application, even if he ultimately recovers the cost from the plaintiff. A further consideration which may have particular relevance to applicants for leave in person is that there is in our view some social value in a procedure which enables the litigant expeditiously and at small cost to himself to hear in public from the court that he has no legal case and the reasons for its refusal to give leave.

39. Although the commentators on Working Paper No. 40 were divided on the point, we have reached the conclusion that in any procedure which we are able to recommend in respect of certain remedies in the public law field the requirement of leave to proceed which at present characterises applications for the prerogative orders should be retained.

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[68] It appears that a total of about 900 applications for leave to bring proceedings for orders of certiorari, mandamus or prohibition will have been made in these years. The total of applications for leave made in each of the years 1971 to 1974 inclusive varied between 140 and 180 but in the year 1975 the total will approach 300.

[69] Practice Note, 1947, W.N. 218. According to figures supplied by the Legal Research Unit, in 1971 there were 21 applications in person for leave, 2 of which were granted and 19 refused; in 1972 there were 17 such applications, of which 1 was granted and 16 refused; in 1973 there were 15 such applications of which 4 were granted, 10 were refused and 1 was withdrawn.

[70] A recent example is *R.* v. *Secretary of State for the Home Department, ex parte Mehta* [1975] 1 W.L.R. 1087.

[71] See n. 59 above.

4. If the necessity for leave is to be retained should the application for leave come before a single judge?

40. In our consultation on Working Paper No. 40 there was considerable support for the view that if the necessity to obtain leave to apply for the remedies of judicial review was to be retained, the hearing should take place before a single judge; at present, as explained above[72], it is necessary to obtain leave to apply for a prerogative order from the Divisional Court, except in vacation when it may be obtained from a single judge. If, however, the leave procedure is to be retained, it seems to us that it is an important safeguard for the litigant that (except in vacation) the decision should be given by three judges rather than one, especially if the application is to be refused.

5. Method of trial at the substantive hearing

41. An ordinary action is normally tried by a single judge. Applications for prerogative orders are heard by the Divisional Court which for this purpose is normally constituted of three judges[73]. While we think that in any new procedure applicable to prerogative orders and certain other remedies in the public law field the substantive issues should continue to be heard by three judges, we recognise that there may be exceptional circumstances in which the Divisional Court, having given leave, might consider it more convenient for the hearing and determination of the application to be by a single judge. For example, the Divisional Court might consider this course appropriate in a case where it appears likely that extensive discovery or oral evidence may be necessary and that the proceedings may be prolonged.

6. Conclusion as to the nature and extent of the reform required

42. We have reached the conclusion that our recommendations should take effect within a similar procedural framework to that which under Order 53 of the Rules of the Supreme Court at present applies to applications for the prerogative orders but with such changes as will overcome the difficulties which we have summarised in paragraph 31 above.

PART V—RECOMMENDATIONS FOR REFORM

(*a*) An application for judicial review

43. Our basic recommendation is that there should be a form of procedure to be entitled an "application for judicial review". Under cover of the application for judicial review a litigant should be able to obtain any of the prerogative orders, or, in appropriate circumstances, a declaration or an injunction. The litigant would have to specify in his application for judicial review which particular remedy or remedies he was seeking, but if he later desired to apply for a remedy for which he had not initially

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72 See para. 14 above.

73 See s. 63 Supreme Court of Judicature (Consolidation) Act 1925 which provides that a Divisional Court shall be constituted of "two judges and no more" but, subject to certain conditions, allows such a Court to consist of more than two judges. See also R.S.C., 0.57 and the note thereto in *Supreme Court Practice* 1976, Vol. 1, p. 827. Under 0.53, r. 3 which concerns applications for prerogative orders the substantive application may in vacation be heard by a judge in chambers but we understand that this would be most unusual.

asked he would be able with the leave of the Court to amend his application. The vital difference, however, from the present system under Order 53 would be that the litigant's choice of remedies in the Divisional Court would not be limited to the prerogative orders but would also (as mentioned above) include, in appropriate circumstances, a declaration or an injunction. Broadly speaking, the circumstances when it would be appropriate for a litigant to ask for a declaration or an injunction under cover of an application for judicial review would be when the case involved an issue comparable to those in respect of which an application may be made for a prerogative order—*i.e.*, when an issue of public law is involved. What we are recommending is only a method whereby the different prerogative orders, the declaration and the injunction may be available to the Divisional Court in the public law field. The essential characteristics of these remedies will remain, subject however to certain changes which we think are desirable when they are employed in that field. The scope of the application for judicial review is considered in greater detail in paragraph 45 below.

