An Introduction to Administrative Law

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AC, App Cases	Appeal Cases
All ER	All England Reports
Ch.	Chancery (Law Reports)
CLR	Commonwealth Law Reports (Australia)
CMLR	Common Market Law Reports
ECR	European Court Reports
EG	Estates Gazette
ER	English Reports
ICR	Industrial Court Reports
JPL	Journal of Planning and Environment Law
KB	King's Bench (Law Reports)
LGR	Local Government Reports
LR HL	House of Lords Law Reports
LR QB	Queen's Bench Law Reports
NZLR	New Zealand Law Reports
P + CR	Property and Compensation Reports
PD	Law Reports Probate Divorce and Admiralty Division
QB	Queen's Bench (Law Reports)
QBD	Queen's Bench Division (Law Reports)
TLR	Times Law Reports
WLR	Weekly Law Reports

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Glossary of Terms

Administrative action	The acts of administrative agencies, covering any of their administrative, judicial or (limited) legislative functions.
affidavit	A written statement made on oath.
alter ego	In the administrative law context, the other person (a civil servant) through whom the minister acts.
appellant	One who undertakes an appeal.
Attorney-General	The principal law officer of the Crown.
audi alteram partem	No man shall be condemned unheard.
Common Law	The unwritten law of England, developed by the courts and, in many instances, reported in the law reports as cases decided by the courts.
Conseil d'Etat	The superior French administrative court.
courts of record	Superior and inferior courts possessing the power to punish for contempt.
hearsay evidence	Evidence relating to a matter of fact which was not witnessed by the person giving the evidence.
inferior courts	Courts like the county courts and magistrates' courts whose jurisdiction is limited, geographically and financially.
intra vires	Within (statutory) powers.
Judicial Committee of the Privy Council	A court comprising mainly members of the House of Lords sitting as a judicial body, acting principally as a final appeal court for some Commonwealth countries.
justiciable	Some matter which is subject to adjudication by a person or body, usually possessing legal authority for the purpose.
locus standi	Standing or status in law, giving a right to be heard.
Lord Advocate	The principal law officer of the Crown in Scotland.
Lord Chancellor	The head of the judiciary, Speaker of the

House of Lords and a member of the Government.

nemo judex in causa sua — No man shall be judge in his own cause.

null and void — Of no effect in law, as with an *ultra vires* decision.

plaintiff — A person who seeks some remedy or relief against another in legal proceedings.

prerogative — Powers peculiar to the monarch which exist independently of the law and which are frequently subject to conventional exercise by ministers of the Crown.

prima facie — At first sight: consequently, *prima facie* evidence will appear to be in favour of the person who presents it.

probative — Something that is capable of providing proof.

respondent — A person or body required to answer an appeal.

Solicitor-General — The second law officer of the Crown.

statute law — Written law, legislated by or with the authority of Parliament.

superior courts — Courts whose jurisdiction is not limited: the House of Lords (in its judicial capacity); the Court of Appeal; the High Court (comprising the Queen's Bench, Chancery and Family Divisions); the Crown Court; the Judicial Committee of the Privy Council; the Restrictive Practices Court; and the Employment Appeal Tribunal.

Supreme Court of Judicature — The High Court and the Court of Appeal whose procedures are governed by the Rules of the Supreme Court.

tort — A civil wrong comprising something other than a breach of contract.

ultra vires — Beyond or outside the (statutory) powers.

vicarious liability — Liability for the act of another arising from the (legal) status of their relationship.

voidable — Legally binding until quashed

Introduction

> Government, even in its best state, is but a necessary evil; in its worst state, an intolerable one.
>
> (Thomas Paine, 1737–1809)

Administrative Law provides many of the safeguards which prevent Government becoming an intolerable evil. It is the purpose of this book to provide an introduction to administrative law and its control of Government powers indicating, wherever possible, the nature of those powers, the purpose of governmental functions as well as the scope and effectiveness of legal control. The book is divided into four parts covering the administrative agencies of Government, the nature, characteristics and sources of its powers, the judicial review of administrative action and the remedies for unlawful and irregular administrative action. The book is designed primarily for non-lawyers studying administrative law on degree courses in Public and Social Administration, Politics and Government, BEC B4 Diploma and other courses, professional courses of the Chartered Institute of Secretaries and Administrators and similar bodies, as well as law students on first year Law degree courses in Public Law. To help the reader through the subject, a glossary of terms used in the book precedes this Introduction and a selected bibliography of further reading and a range of self-assessment questions are found at the back of the book. In writing this book I owe a special debt of gratitude to colleagues and students who have helped to shape many of my ideas about administrative law over the years. June Green has shouldered the burden of much of the typing: for her efficiency and reliability I am extremely grateful.

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PART 1 ADMINISTRATIVE LAW AND THE ADMINISTRATIVE AGENCIES

1 The Scope and Purpose of Administrative Law

1.1 Definition of Administrative Law

Administrative law deals with the legal control of Government powers. This means that the main emphasis of the subject is the control exercised by the High Court over the use of statutory powers by administrative agencies.

In supervising the fulfilment of governmental functions by these agencies, the sole concern of the High Court is to ensure that they exercise their functions within the limits of the statutory powers, that is, *intra vires*. This is achieved by applying the rules developed by the common law, described in Chapters 9 to 11 and collectively referred to as the doctrine of *ultra vires*. Where it is found that an administrative agency has acted outside or beyond its statutory powers, any resulting decision or other act will be recognised as *ultra vires*, that is, null and void so that in law it has never existed. Accordingly, the High Court will probably grant one of the remedies described in Chapter 13, for example, an order of *certiorari* to quash the *ultra vires* decision or action. This supervision and control of the exercise of statutory powers by the High Court is referred to as judicial review and is a vital part of the Rule of Law.

1.2 The Rule of Law

There have been a number of attempts to define just what the Rule of Law is, from the considered academic definition to the popular newspaper headline telling us that some powerful group of workers is threatening the Rule of Law with strike action. One of the best-known definitions is that of Professor A.V. Dicey contained in his famous book *The Law of the Constitution*, published in 1885. He considered that the Rule of Law requires the recognition of the predominance of the regular law, as opposed to arbitrary or wide discretionary powers, equality before the law and that the British Constitution is the product of the ordinary law. In essence, therefore, the Rule of Law requires that there should be government according to law.

The first part of Dicey's definition emphasises the central feature of administrative law as a means of limiting the scope of statutory powers through the doctrine of *ultra vires*. Although we have a supreme, sovereign Parliament which is capable of legislating very extensive laws

which may appear to confer arbitrary or very wide discretionary powers on an administrative agency, the High Court, ever mindful of the Rule of Law, will be reluctant to see those powers as being without limit. A vivid example occurs in *Customs and Excise Commissioners v Cure and Deeley Ltd* (1961) where the Commissioners were empowered by the Finance (No.2) Act 1940 to 'make regulations providing for any matter for which provision appears to them to be necessary for the purpose of giving effect to the provisions of this Part of this Act'. As will be seen in Chapter 11 where this case is dealt with in more detail, Sachs J. rejected the view that these words 'necessarily make [the] authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have'. Although this case represents an important step in the development of the doctrine of *ultra vires* as a means of controlling the statutory powers of administrative agencies, Parliament continues to legislate a number of very wide discretionary powers. Such is the width of some of these powers that their control may be increasingly difficult for the court. This was certainly the case in *Norwich City Council v Secretary of State for the Environment* (1982) where the Court of Appeal was concerned with the powers conferred on the Secretary of State by section 23 of the Housing Act 1980. This section empowers the Secretary of State to intervene and take over the functions of a local authority in relation to the sale of council houses where it appears to [him] that tenants . . . have or may have difficulty in exercising the right to buy effectively and expeditiously'. It was decided by the Court that the determining factor in deciding whether to exercise these powers was the view of the Secretary of State himself whether council tenants had or might have difficulty in exercising the right to buy effectively and expeditiously, for whatever reason. The Court contrasted the words of section 68 of the Education Act 1944 whereby the Secretary of State for Education is empowered to serve a direction against a local education authority if he is satisfied that the authority 'have acted or are proposing to act *unreasonably* with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act'. The contrast is based on the fact that the powers in section 23 of the Housing Act are wider than those in section 68 of the Education Act because they do not involve any objective standard of 'reasonableness' to be determined by the court. As Kerr L.J. observes: '. . . the determinative factor is the view of the Secretary of State'. He also observes that the powers in section 23 are 'draconian' and that, 'short of seeking to exclude altogether any power of review by the courts, the wording of section 23 has clearly been framed by Parliament in such a way as to maximise the power of the Secretary of State and to minimise any power of review by the court', a position which can be explained by the likelihood of political controversy between central government and some local authorities showing reluctance to implement the council tenant's right to buy under the Housing Act 1980.

The second part of Dicey's definition of the Rule of Law concerns the necessity for equality before the law. Compared with the first part of the definition, there would appear to be fewer anxieties in this context. There are certain groups in society such as trade unionists who require limited immunity from legal liability in order to undertake strike and other industrial action. It will be seen in Chapters 2 and 14 that the Crown as an entity in administration also has a limited immunity in law, but, generally, all administrative action is controlled and supervised by the ordinary courts. The UK courts are independent of the executive government and it is vitally important that administrative agencies should not be judges in their own cause. In some countries, notably France, there is a special system of administrative courts whose sole concern is with administrative law. Dicey criticised this system which, in France, comprises local administrative courts headed by a central *Conseil d'Etat*, on the ground that it imported special rules of law and legal immunities for the administrative agencies of Government. In reality and although the judges involved in this system are Government employees, it is a truly impartial and objective aspect of the French judiciary. Although the main focus of English administrative law is the power of the High Court to review the legality of action taken by administrative agencies, it will be seen in Chapter 5 that various administrative tribunals and inferior courts, that is courts such as the county courts which are beneath the 'superior' courts — the Supreme Court of Judicature (comprising the High Court and Court of Appeal) and the House of Lords — have a part to play in the adjudication of administrative disputes. In particular, it will be seen that the tribunals are essentially independent of the Government departments which create them and that more generally, both tribunals and inferior courts are subject to the supervision of the High Court along with other administrative agencies.

The third part of Dicey's formulation of the Rule of Law is that the Constitution is but part of the ordinary law. Whereas most countries have a written constitution which expressly guarantees fundamental rights such as freedom from arbitrary arrest, any constitutional rights in the UK are products of the ordinary law. As a consequence it may appear more difficult to define the scope of police powers of arrest, for example, although our unwritten constitution does mean that the law can be changed quite easily without the requirement of something like a two-thirds majority which might be required for a legislature to change some part of a written constitution. Overall, this third part of Dicey's formulation emphasises the importance of the courts' role in protecting individual liberty through their ability to interpret and apply the ordinary law. In other words, where the law is not being changed by Parliament, the courts are the final arbiters of individual rights. In this context such rights are usually referred to as civil rights and are very much the concern of constitutional law whereas administrative law is concerned with the legal control of government's statutory powers

conferred on various administrative agencies. There are overlaps between these two areas of law, for example, in the area of the Crown's status in law, bearing in mind the Crown's position and importance in the constitutional structure of the country and the fact that various statutory powers are exercised by individuals and organisations acting as servants or agents of the Crown.

1.3 The Constitutional Background to Administrative Law

Although the British constitution is unwritten and not therefore embodied in any one document, it is usually possible to define some aspect of the British constitutional framework from the existing law, difficult though that may be. In the previous section on the Rule of Law reference was made to police powers of arrest. Where it is necessary to ascertain the scope of police powers to enter and question a person on his own property such an issue has probably arisen from that person's refusal to be questioned in such circumstances. If as a result he is arrested for the obstruction of a police officer in the execution of his duty, contrary to section 51 of the Police Act 1964, his conviction will depend on whether there was an obstruction and whether the officer was acting in the execution of his duty. Because these terms are not defined by the Act, their definition has been left to the courts that is, they are terms of art developed through the common law. Consequently, this area of the constitution regulating powers of the police can be defined only by reference to statute and common law, that is, a combination of Act of Parliament and case law. Accordingly, it is likely that a court would conclude that there could be no conviction for obstruction under section 51 where the police officer is told to leave the person's property because, as a trespasser, he would not have been acting in the execution of his duty.

There can be no doubt that the Rule of Law requiring government according to law is fundamental to the constitutional background of administrative law. There are, however, other facets of the constitutional structure which must be examined in order to appreciate the true significance of the law's control of Government powers. These other facets include the sovereignty and supremacy of Parliament, the separation of powers, conventions and prerogative powers.

1.3.1 *The sovereignty and supremacy of Parliament.* In many countries it is the written constitution which is supreme. Consequently, where certain fundamental rights are guaranteed by such a constitution, Parliament cannot legislate in order to take away or modify those rights. This, therefore, indicates that Parliament is not the sovereign, supreme law-maker. The Fifth Amendment of the United States Constitution, for example, prohibits the taking of property without just compensation. Accordingly, any legislation attempting to authorise the compulsory acquisition of a person's land with little or no compensation

entitlement would be struck down by a court in the United States as being *ultra vires* the constitution, indicating that the court is the guardian of such fundamental constitutional provisions. In the United Kingdom with its unwritten constitution it is Parliament which is sovereign and supreme. In other words, Parliament is the ultimate and, in theory, unlimited law-maker.

Because Parliament, that is, the Queen, House of Commons and House of Lords, has a theoretically unlimited power to make law by statute, it could legislate on any matter, but in practice there are all sorts of constraints, such as political opinion. As a result it is usually accepted that Parliament will not enact retrospective legislation in order, for example, to penalise action which has taken place previously in the absence of any legal sanctions. Nevertheless, there are occasional exceptions, as in the case of the War Damage Act 1965. This Act was passed as a result of the decision in *Burmah Oil Co. v Lord Advocate* (1964) where it was decided that compensation was payable by the Government to the company where it had, during wartime, destroyed one of its oil refineries to prevent it falling into the hands of the advancing Japanese army. In order to prevent similar claims for compensation for such events which had occurred previously the Act of 1965 was framed to act retrospectively. One area of law-making by Parliament which has had profound constitutional implications relates to the United Kingdom's accession to membership of the European Economic Community (EEC). As a result of the European Communities Act 1972 the United Kingdom became part of an economic union of Member States of the EEC through acceptance of the Treaty of Rome, which contains the fundamental laws and constitution of the EEC. Accordingly, where EEC law governs a situation then Parliament has disabled itself through the Act of 1972 from legislating in that area. By way of an example, Article 48 of the Treaty stipulates that there shall be no discrimination against the workers of Member States from moving freely between those states. Any attempt by Parliament to legislate, for example to protect the jobs of UK workers, would be contrary to Article 48 where the legislation permitted discrimination against workers from other Member States. More generally, it appears that Parliament gave away some of its sovereignty and supremacy in legislating the European Communities Act. In theory Parliament could repeal the Act to regain its sovereignty and supremacy in full although it is argued that the financial and economic implications for the country would make this very difficult.

Where Parliament has enacted statute law its legality cannot be challenged in the High Court as is the case in a country like the United States of America where laws cannot be made which contravene fundamental provisions of the written constitution. In the leading case of *Pickin v British Railways Board* (1974) Lord Reid said that 'the function of the court is to construe and apply the enactments of Parliament. The

court has no concern with the manner in which Parliament or its officers . . . perform these functions'. There are two qualifications to this fundamental rule. First, and as seen previously in the reference to the EEC, any attempt by Parliament to legislate contrary to the terms of EEC law might be challenged directly or indirectly in the High Court or the European Court of Justice. In the case of any clash then clearly EEC law would have to prevail. However, where such a challenge is made in the High Court it could be argued that, because the judges have to interpret and apply the latest law, any statute which is inconsistent with the requirements of the European Communities Act should prevail. In other words, and particularly where Parliament has legislated in full knowledge of the European Communities Act and its full effect, any later Act which is inconsistent with EEC law would have to be applied by the High Court. The second qualification depends on the important distinction between primary and delegated or secondary legislation which is dealt with in Chapter 8. Where a statute confers a power to make rules, regulations, byelaws and so on, the minister, local authority or other agency exercising such a power to make delegated legislation must remain within the terms of the primary legislation. Failure to do so means that the delegated legislation is *ultra vires* the primary, enabling legislation. In practice these problems tend to arise where a person has been prosecuted for failure to comply with the delegated legislation in which case his argument will be that he cannot be convicted for breach of, for example, statutory regulations which themselves are *ultra vires*.

It has been seen that the High Court cannot question the validity in law of primary legislation so that the Act of Parliament must be interpreted and applied as it appears in the statute book. Although it is not the task of this book to cover the refinements of statutory interpretation, it should be emphasised that such interpretation can sometimes lead to a frustration of Parliament's original intention. There is no better example of this than in the House of Lords decision in *Anisminic v Foreign Compensation Commission* (1969). The Foreign Compensation Act 1950 stated that decisions of the Commission (an administrative tribunal) should 'not be called in question in any court of law'. Despite this apparently clear statement of Parliament's legislative intentions, it was decided that the Court could question the legality of a Commission decision if in law it was no decision at all, that is, if it was an *ultra vires* decision.

1.3.2 *The separation of powers.* In very general terms it is possible to say that any constitutional structure involves the deployment of legislative, executive and judicial powers. Consequently there are facilities for law-making, the implementation and enforcement of the laws so made, and for the adjudication of disputes arising from one or both of these processes, according to the constitutional context. In some constitutions there is a clear recognition of the need for a separation of these

three powers. In the United States, for example, the Federal Constitution gives Congress the legislative powers, the President executive powers and the Supreme Court the judicial powers. In the United Kingdom the separation of powers is recognised through the guaranteed independence of the judiciary, bearing in mind that the executive government effectively controls the legislative functions of Parliament, as long as it can maintain an effective parliamentary majority. Where all three powers become vested in the executive government there is clearly cause for anxiety, and many distinguished writers have pointed to the loss of democratic freedom which is likely to flow from such an arrangement. A particularly graphic example comes from a case in Ceylon (as it then was), *Liyanage v R.* (1967), where a potentially dangerous situation was saved by a judicial insistence that the separation of powers was a feature of the constitution of that country. In that case the Court heard that, following a *coup d'état*, the Government introduced retrospective legislation defining a new offence and prescribing a sentence covering the conduct of the captured ringleaders.

In practice, the separation of powers is a useful doctrine in order to measure any undue shift of power toward the executive. Although it is very difficult to define what is meant by the three powers, it is important to recognise the scope and extent of a Government's executive or administrative powers, and its judicial powers. A Committee on Ministers' Powers, which reported in 1932 and which was concerned also with the growth in the use of delegated legislation, considered that an administrative decision is a matter for the minister's discretion, possibly under the influence of policy, while a true judicial decision involves a dispute between two or more parties where there is an objective application of the law to the facts as found. It was recognised that within Government certain decisions arise from the adjudication of disputes, but in a policy atmosphere. In this case the function would be labelled a 'quasi-judicial' function, for example, where a landowner's rights are in issue following his objection to a compulsory purchase order made in respect of his land. It is in these circumstances that the law has to be vigilant in order to ensure adequate safeguards for those whose rights are affected by such quasi-judicial decisions of the executive government, particularly in areas where decisions are preceded by statutory inquiries, the subject of Chapter 3. A great deal of administrative adjudication is undertaken by administrative tribunals where, again, it is a matter of importance that their judicial decisions should be seen to be safeguarded from Government interference and influence. Consequently the law demands that tribunals and their functions should be effectively separate from the Government departments under which they are constituted and whose decisions they often deal with on appeal. Administrative tribunals are the subject of Chapter 5.

Where statute confers a decision-making function on a Minister of the

Crown within a particular Government department it is through an independent judiciary that this function is supervised to ensure that the decision is made within the relevant statutory powers. Accordingly, the High Court embodies the fundamental constitutional requirement of adherence to the the Rule of Law and recognition of a limited separation of powers in the existence of an independent judiciary.

The minister, therefore is subject to the law in the exercise of his statutory powers. However, the minister is responsible to Parliament for the way in which he exercises these functions, for example in matters of departmental policy. Because the minister is the political head of his department he is ultimately responsible for the actions of civil servants within that department. This means that while the civil servant remains anonymous, the minister is publicly accountable for his actions although this has not often led to his resignation. In essence, therefore, ministerial responsibility provides some opportunity for parliamentary criticism of a Government department's operation even though a very small proportion of the work carried out is actually referred to the minister. Just as the minister is politically accountable for the actions of his civil servants, so, too, he is legally responsible. In both cases the law considers that the civil servant is the minister's *alter ego*.

1.3.3 *Conventions*. Conventions are essentially rules of political practice which arise, and may disappear, as a matter of expediency. Bearing in mind the previous reference to the supremacy of EEC law over the municipal law of the individual Member States, it is probably the case that in the United Kingdom Parliament there is now a convention that there will be no legislation which is contrary to EEC law. There are many other conventions, for example, that the Queen invites the leader of the majority party in the House of Commons to form a government. Generally, however, conventions are of marginal interest only to administrative lawyers, primarily because they are not likely to say very much about the scope of statutory powers and their control by the law.

1.3.4 *Prerogative powers*. Historically, the monarch was able to exercise a great many absolute powers but with the development of democratic, constitutional government it is often the case that these powers are conventionally exercised by ministers of the Crown. There are very few prerogative powers which impinge on and affect individuals and it is for this reason that prerogative powers are employed by the Government, through the Crown, in order to conclude treaties with foreign Governments, to declare war and to make contracts. It is sometimes said that the prerogative is part of the common law because prerogative powers are recognised, but not enforced, by the courts, and that it is the sum total of powers which are peculiar to the Crown because they are powers not possessed by any individual.

As to the first point, that the prerogative is part of the common law, it should be noted that statutory powers which govern the functions and activities of most administrative agencies are both recognised and enforced by the courts. Therefore, the courts will be able to decide where prerogative powers stop and statutory powers begin. This means that if it is alleged that the Crown has acted unlawfully in its dealings with an individual, for example, in relation to the grant or withdrawal of a passport, the court has no power to intervene to protect him as long as the action is recognised as an exercise of prerogative powers. Although the grant and withdrawal of passports is generally regarded as being subject to the prerogative, there is some doubt as to whether these and some other powers are legal powers. Nevertheless, they are recognised by the courts which have considerable influence here in marking the boundary with statutory powers which, in many cases, have superseded prerogative powers. In *Attorney General v De Keyser's Royal Hotel Ltd* (1920), for example, it was argued unsuccessfully by the Crown that compensation for the requisition of an hotel was entirely a matter for its discretion since it was acting under prerogative powers in wartime. It was decided by the Court that the requisition and compensation were now governed by statutory provisions which had superseded the prerogative regulation of such matters.

The second point referred to above is that the prerogative is the sum total of powers which are peculiar to the Crown. If it is accepted that the Crown's power to make contracts is part of its prerogative powers, this picture of the prerogative is inaccurate, bearing in mind that most individuals have the capacity to make contracts. Nevertheless, in the case of those prerogative powers which remain unaffected by statutory provisions, most of the prerogative is concerned with matters which do not interfere with individuals' rights and interests, that is, matters where the executive should have relative freedom of action. In practice, that freedom of action may be severely circumscribed by the need for political and financial support for various schemes to be pursued through the use of prerogative powers. In theory, there is no necessity for parliamentary sanction for an exercise of prerogative powers: in practice, however, political and financial support will often be crucial.

While the prerogative can be described as the sum total of powers which are peculiar to the Crown, there may be occasions when the courts find that these powers are closely linked with and sometimes depend on statutory powers and provisions.

In this situation it is hard to resist the conclusion that prerogative powers are being subjected to legal enforcement by the courts. A graphic example occurs in the case of *Laker Airways Ltd. v Department of Trade* (1977) where the company was granted a licence by the Civil Aviation Authority to operate the Skytrain Service from London to New York. Before the new air service could begin it was necessary for the company to be 'designated' by the Government for the purpose of a

treaty with the United States called the Bermuda Agreement. This treaty designation was subsequently withdrawn by the Government and the Civil Aviation Authority was required to withdraw the licence. It was decided by the Court of Appeal that the Department of Trade was acting *ultra vires* in requiring the withdrawal of a licence by the Authority: the Civil Aviation Act 1971 permitted that only in a limited number of situations, such as a wartime emergency. It was also decided that the Government could not withdraw its designation of Laker Airways since the company had already obtained its statutory licence. In other words, the statutory powers relating to air route licensing act as a legal restriction on the exercise of the Government's prerogative powers.