44. An "application for judicial review" of a somewhat similar kind to that we are recommending was introduced in Ontario by the Judicial Review Procedure Act 1971[74]. One important respect, however, in which we have found it necessary to adopt a different formulation from that adopted in the Ontario legislation is in regard to the circumstances in which declarations and injunctions can be obtained under an application for judicial review, a matter to which we refer in greater detail in the next paragraph. Furthermore, we have found it desirable to deal specifically[75], unlike the Ontario legislation, with the question of the standing necessary to make an application for judicial review.

(*b*) Scope of the application for judicial review

45. In describing in general terms the nature of the application for judicial review which we recommend, it has been possible to speak of its availability "in the public law field". But although in respect of the prerogative orders and declarations declaring subordinate legislation to be *ultra vires*[76] this gives rise to no uncertainty, as they are of their nature public law remedies, the same is not true of other declarations and of injunctions which may have purely private as well as public law application. The Ontario Judicial Review Procedure Act 1971 limits the procedure of review by way of declarations and injunctions to the "exercise, refusal to exercise or proposed or purported exercise of a statutory power". This approach is inappropriate to English administrative law, where it is clear that judicial review is not limited to bodies exercising statutory powers[77].

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74 See also the New Zealand Judicature Amendment Act 1972. A similar procedure is suggested in "A Procedure for Judicial Review of the Actions of Statutory Bodies", which is Working Paper No. 10 of the British Columbia Law Reform Commission.

75 See para. 48 below.

76 See para. 25 and nn. 47 and 48 above.

77 See *R.* v. *Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 Q.B. 864; *R.* v. *Criminal Injuries Compensation Board, ex parte Schofield* [1971] 1 W.L.R. 926. In *R.* v. *Aston University Senate, ex parte Roffy* [1969] 2 Q.B. 538 the Divisional Court would, it seems, although the point was not argued, have been prepared to grant certiorari against a chartered University.

Nor would it be satisfactory to define the circumstances in which a declaration or an injunction may be obtained under cover of an application for judicial review simply by reference to the public character of the person or body against whom the declaration or injunction is sought. A local authority is no doubt a public body, but in respect of many of its activities it is in the same position as a private person[78]. It would not be appropriate for the review procedure of the Divisional Court to be used to obtain a declaration or injunction regarding such activities rather than the ordinary actions which are generally available for declarations and injunctions. We have therefore to find a formula which will sufficiently indicate the circumstances in which a declaration or injunction may be sought under cover of an application for judicial review, by reference both to the public character of the person or body against whom relief is sought and to the nature of the matter in respect of which that relief is sought. To attempt to provide a detailed definition of the circumstances in which an application for judicial review could be made (*i.e.*, not only for any of the prerogative orders but also for a declaration or an injunction) would inevitably involve us in considering the scope of, and not merely the procedure applicable to, remedies for judicial review. This is a task which is clearly outside the terms of reference of this report. In these circumstances we recommend that, as regards a declaration or an injunction to be granted under an application for judicial review, the Court should be directed to have regard to the nature of the matters in respect of which, and the nature of the persons or bodies against whom, relief may be granted by way of the prerogative orders and (in view of the special case of the declaration as to subordinate legislation and the developing scope of the prerogative orders themselves) to the justice and convenience of the case in the light of all its circumstances.

(*c*) **Leave to be necessary to make an application for judicial review**

46. For the reasons stated in paragraphs 37 to 39 above we recommend that it should be necessary to obtain leave from the Divisional Court or in vacation from a single judge to make an application for judicial review.

(*d*) **Power of the Divisional Court to order that an application for judicial review be heard and determined by a single judge**

47. We recommend that once leave has been granted the application for judicial review should be heard by the Divisional Court but, in the light of the considerations mentioned in paragraph 41 above, the Divisional Court should have power to order that the hearing and determination of the application should be by a single judge.

(*e*) **Standing required to bring an application for judicial review**

48. It will have been seen from our discussion of the standing required to apply for a prerogative order, or for a declaration or injunction in the public law field, that this branch of law has been developing to meet new situations[79]. The predominant view expressed in the consultation on our Working Paper No. 40 was that any attempt to define in precise terms the nature of the

[78] See *e.g.*, the *Pride of Derby* case (n. 37 above).
[79] See paras. 13, 22, 27 and 31(*b*).

standing required would run the risk of imposing an undesirable rigidity in this respect. We appreciate this danger, and think that what is needed is a formula which allows for further development of the requirement of standing by the courts having regard to the relief which is sought. Our recommendation is therefore that the standing necessary to make an application for judicial review should be such interest as the Court considers sufficient in the matter to which the application relates.

(*f*) Discovery on an application for judicial review

49. There was a wide measure of agreement in the consultation on Working Paper No. 40 that discovery should be available in prerogative order proceedings[80]. We recommend that on an application for judicial review there should be specific power in the Court to order such discovery as it may consider appropriate in the circumstances. We do not think that discovery should be automatic, as, under Order 24, rule 1 of the Rules of the Supreme Court, it is in an ordinary action. In many applications for judicial review the issues will be sufficiently clear on affidavits and statements filed in support, and it would give rise to unnecessary delay and expense to require automatic discovery in all cases. Similarly, in spite of the generality of Order 26, rule 1(1) and Order 38, rule 2(3)[81], we recommend that there should be specific provision in respect of the application for judicial review enabling the Court in appropriate circumstances to order interrogatories or the attendance for cross-examination of persons making affidavits.

(*g*) Time limits in respect of the application for judicial review

50. We must first make it clear that we are not, except in one respect, recommending any changes as to the time within which application has at present to be made for a prerogative order, a declaration or an injunction, whether the limitation of time is specifically laid down by the Rules of Court[82] or is imposed in the particular case by the Court when exercising the discretion which it enjoys to grant or refuse any of these remedies. It is true that the views expressed on consultation revealed a considerable measure of criticism of the six-months' time limit governing applications for certiorari under Order 53, rule 2(2) of the Rules of the Supreme Court (unless the delay is accounted for to the satisfaction of the Court). We think, however, that any other period (some of those we consulted suggested three, and others six, years) would inevitably be arbitrary as a general rule[83]; a more satisfactory way in our view to meet criticism of the present position would be to give the Court more precise guidance as to the circumstances in which the discretion either as to time in applications for remedies having no fixed limits, or as to the granting of an extension of time beyond a time limit fixed by the Rules of Court, should be exercised. We would wish to emphasize that when an individual makes an application for judicial review what will be in issue will be not only the vindication of his personal right but also the

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80 As to the present position, see para. 15 above.

81 As to the present position regarding interrogatories and attendance for cross-examination of persons making affidavits, see also para. 15 above.

82 Certiorari (six months); mandamus in certain circumstances (two months). See para. 18 and n. 29 above.

83 It will be noted that we are making no recommendations (for reasons explained in para. 7 above) in respect of specific time limits laid down by statute.

assertion of the rule of law in the public sphere. We do not think therefore that delay on the part of an applicant should of itself be the deciding consideration. In the Ontario Act to which we have referred above[84] in an application for judicial review the Court is given power to extend time where "it is satisfied that there are *prima facie* grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay". We think that a helpful formula but one which could be strengthened by emphasizing not only the interests of individuals but also the public interest in good administration. We recommend therefore that on an application for judicial review, except where a time limit for the bringing of proceedings is fixed by statute, relief should not be refused by the Court solely on the ground that there has been delay in making the application, unless the Court considers that the granting of the relief would cause substantial prejudice or hardship to any person or would be detrimental to good administration. Thus, on similar facts to those of *Punton* v. *Ministry of Pensions and National Insurance (No. 2)*[85] under our recommendation the applicant for judicial review could at least attempt to obtain an order of certiorari, even though the six-months' limit for that order had expired, and might be successful if he could satisfy the court that the quashing of the decision refusing benefit would not cause substantial prejudice or hardship to any person or be detrimental to good administration.