1.4 Administrative Law in Perspective

It has been seen that the essential task of administrative law is to provide a legal control in relation to the exercise of statutory powers conferred on various administrative agencies for all sorts of different purposes. Consequently, an independent judiciary in the shape of the High Court has a supervisory role by which it reviews administrative action to ensure that it is not *ultra vires* particular statutory powers. This is the essential character of the subject, but it does not convey the complete picture since administrative law and its rules involve not only a rather negative form of control over the exercise of statutory powers but also a rather more positive aspect. Through its task of interpreting the scope of statutory powers the High Court should be concerned to identify, not only the express limits of the powers, but also any realistic implied powers which may not be spelt out quite so clearly. In this way it is possible to avoid a situation where a statutory scheme in an Act of Parliament becomes unworkable. In addition, there will be occasions where the interpretation of the statutory powers will expedite administration or where a mere technical non-compliance with the statutory requirements will not lead to the action being condemned as *ultra vires*.

As the rules of administrative law have been developed by the Judiciary so they have influenced the course of administration. In Chapter 11 reference is made to the decision of the Court of Appeal in *Coleen Properties Ltd v Minister of Housing and Local Government* (1971) where the minister's confirmation of a compulsory purchase order was quashed as being *ultra vires* because he had no evidence from the local authority making the order that it was reasonably necessary to acquire some of the land covered by the order. In this instance the local authority had not, for some reason, produced evidence for this purpose at the public local inquiry into the order. There can be little doubt that the lessons to be learned from this case were not lost on local authorities. Of course, it is not every administrative proposal or decision which gets as far as the High Court: such litigation is very much the exception although the principles and rules which emerge from it are

often extended or modified to fit the requirements of administration at the grass roots. On many occasions the body or person entrusted with administrative decision-making will have no clear guidance on the law to be applied in a particular case. On other occasions where a minister of the Crown is part of the decision-making hierarchy, for example, he will perhaps develop a body of rules and principles from his own appeal decisions. These rules and principles gain the status of 'quasi-law' unless they are overturned in subsequent litigation. In time it is likely that these rules and principles will shape attitudes to policy or provide a framework for decisions by other bodies in the same decision-making hierarchy, in which case the minister may publish these items, for example, in circulars issued to local authorities.

The rules of administrative law governing judicial review and the remedies for unlawful administrative action which are dealt with in Parts 3 and 4 relate to the exercise of statutory powers governing all types of administrative function. It is clearly impossible to know all there is to know about these functions, not only because of the mass of primary and secondary legislation underpinning these functions but also because of the often formidable amounts of non-statutory details, such as policies, which provide their life-blood. Consequently, any study of administrative law has to be restricted to an examination of the broad rules arising from the doctrine of *ultra vires*, with a general appreciation of the consequences in law of their application to the different statutory powers which govern these many functions.

A study of administrative law cannot be restricted to an examination of judicial review and the doctrine of *ultra vires*, crucially important though they are, for the reasons outlined previously. At various points in this introduction to the subject it will be seen that there are facilities beyond the courts by which administrative action may be challenged, not because it is *ultra vires* any statutory powers, but because it is in some way 'irregular' action. For this reason, some space is devoted to the work of the various 'Ombudsmen' whose concern is with maladministration, and some other institutions whose task is to monitor and deal with the complaints of the individual arising from his dealings with bureaucracy. In this way a complete picture can be conveyed of the way in which administration is accountable either (and perhaps most importantly) to the law or to other institutions whose task may be seen in terms of strengthening the traditional methods of dealing with grievances arising from Government and administration, through Parliament.

Accountability to the law is not necessarily a comprehensive protection for the individual in his dealings with Government and administration. Judicial review in the High Court is concerned only with whether administrative action is within or outside the administrative agency's statutory powers. If it is the latter the court may well quash the resulting decision or other action as *ultra vires*.

Beyond this the law does not provide many other constructive remedies for the individua. affected by unlawful administrative action. Although the private law of negligence may provide damages for the person suffering loss as a result of, for example, negligent advice from a Government official, there is no public law remedy providing damages for the person adversely affected by *ultra vires* action. This is clearly a serious gap in the law and one which is only partially filled by the provision of 'non-legal' remedies like the Ombudsmen whose powers do not extend to the making of legally enforceable awards of compensation against the agencies that they are required to investigate.

2 The Crown and Central Government

2.1 The Conduct of Government

On those occasions when the Government of the country is being discussed it is not unusual to hear references to 'the Crown'. The impression, therefore, is that it is the Crown which undertakes a great deal of the government of the country, but it may not always be clear what is meant by this expression and what are its legal and practical consequences.

In theory the Crown, epitomised by the monarch, exercises her various statutory and prerogative powers personally. In practice, the constitutional convention is that she exercises these powers on the advice of and through her ministers. In turn, those ministers are responsible to Parliament for the exercise of the statutory powers although the normal practice is for Parliament to confer statutory powers on the individual minister who is specifically identified in the legislation. In section 68 of the Education Act 1944, for example, it is provided that

> If the Secretary of State [for Education] is satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient.

The consequence of this normal practice is that the minister is again responsible to Parliament in law to ensure that he acts within his statutory powers and not *ultra vires*. Although the minister is acting as 'a minister of the Crown' here, the statutory powers are conferred on him in his capacity as a named minister whereas he acts as a 'servant or agent of the Crown' in his conventional exercise of any powers actually conferred on the Crown. Although in this latter respect the Crown is equally obliged to ensure that its exercise of statutory powers is not *ultra vires*, it is the case that the Crown, including any servant or agent of the Crown, is not subject to some of the remedies normally granted in the High Court to deal with *ultra vires* administrative action. It will be seen in Chapter 14 that it is the Crown Proceedings Act 1947 which excludes such remedies against the Crown. Consequently, the statutory powers

of a minister when he is not acting as a servant or agent of the Crown would appear to be more amenable to judicial review by the High Court.

The normal practice whereby statutory powers are conferred on an individual minister is a clear reflection of the administrative convenience of having responsibility for a particular function placed with the political head of the relevant Government department. Such an arrangement may be explained also as a matter of political policy, or as a combination of administrative convenience and political policy. The Education Act 1944 states, in section 1, that it is the duty of the Secretary of State for Education: '. . . to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive education service in every area'. This duty is matched by the duty of each local education authority under section 8 to secure that there should be available for their area sufficient schools for providing full-time education suitable for the requirements of the pupils. This pattern of statutory provision is clearly explained by the original political choice of strategy for education whereby central government policies are implemented locally and subject to some central control through the powers in section 68, referred to previously. By way of contrast, some functions may involve more than one Government department. In this case there might well be practical difficulties in conferring a function on one named minister, in which case Parliament would undoubtedly confer the powers on the Crown. One common example occurs in relation to the making of delegated legislation by virtue of various statutory powers. Such a power may be exercised by 'Her Majesty by Order in Council' where formal assent to an Order, an item of delegated legislation referred to in Chapter 8, is given at a meeting of the Privy Council. Again, any minister or ministers exercising such powers in the name of Her Majesty would be acting as servants or agents of the Crown, thereby attracting some legal immunity from certain of the remedies normally available in respect of *ultra vires* administrative action.

A minister of the Crown may be at the head of a government department which may or may not be an 'incorporated' department. If the statutory provisions establishing a Government department indicate that it is incorporated, it can undertake its numerous transactions in its own name. Incorporation is therefore of some practical importance to the Department of the Environment, for example, in view of its need to hold and dispose of a great deal of property. While this department is incorporated, the Civil Service Department is not, and this may be a reflection of the fact that such a status is not so crucial to such a department. Where the department is incorporated the various functions and powers of that department will be exercised, usually in the

name of the designated minister at the political head of that department.

2.2 Legal Immunities of the Crown

It has been seen earlier in this chapter that certain coercive remedies are not available against the Crown, or a servant or agent of the Crown, by virtue of the Crown Proceedings Act 1947. Another immunity under the same Act stipulates that any rights or interests of the Crown shall not be prejudiced by statute unless the statute refers to the Crown expressly or by necessary implication. It is the case that this immunity usually means that the Crown is not liable to pay rates and various types of taxes. Beyond these categories it is difficult to generalise about the scope of the Crown's statutory immunities. One important area of such immunity relates to air pollution control legislation such as the Clean Air Acts. This was the issue in *Nottingham No.1 Area Hospital Management Committee v Owen* (1957) where it was the Committee's statutory obligation to carry out their duties on behalf of the Minister of Health. He in turn was required to hold all National Health Service hospitals on trust for 'the Crown'. In these circumstances the Court decided that a hospital was Crown property and so exempt from the penal provisions of a statute — the Public Health Act 1936 — which sought to control smoke nuisances. It was in this and similar contexts that the Fifth Report of the Royal Commission on Environmental Pollution (1976) commented that: 'Hospitals seem to take most advantage of Crown privilege . . . Nevertheless it is most important that hospitals should do their best to control smoke, particularly when they are in residential areas where smoke control is proposed or operative.'

Whether the Crown is to be covered by and subject to any liabilities under a statute may be a matter of some considerable importance. Unless there is some vigilance on the part of those involved in the legislative process, there is always a danger that an important new statute with perhaps far-reaching implications will contain no reference to the Crown. The only certainty in this area is where the Crown is expressly mentioned somewhere in the statutory provisions. The only other possibility whereby the Crown would be bound occurs where it is possible to conclude that the Crown is bound by the statutory provisions 'by necessary implication'. In a case from India decided by the Judicial Committee of the Privy Council, *Province of Bombay v Municipal Corporation of Bombay* (1947), it was concluded that in the absence of any express words the Crown is bound only where its exclusion would completely frustrate the working of the legislation. The case involved certain statutory powers allowing the laying of pipes and mains in land within the city, a statutory scheme which did not require the Crown to be bound by necessary implication in order to achieve such objects.

2.3 Crown Servants and Agents

Bearing in mind that some statutory functions are performed not by a minister in his own name (albeit as a minister of the Crown) but by or in the name of the Crown, it is a matter of some importance to decide which individuals or organisations come under its umbrella as 'servants or agents of the Crown'. This status is of considerable significance for the reasons already given.

Whether any individual or body can be regarded in law as being a Crown servant or agent may be a matter of statutory interpretation. One of the leading cases is *Tamlin v Hannaford* (1949). The issue for the Court was whether the British Transport Commission could be regarded as a servant or agent of the Crown. The Commission was landlord of a house whose tenant was Tamlin. In turn, Hannaford was Tamlin's sub-tenant. Tamlin wanted possession of the house from Hannaford. It was claimed by Hannaford that he was protected in proceedings for possession in a county court by the Rent Restriction Acts which were not expressly binding on the Crown. This claim was rejected by the county court which decided that the house was held by the Commission as an agent of the Crown. On appeal in the Court of Appeal it was decided that Hannaford was protected by the Rent Restriction Acts which did apply to the Commission since it was not a body connected with the Crown and its legal immunities in this context. Giving the Court of Appeal's judgment, Denning L.J. also observed that:. . . .

> the Commission's servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject . . . It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a Government department nor do its powers fall within the province of Government.

On those rare occasions when there is no clear indication in the statute whether a body is a Crown servant or agent, the above words from the judgment in *Tamlin* will provide some indication that where the function is within the general category of industrial and commercial functions it is unlikely that the body will enjoy any Crown status. Accordingly, in *Mersey Docks and Harbour Board v Gibbs* (1866) the trustees of the Liverpool Docks were held to be liable to a shipowner in respect of their negligence which caused damage to a ship through stranding on mud. Although the trustees attempted to hide behind the legal immunities then available to the Crown, the House of Lords considered that this would not be possible, broadly because the trustees were concerned with commercial functions, not governmental functions referable to the Crown. By contrast, in *Pfizer v Ministry of Health* (1965) the House of Lords decided that the treatment of National Health Service patients was a governmental function so that the use of drugs was 'for the services of the Crown', bearing in mind that the

Hospital Board in question was found to be acting on behalf of the Minister of Health. Broadcasting, on the other hand, was not considered a governmental function in *British Broadcasting Corporation v Johns* (1965) so that the Corporation could not claim Crown immunity from taxation. However, where premises are let as business premises for use by various central governmental agencies, the likelihood is that they are let to the Crown as tenant, whose business is government. It was in these circumstances that the House of Lords decided in *Town Investments Ltd v Secretary of State for the Environment* (1977) that the Secretary of State for the Environment was not the tenant, but the Crown was. Consequently, when the company contracted with the Secretary of State to let the premises they were, in fact, contracting with the Crown, which is synonymous with the Government.

It was seen previously that it is rare for there to be any doubt about Crown status. Normally, a body will be a Crown servant or agent, or not. Nevertheless, there may be some hybrid bodies. One of the better-known examples of the exclusion of Crown status affects the Post Office. The Post Office Act 1969 states that the Post Office 'is not to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown'. By contrast, the Health and Safety at Work Act 1974, referring to the Health and Safety Commission and its Executive, states that: 'The functions of the Commission and of the Executive and of their officers and servants shall be performed on behalf of the Crown'. Finally, an example of a hybrid body, the Atomic Energy Authority, which shares the Crown's immunity from the payment of rates but is not otherwise associated with the Crown. For these purposes the Atomic Energy Authority Act 1954 states that: 'Any land occupied by the Authority shall be deemed for the purposes of any rate on property to be property occupied by or on behalf of the Crown for public purposes.' The same section of the Act goes on to declare that: '. . . save as otherwise expressly provided in this Act, the Authority are not to be treated for the purposes of the enactments and rules of law relating to the privileges of the Crown as a body exercising functions on behalf of the Crown'.

2.4 Central Government Functions

In general terms it is possible to distinguish between those administrative agencies responsible for the initiation of governmental or other administrative action and those which are adjudicative agencies in that they are responsible for the adjudication or resolution of disputes arising from administrative action. Central government departments, local authorities and some public corporations are prime examples of those agencies which initiate governmental or other administrative action. Administrative tribunals and inferior courts are those bodies most obviously responsible for the adjudication of administrative disputes. However, there is no rigid division between these categories

since some central government departments in particular act as adjudicative agencies. Where this is the case and a central government department is given the responsibility for an adjudication, this is almost always an indication that there is a significant policy element in the decision-making process. An important example occurs in the Town and County Planning Act 1971 which empowers local authorities and the Secretary of State for the Environment to control most uses of land by the statutory requirement that if a person wishes to carry out 'development' on land, he is normally required to apply to the local planning authority for planning permission to enable (say) the building of houses or some material change in the use of the land such as the storage of motor vehicles on land hitherto used for agricultural purposes. Each local planning authority is obliged to make a policy which provides an element of guidance for some of the more important decisions that have to be made on applications for planning permission. Some of these policies must be approved by the Secretary of State who is able to impose his own policy preferences for which he is in turn responsible to Parliament. While the Secretary of State can take the initiative in requiring a planning policy to be made, he remains responsible for the adjudication of planning disputes where, in particular the local planning authority refuses to grant planning permission from which decision he has to decide any appeal undertaken by the disappointed applicant.

From the foregoing it has been seen that it is the policy element which usually characterises the various administrative functions which are conferred on central government departments. It is this policy element which often explains the nature of the powers conferred by statute on Government departments. Whether a Government department is required to initiate administrative action, to control other administrative agencies in their performance of various statutory functions or to act as an adjudicative agency from a decision of another administrative agency, such functions are usually defined in terms of a discretion, as illustrated in the earlier reference to section 68 of the Education Act 1944. The essence of any such discretion is that the administrative agency has the opportunity to make a choice of action to take as long as that choice is made within the limits of the statutory powers concerned. Therefore, the Secretary of State for Education could not use his section 68 powers for a purpose unconnected with education. The opportunity to choose a course of administrative action is clearly important where the administrative agency is charged with the function of initiating such action. Equally, it is a matter of importance that there should be some guidance in the exercise of the discretion. Consequently, if the performance of some statutory function depends on the availability of finance, a policy would enable the definition of priorities where such finance is scarce.

Although it is the policy element which usually determines whether a

function goes to a central government department or is subject to some control from the same direction, there are other variables which go to make up the picture. There may be a measure of political sensitivity associated with some administrative decisions, for example, in which case such decisions will probably remain with a Government department rather than being conferred on an administrative tribunal or some other adjudicative body. A good illustration arises from the context of immigration control under the Immigration Act 1971 where one crucial area of control remains exclusively with the Home Secretary, namely, the question of whether a person's presence in the United Kingdom is 'conducive to the public good'. Another variable may involve the presence of some commercial element in which case the presumption is that such a function is hived off to a public corporation, as in the case of the various nationalised industries. In some cases a function clearly has some local dimensions in which case the option may be between the function being conferred on the relevant local authorities or a local regional division of a particular central government department. Clearly, in these circumstances the option will be between two democratically accountable bodies, that is, the council of a local authority and the relevant minister of the Crown. Whichever option is chosen may depend on factors such as the need to retain a strong central government policy influence, for example, in the case of the various localised statutory functions of the Department of Health and Social Security, or the need to recognise local sensitivity and expertise, for example, in the case of town and country planning. Even with this latter case and in similar areas like education it is clear that central government control is not lacking.

Where a statutory function has been conferred on a central government department, it has been seen that there will almost certainly be a policy element involved in that function. This will be true whether the function relates to a decision on whether secondary education should be reorganised or a decision on the question of whether a compulsory purchase order should be confirmed. In both cases and in many others the decision of the responsible minister may be dominated by the need to reconcile any matter of policy with the individual rights and interests of those affected by any proposed action involving (say) the confirmation of proposals for the introduction of comprehensive education or the confirmation of a compulsory purchase order. Is the need for more housing land locally and nationally outweighed by the fact that land contained in the local authority's compulsory purchase order is good quality agricultural land, efficiently farmed by the principal objector to the order? It is this crucial question which can receive close scrutiny, before the minister takes the final decision, through the medium of a public, statutory inquiry. Such an inquiry is provided for by many statutes prescribing administrative action by a minister of the Crown, whether based on local authority proposals or not. As such it is

a fundamentally important part of the bureaucratic process. Indeed, in the area of town and country planning it is the case that many planning appeals are now decided by the minister's inspector who conducts the inquiry, so expediting decision-making. These and other aspects of the system of statutory inquiries are examined in the next chapter.

3 Statutory Inquiries

3.1 Categories

It has been seen already that statutory inquiries are provided for as a prerequisite for many decisions by central government departments. Such decisions may arise principally from proposals initiated by local authorities, as seen in the examples already given, or by the central government department themselves as where the Department of Transport seeks to provide a trunk road under the Highways Act 1980. In addition to these inquiries there are various other categories of statutory inquiry which, although resorted to much less frequently, need to be noted. These other inquiries fall into three categories: accident inquiries, company inquiries and tribunals of inquiry.

3.1.1 *Accident inquiries.* Accident inquiries relate mainly to railway, aircraft, factory and shipping accidents. Each category is governed by its own statutory provisions and there are considerable variations although there is usually some measure of formality for the majority of these inquiries. In the case of an inquiry into a railway accident under the Regulation of Railways Act 1873 there are very few formalities and the inquiry culminates with a report from the Department of the Environment's railway inspectorate. Nevertheless, the Secretary of State can direct a formal investigation under the chairmanship of, for example, a county court judge. In considering the form of a statutory accident inquiry, much may depend on the powers which are conferred. In the case of inquiries into shipping accidents convened by the Department of Trade under the Merchant Shipping Act 1894 there is a power to withdraw certificates of competence. This power probably explains why such inquiries are very formal, with a number of judicial trappings and right of appeal to the High Court in respect of any suspension or withdrawal of certificates of competence.

3.1.2 *Company inquiries.* Although there are various facilities for inquiries in the general commercial context, one of the best-known areas relates to the power of the Department of Trade to appoint an inspector where it appears that fraud is being or has been committed or that the members of a company have not been given all the information they might reasonably expect. This power is found in the Companies

Act 1948 and where such an inquiry is convened it is usually the case that any allegations are preceded by an investigation of the company and its financial and other affairs. This two-stage procedure can attract problems. It will be seen in Chapter 10 that natural justice requirements of fair procedure do not apply at the first stage although any inspector from the Department is legally obliged to act fairly so that there may be some occasions where an individual should have some notification of the types of information being investigated. Otherwise the inspectors' powers are very widely drawn and this led Lord Denning to observe in *Re Pergamon Press Ltd* (1971) that:

> Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a *prima facie* case.

3.1.3 *Tribunals of inquiry*. Beyond Parliament tribunals of inquiry have the widest powers of inquiry in English law. They are set up by virtue of the Tribunals of Inquiry (Evidence) Act 1921 following resolutions of both Houses of Parliament and deal with matters of urgent public importance. The chairman is normally a High Court judge and other members may be appointed to the tribunal in addition. Normally, the Government requires no special powers to set up an inquiry. However, the powers in the Act of 1921 are necessary because they enable a tribunal of inquiry to use powers of compulsion to require the attendance of witnesses and the production of documents, among other things. The Act also gives all the powers of the High Court for the purpose of dealing with contempts on those occasions when there is a refusal to comply with any requirements of a tribunal of inquiry. One of the most notable tribunals of inquiry investigated the Aberfan disaster in 1966 and since then there has been some anxiety about the operation of these tribunals. It is possible that various allegations may be made against those who may or may not be participating in the inquiry's deliberations and which cannot be made the subject of civil or criminal proceedings in some cases. Consequently, the absence of various safeguards such as any right to legal representation, rules of evidence or right of appeal may mean that there is very little protection for those who may be adversely affected by the operation of these tribunals. Bearing in mind the areas which have been subject to this form of inquiry over the years such as the 'Bloody Sunday' shootings in Londonderry in 1972, the collapse of the Vehicle and General Insurance Co. in 1971 and the aforementioned Aberfan disaster in 1966, these are safeguards of fundamental importance.

3.2 Inquiries and the Public Control of Land

Although the statutory inquiry is provided for as a part of many decisions taken by various ministers in central government departments, there is no doubt that the more important and frequent inquiries

occur in relation to decisions affecting land. More particularly the Town and Country Planning Act 1971 governing the need for planning permission for the development of land together with a wide variety of other statutes authorising the compulsory purchase of land under the procedures set out in the Acquisition of Land Act 1981 provide for decisions to be made by the Secretary of State for the Environment. Such decisions will in some cases be policy-based decisions. In a previous example it was seen that a proposal to acquire land compulsorily for the building of houses may be supported strongly by the 'confirming authority', the Secretary of State for the Environment. Such support may be grounded in a policy to encourage more house building in areas of pressing need and such a policy may even be used to override strong objections based on the fact that the land in question is of good agricultural quality.

3.2.1 *The individual and policy-based decisions.* Where statute provides for a policy-based decision there are clear dangers for those affected by any proposal to purchase land for a public function such as the provision of housing or a proposal submitted to a local planning authority to develop land. In the first instance a compulsory purchase order will go to the Secretary of State who will decide whether it should be confirmed while any refusal or conditional grant of planning permission could lead to an appeal to, and a decision by, the same Secretary of State. The dangers inherent in this system of decision-making arise from the fact that in law, the Secretary of State can, in effect, be biased in favour of any particular policy preference so that an individual's rights and interests may not receive adequate recognition. It was against this background that the Government appointed the Franks Committee on Tribunals and Inquiries in 1955. Its terms of reference were:

> . . . to consider and make recommendations on:
>
> (a) the constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions;
> (b) the working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as a result of objections or representations, and in particular the procedure for the compulsory purchase of land.

3.3 The Franks Report on Tribunals and Inquiries

The Franks Committee reported in 1957 and its recommendations covered not only inquiries but also administrative tribunals, the subject of Chapter 5. Bearing in mind the Committee's terms of reference set out above, the following recommendations were made in relation to inquiries: that

> (a) individuals affected by a decision preceded by an inquiry should have adequate notice of any case to be met;
> (b) details of relevant policy should be notified at the inquiry;

(c) inspectors conducting inquiries in this context should be under the control of the Lord Chancellor and not the Minister responsible for the decision;
(d) the inspector's report should be published, together with the Minister's decision letter;
(e) the decision letter should contain a statement of reasons for the Minister's conclusion; and
(f) the Minister's decision following the inquiry should be subject to review in the High Court on matters of procedure and substance.