(*h*) Interim relief on an application for judicial review, with special reference to the Crown

51. We have pointed out that, where an application is being made for certiorari or prohibition the Court can give interim relief preserving the *status quo* pending a final decision under Order 53, rule 1(5)[86]; and where an injunction is being sought such interim relief can be obtained by means of an interlocutory injunction[87]. However, an injunction cannot be obtained against the Crown[88] although it is possible in such a case to get a declaration[89]. But there is at present no form of interim declaration which in effect preserves the *status quo* pending the final declaration[90]. We think it desirable that there should be a form of relief which would have this interim effect where a declaration is being sought against the Crown. We therefore recommend that section 21 of the Crown Proceedings Act 1947[91] should be amended to provide that, in addition to the power there given to make a declaratory order in proceedings against the Crown, there is also power to declare the terms of an interim injunction which would have been granted between subjects[92]. In spite of the judicial doubts[93] which have been expressed as to

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[84] See the Judicial Review Procedure Act 1971, s. 5 (para. 44 above). The British Columbia Law Reform Commission in their Working Paper No. 10, "A Procedure for Judicial Review of the Actions of Statutory Bodies", p. 55 has suggested a similar provision for the Province in respect of time limits.

[85] [1964] 1 W.L.R. 226 C.A. (see para. 28 above).

[86] See para. 29 above.

[87] See para. 24 above.

[88] See para. 23 above.

[89] See para. 26 above.

[90] See para. 29 above.

[91] *ibid.*

[92] See clause 3(2) of the draft Bill, at Appendix A.

[93] See n. 58 above.

the logical character of a provisional declaration, we see no reason to doubt that the Crown would respect a declaration of the terms of an interim injunction in the same way as it respects a final declaratory order.

52. We think therefore that on an application for judicial review the Court should be able to grant such interim relief as it considers appropriate. Where the relief sought is an order of prohibition or certiorari the position will be the same in respect of those orders as under Order 53, rule 1(5) of the Rules of the Supreme Court. Where the relief sought is an injunction the Court will as at present have power to make an interlocutory injunction. Where the relief sought is a declaration against the Crown the Court will be able to declare the terms of the interlocutory injunction it would have made had the case been one between subjects.

(*i*) Power under an application for judicial review to remit a case to the deciding tribunal or authority

53. We have drawn attention[94] to the duty of the court, in hearing certain cases under a statutory right of appeal on a point of law, not to substitute its own decision but to remit the matter to the deciding authority for rehearing and determination by the authority in the light of the guidance provided by the court. In Working Paper No. 40 we suggested that the Divisional Court should have an analogous power, where judicial review, as distinguished from appeal, is in issue, to remit the case to the deciding authority for further consideration in the light of the opinion of the court. This proposal was widely supported in our consultation on the ground that it would in some cases save time and expense in avoiding the necessity of the challenged proceedings being started again from the beginning. We agree but think that, if the Divisional Court is to have such a power, its exercise should be discretionary. Doubtless in a case where bias of a tribunal or authority had been shown, the appropriate course for the Court would normally be to quash the decision under its powers to grant certiorari and, if it considered it necessary, to order mandamus for a new hearing before a differently constituted tribunal or authority. On the other hand, we can see that there might be some advantage in a procedure by which, in a case, for example, where there were grounds for quashing a decision by an order of certiorari for error of law on the face of the record, it would be possible for the Court as an alternative to remit the case to the tribunal or authority for reconsideration in the light of the Court's decision on the point of law involved; it would then be for the tribunal or authority, in view of its exclusive jurisdiction in regard to the facts, to decide whether a fuller hearing on the facts was necessary in the light of the Court's opinion on the law. Our recommendation is that on an application for judicial review, apart from its power to grant a prerogative order, an injunction or a declaration, the Court, where it is satisfied that there are grounds for quashing a decision, should have a discretionary power in lieu thereof to remit the case to the deciding tribunal or authority for reconsideration in the light of the Court's finding.

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[94] See n. 27 above.

(*j*) Joinder of a claim for damages with an application for judicial review

54. We have already explained why in this report we are not making any recommendations in regard to a new remedy for damages for loss arising from illegal administrative acts or omissions which would not be covered by the existing law of contract or tort[95]. We are here only concerned with the present procedural position which does not permit a claim for damages, under the existing law and arising as a result of illegality on the part of a public authority, to be joined with an application for a prerogative order; this is a limitation which does not apply to the joinder of a claim for damages with an action for a declaration or an injunction[96]. An example would be where an authority has on the strength of a decision which has been quashed committed a trespass and caused damage. Having obtained certiorari in respect of the decision, the applicant has at present to bring a separate action for damages in respect of the trespass. Proceedings on an application for a prerogative order, even with the extended possibilities for discovery which we have recommended, will not necessarily be a satisfactory substitute for the full interlocutory process, and normally oral rather than affidavit evidence is desirable for the proof and assessment of damages. Nevertheless we think there may be cases where the court, having decided in exercise of its review jurisdiction that illegality has occurred, and being satisfied that the claim for damages is one recognised by the law, may find that there is no remaining dispute that the damage resulted from the illegality or as to the fact or extent of damage or as to the quantum of damages. In such a case we recommend that the Court should on an application for judicial review have power to make an award of the damages. Where, however, on an application for judicial review the Court is satisfied as to the illegality and as to the legal basis of the claim to damages, but there remain in dispute any of the matters to which we have referred, we recommend that the Court should have power to give appropriate directions for their separate determination[97].