These recommendations were accepted by the Government with the exception of the recommendation that inspectors should be under the control of the Lord Chancellor. Implementation has been through statute and administrative action. The principal statute was the Tribunals and Inquiries Act 1958 which has now been modified and consolidated in the Tribunals and Inquiries Act 1971. One of the major features of the first Act of 1958 was the establishment of the Council on Tribunals which, despite its name, has equally important supervision of public inquiries. According to the Act 1971 its principal function in relation to inquiries is:

> . . . to consider and report on such matters as may be referred [to it under the Act], or as the Council may consider to be of special importance, with respect to administrative procedures which involve or may involve the holding of a statutory inquiry by or on behalf of a Minister.

The term 'statutory inquiry' here means an inquiry or hearing held in pursuance of a statutory duty, or a discretionary inquiry or hearing designated as being under the Council's superintendance and held by virtue of a statutory power. Hearings are private and although various Acts provide for such hearings, most functions in this context are discharged through the public local inquiry.

3.3.1 *Implementation of the Franks Report: the Council on Tribunals.* There is little doubt that the most important development arising from the Franks Report was the Council on Tribunals although the Report makes only oblique references to such an idea. The Council comprises not more than 15 nor less than 10 members appointed by the Lord Chancellor and the Lord Advocate. There is also a Scottish committee. The Council reports to the Lord Chancellor and the Lord Advocate. In its Annual Report for 1975–76 the Council reviewed its functions in the following terms:

> [O]ur role is entirely an advisory one . . . Constituted as we are of part-time members, with a small supporting staff, we cannot do more than exercise a broad oversight over the working of tribunals . . . We are not an inspectorial body . . . We perform a similar advisory role in overseeing the many and varied procedures applicable to the large number of different kinds of ministerial hearings or inquiries held each year. We are not an appellate body with powers to overturn or alter a tribunal's decision or a decision of

> a Minister reached after an inquiry or hearing; and we cannot concern ourselves with the merits of these decisions . . . Our success in achieving changes and improvements in the tribunal and inquiry systems — whether in structure and organization or in procedure — depends on our ability to persuade the Government of the day to follow our advice . . . Ministers are under a statutory duty to consult us before making rules of procedure for tribunals under our general supervision. The Lord Chancellor is under a similar duty when he makes procedural rules or regulations for statutory hearings of inquiries . . . The Council's powers to deal with complaints are not clearly defined . . . [We] attach great importance to complaints since they help us in discharging our function of supervision, by enabling us to monitor the performance of the tribunal and inquiry systems, to identify weaknesses and shortcomings which might lead to unfairness, and to advise Departments on remedial action . . . Inquiry procedures, which in [the] early years gave rise to the most complaints (and the major ones), formed a high proportion of our work. By 1962, new rules for planning appeal and compulsory purchase order inquiries were in operation, and we had fewer complaints about inquiry procedures.

3.3.2 *Rules of procedure for statutory inquiries.* Apart from the establishment of the Council and its supervision of inquiries, the other major facet of the Report to be implemented is the power of the Lord Chancellor, contained in the Tribunals and Inquiries Act, to make rules of procedure for statutory inquiries. Reference has been made to the Council on Tribunal's comment about the first procedural rules made by the Lord Chancellor in this context and it is important to note that he is required by the Act to ensure that they are in compliance with the terms of the Act under which they are to be used. It has been suggested, for example, that when the Town and Country Planning (Inquiries Procedure) Rules were made they unlawfully extended the categories of person having the right to appear at a planning appeal inquiry beyond the categories referred to in the Town and Country Planning Act itself. These and other rules of procedure governing other areas contain the essence of most of the Franks Report recommendations which are in turn characterised by the need for 'openness, fairness and impartiality' in the system of tribunals and inquiries. While this latter standard is perhaps easier to attain in the case of administrative tribunals for reasons which will be seen in Chapter 5, there are certain difficulties with its recognition in the case of inquiries. Of particular significance here is the point emphasised earlier in the present chapter, that the minister's decision may be a policy-based decision. Accordingly, the standard of 'openness, fairness and impartiality' in inquiry procedure has to be seen as a relative standard which provides an important safeguard for the individual's rights and interests as they are reconciled with the minister's statutory responsibility for a policy-based decision.

3.4 Inquiries Procedure and Organisation

In its Annual Report for 1980–81 the Council on Tribunals considered the desirability of statutory rules for public inquiries:

> . . . so that the public may have specified legal rights and not merely privileges which can be taken away at the whim of an organizing authority. Rules let people know exactly what their rights are and give them a proper foundation for an application to the Court if those rights are infringed. Equally, promoting authorities should have no doubt what their obligations are: what notices and statements should be served, on whom and when. Because rules say very little about the conduct of the inquiry itself, and leave the Inspector with an overriding discretion to determine procedure during the inquiry, we do not accept the popular belief that rules must lead to formality and inflexibility of procedure'.

These statutory rules are referred to as statutory instruments and, as such, are items of delegated legislation, a subject which is covered in Chapter 8. It has been seen previously that the rules are made by the Lord Chancellor under the authority of the Tribunals and Inquiries Act for the purpose of inquiries under various Acts. The two most important Acts are the Town and Country Planning Act 1971 (in the case of planning appeal and some other planning decisions by the Secretary of State for the Environment) and the Acquisition of Land Act 1981 (in the case of decisions relating to compulsory purchase orders submitted usually by local authorities and made under a number of different statutory powers). Since it is the case that there are thousands of planning appeals decided each year, the detailed description of statutory inquiries will concentrate on planning inquiries. However, the format and structure of other statutory inquiries is very similar.

3.4.1 *Planning appeals and statutory inquiries.* The Town and Country Planning Act 1971 section 36 specifies that the Secretary of State shall, before deciding an appeal against a local planning authority's decision to refuse or grant a conditional planning permission, afford 'an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose'. Although this provision suggests an alternative of a private hearing or a public inquiry, in practice it is the public local inquiry which is usually convened in order to explore the circumstances of the planning appeal. The 'person appointed' is, in fact, the inspector appointed by the Secretary of State and the power he uses to convene the inquiry is in section 282. Section 282 of the Act states that: 'The Secretary of State may cause a local inquiry to be held for the purposes of the exercise of any of his functions under any of the provisions of this Act.' Because this is a discretionary inquiry provision it does not have the status of the mandatory inquiry and is subject to the Tribunals and Inquiries Act only because it was included in a statutory order (an item of delegated legislation) to that effect, along with certain other discretionary inquiries. Clearly, therefore, that status is of crucial

importance given the Lord Chancellor's power to make procedural rules for these important inquiries and the fact that such inquiries are superintended by the Council on Tribunals. A further statutory provision which is of significance here is section 250 of the Local Government Act 1972. The material part of this provision states that '[W]here the Secretary of State is authorised to hold an inquiry, either under this Act or under any other enactment relating to the functions of a local authority, he may cause a local inquiry to be held'. Although this provision could be seen as an alternative to the inquiry powers in section 282, that provision may, in fact, borrow some of the inquiry powers specified by section 250 so that they may be used for the purposes of planning inquiries. More particularly, the inspector is empowered to summon persons to give evidence and to take evidence on oath. Failure to adhere to a summons here is a criminal offence. In addition, the Secretary of State is empowered to make orders as to costs in relation to such inquiries. The law relating to evidence at planning inquiries has been extended recently in the Planning Inquiries (Attendance of Public) Act 1982 which contains a general requirement that oral evidence shall be heard in public and that documentary evidence shall be available for public scrutiny. The exceptions occur where the Secretary of State directs that such disclosure relates to national security or the security of premises or property and that it would be contrary to the national interest.

3.4.2 *Planning appeal decisions by inspectors.* Although it was the case that the Secretary of State decided each planning appeal, there are now facilities by which many such appeals are, in fact, decided by an inspector. As a result, the decision-making process is greatly expedited. Regulations made under the Town and Country Planning Act indicate the prescribed classes of decision transferred to the inspectors although it is always open to the Secretary of State to regain his power to decide a particular appeal, for example, where it involves points of peculiar difficulty or controversy. Where an inspector is to decide an appeal the parties may request that they are heard before the inspector in which case a public local inquiry will be convened in most cases and, again the provisions of section 250 of the Local Government Act may be stated to apply. Rules of procedure — the Town and Country Planning (Determination by Appointed Persons) (Inquiries Procedure) Rules 1974 — apply to the inquiry and differ very little from the rules relating to the Secretary of State's inquiry-based decision. Areas of difference will be examined below. Where, following the inquiry, the parties so desire, they can have advance notice of the inspector's decision, although any formal decision cannot exist in law until the decision letter is received. This is a non-statutory facility which is available only with the consent of the parties. In a puzzling comment about the transfer of appeal decisions to inspectors, the Council on Tribunals remarked in its Annual Report for 1979–80 that:

> . . . an inquiry into a planning application which has been transferred to an Inspector for decision becomes in effect a tribunal hearing, which makes it particularly important to emphasise the independent status of the Inspector and the "openness" of the proceedings.

It has been observed already that the Franks Report standards of 'openness, fairness and impartiality' are more difficult to recognise in the case of inquiries, bearing in mind the policy base for so many decisions in this and similar areas. Because the Inspector has to take note of the policy element affecting decisions here it is really rather difficult to say that he has the judicial characteristics of independence and impartiality although it cannot be denied that the inquiry process is essentially open and public.

3.5 Inquiries Procedure Rules

The Rules divide the inquiry process into three parts: the pre-inquiry process, the procedure at the inquiry and the post-inquiry process. It has been seen that there are some small differences in the Rules, according to whether the decision is that of the Secretary of State or one of his inspectors operating under transferred powers. These differences will be outlined at the end of the following summary of the Town and Country Planning (Inquiries Procedure) Rules 1974.

3.5.1 *Inquiry preliminaries.* Having accepted the appeal, this fact will be notified by the Secretary of State to the local authority whose adverse planning decision has given rise to the appeal. The authority is then obliged to notify the Secretary of State and appellant of those who have made representations to the local authority in respect of the original application. Thereafter the Secretary of State fixes the time and venue for the inquiry and is obliged to give not less than 42 days' notice of the inquiry to the various parties. The local authority is then obliged to give a written statement of its submissions to be put at the inquiry. This statement goes to the appellant and those who have made representations about the application, not later than 28 days from the start of the inquiry.

3.5.2 *Procedure at the inquiry.* The appellant and the local authority are the main actors at the typical inquiry. Together with those who have made representations about certain applications for planning permission, these parties have a legal right to appear at the inquiry: any other party will appear at the discretion of the inspector although that discretion is usually exercised quite freely in favour of any person with a genuine interest in the application for planning permission and the succeeding appeal. At the beginning of the inquiry the inspector will explain the background to the proceedings before allowing the parties — usually through their representatives — to enter their appearances by explaining their identity and interest in the inquiry. Beyond the terms of the Rules and subject to natural justice, the procedure is at the discretion

of the inspector. At the outset the appellant opens his case. He produces his evidence, usually by means of witnesses who may be examined either after or instead of reading a proof of evidence. Such witnesses may be cross-examined by the local authority and the other parties before a similar process occurs in relation to evidence produced by the local authority and the other parties. The local authority normally sums up its case before the other parties are heard and it is the appellant who normally closes with the final speech, summarising his case. During the inquiry the inspector may ask questions of the parties and it is a matter for his discretion whether evidence is admitted although the rules of evidence are more flexible than those found in a court of law. Consequently, evidence can be admitted where it may be capable of proving some matter of fact. Where any evidence at the inquiry is considered by the inspector to be contrary to the public interest, he is empowered to exclude it. In the same way he can exclude any evidence or questions which appear to relate to the merits of Government policy. Much depends on what is defined as 'Government policy' as will be seen in Chapter 10 on natural justice where the important decision in *Bushell v Secretary of State for the Environment* (1981) is dealt with. Under normal circumstances an inspector's exclusion of questions or evidence at an inquiry would be in breach of natural justice, but in the foregoing areas of evidence contrary to the public interest or questions relating to the merits of Government policy the exclusion is made lawful by the Rules' statutory authorisation.

It is normally the case that the inspector undertakes a site inspection once the inquiry is over.

3.5.3 *Procedure following the inquiry.* It is in the procedure following the close of the inquiry that there are a number of important safeguards which have been incorporated very largely as a result of the recommendations of the Franks Report. One of the causes for concern before the advent of the Rules was the apparent freedom with which the minister could take into account new evidence or some new issue of fact following the close of the inquiry without giving the parties an opportunity of making representations. Before this area is covered, it should be noted that there is a fundamental requirement whereby the inspector is obliged to make a written report to the Secretary of State following the close of the inquiry. The report must contain the inspector's findings of fact and recommendations or his reasons for refraining from making recommendations. Returning to the provision of safeguards following the close of an inquiry, the Rules proceed on the basis of two possible occurrences: either that (a) there is a difference on a finding of fact as between the inspector and the Secretary of State, or (b) some new evidence or new issue of fact is taken into consideration by the Secretary of State, as a result of which in either case the Secretary of State is disposed to depart from the inspector's recommendation. In the case of occurrence (a) the

Secretary of State is obliged by the Rules to offer the parties an opportunity of making representations before coming to a decision. In the case of occurrence (b) the Secretary of State is obliged to offer the facility of reopening the inquiry before coming to a decision. These are clearly important procedural obligations and whether they apply depends on the legal definition of the key terms such as 'fact' and 'evidence'. In *Luke v Minister of Housing and Local Government* (1967) the difference between the inspector and the minister concerned the question whether a proposed development of land was 'sporadic development' *vis à vis* a neighbouring community. The minister did not offer the parties an opportunity of making representations on this difference before coming to his decision. It was decided by the Court that the Rules did not oblige the minister to seek representations because the difference related only to a matter of planning policy or opinion, and not a matter of 'fact'. In the case of *Pyrford v Secretary of State for the Environment* (1977) it was decided that whether a firm was a 'local firm' for planning purposes was a question of fact so that there could be no lawful decision until representations had been sought from the parties in respect of this difference which formed the basis of the Secretary of State's decision. Finally, in *French Kier Developments Ltd v Secretary of State for the Environment* (1977) it was decided that a policy document on land availability for housing could not be relied on by the Secretary of State without an offer to reopen the inquiry where that document constituted new evidence which had not been in issue at the inquiry.

3.5.4 *Notification of a decision and reasons.* When the Secretary of State arrives at his decision, the Rules oblige him to notify that decision to the parties and to include a statement of reasons. A copy of the inspector's report will normally accompany the notified decision. Finally, where the provisions of section 250 of the Local Government Act 1972 apply to the inquiry, the Secretary of State may make orders as to costs although this power is usually exercised sparingly.

3.5.5 *Procedural differences for decisions by inspectors.* Reference had been made to some small differences in the Rules according to whether the decision lies with the Secretary of State or is transferred to one of his inspectors. In the case of a decision by an inspector after an inquiry the discretion as to costs remains with the Secretary of State who is also obliged to notify the parties of the name of the inspector. Following the close of the inquiry, the inspector is not obliged to report to the Secretary of State, in which case he is obliged only to notify his decision and the reasons to the parties.

3.6 Legal Enforcement of the Inquiries Procedure Rules

Reference has been made to the supervisory functions of the Council on

Tribunals in relation to statutory inquiries. In addition to this supervision, the High Court undertakes the legal enforcement of the Rules governing the inquiries. Again, the scope of legal enforcement is very similar in relation to most of the decision-making functions of central government where a statutory inquiry is involved. Accordingly, the Town and Country Planning Act 1971 is fairly typical in its provisions which specify that any person aggrieved by the decision of the Secretary of State in a planning appeal can apply to the High Court to have that decision quashed on either or both of two grounds, within six weeks of the decision. The first ground is that the decision is *ultra vires* the Secretary of State's planning powers under the Act, for example, where the Secretary of State allows an appeal and grants planning permission on the ground that the applicant, that is, the appellant, proposes to finance his building programme on the site from British, not foreign finance. This topic is pursued in more detail in Chapter 11. The second ground is that the Secretary of State's decision is in breach of the procedural requirements of the Rules and that this breach has caused 'substantial prejudice' to the applicant, that is, that there is something more than a mere technical breach of the Rules. Accordingly, in two of the cases previously mentioned, *Pyrford* and *French Kier Developments*, the High Court quashed the Secretary of State's appeal decision for a breach of the relevant post-inquiry Rules. Another area where the High Court has had cause to look critically at appeal decisions of the Secretary of State relates to the requirement for reasons to accompany the decision. In the leading case of *Givaudan v Minister of Housing and Local Government* (1966) it was stated by the Court that this requirement involves: 'the setting forth with reasonable precision and clarity of matters which are relevant and indicating and explaining, positively or negatively, the reasons for the Minister's decision'. The Court considered that the minister would be acting in breach of this requirement where the reasoning is so obscure as to leave 'in the mind of the informed reader . . . real and substantial doubt as to the reasons'. The broader scope of the legal obligation to give reasons for administrative decisions is explored further in Chapter 9. Finally, it should be noted that where an inspector makes a decision under transferred powers this decision is, in law, the decision of the Secretary of State so that the foregoing legal enforcement of the Rules and other substantive powers will occur in the normal way.

3.7 Scope of the Statutory Inquiry System

Whether for reasons of efficiency, policy or political expediency, there are occasions when it is necessary, usually from the Government's point of view, to exclude, restrict or modify the system of statutory inquiries. Looking again at the context of planning inquiries, there are important examples of exclusion, restriction and modification and each is now examined in turn.

3.7.1 *Exclusion of statutory inquiries.* There are two situations where the system of statutory inquiries is excluded, in relation to the determination of planning appeals by written representations and by means of hearings. When an applicant for planning permission notifies an appeal against an adverse decision of the local planning authority, he may be invited to choose between a hearing or inquiry on the one hand, and written representations on the other. This latter procedure is not statutory, that is, it is a purely informal measure aimed at expediting the decision-making process. This is achieved through an exchange of the parties' written statements where, for example, the local authority will defend its decision refusing planning permission, while the appellant will, of course, argue that the planning permission should be granted. Thereafter a decision is made in the normal way on the basis of the parties' arguments in the appeal, usually within six to eight weeks. It is not a procedure which is often used where third parties are involved in a planning appeal, usually as objectors to the applicant's proposed development: their participation in the process would tend to defeat the object of more expeditious decision-making. If necessary, and even though the parties have opted for written representations, it is possible for the Secretary of State to insist that the appeal is conducted without written representations but with an inquiry. The second area of exclusion relates to the provision of a hearing rather than the public local inquiry. The hearing is essentially a private process which is not often used in practice.

3.7.2 *Restriction of statutory inquiries.* In some cases there is a restriction on the coverage of the statutory inquiry. Before examining two significant examples in the context of planning, it should be noted that any objection to a compulsory purchase order which relates to the measure of compensation payable cannot be accepted and, more particularly, cannot be dealt with by a statutory inquiry into such an order. Any such objection is a matter for the Lands Tribunal and so it seems clear that the reason for this restriction reflects on the complexity of compensation questions, an area which is better dealt with by the expert Lands Tribunal. Returning to the planning context, the first example of a restriction on the facilities normally available through the statutory inquiry occurs in the area of immunity given to the treatment of Government policy. It has been seen already that under one set of Inquiries Procedure Rules there is an exclusion of questioning which in the inspector's opinion is directed to the merits of Government policy. This precedent is also carried into other, similar Rules. The second area of restriction relates to development plans known as structure plans. These plans are broad, strategic plans for large areas such as counties. They are made by the County planning authorities and submitted to the Secretary of State for the Environment for approval. Before a decision is made, an inquiry must be convened. However, the more conventional statutory public

local inquiry is not used, apparently because there was thought to be a danger that large numbers of objectors would be attracted and would be concerned only with detailed land use issues whereas the structure plan is concerned only with broad, strategic questions which are not usually site-specific. For this reason the Town and Country Planning (Amendment) Act 1972 permits the Secretary of State to convene an 'examination in public' of the structure plan. This contrasts with the adversorial statutory inquiry which is, in many respects, a court-like process. The examination in public is, in essence, a round-table discussion of the issues raised by the proposed structure plan. Accordingly, the Act of 1972 gives the Secretary of State an important discretion to do two things: first, to draw up an agenda for the examination in public, and second, to identify those persons or groups of persons who should be allowed to appear.

3.7.3 *Statutory inquiries and proposals for controversial development.* There may be a fine distinction between the foregoing section on the restriction of the statutory inquiry and the present section dealing with its modification. This section is concerned mainly with the extent to which the conventional statutory inquiry process is adequate to deal with wider issues of national policy, for example, in relation to the country's energy requirements. The main focus of this question was the Windscale Inquiry into a proposal by British Nuclear Fuels Ltd to extend its nuclear reprocessing plant at Windscale. The Secretary of State used his power in the Town and Country Planning Act to call in the company's application for planning permission made to the local planning authority for the area. To examine the background to and implications of the application, a public local inquiry was convened with a High Court judge, Parker J., as chairman, together with two assessors. Parker J. recognised the wide-ranging implications of the inquiry: 'the issues to be investigated may affect not only those already alive and residing in the immediate neighbourhood but also those who live far away and who will not be born for many years ahead'. The inquiry covered many wide-ranging issues, far beyond the question of whether the site itself was inherently suitable for the proposed expansion of the nuclear processing facility. Major questions covered included the issue of whether there should be reliance on nuclear fuel as opposed to naturally generated energy in the UK and the issue of safety in transporting fuel to and from the site for reprocessing. All the evidence was taken on oath and there was an exclusion of evidence that might prejudice national security or the national interest, together with evidence questioning the merits of Government policy, although it appears that this latter exclusion was interpreted quite flexibly during the inquiry. It was finally recommended that planning permission should be granted, a conclusion which was upheld on a vote following a debate in Parliament. For technical reasons the Secretary of State decided to refuse planning permission and then made a Special Develop-

ment Order (an item of delegated legislation, a subject covered in Chapter 8) granting planning permission but incorporating all the safeguards which had emerged from the report of the statutory inquiry.

3.7.4 *The Windscale Inquiry.* The major criticism emerging from the Windscale inquiry was that it and the planning system as a whole are not able to deal adequately with the wider and more controversial questions which are likely to arise from proposals for large-scale energy developments. Somewhat surprisingly, there are facilities in the Town and Country Planning Act 1971 for what is known as a Planning Inquiry Commission, which appears to have some, if not all, of the advantages which may be lacking in the ordinary public local planning inquiry for the purpose of dealing with large-scale energy development proposals. The Planning Inquiry Commission, although it has not been used, is intended to operate in two stages. Initially it considers the broad background to a proposal on the basis of evidence provided by the promoters of the scheme, the local authority, objectors, and so on. The second stage involves a local inquiry in conventional form and permits an investigation into the scheme and objections to it. Such a Commission, if it were ever employed in this context, would be comprised of experts in the appropriate fields of activity whose conclusions and recommendations would be very persuasive. Having established a reputation such a Commission would be seen as an increasingly popular instrument in the face of proposals for large-scale energy development. However, there is one significant precedent in this context, namely, the Roskill Commission which investigated proposals for a third London airport between 1969 and 1971. A number of sites were subject to general investigation initially until just four sites were singled out, at which point local inquiries were convened at each site and, eventually, one large inquiry was convened at which the arguments for and against each of the sites were heard. The one site which was recommended as a result was rejected following a debate in Parliament, the result of which was that Parliament recommended the site at Foulness which had been included in the final list of four sites. The process took three years, which may be a significant argument against the employment of such a Commission.

3.7.5 *The statutory inquiry in future.* There have been various proposals for a better modification of the system of statutory inquiries for cases involving complex, controversial issues of national and perhaps international dimensions. Nevertheless, the largely conventional framework has continued to be used for inquiries into proposals to mine coal in the Vale of Belvoir and to build a Pressurised Water Reactor at Sizewell in Suffolk. Given the political and policy controversy which frequently arises from the large scale development proposal, particularly in the context of energy, it is not surprising perhaps that the Government should want to maintain a flexibility of response which it can do within

the present system with the existing framework of statutory inquiries. A radical modification of the statutory inquiry system through the creation of an expert, investigative body could make it more difficult for a Government to resist proposals and recommendations which run counter to its existing policies.

4 Local Authorities

4.1 Status and Functions

Local authorities are statutory corporations established in tiers for the performance of a wide variety of local functions prescribed by statute. Local authorities act through their respective councils comprising democratically elected members. Most of the law relating to the status of local authorities is found in the Local Government Act 1972 which introduced a reorganised system of local government in 1974. That Act defines the main units of local government, the county and district councils, the metropolitan county and district councils and the parish councils (known as community councils in Wales). Local government in London is dealt with in the London Government Act 1963 which divides the various governmental functions between the Greater London Council, the London boroughs and the Corporation of the City of London.