(*k*) Powers of the Divisional Court, if an application for judicial review is refused, in respect of declarations, injunctions and actions for damages in the private law sphere

55. It may emerge in the course of a hearing on the substantive motion for a prerogative order that the applicant is not entitled to the order, because the person or authority about whose acts or omissions he is complaining is not the kind of public authority against whom a prerogative order will lie, or the activities in question are not the kind of activities in respect of which it will lie. Nevertheless, it may have become plain during the hearing that the applicant has a cause of action for a declaration, an injunction or damages against the respondent which he could have brought by ordinary civil proceedings. At present, as we have explained, the Divisional Court on an application for a prerogative order, has no power to grant a

95 See para. 9 above.
96 See para. 21 above.
97 We envisage that these directions might involve such determination by a judge, a Master or an Official Referee, and that in the course of this determination there would be an opportunity for pleadings, or discovery, if necessary, to be ordered.

declaration or injunction or to deal with a claim for damages. The application for judicial review which we are recommending would cover the granting of a declaration or an injunction only in circumstances in which a remedy by way of judicial review is appropriate—*i.e.*, in the public law field[98]—and would further allow for a claim for damages to be joined with the application; thereupon the Court could, if the application was granted, dispose of the claim or give directions as to the issue of damages[99]. But however clear the case as to the private rights of the applicant, under our recommendations as so far explained the Court could not deal with a cause of action in private law for a declaration, an injunction or for damages, if it had to refuse the public law remedy of the application for judicial review. For example, it might ultimately be decided by the Court on an application for judicial review that a club or similar association was not a body against the decisions of which certiorari would lie, although it might have become clear that the rule of *audi alteram partem*, which is now implied by well established decisions in the private contractual relationship between the members of such bodies[100], had not been observed in disciplinary proceedings against the applicant. We think there may be exceptional cases where it would be generally convenient if, in the event of an application for judicial review being refused, the Court had power to grant a declaration or injunction notwithstanding the essentially private law character of the dispute and to deal with any claim for damages which had been joined with the application for judicial review in the way we have recommended in paragraph 54 above, and we so recommend. We do not think that this power (and that proposed under our recommendation in paragraph 54 above) would prove an embarrassment to the Divisional Court. Any attempt to use the application for judicial review as a device on which to present what was in essence a private law claim could be discouraged at the outset by refusal of leave to make the application.

PART VI—SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. Matters not covered by this report

56. The substantive law and institutional arrangements relating to the judicial control of administrative authorities are outside our terms of reference, and we have not considered them. Nor, for the same reason, have we considered clauses excluding judicial review of administrative acts or omissions, special statutory limitation periods for judicial review or a new remedy in damages for loss arising from illegal administrative acts or omissions (paragraphs 1-9).

2. Defects in the present procedure of judicial review

57. The five methods by which judicial review of the acts or omissions of public authorities may be obtained (i.e. the prerogative orders of certiorari, prohibition and mandamus and actions for a declaration or an injunction) each have their characteristic procedural advantages and disadvantages from

98 See para. 45 above.
99 See para. 54 above.
100 See de Smith, *Judicial Review of Administrative Action*, 3rd ed., 1973, p. 138.

the standpoint of the litigant. There is, however, no single procedure of review available which preserves the advantages of some of these remedies, while eliminating, or at least reducing, the disadvantages of the other remedies ; furthermore, it is not even possible to obtain in a single proceeding a declaration or injunction as an alternative to a prerogative order. Nor is it possible to join with an application for a prerogative order a claim for damages for loss arising from the illegal acts or omissions in respect of which the prerogative order is being sought (paragraph 31).