4.1.1 *County councils.* County councils' responsibilities include education, personal social services, highways and transportation, town and country planning, the police and consumer protection. Education and personal social services are responsibilities undertaken by the metropolitan district councils but not the metropolitan county councils whose functions otherwise overlap broadly with those of the non-metropolitan county councils.

4.1.2 *District councils.* District councils' responsibilities include town and country planning, housing, environmental health and the making of bylaws. These principal responsibilities also relate to the metropolitan district councils although it has been seen that these councils have responsibilities for education and personal social services, among others. Although the county councils have responsibilities for planning in addition to those of the district councils, it is the latter which are designated as the principal planning authorities by statute in order to deal with most aspects of this function. In some cases the function, as in the case of parks and open spaces for example, is exercised concurrently as between the two main tiers of local government. On other occasions there is a clear 'dovetailing' of functions as in the case of solid waste pollution under the Control of Pollution Act 1974 where the county

council is refuse disposal authority while the constituent district councils are the refuse collection authorities. In a few instances and particularly in the case of sewerage and related services a district council may and often does act as an agent of the regional water authority. Finally in this context, a number of statutory provisions require that a district council is consulted by a county council before it exercises a function, particularly on those occasions when development plan schemes are being made in order to co-ordinate the making of planning policies in a county.

4.1.3 *London government.* Responsibility for the two crucial areas of planning and housing is shared between the Greater London Council and the London boroughs. Otherwise the Greater London Council has responsibility for, among other things, roads and traffic management and refuse disposal. Most of the other major functions lie with the boroughs. In the case of education, responsibility lies with the Inner London Education Authority, specially constituted as a committee of the Greater London Council, in the case of the 12 inner London boroughs. Each outer London borough acts as an education authority.

4.1.4 *Parish councils.* Well over a thousand parish councils in England, and their equivalent community councils in Wales, exercise numerous functions. These elected bodies, usually serviced by a part-time clerk, have limited powers to make bylaws, powers to deal with footpaths, to provide community centres, to acquire land for use as open space, the right to be consulted by the local planning authority in respect of relevant applications for planning permission, the right to issue a rating precept on the relevant district council to fund its various functions, and so on.

4.2 The Local Authority as a Statutory Corporation

The focal point of a local authority is its council of elected members which is declared by the Local Government Act to be a body corporate under the name of the county or district council concerned. As a corporate entity the council goes on for ever, even though its membership will change from time to time. As a separate legal entity in law, the council can act as an individual in acquiring and disposing of all types of property for the fulfilment of its various functions. In the same way it has the capacity to enter into contracts, again for the fulfilment of its various functions. Finally, and again as an individual corporate entity, the council of a local authority can sue and be sued in its own name. All of this makes for a more efficient discharge of business for the local authority.

4.2.1 *The acquisition of property.* In order to fulfil its functions a local authority will have to acquire all types of property, from office furni-

ture to land for the building of houses. A large number of statutory powers exist to facilitate these transactions. These powers may be expressed in very broad terms or in very specific terms. As a rule of thumb, the powers will be broadly defined where local authorities can conclude voluntary contracts or similar transactions while the powers will be closely defined where the local authority has to use compulsion, primarily in the area of the compulsory acquisition of land. By way of an illustration of this latter area, section 112 of the Town and Country Planning Act 1971 permits the compulsory acquisition of land for planning purposes. More specifically, the section allows the local planning authority to acquire land in its area which is 'suitable for and is required in order to secure the carrying out of one or more of the following activities, namely development, redevelopment and improvement' or 'which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated'. Any compulsory purchase order made under this power has to be submitted to the Secretary of State for the Environment for confirmation. His decision whether to confirm will be taken after a public local inquiry into any objections to the order. By way of contrast, the Local Government Act contains a broadly defined power to acquire land by agreement for the purpose of any function and for the 'benefit, improvement or development' of a local authority's area (section 120). In addition to these statutory powers to acquire land compulsorily or by agreement, the local authority, acting again in its own name, is empowered by section 123 of the Local Government Act to dispose of land, subject to general consent of the Secretary of State.

4.2.2 *Contracts.* As statutory corporations with functions to fulfil, it is clearly necessary for local authorities to have an effective power to enter into contracts, for example, for the supply of goods and services. It would be impossible to define precisely every purpose for which a contract has to be made in the day-to-day discharge of functions which explains the very broad power in section 111 of the Local Government Act. This section empowers a local authority, subject to some limitations, to 'do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'. There are, in addition, a number of specific powers for the making of contracts in some areas where, for example it may not be clear whether section 111 extends to cover the particular transaction. Nevertheless, section 111 is very widely defined and does permit virtually any contract which is in some way reasonably referable to a local authority's function or functions. The powers have not often been challenged in the courts but in *R. v Greater London Council ex p. Burgess* (1978) it was decided that a

closed shop agreement between a local authority and a trade union was within the powers of the section.

4.2.3 *Extended powers.* Beyond the power in section 111, section 137 of the Local Government Act empowers a local authority, again subject to some limitations, to 'incur expenditure which in their opinion is in the interests of their area or any part of it or all or some of its inhabitants'. This power relates to any transaction which is not already provided for by statute as a particular function and is limited to the product of a rate of 2 pence in the pound. Section 137 was in issue in *Manchester City Council v Greater Manchester Council* (1980) where it was decided that the establishment of a trust fund to provide monies for the private education of some children in the Greater Manchester area was within the section 137 powers, even though the council in question was not an education authority. A number of local authorities have used these powers recently in order to establish and fund private companies for the purposes of promoting industrial development in their respective areas.

4.2.4 *Local authorities' contracts and the doctrine of ultra vires.* Wherever a local authority strays beyond the statutory limits of the various powers prescribing its right to acquire property, make contracts and to enter other transactions, it will be acting *ultra vires* so that the acquisition, contract or transaction will have no effect in law that is, it will be null and void. As an *ultra vires* contract it cannot be enforced so that one of the parties could not sue for payment, for example. There is one notable exception to this general rule in the context of the Secretary of State for the Environment's control of local authorities' capital expenditure under the Local Government Planning and Land Act 1980. Where the Secretary of State considers that a local authority has failed or is likely to fail to comply with prescribed limits for capital expenditure he may direct that contractual expenditure should not exceed the limit. If that direction is not adhered to, any contract entered into for this purpose is *ultra vires*, but it will not be null and void as between the local authority and the other party. As a result it would appear that the members of a local authority who sanction such contractual expenditure may be surcharged and may face other penalties which will be described in section 4.4.4. Finally, it is a fundamental rule of the law that a local authority cannot use a contract or, indeed, any other means in order to fetter or prevent its exercise of functions prescribed by statute (*Stringer v Minister of Housing and Local Government* (1971)).

4.2.5 *Ultra vires in practice.* Although sections 111 and 137 of the Local Government Act bring a useful measure of flexibility to many areas of local government activity, there will be occasions when the

more specific statutory powers will be in use and when it will be necessary to decide how far they extend. It is clearly impossible for Parliament to legislate for every detail which is likely to arise from the exercise of such powers. It is equally unrealistic for the law to insist that a local authority should operate strictly within the express limits of the statutory powers. Accordingly, the courts have attempted to apply the doctrine of *ultra vires* so that local authorities can do all those things which are implied from or are incidental to the express statutory powers. In most instances, any other approach would frustrate the working of the legislation. This approach can be illustrated with the case of *Attorney General v Crayford Urban District Council* (1962) where the local authority proposed to introduce a scheme of compulsory insurance for the personal property of its residential tenants. The scheme was introduced under section 111 of the Housing Act 1957 which states that the 'general management, regulation and control of houses provided by a local authority . . . shall be vested in and exercised by the authority'. It was decided by the Court of Appeal that the scheme was not *ultra vires* because the statutory powers implied that the local authority could pursue the general social welfare of its tenants.

4.2.6 *Challenging local authorities' ultra vires acts.* There are three methods by which an *ultra vires* act may be challenged:

(a) by an application for judicial review in the Queen's Bench Division or, exceptionally, by an application for a declaration or an injunction in the High Court, topics which are covered in *Chapter 13;*
(b) indirectly where an individual is prosecuted in a criminal court for an alleged failure to comply with some order, notice or licence: the individual may attempt to avoid conviction by establishing that the order, notice or licence was *ultra vires* so that he could not be convicted for failure to comply with something which does not exist in law;
(c) by means of audit, where the auditor finds that an item in the local authority's accounts is 'contrary to law'. If this finding is confirmed on application to the High Court by the auditor the amounts involved may be surcharged to the members responsible who may also find themselves excluded from membership of the council.

4.3 Legal Control of Local Authorities

Control of local authorities by the court is clearly crucial but the bulk of control occurs outside the courts. In practice, a great deal of control is exerted over local authorities by central government, particularly in the area of finance. This control is often discreet control where the lever which encourages local authorities to keep within statutory and non-statutory limits is the knowledge that a lot of financial support for their functions comes from central government. It will be seen that central government has many other means of ensuring that local authorities adhere to the law and preferred policies through various powers by

which central government can approve schemes, make decisions on appeals, and so on. Each of these areas of control is examined in turn.

4.4 Local Government Finance and its Control

In very broad terms, local authority expenditure falls into two categories: current (revenue) expenditure covering items such as wages, salaries and the cost of running buildings, and capital expenditure, covering the acquisition of assets like roads and buildings. Current expenditure is financed from three sources:

(a) the rates;
(b) the rate support grant from central government; and
(c) any other council revenue like rents and charges.

Some services such as housing attract specific grants from central government. Much capital expenditure is financed by borrowing within limits set by central government.

4.4.1 *Rating.* Rate finance is raised by the rating authorities which are the district councils and the London boroughs. The relevant law is to be found mainly in the General Rate Act 1967. The general rate for a rating area is levied by reference to a uniform amount on the rateable value of each hereditament. Precepts are issued to the rating authorities by certain other authorities, principally the county councils, the Greater London Council, parish councils, transport authorities and the water authorities. The rating authority is required by law to levy the full amount of any precept from county councils and the Greater London Council. In fixing a rate the rating authority is obliged to make an assessment of the yearly value of the property for the purpose, according to the General Rate Act, 'of applying the proceeds thereof to local purposes of a public nature'. Approval of the overall rate for the area must be undertaken by the full council. To be liable for rates the general requirement is that there should be 'rateable occupation' which has four broad requirements:

(a) actual occupation;
(b) exclusive occupation;
(c) occupation of some value or benefit; and
(d) occupation for not too transient a period.

There are a number of exemptions from rates, including premises used as churches and chapels, and land used for agricultural purposes. Apart from these exceptions, the rating authority maintains a valuation list showing each hereditament in the area and its value. Any alteration to the list can be appealed against to a local valuation court with a further appeal to the Lands Tribunal, although an alternative method of resolving such disputes is by means of arbitration. The legality of a rate or precept can be challenged only by an application for judicial review

which is covered in Chapter 13. The validity of a rate as it affects a particular individual or hereditament is the subject of an appeal to the Crown Court.

4.4.2 *Rate support grant.* The purpose of the rate support grant is to supplement local authorities' own finances so that they can provide similar standards of service for a similar rate in the pound despite differences in need for the services they provide and in the rateable resources they can draw on. The grant is, in essence, a block grant which is calculated mainly by reference to the Local Government Planning and Land Act 1980. In very crude terms, the amount of the rate support grant is the difference between the product of the national average rate, as calculated by the Department of the Environment, and the level of the local authority's own expenditure. The local authority is able to overspend up to a certain defined limit beyond which any overspending is subsidised from the rates, although it is not now possible to levy a supplementary rate during the year.

4.4.3 *Capital expenditure.* The Department of the Environment is empowered by statute to control all local authority capital expenditure. Each year a global sum is set aside for capital expenditure and each local authority receives an allocation by reference to its proposals for this purpose submitted to the Department. The Secretary of State has considerable powers under the Local Government, Planning and Land Act to define so-called 'prescribed' capital expenditure so that it can be decided whether certain types or amounts come within a local authority's permissible capital expenditure. Under the Act the Secretary of State can direct that part of the expenditure should or should not be spent on a defined project as a matter of national or regional importance. Where the Secretary of State considers that a local authority has failed or is likely to fail to adhere to the limits defined for capital expenditure, he may, among other things, direct that contractual expenditure should not exceed the limit. It was seen previously that contravention of such a direction renders any resulting contract *ultra vires* but not void as between the local authority and the other contracting party. Allocations for capital expenditure fall into five blocks: education, housing, personal social services, transport and other services. However, a local authority is able to apply for a single block in order to define its own priorities.

4.4.4 *Audit.* Local authority accounts are subject to audit by an auditor appointed by the Audit Commission. The Commission was created by the Local Government Finance Act 1982 and its membership of between 13 and 17 is appointed by the Secretary of State for the Environment in consultation with the local authority associations

and the professional accountancy bodies. The Commission is a corporate body. It does not act as an agent of the Crown and its members, officers and employees are not Crown servants. The Secretary of State is empowered to give the Commission directions as to the discharge of its functions whereupon it is the Commission's duty to give effect to those directions. An auditor appointed by the Commission may be an officer of that body or a private accountant. It is the duty of an auditor in examining the accounts to satisfy himself that statutory standards for accounts have been adhered to, that proper practices have been observed in compiling accounts and that the body whose accounts are being audited has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources. He is also required to comply with a code of audit practice, compiled by the Commission, and to consider whether, in the public interest, he should make a report on any matter to the body subject to audit or that such a report should be brought to the attention of the public. In undertaking the audit, the auditor has a right of access to documents and a right to information and explanation for the purpose of that audit. Any person interested has a right to inspect the accounts to be audited and other relevant items such as contracts and receipts. A local government elector for the area has a right to question the auditor about the accounts and a right to object to the audited accounts. A decision of the auditor on an objection must be supported by reasons. Where such an objector is aggrieved by a decision of the auditor not to act in connection with an alleged illegality, any loss due to wilful misconduct or a failure to bring a sum of money into the accounts, he may appeal either to the County Court (where the amount in issue is less than the financial limits for this court) or the High Court. However, where the auditor considers that any item of account is contrary to law he is empowered to apply to the court for a declaration to that effect except where it is sanctioned by the Secretary of State. Whoever applies, the court has a power to surcharge any person responsible for incurring or authorising the unlawful expenditure and a power (where the expenditure exceeds £2,000) to disqualify the person responsible from membership of a local authority unless the court is satisfied that the person acted reasonably or believed that the expenditure was authorised by law. It should be noted that where a local government elector makes an application or where the Commission considers it desirable in view of an auditor's report or other reason, the Commission can require that an extraordinary audit of a local authority's accounts is undertaken. More generally, in deciding whether an item of account is contrary to law, the tests to be applied are those in *Giddens v Harlow District Auditor* (1972) where it was stated that the auditor can intervene where the council has:

> (a) refused or neglected to take into account matters which it ought to have taken into account; or

(b) taken into account matters which it ought not to have taken into account; or

(c) come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

In effect, the auditor can intervene where an item of account is *ultra vires* and the three grounds for intervention just mentioned are among those which are used in the High Court to review the legality of administrative action generally, as to which, see Chapter 11. Each of the three grounds for intervention by the auditor can be illustrated from cases which have been before the courts. Ground (a) was in issue in *Barnes v District Auditor for No. 11 District* (1976) where the council paid excessive wages which were lawfully disallowed by the auditor. The Court agreed that the council 'wrongly neglected to take into account the provisions of the Pay Code, the advice of their officers and the National Joint Council, and the interests of the ratepayers'. By contrast, in *Pickwell v Camden London Borough Council* (1982) the council settled a pay claim by their striking manual workers at a rate in excess of the later national settlement. It was decided by the Court that the council had not incurred an item of account contrary to law, primarily because it had not failed to take into account the legally relevant interests of the ratepayers and had balanced the interests and welfare of its workforce, another legally relevant factor. Ground (b) occurred in *Taylor v Munrow* (1960) where expenditure incurred in failing to increase rents, as required by law, was disallowed because the council was influenced by a legally irrelevant consideration, namely, a desire to protect tenants from rent increases under the Rent Act. Finally, ground (c) was in issue in *Backhouse v Lambeth London Borough Council* (1972), another case concerned with a council's attempt to avoid rent increases for many tenants, this time under the Housing Finance Act 1972. In order to avoid such increases, the council took one of its houses and imposed an artificial rent of £18,000 per week, the amount which would have been yielded had the tenants been subject to the increase. It was decided by the Court that this was totally unreasonable and so *ultra vires*. In other words, Parliament could never have intended that the provisions of the Housing Finance Act should be used in this way.

4.5 Central Government Control of Local Authorities

It has been seen that there are very comprehensive controls imposed on local authorities in relation to finance, with particular reference to limits on the amounts which can be sought from central government and the purposes for which money can be spent. Other forms of statutory control will be examined in this part of the chapter, with particular reference to the relationship between central and local government as seen in the Town and Country Planning Act. Once again the relationship is defined by law in the Act and although it gives some

autonomy to the local planning authorities, central government in the shape of the Secretary of State for the Environment and his department wield great influence. Nevertheless, a good deal will depend on the policies being operated in the name of the Secretary of State at any one time. In the crucially important area of development control, where the local planning authorities are required to determine applications for planning permission if a person intends to undertake 'development' on land, central government policy may be in favour of encouraging as much residential and industrial development as possible. Consequently, if applications for planning permission for such development are ever refused by a local planning authority, an appeal by the disappointed applicant to the Secretary of State is likely to be successful. Indeed, on some occasions the Secretary of State may 'call in' an application for decision before the local planning authority is able to deal with it.

Central government influence may also have been felt where the Secretary of State has imposed his policy preferences in approving the local planning authority's own policies in its development plan, or where the Secretary of State has issued a circular. Government circulars are intended to provide local authorities with guidance on a variety of issues, as well as information. Some local authorities may require guidance on the practical implications of some new piece of legislation which has just come on to the statute book while central government may be anxious to inform local authorities about policy preferences. Both these functions can be performed by circulars which are non-statutory channels of communication which have considerable influence over the way that local authorities perform many of their functions. Indeed, where a circular prescribes a policy it is often the case that much time is taken up at a planning inquiry arguing whether the instant case of (say) a refusal of planning permission falls within that policy as described by the words of the circular. This then is the background to a number of statutory controls of local government activity. However, in looking at the important areas of control, some of which have been outlined earlier, it should be remembered that although there are controls available to central government they do not necessarily have to be used and often are not used. It is clearly important that local authorities should be allowed to use their local knowledge and expertise and maintain an effective measure of autonomy. Ideally, therefore, the relationship between the two tiers of government should be defined as a collaborative partnership with ultimate control of many functions residing with central government, with its concern for implementation and co-ordination of national policies.

4.5.1 *Statutory control.* Some of the more important statutory financial controls affecting local authorities have already been outlined. In the case of the many functions performed by local authorities there is

always a need for a statutory framework, effectively defining the terms on which central government will allocate a function. This legislative task will often take place against a background of consultation with, among other organisations, the local authority associations. The statutory framework legislated by Parliament will indicate the nature and scope of any powers given to the local authorities, an issue which will be taken up in Chapter 7, and will indicate the scope of any central government control in the exercise of the function concerned. Section 1 of the Education Act 1944, for example, imposes on the Secretary of State for Education a duty:

> . . .to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area.

In the area of town and country planning, the Minister of Town and Country Planning Act 1943 states that the minister now responsible for planning, the Secretary of State for the Environment, has a duty to secure 'consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales'. The detailed statutory framework is, of course, to be found in the principal Acts of Parliament. These Acts often contain further powers permitting the Secretary of State or other minister responsible for a function to make rules and regulations and other items of delegated legislation governing the detailed conduct of the local authorities. It has been seen in Chapter 3 that procedural rules have been made for the conduct of public local inquiries into planning appeals, prescribing the steps to be taken by local authorities and others involved in the inquiry process. Another example occurs in the Town and Country Planning General Development Order, another item of delegated legislation made by the Secretary of State under the powers conferred on him for this purpose by the Town and Country Planning Act 1971. This order contains a vast amount of detail about the operation of the planning system. Among other things it sets out the procedures to be followed by local planning authorities in dealing with applications for planning permission and those categories of 'development' which are defined as 'permitted development', that is, for which planning permission is deemed to have been granted, for example, the extension of a dwelling house by up to 15 per cent of its cubic capacity.

4.5.2 *The administrative appeal process.* Where a function is conferred on a local authority there may be various reasons why it is deemed appropriate that there should be an appeal against the authority's decision and that the appeal should go to the Secretary of State as opposed to an inferior court or an administrative tribunal. In one of the

most frequently used appeal processes where a local planning authority refuses or grants a conditional planning permission it is the Secretary of State for the Environment's concern for national planning policy which indicates the need for him to be centrally involved in the planning appeal process. Indeed, he is involved in other planning appeal processes, the two most important of which are appeals against a local planning authority's decision on the question of whether a proposal involves 'development' and requires planning permission, and appeals against enforcement notices served by a local planning authority alleging unlawful development, for example, without planning permission. Where such an appeal is undertaken the statutory powers of the Secretary of State are widely defined. In the case of the appeal against a refusal or conditional grant of planning permission, for example, the Secretary of State is able to look afresh at the applicant's proposal and is required to decide at the outset whether a planning permission should be granted or whether any condition or conditions should be deleted from a planning permission. Although many applications for planning permission involving proposals to build single houses, for example, do not involve any policy, it has been seen that in other cases where policy is in issue the appeal decision may permit the Secretary of State's policy preference to be applied.

4.5.3 *The approval process.* Where a local authority initiates various proposals, which may be administrative or legislative, there is usually a statutory requirement that the Secretary of State approves or confirms them before they become effective or have the force of law. Apart from particular schemes requiring financial sanction, the approval process applies to three very important areas of local authority activity: bylaws, compulsory purchase orders, and (in the area of town and country planning again) development plans. Compulsory purchase orders and bylaws are dealt with in Chapter 8. Suffice it to say in this context that the confirming authority in the appropriate central government department is unlikely to give confirmation where the order or bylaw is considered to be beyond the statutory powers of the local authority. Development plans are the vehicles for local authorities' planning policies under the Town and Country Planning Act. There are two varieties of development plan: the structure plan (referred to in Chapter 3) and the local or district plan. It has been seen that the structure plan is prepared by the country planning authority and is essentially a written policy strategy for the county area indicating, for example, the likely demand for housing in the next ten years and the broad areas where that demand may be satisfied. The completed structure plan is submitted to the Secretary of State for the Environment for approval but before arriving at a decision whether to approve the plan, he will convene and eventually consider the report of an Examination in Public. By contrast, the local or district plan is usually made by the

constituent district councils within the county and fills out in detail (some of it map-based) the broad policies of the structure plan. This type of development plan can be approved and adopted by the local authority which made it, but the Secretary of State does have a reserve power to call in such a plan for his own and not the local authority's approval. It could be the case that a local or district plan would be 'called in' if it made no attempt to identify any land in its area for future housing provision where the structure plan has already insisted that the district has the most suitable potential in broad, strategic terms. Once approved a local planning authority is required to have regard to a development plan in deciding whether to grant planning permission.

4.5.4 *Default powers.* Reference was made in Chapter 1 to the default powers of the Secretary of State for the Environment in section 23 of the Housing Act 1980 and the Secretary of State for Education in Section 68 of the Education Act 1944. It is difficult to generalise about default powers except to say that they facilitate central government intervention on those occasions, for example, after a central government inspection, when it is considered that a local authority is not undertaking a proper discharge of its statutory functions. While some default powers require some prerequisite such as an unreasonable act before the Secretary of State can intervene, other default powers operate simply on the basis that the Secretary of State is of the belief that a function will not be performed properly. The default power in section 276 of the Town and Country Planning Act is somewhat different. It states that if it appears to the Secretary of State, after consultation with a local planning authority, that certain action should be taken, he may require that that action be taken, for example, that an enforcement notice should be served or that an order revoking planning permission should be submitted to him for confirmation. Default powers in other areas of local authority activity may lead, as in the case of section 23 of the Housing Act 1980, to the Secretary of State taking over the function himself. On the other hand and perhaps more frequently, an exercise of default powers in a statute like the Education Act 1944 requires the Secretary of State to serve a direction. Such a direction might require a local education authority to provide a certain type of educational facility which, hitherto, it had unreasonably failed to provide. Non-compliance with the direction would permit the Secretary of State to apply to the High Court for an order of *mandamus* against the education authority. This remedy, which is dealt with more generally in Chapter 13, comprises an order of the court requiring the authority to comply with any lawful direction. Under the Town and Country Planning Act directions are relatively common and, as such, are not seen as default powers in quite the same way. Some of the more common purposes for which directions are used include the Secretary of State's power to 'call in' an application for planning permission for his own decision and a 'standing' requirement that any proposal to grant planning permission which

would be a 'substantial departure' from development plan policies should be advertised and (in some limited cases) referred to the Secretary of State for decision.

4.6 The Council Member

Very little has been said about the membership of the council of a local authority primarily because the law focuses its attention on the legal status of the council as the instrument of administrative action. Consequently, any contract is made by 'the council' and one central question for the law is whether it is within the council's statutory powers. Nevertheless, it has been seen that the individual member is potentially responsible in his own right for any item of account which is found to be contrary to law through the audit process. Other areas of legal significance in relation to the individual member include his right of access to and inspection of documents, the duty to disclose pecuniary interests and the regulation of bribery and corruption.

4.6.1 *Right of access to and inspection of documents.* Section 228 of the Local Government Act authorises a member's inspection of the local authority's accounts. As far as other documents are concerned, a member's rights are recognised by the common law which stipulates that he may have access to those documents deemed reasonably necessary for the discharge of his responsibilities as a councillor. This legal right was in issue before the House of Lords in *R. v Birmingham City Council ex p. 0* (1983). A council member who was not a member of the Social Services committee which was dealing with a proposed adoption was entitled to access to documents prepared by the Social Services department for the committee. The documents covered the proposed adoption and the member was anxious to see them when, as a member of another committee, she had indirect contact with the case which gave rise to some genuine concern. The House of Lords had no hesitation in saying that there is free access to documents for members of the appropriate committee actually dealing with the matter in issue. However, where a member who is not a member of that committee requires access, this is a matter for the council or any person or group exercising powers in this respect delegated by the council. In this particular case access was permitted by the deputy director of Social Services and not the council and it was the House of Lords' view that he was impliedly authorised to allow access.

4.6.2 *Disclosure of pecuniary interests.* Sections 94 to 97 of the Local Government Act state that where a member of a local authority has any pecuniary interest, direct or indirect, in any contract, proposed contract or other matter, and is present at a meeting of the authority at which the contract or other matter is the subject of consideration, he is required to disclose the fact at the meeting and to desist from discussion

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and voting on that contract, proposed contract or other matter. Non-compliance with this requirement is a criminal offence which can be prosecuted only by the Director of Public Prosecutions or on his behalf. Some interests such as allowances paid to council chairmen as expenses are not regarded as 'pecuniary' interests for present purposes. On the other hand, some interests are classified as 'indirect' pecuniary interests as where a member of a local authority is also a member of a company about to make a contract with that authority. An alternative to the method of disclosure mentioned at the beginning of this section allows a member to register a general notice in writing with the proper officer of the authority. A register of such disclosures is maintained for inspection by members. Members' disability in this context can be removed by a district council, in the case of the membership of a parish or (in Wales) a community council, or by the Secretary of State for the Environment, in the case of any other local authority, where it is considered that the number of members disabled by the law is such that council business would be adversely affected or that it is in the inhabitants' interests that this disability should be lifted. The member is not affected by a legal disability where an interest in a contract or similar transaction arises by virtue of his status as a ratepayer or as a member of the community taking advantage of services normally available. A member's interest will not give rise to a legal disability where that interest is too remote and as such is unlikely to influence his conduct in relation to council business. Nevertheless, the member is regarded as having an indirect pecuniary interest where his beneficial interest in a company or similar organisation does not exceed £1,000 or 1/100th of the total nominal value of the issued share capital. However, in this situation the member is not disabled from participating in the transaction of relevant council business, but he is obliged to make a disclosure of his interest. More generally, whether a member has a pecuniary advantage or disadvantage, he is subject to the legal disability (*Brown v Director of Public Prosecutions* (1956) and *Rands v Oldroyd* (1959)). The law's coverage has been criticised on occasions, particularly because it does not extend beyond pecuniary and similar interests to other interests which may be equally persuasive, and because a member's legal disability applies only to meetings of a local authority and not private 'party' meetings, for example. Where a member participates in the transaction of council business while subject to the legal disability, any vote of his will be discounted (*Nell v Longbottom* (1894)). Where this is the case the decision of the council may be set aside by the court for the breach of the rule against bias in natural justice, which is dealt with in Chapter 10 (*R. v Hendon Rural District Council ex p. Chorley* (1933)). Various recommendations have been made for changes in the law through reports such as the report of the Prime Minister's Committee on Local Government Rules of Conduct published in 1974. These changes have not so far taken place although a circular from the Department of the

Environment (92/75) does set out recommended standards of conduct for councillors in this context.

4.7 The Council Officer

The officer is a professional employee of the council with day-to-day responsibility for the conduct of council functions. Although there are specific statutory provisions requiring the appointment of certain officers such as senior police officers like the chief constable, most appointments are made under section 112 of the Local Government Act. This empowers a local authority to appoint such officers as it thinks necessary for the proper discharge of its functions. Such officers then hold office on such reasonable terms and conditions, including conditions relating to remuneration, as the authority thinks fit. Clearly, any attempt to appoint an officer outside the terms of section 112 would be *ultra vires* and any resulting expenditure on salaries and other related items would be contrary to law and subject to audit sanctions. Officers, like members, are required to disclose certain pecuniary interests, although the relevant provisions in section 117 of the Local Government Act are somewhat different to those relating to members. An officer employed under the Local Government or any other Act is obliged to give written notification of a direct or indirect pecuniary interest in a contract or proposed contract with the authority. Unlike the law relating to members' interests, section 117 refers only to contracts and, in addition, there is no requirement of disclosure at a meeting. It was recommended by the Prime Minister's Committee on Local Government Rules of Conduct, referred to in the previous section, that these inconsistencies should be reconciled with the law on members' interests and a register kept in each local authority of interests of chief and deputy officers and such other officers as the authority may require.

4.8 Bribery and Corruption

Bribery and corruption are criminal offences defined in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 to 1916. The Act of 1889 makes it an offence for any person corruptly to give or receive any gift or other advantage as an inducement to influence the conduct of any member, officer or servant of any public body, that is, 'local and public authorities of all descriptions'. The Acts of 1906 and 1916 make it an offence corruptly to provide an agent with or for that agent to receive any gift or consideration as an inducement or reward for influencing the principal's affairs or business.

4.8.1 *Coverage of the Acts.* The law covers most of the so-called public sector: in general terms, local authorities, public corporations (dealt with in Chapter 6) and Crown servants and agents. However, it is likely that a Crown servant or agent or any other person deemed not to be an

employee of a 'local or public authority' would be prosecuted under the Act of 1906. The term 'local authorities' appears to be self-explanatory. The term 'public authorities' is not defined in the Acts and unfortunately, very little help is forthcoming from two of the leading cases. In the first, *R. v Newbould* (1962) it was decided that the National Coal Board was not a public authority for the purposes of the Act of 1889 whereas in *R. v Manners* (1976) it was decided that the North Thames Gas Board was a 'public body'. Despite some uncertainty in this context it is possible that a conviction could be obtained through a prosecution under the Act of 1906, at least on the assumption that the defendant had been acting as an 'agent' on behalf of this principal. All of the offences are punishable with imprisonment and/or a fine while the Act of 1889 provides for subsidiary penalties:

(a) surrender of a corrupt gift to the employer of the recipient;
(b) forfeiture of entitlement to a pension;
(c) disqualification from voting; and
(d) disqualification from holding office as a member or employee of a public body.

The penalties attaching to offences under the Acts of 1889 and 1906 in the case of contracts with public bodies and Government departments are more severe than in other cases. Prosecution of offences requires the consent of the Attorney-General or Solicitor-General.

4.9 Council Meetings

Meetings are governed by statute and the council's own standing orders. The Local Government Act obliges the principal councils, that is, all those local authorities except parish and community councils, to hold annual meetings and any other meetings as deemed to be necessary for the transaction of business and the performance of functions. While the Act details the various formalities relating to the calling and conduct of meetings, standing orders for each council will detail matters of procedure at meetings where there is no other statutory provision. Similar standing orders can be made by local authorities for the transaction of business by their various committees. Decisions are by a majority of the votes of the members present and in the event of no majority the chairman has a second or casting vote. A minute book must be maintained, copies of which are generally available for public inspection. It is also provided by statute that, as a general rule, meetings are open to the public. Private meetings may be held in special circumstances, usually where it would be contrary to the public interest to disclose the nature of certain confidential business. These rules relating to access to meetings are found in the Public Bodies (Admission to Meetings) Act 1960, an Act which applies to various public bodies including local authorities and which is extended to cover local authority committees. It should be noted that a council member may be liable

for defamation in respect of what is said, or even written, in the course of council meetings. Defamation covers an oral statement (slander) and a written statement (libel) and any such statement is defamatory where its publication is calculated to injure the reputation of another through exposure to hatred, contempt or ridicule. However, the member may be able to avoid liability if he can establish that his statement was made without any malice. In the leading case of *Horrocks v Lowe* (1974) it was emphasised that a statement is made without malice where it is made with a positive belief as to its truth, that is, an honest belief. On this basis, it was stated in *Horrocks* that where the dominant motive for a statement is not a desire to perform the relevant duty or to protect the relevant interest but to give vent to a member's personal spite or ill-will towards the person he defames, the member cannot rely on the defence of an absence of malice. However, depending on the facts of the individual case, the member may be able to rely on two other significant defences: justification and fair comment. As far as the council itself is concerned, the law gives it a 'governing reputation' (*Bognor Regis Urban District Council v Campion* (1972) which meant that the local authority in this case could redress a libel directed at the chairman and councillors, that is, the council.

4.10 Council Decisions

It is the council of a local authority which is empowered to take decisions for the discharge of functions as prescribed by statute. However, the Local Government Act does empower a local authority to delegate some of its functions. Section 101 in particular states that a local authority may 'arrange for the discharge of any of their functions (a) by a committee, a sub-committee or an officer of the authority or (b) by any other local authority'. The legal implications of delegation are taken up in Chapter 9. More generally, it should be noted that section 101 is an attempt to recognise the need for efficient local government so that every decision need not be taken by the full council itself. The extent of delegation is very much a matter for each council although a comprehensive committee structure is a feature of most local authorities. However, it is not every local authority which allows wide delegated powers to its officers. While the terms of section 101 are drawn quite widely to allow some flexibility to local authorities, there are some statutory provisions which require that particular committees are established, for example social services committees under the Local Authority Social Services Act 1970, and that certain decisions are taken only by the full council, for example section 101(6) of the Local Government Act, which states that a local authority's functions with respect to the levying of a rate shall be discharged only by the full council

4.11 Legal Liability of Local Authorities

Reference has been made earlier in this chapter to the powers of a local

authority to enter a contract. Where the local authority acts in breach of a lawful contract it is generally liable for damages or any other appropriate remedy in the same way as any other individual. The same would be true of public corporations, the subject of Chapter 6. However, where the contract is entered into by or on behalf of the Crown, special rules of law apply and these are outlined in Chapter 14. Apart from contractual liability, it should be remembered that an individual or other corporate body may be liable in tort or criminally liable for its acts or omissions. Criminal liability is a well recognised part of the law. Tortious liability, on the other hand, deserves some explanation. In very general terms, a tort is a civil wrong. Consequently, where an individual or other corporate body can persuade a court that his rights guaranteed by the law of tort have been infringed, he should be able to claim the appropriate remedy which may be damages as compensation for any loss or injury, or (perhaps) an injunction to prevent any repetition of the unlawful conduct in question. Prominent examples of torts, as they are known, include negligence, nuisance, trespass, defamation and breach of statutory duty. This final section of the chapter will concentrate on the tortious and criminal liability of local authorities and most of the law here is equally applicable to the public corporations which are deal with in Chapter 6.

4.11.1 *Tortious liability*. Although the general rule is that a local authority is liable for its tortious acts or omissions, there are notable exceptions, particularly on those occasions when there is statutory authorisation. By way of an example, the Acquisition of Land Act 1981 empowers a local authority to effect entry to land which is being compulsorily purchased. Consequently, where the requirements of the Act are met the local authority in this case would have the best defence to a civil action for trespass by the landowner, that is, statutory authorisation. One crucial area of tortious liability is that relating to the vicarious liability of an employer for the acts or omissions of his employee. However, where the employee of a local authority also operates in another capacity unrelated to his status as a local authority employee, his employer may not be vicariously liable. This proposition can be illustrated by the case of *Stanbury v Exeter Corporation* (1905) where sheep, allegedly suffering from an infection, were seized negligently by an inspector who, although he was employed by the local authority, was operating as an inspector under the independent statutory authority of the Diseases of Animals Act. By way of contrast, in *Ministry of Housing and Local Government v Sharp* (1970) a local authority was found to be vicariously liable even though the negligent employee had the statutory status of local land charges registrar.

4.11.2 *Statutory authority*. There has been a reference to statutory authority in the previous section but the area where it has considerable

significance is nuisance. A nuisance is some act which interferes with a person's use and enjoyment of his land although the law will not protect a person of peculiar sensitivity. Where Parliament legislates to authorise the construction of large and perhaps controversial undertakings like oil refineries, it will usually authorise all aspects of the construction and use. In so doing the statute takes away the possibility of establishing liability in nuisance against the agency responsible in respect of physical interference arising from construction and use of the undertaking. The courts reinforce this position by saying that the statutory agency in question has authority in respect of anything arising from construction and use which is the inevitable consequence of these activities. In *Allen v Gulf Oil Refining Ltd* (1981), for example, it was decided that noise, smell and vibration were the inevitable consequences of the establishment of an oil refinery. However, where the statutory agency has a discretion, that is, a choice, in deciding where to establish an undertaking, that discretion must be exercised so that a nuisance is avoided (*Metropolitan Asylum Board v Hill* (1881)). In other words, Parliament has not presumed that a particular site is the only one suitable for the purpose so that the statutory agency has to be as vigilant as anybody else in exercising its powers in order to avoid nuisances. In the same way, there is no defence available to the statutory agency that its function is being performed reasonably in the interests of the public (*Pride of Derby and Derbyshire Angling Association v British Celanese Ltd* (1953)). Where there is statutory authority for the establishment of some public or other undertaking such as an oil refinery, motorway or airport, the statutory provisions, having taken away the right to sue for nuisance, usually allow any individual whose land is affected to claim compensation according to criteria set down in those or other statutory provisions.

4.11.3 *Negligence.* In general terms, negligence indicates a failure to take reasonable care in undertaking some activity. In order to succeed in an action for damages for negligence it is necessary to establish:

(a) that there is a duty on the defendant to take reasonable care, usually because the defendant should have had his victim's interests and welfare in mind;
(b) that there is a breach of the duty; and
(c) as a result the victim has suffered some reasonably foreseeable injury, loss or other damage.

In the case of a local authority performing a statutory duty, the law imposes liability for any negligent exercise of that duty. Consequently, Parliament presumes that every statutory duty will not be performed negligently. Where the authority has a discretion as to the ways and means to be used for the performance of a statutory function there will be liability where the authority chooses to perform it and performs it

negligently (*Dutton v Bognor Regis Urban District Council* (1972)). On the other hand, where it is decided not to perform the function or to perform it only partially, liability in negligence arises only where that (policy) decision is *ultra vires* and it is possible to establish the three requirements for negligence mentioned above (*Anns v Merton London Borough Council* (1977)). By way of an illustration of this proposition from the background to the decision in *Anns*, local authorities have statutory responsibility for implementing and enforcing the Building Regulations which prescribe health and safety standards for new buildings in particular. Each district council has the statutory responsibility to decide whether building plans should be approved and whether the building process should be monitored and approved. Where a decision not to monitor and inspect the building process is influenced by a failure to take account of legally relevant factors such as the nature of the site and the technical difficulties of construction, the decision is *ultra vires*. Thereafter, where the court concludes that the local authority's negligent omission led to a failure of the building, that authority will be liable in negligence.

A local authority may also be liable in respect of a negligent misstatement, in which case a crucial requirement is that the individual concerned for example, an officer of a local authority, holds himself out as having the requisite expertise (*Hedley, Byrne & Co. Ltd v Heller & Partners* (1963)). Even where there is no negligence the law may impose so-called 'strict' liability where a person, for his own purposes, brings on to his land and collects and keeps there anything likely to do mischief if it escapes (*Rylands v Fletcher* (1868)). Where the defendant local authority has brought on to its land some dangerous substance, any damage, loss or injury caused by its escape will bring liability, even though the authority took reasonable care. However, any public authority which functions for the 'public benefit' is not taken to be acting 'for its own purposes' in this context (*Dunne v North Western Gas Board* (1963)). In *Dunne* gas escaped from a main and injured persons and property as a result of a leak from a water main which had removed soil supporting the gas main.

4.11.4 *Breach of statutory duty*. Where statute imposes a duty on a local authority, a failure to comply with that duty could render the authority liable for damages where the plaintiff can establish that the duty was imposed for his benefit and there are no statutory penalties which apply on breach of the duty. In *Reffell v Surrey County Council* (1964) a child was injured by an unsafe glass door in a school. Damages were awarded by reference to the education authority's breach of statutory duty under the relevant safety regulations. More recently in *Thornton v Kirklees Metropolitan Borough Council* (1979) the local authority was liable in damages for failure to exercise a duty under the Housing (Homeless Persons) Act 1977 which required the provision of temporary accom-

modation for an applicant who had satisfied the various qualifications for such accommodation pending a final determination of his claim for housing accommodation.

4.11.5 *Criminal liability*. It is possible for a local authority to be convicted of a criminal offence although there are clear limitations in that an authority cannot be convicted of an offence punishable with imprisonment. Similarly a local authority is subject only to those offences which can be committed vicariously. In *York District Council v Poller* (1975) a builder's skip was hired by the council's housing department. An official intimated to the owner of the skip that there was a 'blanket permission' to leave skips on the highway. The local authority was later (and correctly) convicted of an offence under the Highways Act 1971 since the offence had been committed 'owing to the act or default of some other person', in this case the local authority. In practice, whether the local authority is criminally liable often depends on the extent to which the officer or employee is seen as acting for the authority in the performance of its functions. The legal principle is found in a case involving a company which was acquitted of an offence against the Trade Descriptions Act, *Tesco Supermarkets Ltd v Nattrass* (1971) where Lord Reid in the House of Lords said that:

> [T]he board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the Company.

As far as local government is concerned, it is clear from this relevant statement of principle that wherever there is in issue a criminal offence which a local authority is capable of committing, the local authority will avoid conviction only where any delegate of that body is clearly acting beyond any express or implied limits of delegated powers, for example, as a committee or officer.

5 Administrative Tribunals

5.1 Status

Administrative tribunals might well be referred to as 'administrative courts' since usually their task is to adjudicate disputes which arise from the statutory regulation of a wide variety of situations, some of which will involve decisions or other action by administrative agencies, or the relationship between private individuals. It will be seen later in this chapter that tribunals have been established for many purposes, including the adjudication of disputes between landlord and tenant about the payment of rent and between an individual and a local authority about the payment of compensation for the compulsory acquisition of land. They have also been established in order to decide appeals from decisions of other tribunals and administrative agencies on issues such as statutory entitlement to certain welfare benefits.

5.1.1 *Tribunals and inquiries distinguished.* The tribunals differ from the statutory inquiries which operate in the context of ministers' decision-making responsibilities in central government. This difference was described by the Council on Tribunals in its Annual Report for 1960 where it was observed that:

> Tribunals, generally speaking, exercise an independent jurisdication: they decide particular cases by applying rules and regulations and sometimes by using their own discretion. Inquiries, on the other hand, form part of the process by which a Minister exercises his discretion — discretion for which he is answerable to Parliament.

Because tribunals are not generally concerned with policy-orientated decisions, normally associated with ministers in central government departments, it is of greater relevance to compare tribunals with courts of law. In simple terms, tribunals and courts of law are concerned with the application of the relevant law to the facts of a particular case in a judicial spirit. However, the court is a truly independent entity whereas the tribunal is created by the relevant Government department to adjudicate disputes arising under a statutory provision. Although the independence of the tribunal is effectively safeguarded, it does have responsibility in many cases for expert adjudications arising from disputes relating to the department's legislation. Indeed, the Franks

Report considered it a matter of principle 'that a decision should be entrusted to a court rather than to a tribunal in the absence of special considerations which make a tribunal more suitable'. Apart from the fact that judges in courts of law are generalists whereas tribunal members are specialists in the relevant field of activity, there are various other reasons why the administrative tribunal has advantages over the court of law, and these are examined below.

5.1.2 *Tribunals as 'court substitutes'*. The Franks Report emphasised that tribunals:

> . . . are not ordinary courts, but neither are they appendages of Government Departments . . . tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned . . . and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.

In most cases, this accurately reflects the status of the tribunal and it is now referred to frequently as the 'court substitute' tribunal. However, there are a few odd exceptions where the tribunal is more closely associated with the relevant Government department. Because these few tribunals are more closely associated with particular Government departments and their policies, they are referred to frequently as 'policy-orientated' tribunals. The latter category of tribunal will be dealt with in the following section.

5.1.3 *Policy-orientated tribunals*. The policy-orientated tribunal cuts across the sentiments about the independence of tribunals expressed in the Franks Report because, in one way or another, it is obliged to take notice of and perhaps implement the policy pronouncements of the relevant Government department. One prominent example concerns the Civil Aviation Authority which, as a tribunal, is responsible for the licensing of civil air transport. By virtue of the Civil Aviation Act 1971, the Secretary of State for Trade is empowered to give policy guidance to the Authority whose responsibility then is to perform its licensing functions in such manner as it considers to be in accordance with that guidance. In this way, the Department of Trade is able to maintain an influence in policy terms over what is an area of importance for Government. A similar example occurs in the Transport Act 1968 where the minister is empowered to give policy guidance to the local licensing bodies dealing with licence applications from goods vehicle operators. Such guidance is in turn carried forward to the Transport Tribunal which deals with appeals arising from the decisions of the local licensing bodies.

5.2 Characteristics

In view of the fact that most tribunals come within the category of 'court substitutes', that feature provides one characteristic but there are, of course, reasons why the comparison with ordinary courts of law cannot be carried too far. Such reasons emerge from an examination of the advantages of tribunals compared with courts of law. The Franks Report concluded that:

> [T]ribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, and expedition and expert knowledge of their particular subject. It is no doubt because of these advantages that Parliament, once it has decided that certain decisions ought not to be made by normal executive or departmental processes, often entrusts them to tribunals rather than to the ordinary courts.

The advantages of tribunals will be seen in more detail later in this chapter. In more general terms, however, one of the outstanding advantages must be the first one, cheapness. The main emphasis of this advantage depends chiefly on the comparison of costs for the litigant who has to use the ordinary courts of law. For him there is the greater likelihood of considerable costs incurred through the need to engage a solicitor and possibly a barrister as well. The second characteristic mentioned above, accessibility, refers to the fact that in the case of the more popular tribunals there is a greater likelihood that they are organised with relative informality on a regional or local basis so that it can be said that the particular tribunal, such as an Industrial or a National Insurance Tribunal, does operate within easy reach of most people. Freedom from technicality means that in the case of most tribunals there are no technical rules of procedure or evidence to be observed as in an ordinary court of law. Such freedom from technicality means that hearings are shorter than in the case of a full trial before a court of law with a resultant saving of time and money. This characteristic shades into the next advantage relating to expedition and expert knowledge. The tribunal system permits an efficient disposal of many cases by a body which has the relevant expertise in the area of the dispute or matter being dealt with. Accordingly, one of the most convincing arguments in favour of the system of tribunals is that it enables a large body of cases to be disposed of efficiently in a way which, given the present judicial system, is not possible as far as the ordinary courts of law are concerned. A graphic example occurs in the case of the Industrial Tribunals which deal with a large number of matters, the most frequent cases relating to unfair dismissal and redundancy payments. In 1981 the tribunals, with their regional organisation, sat in 51 areas throughout the country and disposed of nearly 42,000 cases, over 16,000 of which were dealt with through a hearing before the tribunals.

5.3 Varieties of Tribunal and their Functions

Tribunals fall into four categories according to their various functions, which are:

(1) to decide appeals from decisions taken by Government departments;
(2) to determine various claims at first instance;
(3) to decide disputes arising as between individuals; and
(4) to undertake various other functions.