3. Proposals for reform not adopted in this report

58. We are not in this report recommending—

(*a*) that the new procedure we envisage in respect of applications to the Divisional Court for judicial review should be exclusive in the sense that it would become the only way by which public law issues relating to the legality of the acts or omissions of persons or bodies could be decided ; where such issues arise in ordinary actions or criminal proceedings they would not have to be referred to the Divisional Court but would continue to be dealt with as at present by the Court seized of the case (paragraph 34) ;

(*b*) that the procedure applicable to prerogative order proceedings be assimilated to that of ordinary actions ; nor are we recommending that the new procedure we are recommending for judicial review should be obtainable without leave ; we also take the view that the applications for such leave should not be heard by a single judge (except in vacation) but by the Divisional Court, as at present is the position in regard to applications for prerogative orders (paragraphs 35-40).

4. The recommendations made in this report

59. Our recommendations are set out below with cross references to the clauses which implement them in the draft Bill annexed at Appendix A. To the extent that they are not directly implemented by the draft Bill we would envisage that they would be given effect by Rules of Court.

We recommend that—

(*a*) there should be a form of procedure to be entitled "an application for judicial review" under cover of which an applicant could apply to the Divisional Court for any of the prerogative orders, or in appropriate circumstances a declaration or an injunction (paragraph 43 and clause 1(1)) ;

(*b*) in deciding whether it is appropriate for a declaration or an injunction to be applied for under cover of an application for judicial review, the Divisional Court should have regard to the nature of the matters in respect of which and the nature of the persons or bodies against whom relief may be granted by way of the prerogative orders and to the justice and convenience of the case in the light of all its circumstances (paragraph 45 and clause 2) ;

(*c*) the leave of the Court should be required to make an application for judicial review; such an application for leave should be made to the Divisional Court except in vacation when it should be made to a single judge (paragraphs 37-39 and 46 and clause 1(2));

(*d*) the Court, having given leave to make an application for judicial review, should have power to order that the hearing and determination of the application should be by a single judge (paragraphs 41 and 47);

(*e*) a person making an application for judicial review should have such interest as the Court considers sufficient in the matter to which the application relates (paragraph 48 and clause 1(3));

(*f*) on an application for judicial review the Court should have specific power to order such discovery, interrogatories or attendance for cross-examination of persons making affidavits as it may in the circumstances think necessary (paragraph 49);

(*g*) on an application for judicial review, except where a time limit for the bringing of proceedings is fixed by statute, relief should not be refused by the Court solely on the ground that there has been delay in making the application, unless the Court considers that the granting of the relief would cause substantial prejudice or hardship to any person or would be detrimental to good administration (paragraph 50 and clause 6);

(*h*) subject to recommendation (*i*) below, the Court should be able to make such interim orders as it considers proper pending the final determination of the application (paragraphs 51-52 and clause 3(1));

(*i*) an appropriate amendment should be made to section 21 of the Crown Proceedings Act 1947 providing that in proceedings against the Crown the Court should have power to declare the terms of an interim injunction which would have been granted in proceedings between subjects alone (paragraphs 51-52 and clause 3(2));

(*j*) on an application for judicial review, the Court, where it is satisfied that there are grounds for quashing a decision, should have a discretionary power in lieu thereof to remit the case to the deciding tribunal or authority for reconsideration in the light of the Court's findings (paragraph 53 and clause 5);

(*k*) where the Court, having decided on an application for judicial review that illegality has occurred (in respect of which a claim for damages has been joined with the application), is satisfied that such a claim is in law maintainable, and that there is no dispute that the damage resulted from the illegality or as to the fact or extent of damage or as to the quantum of damages, it should be able to make a formal award of damages; and if there is dispute as to any of these matters, the Court should have power to give appropriate directions for their separate determination (paragraph 54 and clause 4);

(*l*) where the Court declines to make an order on an application for judicial review, it should have power to make a declaration or grant an injunction in respect of the acts or omissions of the person or body against whom the application has been sought, if it is satisfied that the applicant is in law entitled to a declaration or injunction, apart from his claim thereto under the application for judicial review; and where a claim for damages is joined with an application for judicial review which is refused, the Court should have the same powers to deal with the claim for damages as it would have, under recommendation (*k*) above, to deal with a claim for damages joined to a successful application for judicial review (paragraph 55).

(*Signed*) SAMUEL COOKE, *Chairman.*
AUBREY L. DIAMOND.
STEPHEN EDELL.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

22 *December* 1975.