Each of these categories will be examined in turn.

5.3.1 *Tribunals and appeals from departmental decisions.* Some of the best-known tribunals dealing with appeals from decisions of Government departments are the so-called social security tribunals. National insurance decisions taken by insurance officers of the Department of Health and Social Security or (in the case of unemployment benefit) by officers of the Department of Employment, are subject to an appeal to the National Insurance Local Tribunals. Supplementary benefit decisions taken by a benefit officer of the Department of Health and Social Security are subject to an appeal to the Supplementary Benefit Appeal Tribunals. Thereafter, decisions from any National Insurance Local Tribunal or Supplementary Benefit Appeal Tribunal may go on appeal to a Social Security Commissioner. Another area where appeals go to a tribunal from a governmental decision is income tax. Decisions on liability to tax go to either the General Commissioners of Income Tax or the Special Commissioners of Income Tax, according to the technical nature of the dispute. General Commissioners, who sat in 429 tribunals in 1981, are required to have some knowledge of income tax legislation and are usually appointed from the ranks of magistrates, solicitors and accountants. There were seven Special Commissioners in 1981, from whom a tribunal of two or three members is constituted. They are appointed by the Treasury from among barristers and solicitors in the Inland Revenue department and once appointed, sever any links with that department. A third example in this first category are the six Vaccine Damage Tribunals which deal with disputes arising from claims to the Secretary of State for Health and Social Security for compensation arising from severe disablement caused by vaccination. These and the social security tribunals outlined above are covered in more detail later in this chapter. Another tribunal which is covered in detail is the Transport Tribunal. Although it does not deal with decisions of a central government department, it has been seen that the local licensing body is susceptible to policy guidance from the Minister of Transport.

5.3.2 *Tribunals and 'first instance' claims.* Some tribunals deal with claims at first instance. Reference has been made already to the Civil Aviation Authority and its responsibility for the licensing of civil air

transport. The Authority deals with the licence applications initially and its decision may be appealed against to the Secretary of State for Trade. Consequently, this opportunity and any earlier opportunities which may have been taken through policy guidance enable the Secretary of State to influence the direction of decisions. Another tribunal in this limited category is the Foreign Compensation Commission which adjudicates claims for compensation from British subjects, usually where their property has been requisitioned or damaged in another country. Where the Government of that country agrees with the British Government that compensation is payable, the sum agreed will be distributed to claimants according to the decisions of the Commission.

5.3.3 *Tribunals and disputes between individuals.* The main feature of the tribunals whose task is to decide disputes between individuals is that their decision relates to some statutory right or entitlement. Perhaps the best-known tribunals in this context are the Industrial Tribunals, referred to previously in this chapter. Most of their work arises from disputes about unfair dismissal and redundancy payments as between employer and employee. Such disputes arise primarily by reference to the relevant employment legislation which prescribes a general right not to be dismissed unfairly and a general right to compensation where an employee is dismissed by reason of redundancy. It is the tribunal's task to decide whether or not a claimant comes within the terms of the statutory scheme or is excluded from protection and entitlement. Where the claimant is found to be within the terms of the statutory scheme it is the tribunal's task to decide on the amount of redundancy payment or compensation for unfair dismissal or, exceptionally, whether an unfairly dismissed employee should be reinstated. Other important tribunals in this category are the Rent Assessment Committees and Rent Tribunals whose tasks include the resolution of rent disputes between landlord and tenant or the parties to a restricted tenancy contract.

5.3.4 *Additional functions of tribunals.* The final category of tribunals includes those which have various other functions over and above their other, normal functions. This does raise the question: what are those 'normal' functions? Is it possible to characterise tribunals as undertaking judicial functions similar to those of an ordinary court of law, or are they essentially investigatory bodies? Some tribunals, notably the Lands Tribunal and the Transport Tribunal, function like ordinary courts of law. Even where the formality of tribunal procedures does not permit this comparison, it is possible to conclude that most of such bodies are judicial and not investigatory so that they act as impartial adjudicators of evidence presented to them by the respective parties. Beyond such a normal judicial function, some tribunals do undertake

additional functions. The Mental Health Review Tribunal, comprising 15 separate tribunals throughout England and Wales in 1981, has operated as part of the scheme of the Mental Health Acts in order to review decisions whereby compulsory powers have been used to detain people for the treatment of mental disorder. Another facet of the Tribunal has been its function in giving the Home Secretary advice on the recall to hospital of restricted patients who have been conditionally discharged or given leave of absence. A second example here is the Civil Aviation Authority, a regulatory authority which is responsible for air transport licensing, together with the maintenance and enforcement of safety standards. Beyond its judicial, tribunal function the Authority also exercises important rule-making functions and this legislative function in the interest of air safety involves enforcement functions as well.

5.4 Allocation of Functions to Tribunals

Reference has been made earlier in this chapter to the advantages of using a tribunal as opposed to an ordinary court of law for the adjudication of disputes and it has been said that most tribunals can be regarded as 'court substitutes'. However, it is still necessary to determine why the various adjudicatory functions have been given to tribunals in the first place. Apart from the supposed advantages of tribunals previously listed, what is it about the adjudicatory functions which make them appropriate subjects to be dealt with by tribunals?

5.4.1 *The policy element in administrative decisions.* As a general rule, it appears that any function involving an element of policy will not be conferred on a tribunal and is most likely to be conferred on a minister in central government who will be democratically accountable for any such policy to Parliament. This is well illustrated in the context of a licensing system which was aimed at encouraging industry to develop in the depressed areas of the United Kindom. Although the system has now been suspended, the Town and Country Planning Act specifies that any application for planning permission for industrial development within certain categories and areas shall be of no effect without an industrial development certificate granted by the Secretary of State for Industry. In deciding whether to grant such a certificate, the Secretary of State is obliged to satisfy himself that the development can be carried out consistently with the proper distribution of industry. Such a decision is bound to involve the weighing of the applicant's case, not against some fixed or measurable criteria against the background of which tribunals normally operate, but against a judgment of the national distribution of industry and employment. Apart from the fact that such a matter is likely to be a sensitive issue of a Government's economic policy, it is unlikely that any Government would be willing to give away an important decision like this to a tribunal which is unlikely to be able to respond to shifts in economic conditions and economic policy. When

the Hunt Committee investigated some of the issues in this area in 1969, it was suggested that there should be an appeal against the Secretary of State's refusal of an industrial development certificate. The Committee's report observed that:

> [T]he flexibility and sensitivity with which the policy is operated . . . means that there is a lack of permanent and readily applicable criteria which would guide an independent appeal tribunal.

Accordingly, the Secretary of State's decision remains final.

5.4.2 *The Civil Aviation Authority and the Transport Tribunal.* It has been seen that some significant policy-based decisions may occur away from central government in these tribunals. It must be remembered in these cases that the responsible minister is not without influence in view of the statutory powers conferred on him to give so-called policy 'guidance'. Furthermore, the licensing function of the Civil Aviation Authority was undertaken by a central government department until the early 1970s and with a transfer of the responsible staff to the Authority there was little adverse effect on the Government's influence over policy. In addition, where there is an adverse decision of the Authority the appeal lies to the Secretary of State, so providing the best opportunity for emphasising any policy. In the case of the Transport Tribunal there has been a considerable reduction in the significance of goods vehicle licensing given the influence of the nationalised transport undertakings. Indeed, in 1981 the Transport Tribunal dealt with 29 cases only in this context.

5.4.3 *Objective decisions: tribunals or courts?* A further factor in favour of allocating a decision-making function to a tribunal is the likelihood that a person's rights, interests or even his very livelihood may be affected. Where this is the case and there is a need for objective decision-making with clear safeguards there is likely to be an option, either to allocate the function to an ordinary court or a tribunal. If it is likely that many cases will be generated by the statutory scheme in question then it is unlikely that the ordinary courts could cope. However, where the issue or dispute to be adjudicated is, for example, a matter of some sensitivity or importance in a wider context, a court may be the more appropriate forum. Indeed, when the Race Relations Act 1968 was being legislated it was the County Court system which was chosen to deal with race relations disputes where conciliation between the parties had failed. In one of the Parliamentary debates on the Race Relations Bill it was observed that tribunals might not be regarded as instruments of law in quite the same way as the courts and might come to be regarded as conferring special rights on minority groups.

5.4.4 *Immigration appeals.* The need for some clearly objective

decision-making occurs in the field of immigration. This was an important theme of the Wilson Committee Report on Immigration Appeals in 1967 where it was said that:

> However well administered the present law may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal.

It was also emphasised that a system of appeals to tribunals from immigration decisions is necessary in order 'to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice and of confidence in dealings with the administration'. Since 1969 there has been a two-tier system of appeals involving in the first tier adjudicators appointed by the Home Secretary, and the Immigration Appeal Tribunal. A chief adjudicator, 15 adjudicators and 61 part-time adjudicators disposed of nearly 12,000 cases in 1981 while the Tribunal disposed of nearly 450 appeals from the adjudicators who themselves deal with appeals from the decisions of the immigration authorities, for example, refusing entry to the United Kingdom. In some instances there is no appeal from a decision of the immigration authorities, in particular where the Home Secretary has himself directed that a person should not be permitted to enter on the ground that his presence in the United Kingdom is not conducive to the public good. This is an important illustration of the fact that there are some decisions which are more sensitive than others from a political point of view and so are reserved for central government whose view it would be, no doubt, that tribunals should not be arbiters of matters such as national security and the public interest.

5.4.5 *Tribunals and local authority decisions.* While there are broad guidelines to indicate the likely circumstances in which an adjudicatory function will be conferred either on a tribunal or a central government department, can the same be said as between tribunals and local authorities? Local authorities like central government are democratically accountable bodies and it has been seen in Chapter 4 that they are also responsible for many policy-based decisions. Once again, the presumption is that any policy-based decision of a local authority will be subject to appeal to or be reappraised by the appropriate central government department. The exercise of powers of compulsory purchase is subject to confirmation of the necessary compulsory purchase order by the relevant Government minister, usually the Secretary of State for the Environment. A similar situation exists in the case of local authority decisions on applications for planning permission, where any adverse decision affecting the applicant can be appealed by him to the Secretary of State for the Environment. There are, however, two notable areas of local authority action which involve recourse to tribunals. The first area

of recourse arises from a dispute between a local authority and an individual on the amount of compensation payable for the compulsory acquisition of land. This is one of the more important matters dealt with by the Lands Tribunal. The second area relates to rating assessments in respect of which there is an appeal to a local valuation court constituted from any one of 65 panels maintained in England and Wales (in 1981), with an appeal to the Lands Tribunal. The local valuation courts, which despite their name are genuine tribunals, dealt with over 32,000 cases in 1981 while the Lands Tribunal dealt with over 1,100 cases in this and the various other categories of cases it deals with.

5.4.6 *Tribunals and inferior courts.* Where there is no significant policy element in administrative action taken by local authorities there may be facilities for an appeal to a court rather than a tribunal. Where an appeal is permitted in these circumstances the choice of a court may be explained in historical terms by the fact that the statutory scheme in question was created some years ago before the advent of tribunals on a large scale. The choice might also be explained by the fact that, even if a tribunal was an option, a local court might still provide convenient, local expertise, so avoiding the need to create an entirely new system of tribunals.

The County Courts and the magistrates' courts provide good examples in the present context of inferior courts, that is, courts below the Supreme Court of Judicature. Among the tasks of the magistrates' courts is that of deciding appeals against notices served under section 65 of the Town and Country Planning Act 1971 by local authorities where it is considered that the condition of open land is seriously injurious to the amenity of an area. One of the appeals dealt with by the County Courts relates to repair notices served under section 9 of the Housing Act 1957. One of the housing repairs notices which can be served by a local authority under section 9 requires the person having control of the dwelling to undertake necessary repairs where the authority is satisfied that it is unfit for human habitation but capable of repair at reasonable expense. In the case of these and many similar appeals to such inferior courts the courts in question usually have wide powers to deal with the matters in issue and may be able to substitute their own conclusions, for example, by confirming a notice and substituting certain terms of any notice or order served.

5.5 Tribunals and Inquiries Act 1971

It has been seen in Chapter 3 that the Tribunals and Inquiries Act is an important element in the control of many of the more important inquiry-based decisions taken under statutory powers by various ministers in central government. The Act is also of great significance in organising and controlling the many administrative tribunals which function as an important element in dispensing administrative justice.

Most of the recommendations from the Franks Report were implemented and it will be seen that these recommendations have found their way into the Tribunals and Inquiries Act where they seek to uphold the important idea that procedures and processes in this context should once again manifest 'openness, fairness and impartiality'. Reference has been made to the Council on Tribunals in Chapter 3. Having been established by the Tribunals and Inquiries Act, its principal function in relation to tribunals is to:

> . . . keep under review the constitution and working of the tribunals specified in Schedule 1 to the Act and, from time to time, to report on their constitution and working; [and] to consider and report on such particular matters as may be referred to the Council under the Act with respect to tribunals other than the ordinary courts of law, whether or not specified in Schedule 1 to the Act . . .

Most of the tribunals are listed in Schedule 1 to the Act and this, of course, means that they are under the scrutiny of the Council. Their inclusion here also means that they are subject to the various safeguards built into the provisions of the Tribunals and Inquiries Act, which will be examined below. All of the tribunals so far mentioned, with the exception of the Foreign Compensation Commission, are 'Schedule 1' tribunals. Other exclusions from Schedule 1 along with the Foreign Compensation Commission are the Parole Board, the Gaming Board, local legal aid committees and the Criminal Injuries Compensation Board.

5.6 Tribunals and Inquiries Act Safeguards

Whether a tribunal falls within the Act and its provision of safeguards, including supervision by the Council on Tribunals, depends on whether a statutory order (an item of delegated legislation) has been made and approved. Consequently, when a new tribunal or system of tribunals is created there will be some interest in the question of whether they are to be 'Schedule 1' tribunals. However, a particular tribunal may not be subject to all the provisions and safeguards in the Act so that the relevant statutory order may specify which parts of the Tribunals and Inquiries Act apply. The safeguards in the Act are concerned primarily with tribunal membership and procedure, and they are now dealt with in turn.

5.6.1 *Tribunal membership*. On matters of membership in relation to tribunals, the Act in section 5 empowers the Council to make general recommendations to the appropriate minister on the subject of appointments to Schedule 1 tribunals and panels from which tribunal membership is drawn. Where section 7 applies, the minister is required to select tribunal chairmen from a panel maintained for this purpose by the Lord Chancellor. Where section 8 applies, a minister is unable to

terminate a person's membership of a tribunal without the consent of the Lord Chancellor.

The power to make general recommendations about membership has been used on several occasions by the Council. In recent years the Council's concern about membership has focused on a number of issues including a policy of the Department of Health and Social Security not to allow chairmen of National Insurance Local Tribunals and Supplementary Benefit Appeal Tribunals to serve on the panels of both tribunals at the same time. Other issues have included the need for more legally qualified chairmen of Supplementary Benefit Appeal Tribunals and (in Scotland) the need for more women to serve as members of these tribunals.

5.6.2 *Rules of procedure for tribunals.* In relation to procedure, the Council exercises a very important consultative function since under section 10, no power of a minister to make, approve, confirm or concur in procedural rules is exercisable without consultation with the Council in the case of Schedule 1 tribunals. Section 12 deals with the giving of reasons for tribunal decisions and stipulates that where any Schedule 1 tribunal gives a decision there is a duty to furnish a written or oral statement of reasons on request. The section goes on to say that a statement of reasons may be refused or restricted on grounds of national security and that a tribunal may refuse to furnish the statement to a person not primarily concerned with the decision if of the opinion that to furnish it would be contrary to the interests of any person primarily concerned.

Although not strictly a matter of procedure, it should be noted that in the case of some of the Schedule 1 tribunals there is an appeal on a point of law to the High Court from their decisions. This is provided for by section 13 which contains an alternative whereby the tribunal can be requested to state and sign a case for the opinion of the High Court. It is difficult to generalise about this facility in section 13. On some occasions, as with decisions of the Immigration Appeal Tribunal, section 13 does not apply so that any challenge to the legality of a decision must be by means of judicial review in the High Court as described in Chapter 13. On the other hand, section 13 does apply to decisions of Rent Tribunals and Rent Assessment Committees. Finally, in the case of a few tribunals such as the Lands Tribunal and the Transport Tribunal any appeal on a point of law will go directly to the Court of Appeal, leap-frogging the High Court. This facility for an appeal directly to the Court of Appeal is undoubtedly a reflection of the tribunals' high legal reputation and specialist expertise. Where section 13 applies to a tribunal this will not exclude recourse to other remedies in the High Court where it is alleged that a decision is *ultra vires* and should be quashed. This matter is dealt with in Chapter 13.

5.7 Aspects of Tribunal Procedure and Organisation

Whether a tribunal operates effectively will necessarily depend on its membership and their ability to deal with the powers and procedures in question. The tribunal system permits the appointment of members by the relevant minister in the Government department concerned. Accordingly and by way of example, the Secretary of State for Health and Social Security will appoint the members of the various social security tribunals. It has been seen previously that in some instances the relevant minister is required to appoint tribunal chairmen from a panel maintained by the Lord Chancellor, which is usually an indication that such chairmen are to be legally qualified Legal qualifications are regarded as being particularly relevant for the chairmen of appellate tribunals. As far as general tribunal membership is concerned, the relevant statute constituting the tribunal will usually specify desirable qualifications. In practice, most tribunals comprise a chairman and two other lay members with assistance from a clerk.

5.7.1 *The presidential system in tribunals.* The position of the tribunal clerk is often a matter of concern. In its Annual Report for 1981–82, the Council on Tribunals reported on a complaint concerning the independence of National Insurance Local Tribunals. The complainant thought it wrong that anyone wishing to raise a matter with the tribunal by telephone had to speak to the department as the tribunal appeared to have no independent staff working in independent premises directly approachable by a claimant or representative. Although recognising the need for an employee of the department to act as tribunal clerk in some instances, for example, where the volume of work did not justify the tribunal employing its own full-time staff, the Council 'entirely accepted that it would be desirable for tribunals to be administered completely independently from Government departments'. Although departmental administrative arrangements for tribunals are closely monitored by the Council to ensure that their independence is not compromised, there is one measure which is probably more effective than most, the 'presidential' system. This system exists in some areas, notably the Industrial and Immigration Tribunals, and depends on a president who is responsible for the operation of the tribunals in question and stands between the tribunal and the responsible department. Because it is the president to whom reference is made for most purposes of tribunal operation, the system, according to the Council on Tribunals, 'fosters a desirable spirit of independence and properly emphasises a feeling of separation between the tribunals and the administration of the responsible Government department'.

5.7.2 *Openness in tribunal procedure.* The requirement of 'openness' emphasised by the Franks Report provides the basis for the general rule that tribunal proceedings are in public. There are notable exceptions,

for example, in the case of the Mental Health Review Tribunal, although it is general practice in most tribunals to read the evidence prior to the hearing so that there is not always the same public airing of evidence as in a court of law. Furthermore, it is generally the case that tribunals do not follow strict rules of evidence observed by the courts so that 'hearsay' evidence may be admitted, for example. Although there are differences in the rules of procedure for the various tribunals, one fairly typical example of procedural flexibility enjoyed by tribunals comes from the Industrial Tribunals (Rules of Procedure) Regulations 1980 which state that:

> The tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it shall so far as appears to it appropriate seek to avoid formality in its proceedings and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law.

Very largely, therefore, the procedure before the tribunal will be at the discretion of the chairman although, as will be seen in Chapter 10, this does not absolve him from observing the rules of natural justice. These common law rules would, for example, require a tribunal chairman to disclose most documents submitted by one of the parties to the proceedings, to the other party. Failure to observe this and the other requirements of natural justice would probably lead to a quashing of the tribunal's decision on the ground that it is *ultra vires*.

5.7.3 *Tribunal representation.* Parties to most tribunal proceedings are able to rely on representation whether in the form of legal or lay representation. Many welfare tribunals such as the Supplementary Benefit Appeal Tribunals see a great deal of representation by the various voluntary agencies whose expertise before these tribunals is considerable. Indeed, there are those who would argue that lawyers are out of place in tribunals and tend to introduce a measure of formality and technicality which is alien to administrative tribunals.

5.7.4 *Legal aid, advice and assistance.* In order to prepare a case for presentation to a tribunal it may be possible to rely on the free services of one of the voluntary agencies. In practice, many cases before the Industrial Tribunals are prepared and presented by officers of workers' trade unions as a service to the membership. In other cases where such assistance is not available to parties to tribunal proceedings legal advice and assistance is available from solicitors in the preparation of a case. However, legal aid to cover further expenses in pursuing or defending a case before a tribunal is not available except before the Lands Tribunal, the Employment Appeal Tribunal and the Commons Commissioners. This latter tribunal deals with disputes about the designation of land as

common land. Assistance by way of representation may also be available before the Mental Health Review Tribunals. This matter of legal aid was dealt with by the Lord Chancellor's Advisory Committee on Legal Aid in 1974. Although it was recognised that different persons have different needs before different tribunals, the Committee concluded that financial help should be extended to those voluntary agencies already operating in the tribunal system. Nevertheless, it was also recognised that legal aid before tribunals would lead to too much formality in their proceedings and the possibility that the proceedings would become too lengthy. The Council on Tribunals has also added its weight to the controversy in calling for legal aid to be made available before those tribunals under its supervision where legal representation is available.

5.7.5 *Legal immunity for tribunal proceedings.* Where judicial proceedings are being conducted in a court of law the judges enjoy an immunity from legal liability in tort. In other words, they cannot be liable for civil wrongs such as libel and slander, a matter which is dealt with again in Chapter 14. One of the big problems in the present context is whether this immunity extends to and protects the members of tribunals. In one of the leading cases, *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* (1892), the Court was concerned with a case of slander in respect of words spoken at a meeting of London County Council while it was acting as a licensing body for music and dancing licences. The defendant, Parkinson, claimed that his allegedly slanderous statements were protected by absolute privilege of the sort accorded to judges in judicial proceedings. However, it was decided that absolute privilege did not apply because the licensing body did not have the characteristics of a court even though it was obliged sometimes to act judicially. As a result Parkinson, it was decided, could rely only on 'qualified' privilege so that he could claim immunity from tortious liability for slander if he could prove that the offending words were spoken without malice.

While tribunals are obliged to act judicially, there must be some doubt about the legal immunity of their membership. This doubt is emphasised in relation to proceedings for contempt of court where there is a failure to comply with some order or some interference with the functioning of a court. One important aspect of the law relating to contempt permits an order for committal for contempt to be made by a Divisional Court of the Queen's Bench Division (part of the High Court) where the contempt is committed in connection with proceedings in an 'inferior' court. It was decided in *A-G v British Broadcasting Corporation* (1981) that a local valuation court did not come within this description. As a result, it may now be the case that only those tribunals which are described as 'courts' in their statutory definition will be regarded as deserving immunity in certain areas of tortious liability and as being

within the care of the Queen's Bench Division for the punishment of contempt.

5.7.6 *Precedent in tribunals.* One final area of interest in this context of procedure and organisation concerns precedent. By means of judicial precedent the common law has been developed through a system which requires a court to follow a decision of a court above it where the facts are similar. In theory there is no similar requirement for tribunals although in practice a system of precedent has developed in most cases. In particular, where there is a hierarchy of tribunals culminating with an appeal tribunal as with the Social Security Commissioners and the Immigration Appeal Tribunal, the lower tribunals will follow similar decisions of the appeal tribunals. However, this system does depend on an effective publication of significant previous decisions.

5.8 Specific Tribunals

In order to show the tribunal system in action and some of the foregoing principles in practice, the remaining section of this chapter is devoted to a description of the nature and purpose of some particular tribunals. The tribunals which are covered are the Transport Tribunal, the Vaccine Damage Tribunals, Rent Assessment Committees and Rent Tribunals, National Insurance Local Tribunals and Supplementary Benefit Appeal Tribunals.

5.9 The Transport Tribunal

The Transport Act 1968 states that: '. . . no person . . . shall use a goods vehicle on a road for the carriage of goods (a) for hire or reward; or (b) for or in connection with any trade or business carried on by him, except under a licence.' Applications for such licences are made to the local licensing authority. Before granting a licence, such an authority has to be satisfied about a number of matters, for example, that the applicant is a fit and proper person to hold an operator's licence and that there will be satisfactory facilities and arrangements for maintaining the authorised vehicles in a fit and serviceable condition. The disappointed applicant is entitled to appeal against the adverse decision to the Transport Tribunal. The Tribunal has High Court status which means that it has the power to compel the attendance and examination of witnesses, to secure the production and inspection of documents, to enforce orders and to enter and inspect property.