APPENDIX A

Draft Procedure for Judicial Review Bill

DRAFT

OF A

BILL

TO

AMEND the law, and provide for a procedure to be known as an application for judicial review, in relation to orders of mandamus, prohibition and certiorari and certain declarations and injunctions, and for connected purposes.

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:—

Application for judicial review.

1.—(1) Rules of court shall provide for a procedure, to be known as "an application for judicial review", under which application may be made to the High Court for one or more of the following forms of relief, that is to say relief by way of—

(*a*) an order of mandamus, prohibition or certiorari,

(*b*) a declaration or injunction under section 2 of this Act, or

1938 c. 63.

(*c*) an injunction under section 9 of the Administration of Justice (Miscellaneous Provisions) Act 1938 (restraining a person acting in any office in which he is not entitled to act).

(2) Without prejudice to the generality of subsection (1) above, the rules shall provide—

(*a*) for leave to be obtained before any application for judicial review is made,

EXPLANATORY NOTES

Clause 1

This clause gives effect to the recommendation (paragraph 43 of the report) that there should be a new form of procedure to be known as an application for judicial review.

Subsection (1) specifies the forms of relief that may be sought on an application for judicial review. The procedure which at present applies to applications for the prerogative orders (R.S.C. Order 53) also applies to applications for injunctions under section 9 of the Administration of Justice (Miscellaneous Provisions) Act 1938. Applications for relief by way of such injunctions will therefore continue (by virtue of subsection (1)(*c*)) to be subject to the same procedure as applications for relief by way of any of the prerogative orders.

Subsection (2) provides that the rules made under subsection (1) must provide for leave to be obtained before any application for judicial review is made and for the grounds relied on, and relief sought, to be specified in the application. So far as the prerogative orders are concerned, this reproduces the effect of section 10 of the Act of 1938.

(*b*) that where leave is so obtained, the grounds relied on and the relief granted shall only be one or more of those specified in the application, and

(*c*) that the court may grant leave for the application to be amended to specify different, or additional, grounds or relief.

(3) The court shall not grant any relief sought on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

Clause 1 (*continued*)

Subsection (3) requires the applicant to have sufficient interest in the subject-matter of his application. In effect this requirement applies at present to applications for the prerogative orders, where the applicant must have the necessary standing. In extending the requirement to applications for declarations and injunctions, subsection (3) applies only to applications for judicial review and not to applications for declarations and injunctions made in other proceedings.

Declarations and injunctions.

2. A declaration may be made or an injunction granted under this section in any case where an application for judicial review, seeking that relief, has been made and the court considers that, having regard to—

(*a*) the nature of the matters in respect of which relief may be granted by way of orders of mandamus, prohibition or certiorari,

(*b*) the nature of the persons and bodies against whom relief may be granted by way of such orders, and

(*c*) all the circumstances of the case,

it would be just and convenient for the declaration to be made or, as the case may be, injunction granted, under this section.

Clause 2

The prerogative orders are available as relief in what may be broadly called the "public law area". As explained in paragraph 45 of the report this clause gives the court power to make a declaration or grant an injunction in any case which, in effect, falls within the public law area. The court is directed to consider whether, in all the circumstances of the case, it would be just and convenient to grant relief under the clause, and also (by paragraphs (*a*) and (*b*)) to consider the criteria which determine whether a case falls within the area in which the prerogative orders are available.

Interim relief.

3.—(1) On an application for judicial review the court may grant such interim relief as it considers appropriate pending final determination of the application.

1947 c. 44.

(2) In section 21 of the Crown Proceedings Act 1947 (nature of relief in civil proceedings by or against Crown), for paragraph (*a*) of the proviso to subsection (1) there shall be substituted the following paragraph:—

"(*a*) the court shall not grant an injunction, or order specific performance, against the Crown but may in lieu thereof—

(i) in a case where the court is satisfied that it would have granted an interim injunction if the proceedings had been between subjects, declare the terms of the interim injunction that it would have made; or

(ii) make an order declaratory of the rights of the parties;".

Clause 3

Subsection (1) gives effect to the recommendation in paragraph 51 of the report that the court should have power to grant interim relief on any application for judicial review. The present procedure in relation to the prerogative orders (Order 53, rule 1(5)) provides for relief by way of a stay of proceedings.