5.9.1 *Composition.* The Tribunal comprises a president who is an experienced lawyer and four other members, of which two are required to be persons of experience in the transport business, one a person of experience in commercial affairs and one a person of experience in financial matters or economics. The membership is appointed by Her Majesty on the joint recommendation of the Lord Chancellor and the

Minister of Transport. When the Tribunal is dealing with a licensing appeal of the type previously described, it comes before the Road Haulage Appeals Division which comprises at least two members of the Tribunal. Decisions of the Tribunal are by a majority and there is an appeal on a point of law, not to the High Court, but to the Court of Appeal, whose decision is stated to be final.

5.9.2 *Procedure.* Procedural requirements are governed by the Transport Tribunal Rules 1965 which indicate the considerable status of this body. Bearing in mind that the Tribunal has High Court status for various purposes and is designated as a statutory court of record, the Rules stipulate that: 'Where not inconsistent with these Rules the general principles of practice or any particular practice of the Superior Court may be adopted and applied at the discretion of the Court.' Two other Rules stipulate that a party may be heard in person or by counsel or a solicitor and that reasons shall be given for a decision.

5.9.3 *Status.* The Tribunal is a 'Schedule 1' tribunal under the Tribunals and Inquiries Act 1971 but the foregoing requirement for reasons in the Transport Tribunal Rules supersedes the requirement of reasons on request under section 12 of the Act of 1971. In the same way, the facility for an appeal on a point of law to the High Court in section 13 is superseded by a specific provision for a similar appeal to the Court of Appeal. As a tribunal under the supervision of the Council on Tribunals, the Transport Tribunal is subject to the Council's general recommendations about membership and the Council's concurrence is required for the removal of any member of the Tribunal. Finally, the Council has to be consulted in respect of any changes to rules of procedure.

5.10 The Vaccine Damage Tribunals

The Vaccine Damage Payments Act 1979 provides for a lump-sum payment of £10,000 to be made to any person whom the Secretary of State for Health is satisfied has suffered severe disablement as a result of vaccination. Certain conditions have to be satisfied, for example, in general the vaccination must have been before the age of 18 and the person concerned must have suffered 80 per cent or greater disability as a result. Where it is decided that there is no entitlement, the written notification must state the grounds for the decision. Where the written notification states that the Secretary of State is not satisfied that the claimant is severely disabled as a result of vaccination, it must specify arrangements for the matter to be referred to an independent medical tribunal, that is, one of the Vaccine Damage Tribunals. Decisions of any such tribunals are conclusive and binding on the Secretary of State. In some circumstances, for example, where there is a material change of

circumstances, the Secretary of State is empowered to reconsider a decision within six years of that decision.

5.10.1 *Procedure.* The Vaccine Damage Payments Regulations 1979 contain the procedural and other details governing the operation of the tribunals. The tribunals each comprise a chairman and two medical practitioners, each chairman being appointed by the Secretary of State from a panel maintained by the Lord Chancellor. In common with most other tribunals, hearings are in public 'except in so far as the chairman may for special reasons otherwise direct'. Apart from the specific statutory procedural requirements, the procedure is at the discretion of a tribunal. The Secretary of State and the claimant have a right to be heard before a tribunal so that they can call witnesses, question any witnesses and address the tribunal. For this purpose, any person having a right to be heard can be represented at the hearing by another person whether or not that person has professional qualifications. Where in the opinion of the chairman it would be undesirable in the interests of the claimant or the disabled person to disclose to them medical advice or medical evidence which is before a tribunal, such advice or evidence need not be disclosed but may be taken into account in making a decision.

5.10.2 *Status.* The tribunals came under the supervision of the Council on Tribunals in 1979. Apart from the Council's power to make recommendations about the tribunal's membership and the need for chairmen to be selected from a panel maintained by the Lord Chancellor, the Council has to be consulted in respect of procedural rules and the tribunals are bound to give reasons for decisions by virtue of section 12 of the Tribunals and Inquiries Act. However, section 13 of the Act does not apply so there is no appeal on a point of law to the High Court from decisions of the Vaccine Damage Tribunals. Consequently, tribunal decisions are subject only to judicial review in the High Court (the implications of this will be examined in Chapter 13). Six tribunals have been established and they disposed of 230 cases in 1981.

5.11 Rent Assessment Committees and Rent Tribunals

These tribunals, organised locally throughout the country, are concerned with disputes arising under the Rent Acts, that is, disputes relating to private residential tenancies and similar arrangements. Rent Assessment Committees are responsible for fixing 'regulated' rents and rents in respect of 'shorthold' tenancies on an appeal from a decision of a rent officer. Rent Tribunals are responsible for the fixing of rents in respect of 'restricted contracts', that is, where rented accommodation is situated in property which is also being occupied by the landlord, and for awarding 'security of tenure' whereby a person may be able to stay on in the accommodation. The fact that there is a close relationship

between these tribunals is reflected in their membership arrangements. Under the Rent Act 1977, the Secretary of State for the Environment maintains a panel of persons to act as chairmen and members of the Rent Assessment Committees established in various areas of the country. Each area has a panel containing a list of persons appointed by the Lord Chancellor who are capable of acting as chairmen, and a list of persons appointed by the Secretary of State in consultation with the Council on Tribunals who can sit as members. Rent Tribunals are constituted from the same source. Each Rent Tribunal comprises a chairman and two members while each Rent Assessment Committee comprises a chairman and one or two members.

5.11.1 *Rent Assessment Committees.* Hearings are in public unless, for special reasons, it is decided to meet *in camera*. The conduct of the hearing is at the discretion of the committee and any of the parties has a full right to be heard. The committee may inspect a dwelling subject to the proceedings and must inspect it if requested to do so by one of the parties. Most Rent Assessment Committee work is concerned with the task of resolving disputes about the fixing of 'fair' rents in respect of regulated tenancies: in 1981 they disposed of over 13,000 cases.

5.11.2 *Rent Tribunals.* Reference of restricted contracts for a tribunal's consideration is in writing. After a consideration of the reference, any such inquiry as the tribunal may think fit and any oral or written representations from the parties, the tribunal will fix a 'reasonable' rent. Any party may appear in person, be legally represented or be accompanied by any person. Hearings are usually in public but again, as is often the case with many tribunals, 'special reasons' may justify a hearing *in camera*. In 1981 the tribunals disposed of nearly 3,000 cases.

5.11.3 *Status.* It was seen previously that the membership of the tribunals is regulated by the Act to the extent that the Secretary of State is obliged to involve the Lord Chancellor and the Council on Tribunals. In addition, the Lord Chancellor's consent is required for the termination of a person's membership of one of the tribunals. Beyond the membership provisions of the Act, the tribunals are subject to section 12 (reasons for a decision to be given on request) and section 13 (appeal on a point of law to the High Court), as well as being under the supervision of the Council of Tribunals.

5.12 National Insurance Local Tribunals

Decisions on most applications for national insurance benefits under the Social Security Act 1975 are made by insurance officers in the Department of Health and Social Security. Officers in the Department of Employment are responsible for decisions on applications for unemployment benefit. Appeals from these decisions go to the National

Insurance Local Tribunals which comprise a chairman and two other members and, on some occasions, medical or other assessors. Chairmen are appointed by the Secretary of State from a panel appointed by the Lord Chancellor. The two other members are drawn from panels of employers and the self-employed on the one hand, and panels of employed earners on the other. Hearings are in public, except where a chairman considers that intimate personal or financial circumstances may have to be disclosed or that matters of public security are involved. The parties who are legally entitled to appear before the tribunal are the claimant, the insurance officer, the Secretary of State and any person whose benefit may be affected by a decision of the tribunal. Each party may be represented at the hearing. The decision is required to be in writing and must incorporate findings of fact and reasons. The tribunal's decision is subject to an appeal to a Social Security Commissioner: both the local tribunals and the Commissioners are tribunals under the supervision of the Council on Tribunals.

5.12.1 *Social Security Commissioners.* The Commissioners, of whom there are 12 in England and Wales, are barristers or solicitors of ten years' standing. The rules of procedure on appeal to a Commissioner are very similar to those applying in the local tribunals although in both cases there is considerable discretion to determine most aspects of procedure. Commissioners' decisions are subject to an appeal on a point of law to the Court of Appeal.

5.13 Supplementary Benefit Appeal Tribunals

The Supplementary Benefits Act 1976 stipulates that any person over the age of 16 years whose resources are insufficient to meet his or her requirements is entitled to receive supplementary benefit. Decisions on applications for supplementary benefit are taken by benefit officers from whose decision there is an appeal to a local Supplementary Benefit Appeal Tribunal. Each tribunal comprises a chairman and two other members. Again, as in the case of some of the tribunals previously described, the chairman of a tribunal is appointed by the Secretary of State from a panel appointed by the Lord Chancellor. One of the other members appointed by the Secretary of State must appear to represent work-people. The third member must appear to the Secretary of State to have knowledge and experience of conditions in the area concerned and of the problems of people living on low incomes.

5.13.1 *Procedures.* Procedurally, the Supplementary Benefit Appeal Tribunals are notable because they proceed in private. The parties are entitled to attend and be heard but as soon as any appeal is notified, the decision subject to the appeal is reviewed by an officer of the Department of Health and Social Security. If the appeal proceeds, the Department's case is put by the Presenting Officer who specialises in tribunal

work for the Department. Subject to some specific statutory requirements, the procedure at the hearing is largely at the discretion of the tribunal chairman. At the conclusion of the hearing when the decision is given, the tribunal is obliged to give reasons for its decision and to give its findings of fact on the material issues in the appeal. There is an appeal on a point of law against a decision of a Supplementary Benefit Appeal Tribunal to a Social Security Commissioner. Each of these tribunals is a Schedule 1 tribunal under the supervision of the Council of Tribunals. Supplementary benefit appeal decisions of a Social Security Commissioner are subject to an appeal on a point of law to the Court of Appeal.

5.14 The Caseload of Social Security Tribunals

Of all the administrative tribunals operating in England and Wales, the social security tribunals have some of the heaviest caseloads. The following figures are for 1981:

155 National Insurance Local Tribunals disposed of over 3,000 industrial injuries cases and nearly 29,000 other cases;
112 Supplementary Benefit Appeal Tribunals disposed of nearly 45,000 cases;
13 social security commissioners (including one part-time Commissioner) disposed of over 2,500 cases, the bulk of which were appeals under the Social Security Act and a very small proportion, appeals on a point of law from decisions of Supplementary Benefit Appeal Tribunals.

6 Public Corporations

6.1 Status

Public corporations are bodies with their own legal entity created by statute in most instances, normally without the status of Crown servant or agent, to undertake functions of concern to and subject to some control by Government.

6.1.1 *Statutory corporations.* Like local authorities, most public corporations are created by statute, in which case the corporation is referred to as a 'body corporate'. As an artificial individual in law, the public corporation can undertake transactions in its own name, can acquire, hold and dispose of property in its own name, and can sue and be sued in its own name. The one notable exception to the general rule that public corporations are statutory corporations is the British Broadcasting Corporation, which was created by charter under prerogative powers. In *British Broadcasting Corporation v Johns* (1965) (referred to in Chapter 2), it was decided that the Corporation was not a Crown servant or agent so that there could be no Crown immunity from the payment of taxes. In the case of most public corporations, the relevant statute will define any Crown status. The usual practice is to include a statement that the corporation is not a Crown servant or agent. However, in some cases it may have been decided that a corporation should have Crown status for a particular purpose, for example, in relation to the payment of rates on land in its ownership.

6.1.2 *Public corporations and functions of concern to Government.* There may be many reasons why Government decides to create a public corporation. These reasons are best reflected in the categories of corporation which will be examined in the next three sections. It should be noted that public corporations are not totally independent of Government. Why, then, should Government decide not to incorporate a particular function in a Government department? The answer is not a simple one. From a political point of view, Government may not want to be identified too directly with sensitive or potentially embarrassing areas of social regulation, for example. On the other hand, it may be considered that there is insufficient expertise in a Government department for the purpose of some area of regulation or that the nature of

and scale of a commercial operation is such that it cannot be undertaken by a Government department. As to the types of function undertaken by public corporations, there seem to be three broad categories, although there is always the possibility of an overlap between the categories in some cases. In the first category, one finds the commercial and industrial organisations. The second category covers the organisations concerned with economic, social and welfare regulation, while the third category covers those organisations whose concern is with social standardisation. Each of the three categories is now examined.

6.1.3 *Industry and commerce.* Where there is need for governmental intervention in economic activity, for example, because of a perceived need for monopolistic supply of a particular commodity or because of the importance of effective price control, a public corporation may be created either for the purpose of taking over an enterprise or group of enterprises or for the purpose of starting some undertaking right from the start. It is in this context that one finds the better-known public corporations like the National Coal Board, the Atomic Energy Authority, the British Steel Corporation, British Gas, the Independent Broadcasting Authority and the Central Electricity Generating Board. As an alternative to this general form of public corporation, there has been an occasional preference in Government for the creation of a private corporation, that is, a private company with some governmental representation on the board. Such private companies sponsored by Government usually represent a loosening of governmental control compared with the public corporation described in this chapter.

6.1.4 *Economic, social and welfare regulation.* Public corporations in this category may be seen as agents of Government in the fulfilment of some area of public policy, although this observation in no way suggests that such corporations are 'Crown' agents. As regulatory corporations, the bodies in this category are concerned to ensure that particular policies of the Government are implemented. Health authorities, for example, are concerned with implementing the policies of successive Governments which have provided the National Health Service. Among other tasks, the health authorities act as providers as well as regulators of health care in each area of the country. When it comes to economic regulation, public corporations in this category should be contrasted with those in the first category. Corporations in this second category are regulatory agencies: they are not usually the initiators of the economic activity itself. A prominent example in this area of economic regulation is any one of the agricultural marketing boards which facilitate the marketing of commodities provided by the various producers. That these categories of public corporation are but a rough introductory guide to a diverse background of quasi-governmental activity is well illustrated by the status and functions of the Indepen-

dent Broadcasting Authority which was included in the first category. The Authority has a very important regulatory function in respect of the award of broadcasting contracts and in ensuring that the contractors adhere to the terms of their contracts and any other statutory requirement for independent broadcasting. This, of course, is part of the Authority's overall commercial function. In the case of social regulation, again the task of any public corporation is to implement Government policies. One striking example here is the Housing Corporation which is organised regionally for the purpose, among other purposes, of regulating and financing the activities of housing associations. Consequently, housing rehabilitation can be effected by a fusion of these important elements in one body which for many financial purposes acts as an agent of Government.

6.1.5 *Social standardisation.* This category, like the one above, is almost always the product of some area of public policy and, again, there are probably many comparisons with the public corporations in the second category. However, in this third category it often appears that the public corporations are concerned particularly with the enforcement of standards of social behaviour. Prominent examples are the Commission for Racial Equality, the Equal Opportunities Commission, the Nature Conservancy Council and the Advisory, Conciliation and Arbitration Service. Social standardisation by these public corporations may involve a variety of techniques, for example, licensing, criminal prosecution or conciliation.

6.1.6 *Government control.* A clear point of distinction between the public corporation and the private company lies in the statutory facility for control of the public corporation by the minister, who is, in turn, responsible to Parliament. Examples of this control and its scope will be examined below where specific types of public corporation are dealt with. Apart from this area of control there are three other areas of control: Parliamentary control, 'consumer' control and judicial control by the courts. Parliamentary control is achieved through debates, questions and scrutiny by Select Committees either in general terms or on those occasions when some specific financial item is questioned, as a result of auditing, for example. So-called 'consumer control' is available in some cases, usually where consumer or consultative councils are established in relation to the commercial activities of some of the nationalised industries such as British Gas. Finally, there is judicial control, which is outlined in the next section.

6.1.7 *Judicial control.* In the case of most public corporations and the nationalised industries in particular, there appear to be few opportunities to challenge their acts as being *ultra vires*. It is difficult to identify precisely why this should be the case but there are some broad

indications. In the first place, the statutory powers and responsibilities of many public corporations are quite widely drawn so that proof of an *ultra vires* act could be quite difficult. Secondly, Government control, for example in the context of financial sanction for various projects, programmes or schemes, provides a filter to guard against anything which might be *ultra vires*. Finally, where the functions of a public corporation are undertaken mainly through contracts, it is that contractual forum which is the focus of attention so that the main concern is with the law of contract and whether the terms of any contract have been fulfilled. These three observations relate mainly to the so-called nationalised industries in industry and commerce. However, in the case of many other of the public corporations with statutory powers of regulation and social standardisation, there have been greater opportunities for challenge by reference to *ultra vires*. Individuals or organisations subject to administrative action by these public corporations have not always been slow to challenge that action as being *ultra vires* action. Whether it has been a case of the Commission for Racial Equality taking action to require a person to desist from allegedly unlawful discrimination contrary to the Race Relations Act or a case of the Advisory, Conciliation and Arbitration Service acting to require a company to recognise a trade union in collective bargaining, the fact that an individual or organisation has considered that legal rights are affected by administrative action has been sufficient to give rise to a challenge in the High Court. One of the responsibilities of the Advisory, Conciliation and Arbitration Service (ACAS), under a now repealed provision of the Employment Protection Act 1975 was to facilitate union recognition. ACAS was under a statutory duty to 'ascertain the opinions of workers to whom the issue relates by any means it thinks fit'. It will be seen in Chapter 9 that action by ACAS was challenged successfully by one employer in this context on the ground of procedural *ultra vires*. A number of other challenges to the exercise of these powers were mounted, but not always with similar success.

6.1.8 *Legal liability of public corporations.* Many of the legal principles mentioned in relation to the legal liability of local authorities in Chapter 4 are relevant to public corporations. The one crucial difference occurs where a public corporation is, in law, a Crown servant or agent, in which case the Crown's legal privileges referred to in Chapter 14 will apply. However, because most public corporations do not enjoy this status, this matter is of little significance here. Nevertheless, it was seen in Chapter 2 that some public corporations are closer to Government than others, in which case they are likely to have the status of Crown servant or agent, for example, the health authorities. Apart from this issue of Crown status, the legal liability of the public corporation will depend in many cases on whether there is sufficient statutory authority to protect the corporation in respect of action which is alleged to be a

tortious nuisance, for example. The public corporation's legal liability may depend also on the scope of any statutory duty which prescribes the functions it is expected to perform. In many instances, particularly in relation to the public utilities like the regional water authorities, the statutory duty is defined very broadly. The Water Act 1973 section 11 indicates, for example, that it is the duty of a water authority to supply or secure the supply of water for its area. It is the case that such widely drawn statutory duties cannot be enforced in law directly by a person who complains that he has no water supply, a point which is taken up in Chapters 11, 12 and 13. Because the fulfilment of these important duties depend on all sorts of financial and policy issues affecting water authorities, the law requires any complaint to be taken directly to the responsible minister. If, following investigation, some substance is found in the complaint, the minister may choose to serve a direction against the authority. Continuing failure to obey the requirements of the direction usually activates the minister's legal power to apply to the High Court for an order of *mandamus* which, if issued against the authority, compels adherence to the direction. In this latter context of statutory duties therefore, it may be possible to generalise by saying that such duties are not usually intended to be legally enforceable in the courts but they do underline the scope of Government control of many public corporations. The remainder of the chapter contains a brief description of some of the different public corporations which fall within the foregoing categories.

6.2 The Independent Broadcasting Authority

It is the function of the Authority to provide television and local sound broadcasting services of high quality in addition to those of the BBC for so much of the United Kingdom, the Isle of Man and the Channel Islands as may from time to time be reasonably practicable. This latter provision would presumably protect the Authority from any liability on those occasions when physical difficulties might hinder broadcasting, for example. The Authority is governed by the Broadcasting Act 1981, which goes on to say that programmes broadcast by the Authority are to be provided by the programme contractors in general. Accordingly, much of the Authority's control over broadcasting is exerted, not through any licence, but through the contracts made with the contracting companies. Indeed, the Broadcasting Act requires the Authority to ensure that each contract contains all such provisions considered necessary or expedient for the purpose of compliance with the standards set out in the Act. The Act also stipulates that the Authority is not to be treated as a body exercising functions on behalf of the Crown.

6.2.1 *Membership.* The Secretary of State has a wide power to appoint the Authority's membership from among those appearing to him to be

qualified for the office. The Authority presently comprises a chairman, deputy chairman and ten members, three of whom are required to look after the interests of Scotland, Wales and Northern Ireland respectively. In making an appointment, the Secretary of State is required to be satisfied that a member has no financial or other interest which is likely to prejudice the discharge of his functions as a member of the Authority.

6.2.2 *Powers, duties and functions.* Reference has been made to the functions of the Authority and these have to be seen in the context of the statutory powers and duties which help to facilitate them. Subject to the terms of the Act itself, the Authority has the power 'to do all such things as are in their opinion necessary for or conducive to the proper discharge of' the functions. By way of an example, the Act expressly permits the Authority to provide relay stations for broadcasting. With contractual and other financial transactions in mind, the Act also empowers the Authority 'to do such things and enter into such transactions as are incidental or conducive to the exercise and performance of' the powers and duties prescribed, 'including the borrowing of money'. The statutory duties of the Authority concentrate on the content and purpose of the programmes. The Act therefore states that the Authority's broadcasting shall be a public service for disseminating information, education and entertainment, that programmes shall maintain a high general standard including a proper balance and wide range of subject-matter, and that the Authority shall secure a wide showing or hearing for programmes of merit. The Authority has a duty to ensure observance of certain statutory requirements, for example that programmes do not offend against good taste, and a duty to ensure the exclusion of expressions of opinion by the Authority and any contractor on matters of political or industrial controversy or on matters of current public policy.

6.2.3 *Government control.* Government control of broadcasting is always a very sensitive issue. This is reflected in the Broadcasting Act which does not contain any power permitting the Secretary of State to give 'general directions', a power which is not uncommon in the case of several public corporations. In the case of the Independent Broadcasting Authority the Secretary of State is empowered to give directions as to the hours of broadcasting and it is the duty of the Authority to comply with such directions. In addition, the Secretary of State and any other minister of the Crown may require the Authority to broadcast any announcement which is necessary or expedient in connection with their respective functions of Government, for example, in the event of national emergencies.

6.3 The British Steel Corporation

The British Steel Corporation is governed by the Iron and Steel Act 1975. The Act empowers the Corporation to carry out or promote the carrying on of 'iron and steel activities', inside or outside the United Kingdom. The Corporation can also carry on or promote any other activities which any publicly owned company is for the time being authorised to undertake, but this requires the consent or general authority of the Secretary of State. Any such consent or authority would no doubt stop short at any radical departure from the Corporation's normal activities. Similar consent or authority is required if the Corporation wishes to acquire or hold interests in companies or to form such companies. In contractual and financial terms, the Corporation is empowered to do anything which, in its opinion, is calculated to facilitate the carrying out of the activities and powers outlined above. The Corporation does not have Crown status.

6.3.1 *Membership.* The Corporation comprises a chairman and not less than 7 and not more than 20 members appointed by the Secretary of State from persons appearing to have had experience in relevant fields of activity.

6.3.2 *Government control.* Section 4 of the Iron and Steel Act contains a range of provisions empowering the Secretary of State to issue directions to the Corporation. It may not be without significance that the section contains a duty requiring the Corporation to exercise its powers to ensure that its activities are carried on in 'the most efficient manner'. The section specifies the Secretary of State's power, after consultation with the Corporation, to issue directions of a general character on matters which appear to affect the national interest and a corresponding duty to give effect to such directions. More specifically, directions may be given, again after consultation with the Corporation, requiring a discontinuance of some of its activities, for example. However, such specific directions cannot be given unless the Secretary of State is satisfied that they will further the public interest.

6.4 The Housing Corporation

The Corporation has various functions, the more important of which are promotion and assistance in the development of registered housing associations, the registration of housing associations, supervision and control of the associations and the processing of applications for housing development funds from such bodies. In order to achieve these objectives the Corporation has the capacity to do such things and enter into such transactions as are incidental to the exercise or performance of the above functions. The Corporation is not a Crown servant or agent for any purpose.

6.4.1 *Government control and membership*. The Corporation is subject to general directions from the Secretary of State, a particularly important element of control in the case of this and other public corporations with statutory responsibilities for the distribution of public money. The Secretary of State again has the responsibility for appointing members of the Corporation, in this case 15 members.