Subsection (2) deals with the problem that relief by way of an interim injunction cannot be granted against the Crown. The amendment made in section 21 of the Crown Proceedings Act 1947 is intended to supplement the general provision in subsection (1) of this clause which empowers the court to grant such interim relief as it considers appropriate. In a case where relief by way of an application for judicial review is sought against the Crown, the court will be able to make a declaration which is tantamount to an interim injunction, without attracting the sanctions which make the injunction an inappropriate remedy against the Crown.

Damages.

4.—In proceedings on an application for judicial review the court may award damages to the applicant, if—

(*a*) he has, in accordance with rules of court, joined with his application a claim for damages arising from any matter to which the application relates, and

(*b*) the court is satisfied that, if his claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.

EXPLANATORY NOTES

Clause 4

This clause gives the court power to award damages in proceedings on an application for judicial review. Paragraph (*a*) requires a claim for damages to be joined with an application for judicial review in accordance with the procedure to be laid down by rules of court.

Power to remit matters for reconsideration.

5.—On an application for judicial review where—

(*a*) the relief sought is an order of certiorari, and

(*b*) the court is satisfied that there are grounds for quashing the decision in issue,

the court may, instead of quashing the decision, remit the matter to the tribunal or authority concerned, with a direction that they reconsider it and reach a decision in accordance with the finding of the court.

EXPLANATORY NOTES

Clause 5

This clause gives effect to the recommendation in paragraph 53 of the report that the court should have a discretionary power to remit a case for reconsideration by the tribunal or authority concerned. At present the only options open to the court are to quash the decision, or to refuse to quash it. If the court does quash the decision, the tribunal or authority concerned have to hear the whole case again; the advantage in giving the court power to remit the case is that this avoids the necessity for a complete rehearing.

Delay in applying for relief.

6.—(1) Subject to subsection (2) below, no court shall refuse to grant—

(*a*) leave for the making of an application for judicial review, or

(*b*) any relief sought on such an application,

on the ground that there has been delay in making the application, unless it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(2) This section shall not apply in any case where the effect of any provision of an Act of Parliament is that an application for judicial review may not be made after the expiration of a period specified in that provision, and the period has expired.

EXPLANATORY NOTES

Clause 6

This clause gives effect to the recommendation in paragraph 50 of the report that delay should only be a ground for withholding relief on an application for judicial review if to grant the relief would cause substantial hardship or substantially prejudice any person or would be detrimental to good administration.

Subsection (2) provides, in effect, that a time limit for the bringing of proceedings, fixed by Act of Parliament, is not overridden by subsection (1); reasons for this are given in paragraph 7 of the report.

Short title and consequential amendments, etc.

7.—(1) This Act may be cited as the Procedure for Judicial Review Act 1976.

1938 c. 63.

(2) Section 10 of the Administration of Justice (Miscellaneous Provisions) Act 1938 (which provides for the making of rules of court in respect of applications for orders of mandamus, prohibition or certiorari) is hereby repealed.

1959 c. 22.

(3) Section 117 of the County Courts Act 1959 (which provides for the granting of leave to make an application for an order of certiorari or prohibition in certain cases to operate as a stay of the proceedings in question) is hereby repealed.

1964 c. 42.

(4) In section 28 of the Administration of Justice Act 1964 (which provides that the general power to indemnify a justice of the peace or justices' clerk, in respect of costs and damages in proceedings against him, is not to apply in relation to proceedings for an order of prohibition, mandamus or certiorari) for the words "proceedings for an order of prohibition, mandamus or certiorari", in both places, substitute "proceedings on an application for judicial review".

(5) This Act shall come into force on such day as the Lord Chancellor may by order appoint.

(6) This Act does not extend to Scotland or Northern Ireland.

APPENDIX B

Membership of the Consultative Panel on Remedies in Administrative Law

The Right Honourable Lord Justice Bridge
Mr. Peter Boydell, Q.C.
Mr. F. N. Charlton, C.B., C.B.E. (Treasury Solicitor's Office)
Mr. W. R. Cox, C.B. (Home Office)
Master Elton
Mr. G. T. Heckels, D.L.
Mr. Michael Mann, Q.C.
Mr. H. Wentworth Pritchard, C.B.E.
Professor S. A. de Smith (since deceased)
Professor H. W. R. Wade, Q.C.

APPENDIX C

Organisations and persons who submitted comments on Working Paper No. 40

The Right Honourable Lord Gardiner, C.H.

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