6.5 The Wool Marketing Board

This Board is one of a number of agricultural marketing boards which are now governed by the Agricultural Marketing Act 1958. Schemes for the market regulation of an agricultural product may be submitted to the minister by persons who are substantially representative of the producers of that product. The minister is required to publicise a scheme, indicating that there are facilities for objections. Any objections which are made are examined at a public inquiry and the minister is obliged to consider the inspector's report before deciding whether the scheme should be implemented. If a scheme is to be implemented, a board is appointed to administer that scheme. The minister has a power to give directions where it appears to him that any act of a board will be contrary to the public interest. However, the board must receive notice of any such direction and can require that the matter be referred to a committee of investigation. The Wool Marketing Board comprises ten regional members, two 'special' members and three persons appointed by the minister. Each regional member is elected by the registered producers in his area. The Board maintains a register of producers. Any producer who is neither registered nor exempt from registration is prohibited from selling wool, although the Board can grant exemptions. No registered producer can sell wool except through the agency of the Board which has wide powers in connection with matters such as the condition of wool to be sold. Valuation decisions are conclusive unless a valuation appeal tribunal is set up under the scheme. Contravention of the scheme by a registered producer attracts financial penalties levied by a disciplinary committee under the scheme. It should be noted finally in this context that this and other agricultural marketing boards now operate against a broader background of EEC law and the Common Agricultural Policy. As a result, there is always a possibility that an agricultural marketing scheme will be contrary to certain EEC legal rights and safeguards such as the provision in the Treaty of Rome which requires the free movement of goods between the Member States. The status of EEC law in relation to administrative law is outlined in Chapter 8.

6.6 The Nature Conservancy Council

The Council undertakes a wide variety of functions compared with many other public corporations. First, the Council has an advisory function, for example, in advising the Secretary of State in respect of

the categories of animals and plants to be protected by the provisions of the Wildlife and Countryside Act 1981. Secondly, the Council has a licensing function for the purpose of permitting activities which are otherwise unlawful, for example, the taking from a habitat of a wild animal protected by the Act of 1981, for scientific purposes. Thirdly, there is an executive function where, under the same Act, the Council is able to identify land considered to be of special interest by reason of its flora, fauna or other similar characteristics. After notifying the landowner, local planning authority and the Secretary of State, the Council is able to enforce any restrictions on uses of the land and to pay compensation therefor. Fourthly, the Council has a grant and loan giving function for nature conservation. Fifthly, the Council has a legislative function in the power to make bylaws for marine nature reserves. These are the main categories of function undertaken by the Council. It enjoys Crown status in respect of its land which gives exemption from the payment of rates in particular. The Council is governed by the Nature Conservancy Act 1973.

6.6.1 *Membership and Government control.* The Secretary of State appoints the membership of the Council. In addition, he has the power to give directions of a general character in relation to the performance of certain of the Council's functions, for example, the establishment, maintenance and management of nature reserves. Because so many of the Council's other functions are so closely related to the Secretary of State's responsibilities, it may be the case that any wider power to give directions is unnecessary.

6.7 The Advisory, Conciliation and Arbitration Service

The Service, usually referred to as ACAS, is governed by the Employment Protection Act 1975 and has a general duty: 'of promoting the improvement of industrial relations, and in particular of encouraging the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery'. ACAS has six functions:

(1) the provision of conciliation in industrial disputes;
(2) the provision of conciliation officers to promote the settlement of complaints made to industrial tribunals;
(3) the reference of matters in dispute to arbitration;
(4) the presentation of advice to the parties to industrial relations problems;
(5) inquiries into industrial relations problems;
(6) the preparation and publication of codes of practice for the promotion of good industrial relations.

Because ACAS has to be seen to be a truly independent body in the often sensitive area of industrial relations, the Act of 1975 states that 'the Service shall not be subject to directions of any kind from any

Minister of the Crown as to the manner in which it is to exercise any of its functions'. The Act also designates ACAS as a body performing its functions on behalf of the Crown and goes on to emphasise that the corporation enjoys the Crown's special legal position in civil proceedings as defined in the Crown Proceedings Act 1947, a subject dealt with in Chapter 14. ACAS is governed by a council whose membership is appointed by the Secretary of State from both sides of industry, with the addition of a minority of 'independent' members.

PART 2 ADMINISTRATIVE POWERS

7 The Nature and Characteristics of Administrative Powers

7.1. Statutory Powers

The principal characteristic of most administrative powers is that they arise from and can be used by virtue of legislation. It will be seen in Chapter 8 that there are different varieties of legislation and that they each relate to different areas of administrative powers. However, the most important variety of legislation is the so-called public general Act which affects the law across the country as a whole. It was seen in Chapters 3 and 5 that the Tribunals and Inquiries Act 1971 governs some of the important requirements to be observed by most administrative tribunals and statutory inquiries. In addition to defining the general legal standards to be observed in this context, the Act also permits the making of statutory orders to bring a tribunal under the Act and statutory rules to set down rules of procedure for some statutory inquiries. It will be seen in Chapter 8 that such orders and rules are items of subordinate, or delegated, legislation since they are made under the authority of a principal Act of Parliament by a delegate, in this case, a minister of the Crown. In some instances, the Crown relies on prerogative powers, as described in Chapter 1. It was seen that these powers are not legal powers although they are recognised by the courts which have a crucial role in deciding where legal powers end and the more uncertain prerogative begins. The rarity of such decisions indicates the predominance of legal powers in the present context and, in particular, statutory powers.

Reference must be made finally to the common law, that is, the case law developed by the courts. The common law has been developed where the courts have had to make the law for a situation which is not governed by statute and where it is necessary to interpret Parliament's words in a statute. It is this second situation which has characterised the development of so much administrative law. Most administrative powers are statutory so that it has been the case on frequent occasions that the High Court in particular has been called upon to interpret the statutory words of Act of Parliament or some other item of legislation, primarily by reference to the doctrine of *ultra vires* as described in Chapter 1 and Part 3. As a result of judicial decisions in the courts, it has been possible for all sorts of administrative agencies to appreciate the scope of their various statutory powers. In matters of substance and procedure the courts' decisions have had a very persuasive influence on

the way in which many administrative powers are used as well as the purposes for which they are used. Such matters are addressed more fully in Part 3.

7.2 The Law of the European Economic Community

Chapter 8, which deals with the sources of administrative powers, includes a reference to the law of the European Economic Community, the EEC. When the United Kingdom became a member of the EEC, it was agreed that the Treaty of Rome would apply to and be observed in the UK. It will be seen in Chapter 8 that the Treaty of Rome provides the basis for the constitutional and legal framework of the EEC. This is now recognised by the European Communities Act 1972 by which Parliament accepts that EEC law is superior to the law of the United Kingdom and will apply to the exclusion of the latter whenever there is an overlap. Consequently, it is necessary to identify three things:

(1) the object of the EEC for the purpose of indicating the areas of law where the United Kingdom Parliament has accepted the superiority of EEC law;
(2) the nature of EEC law; and
(3) the characteristics of admininstrative law and administrative powers as they are affected by EEC law.

7.2.1 *The object of the EEC.* Article 2 of the Treaty of Rome specifies that the EEC is an economic union of Member States. In general terms, this means that EEC law must relate in some way to the economic relationship between Member States. Accordingly, the more important areas of EEC law relate to economic competition, the free movement of goods and the free movement of workers. An example of EEC law in operation relates to an environmental protection policy in 1972 and various items of law which have been legislated since 1973 by reference to Articles 2 and 100 of the Treaty, among others. Article 100 provides for the harmonisation of such legislation among Member States as affects the establishment or functioning of the Community. The apparent intention behind the EEC law in this area is the harmonisation or reconciliation of the pollution laws in the Member States in order to reduce or eliminate disparity between their respective pollution laws. In this way, it is less likely that there will be great disparity in the costs of industrial production in Member States according to the relative laxity of their respective pollution laws. EEC law deals with the pollution problem both specifically, in relation to particular problems, and generally. In this latter context of general EEC laws, the United Kingdom promoted what is now the Control of Pollution Act 1974 which largely implements the requirements of a 'directive' legislated by the EEC.

7.2.2 *The nature of EEC law.* The outstanding characteristic of EEC

law is that it sets legal standards which are to be observed by and, sometimes, enforced against, Governments of Member States, individuals and organisations. In some instances, EEC law gives legally enforceable rights and it is often the case that such rights can be enforced in the courts of the United Kingdom, whether the matter is civil or criminal. In pursuing their duty to recognise and implement EEC law, the courts of the United Kingdom may find problems in interpreting that law. The Treaty of Rome states that in these circumstances any such court may refer the problem of interpretation to the European Court of Justice. EEC law as interpreted by the Court of Justice will be applied to the facts of the case by the court dealing with the case in the United Kingdom. By way of an illustration of the essential nature of much of EEC law, one can turn to Article 48 of the Treaty of Rome. Among other things, Article 48 stipulates that there shall be freedom of movement for workers as between the Member States and that there shall be no discrimination for this purpose in relation to employment, remuneration and conditions of employment. This important area of EEC law would be infringed where an organisation in one of the Member States has a requirement that its employees shall be nationals of that Member State, for example. Any national of a Member State excluded from employment by such an organisation could well claim a legal right to challenge the legality of the organisation's employment restriction as being contrary to Article 48 of the Treaty of Rome. There are exceptions to Article 48, and one EEC Directive states that it does not apply in various situations where, for example, a person is expelled from a Member State and the expulsion is referable to his personal conduct in relation to matters of public policy, public security or public health. Consequently, a deportation order served by the Home Secretary against a national of a Member State under his powers in the Immigration Act 1971 will be perfectly lawful as long as it can be justified under any of the exceptions to Article 48. If the order was challenged in the High Court, it would be found to be *ultra vires* as contrary to Article 48 if one or more of the exceptions could not be established.

7.2.3 *Administrative law, administrative powers and EEC law.* From the previous section it can be seen that an exercise of statutory administrative powers may be subject to the limitations of EEC law. Where statutory administrative powers are conferred on any administrative agency and are exercisable for purposes which overlap with EEC law then those powers must be exercised consistently with EEC law. An example from the Immigration Act and Article 48 was given in the previous section and in one of the leading cases, *van Duyn v Home Office* (1977), the issue related to those immigration powers which permit an immigration officer to refuse entry to the United Kingdom. Miss van Duyn was a member of the Church of Scientology which was

regarded by the United Kingdom Government as being an undesirable organisation, for a number of reasons. The Government's attitude to the Church had been made known publicly as had its intention to take steps to curb its activities. As a Dutch national, that is, a national of a Member State of the EEC, Miss van Duyn sought to enter the United Kingdom in order to take up employment at the Church's college in Sussex. Entry was refused, whereupon Miss van Duyn applied to the High Court for a declaration that she was lawfully entitled to enter the United Kingdom to take up employment with the Church. The crucial part of the Court's decision to refuse to grant the declaration was that Miss van Duyn's exclusion came within the 'public policy' exception to the legal rights conferred by Article 48. As a result, a Government of any Member State can lawfully discriminate against the nationals of another Member State in relation to Article 48, even though the same action might not be taken lawfully against one of its own nationals. Another example goes back to what was said in Chapter 6 about public corporations and, in particular, the agricultural marketing boards. It was seen in Chapter 6 that the various agricultural marketing schemes are approved by the Minister of Agriculture and operated by the boards concerned. It was suggested in *Potato Marketing Board v Robertson's* (1983) that the potato marketing scheme was contrary to certain provisions of EEC law. The issue arose when the Board sued Robertson's, a registered potato producer, for payment of a levy which was due under the scheme. In answer to Robertson's claim it was decided by the Court that, among other provisions of the Treaty of Rome, the scheme (which provided for quantitative marketing restrictions) did not contravene Article 34 which provides that quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States. One of the technical reasons for this part of the decision was that the relevant parts of the scheme did not have as their specific object the restriction of patterns of exports.

7.3 The Nature of Statutory Administrative Powers

In Part 1 the various administrative agencies were examined together with their various functions. In the remainder of this chapter it will be seen that some generalisations can be made about the nature and characteristics of the powers conferred on these agencies to enable them to perform their various functions. As to the nature of administrative powers, there is a simple distinction between discretionary and non-discretionary powers. This distinction is one which relates to whether an administrative agency has an opportunity to make choices in performing its statutory functions. In general, this opportunity to make discretionary choices is one which goes to ministers of the Crown and local authorities. Both of these are democratically accountable, to Parliament and councils respectively, for a large number of policy-based decisions in relation to functions which require a flexibility of response.

Some public corporations, and the so-called nationalised industries in particular, also enjoy a large measure of discretion for the purpose of being able to fulfil an effective commercial or industrial role. However these bodies are only indirectly accountable to Parliament through the minister responsible and the system of Parliamentary Select Committees. Administrative tribunals, on the other hand, are characterised by non-discretionary powers conferred by statute. As was seen in Chapter 5, the 'court-substitute' tribunals usually operate in order to adjudicate some statutory entitlement. In general terms, therefore, as long as any claim, dispute or similar matter can be isolated within the statutory formula by reference to which the tribunal operates, there is no discretion for the tribunal to do anything but deal with it within the terms of the statutory scheme concerned.

7.3.1 *The nature of discretionary powers.* It often appears that any discretionary powers conferred on a minister of the Crown are wider than those conferred on any other administrative agency. There may well be some substance in this observation, particularly in areas such as national security and economic regulation. As to national security, the Prevention of Terrorism (Temporary Provisions) Act 1976 states that:

> The Secretary of State may exercise the powers conferred on him by . . . this Act in such way as appears to him expedient to prevent acts of terrorism (whether in the United Kingdom or elsewhere) designed to influence public opinion or Government policy with respect to affairs in Northern Ireland.

The Act goes on to confer wide powers on the Home Secretary to make exclusion orders under the Act. As to economic regulation, Section 8 of the Industry Act 1972 states that for various purposes such as the promotion of the development or modernisation of an industry:

> [T]he Secretary of State may . . . provide financial assistance where, in his opinion — (a) the financial assistance is likely to benefit the economy of the United Kingdom, and (b) it is in the national interest that the financial assistance should be provided on the scale, and in the form and manner proposed, and (c) the financial assistance cannot, or cannot appropriately, be so provided otherwise than by the Secretary of State.

Each of these examples of discretionary powers indicates that within the broad limits of the statutory powers the Secretary of State responsible enjoys an important flexibility in his choice of action. As long as the particular Secretary of State has some grounds for an opinion under the Act of 1972 and is able to justify the expediency of his use of the powers under the Act of 1976, the law considers that he is acting *intra vires*, that is, within his statutory powers, and will not interfere on the basis that the task being performed is his task, conferred by Parliament. More particularly, the law is concerned only with the question of whether the Secretary of State has strayed beyond the limits of his powers, for

example, where, in an unlikely event, the powers in the Act of 1976 were to be used to prevent non-violent political acts in the United Kingdom. Clearly, it would be difficult and often controversial for the High Court to deal with questions as to whether it was 'expedient' for a Secretary of State to act in order to prevent acts of terrorism or whether the economy of the United Kingdom would be benefited by financial assistance to industry. The limits of the doctrine of *ultra vires* in areas like this are dealt with more fully in Chapter 11.

7.4 Characteristics of Administrative Powers

Administrative powers are characterised by many different forms, according to a variety of different requirements such as the need to allocate scarce financial resources for the fulfilment of important national needs and the need to control some potentially dangerous activity. Although it is not an easy task to characterise and categorise the various forms of administrative powers, six categories seem to provide an effective picture of the way in which statute confers these powers:

(1) the initiation of administrative action;
(2) licensing;
(3) financial regulation;
(4) contractual regulation;
(5) regulation by the criminal law;
(6) disciplinary regulation.

While it is recognised that there may be overlaps between these categories, each one will be examined in turn.

7.4.1 *The initiation of administrative action.* The initiation of administrative action is usually the responsibility of democratically accountable administrative agencies acting under the umbrella of statutory discretionary powers. The initiation of administrative action is most clearly associated with central government departments, as where the Home Secretary decides to exclude a person from the United Kingdom under the Immigration Act on the ground that his presence is not conducive to the public good. While this example relates to a single, individual case, there are many instances where all sorts of large, important schemes can be initiated under various statutory powers such as the Industry Act 1972, section 8 of which was mentioned earlier in the present chapter. The initiation of administrative action often occurs against a background of policy for which a minister is responsible to Parliament.

In the case of local government, the initiation of administrative action can be illustrated by reference to the various statutory powers which permit the compulsory purchase of land for all sorts of different purposes. Although some local authorities may be reluctant, as a matter of

policy, to allow a use of these powers, where they are used, any order made will be subject to confirmation by the appropriate minister, usually the Secretary of State for the Environment. Such a power to make a compulsory purchase order is strictly a legislative function, not an administrative function, but there are many other examples of purely administrative action being initiated by local authorities, for example where a local authority serves a repair notice in respect of a dwelling house which is unfit for human habitation but repairable at reasonable expense, under the power conferred by section 9 (1) of the Housing Act 1957.

7.4.2 *Licensing.* Licences are required for a wide variety of different purposes. Licensing therefore represents one of the most important types of administrative action. The various licensing agencies usually operate under discretionary powers which should permit effective control of the activities concerned. Many such activities are prohibited by statute which goes on to provide that they may be permitted where a licence or consent is granted by the particular licensing agency. Liquor licensing by magistrates is one of the better-known examples. One of the more important licensing functions relates to town and country planning where the Town and Country Planning Act 1971 states that the development of land requires planning permission, that is, a 'land use licence'. Local authorities have many other licensing functions in addition, covering activities such as the operation of pleasure boats and lotteries, and the use of firearms. Bodies such as the Civil Aviation Authority may undertake relatively limited licensing functions compared with central government. Central government is usually concerned with licensing in so far as any proscribed activity has some broad, national significance, as in the case of industrial development certificates mentioned in Part 1.

7.4.3 *Financial regulation.* Administrative powers conferred in this area are usually related to central government statutory control of local authorities' finances and to other grant-making activities undertaken by all types of administrative agency. The Housing Corporation, for example, distributes grants to housing associations. In the same general area, local authorities are responsible for the payment of housing renovation grants for the repair and improvement of substandard housing.

7.4.4 *Contractual regulation.* This area of administrative action provides what is often effective regulation from the point of view of the administrative agency although it is a fundamental legal restriction that any such agency cannot extend its statutory powers by the use of contractual powers. It was seen in Chapter 6 that the Independent Broadcasting Authority undertakes its statutory functions primarily by reference to the contracts made with companies providing programmes

by virtue of the Broadcasting Act 1981. One of the most far-reaching statutory powers permitting the making of contracts appears in the Town and Country Planning Act 1971 and some related statutory provisions. These powers permit local planning authorities to make planning agreements with developers, usually in conjunction with grants of planning permission. These contractual agreements allow a far more effective, detailed control of development than is normally available through the conventional 'land use licence' comprising a planning permission and any conditions attached to it.

7.4.5 *Regulation by the criminal law.* The criminal law tends to be used as a means of regulation where an activity has potentially serious consequences. Some of the best examples occur in the general context of pollution. Section 1 of the Clean Air Act 1956, for example, stipulates that it is a criminal offence to emit dark smoke from the chimney of any building. The law operates against the occupier of the building, the categories of which include dwelling houses in addition to the more obvious industrial buildings. There are some exceptions to the coverage of the criminal law in this area, as well as certain defences, for example, that the failure of a furnace was not reasonably foreseeable. The law is enforced by local authorities in the districts and the Clean Air Act prescribes a maximum fine of £100 in respect of dark smoke emitted from a private dwelling-house and a maximum fine of £400 in respect of any other building. Local authorities tend to use the criminal law in this and similar areas as a last resort, preferring to persuade occupiers to comply with the law voluntarily.

In other areas, the criminal law may be used as a means of regulation but less immediately than in the case of the Clean Air Act and similar statutes. The Town and Country Planning Act, for example, empowers a local planning authority to serve an enforcement notice requiring development without or in breach of planning permission to be discontinued. Only where the requirements of the notice are not complied with is there an opportunity for the authority to prosecute the offender in the magistrates' court.

7.4.6 *Disciplinary regulation.* This variety of regulation usually occurs within non-statutory domestic organisations such as trade unions, clubs, societies and professional organisations. Such organisations are of interest in administrative law particularly where the rules of natural justice are concerned. As far as statutory administrative agencies are concerned, disciplinary regulation is a matter of interest in two particular areas: the police and the agricultural marketing boards. In both areas there is some statutory regulation of discipline according to the respective requirements of these organisations which are therefore amenable to the doctrine of *ultra vires*.

8 The Sources of Administrative Powers

8.1 The Range of Administrative Powers

It was seen at the beginning of Chapter 7 that most administrative powers have their source in legislation, that is, they are statutory powers. As a general rule it can be said that such powers must have the force of law because they affect, or may affect, the rights of individuals or organisations. The impact of this general rule is seen in another dimension in the fundamental rule of law that where an administrative agency acts beyond or outside its statutory powers, the resulting action is regarded as being *ultra vires*, that is, no action at all in law. The general nature of this fundamental source of administrative powers will be outlined later in this chapter.

Reference has been made to the common law in Chapter 7. The common law is clearly a secondary though important source of administrative powers. As was seen in Chapter 7, the courts' interpretation of the statutory powers provide valuable guidance for many administrative agencies. Many of the rules of law developed by the courts in the context of the doctrine of *ultra vires* occur in Part 3 where it will be seen that it is the task of the courts to interpret and apply Parliament's intentions in relation to the statutory powers governing the functions of the administrative agencies. As these rules are developed under the umbrella of the doctrine of *ultra vires*, so they become an important influence in relation to much administrative action.

While Part 3 deals with the common law and the doctrine of *ultra vires*, the present chapter deals also with EEC law, not so much as a source of administrative powers but rather as a source of law and legal restrictions in relation to the functions and activities of administrative agencies as they fall within the objectives of the Community.

Finally, reference should be made to the prerogative as a source of administrative powers. It was seen in Chapter 1 that it is the Government of the day which exercises the Crown's remaining prerogative powers. In many though not all instances, prerogative powers do not impinge directly on the individual's rights, for example, in the broader regulation of Government monetary and economic policy. Consequently, in the absence of any statutory regulation, there appears to be some considerable flexibility of action available to the Government

within what is an ill-defined source of administrative powers. It is only on the rare occasion that a use of powers said to have their source in the prerogative may come under the scrutiny of the courts. In these circumstances the court may wield considerable influence in terms of being able to dictate where prerogative regulation ends and legal regulation begins.

It was said at the outset of this chapter that most administrative powers have their source in legislation as statutory powers. Accordingly, the remainder of this chapter is taken up with an examination of such powers and the other major source — EEC law.

8.2 Legislation

Any Government will use its albeit temporary control of Parliament to legislate measures in fulfilment of its various policies. Such legislation may, for example, set out a statutory scheme, its substantive and procedural requirements and the nature of any relationship between the administrative agency dealing with the scheme and the minister responsible.

8.2.1 *The advantages and disadvantages of legislation.* In a modern, complex society there is often a need for a precise definition of the law as it governs administrative powers and their implementation. It is often said that the common law has developed from 'accidents of litigation' between individuals and organisations, so that this area of the law is clearly unsuited for the provision of precisely defined, complex schemes governing areas like the social security system. However, even the major legislation like the Social Security and Housing Acts are subject to some limit on the amount of detail that can be incorporated. It is for this reason that many such Acts contain a power conferred on the minister responsible to make delegated, or subordinate, legislation specifying details for the operation of the statutory scheme. Most legislation operates in advance: exceptionally, a statute may be retrospective and operate against events in the past, for example, creating or removing legal liability. Most legislation is complex and not easily understood (even by lawyers on some occasions!). This difficulty is eased on those occasions when various items of legislation are consolidated in one Act. The Town and Country Planning Act 1971, for example, consolidated the Town and Country Planning Acts of 1962 and 1968. Unfortunately, and as is so often the case, it was not long before the legislation was being amended once again in the Town and Country Planning (Amendment) Act 1972, the Local Government Act 1972 and various other Acts. Although it is true to say that the central scheme of the law here remains the same, there are considerable difficulties in having to look at other Acts to find answers to detailed questions where the law has been modified and amended or

even repealed in some respects. In some other countries this problem is solved by amending the principal Act as soon as changes are legislated, so that there is no need to go beyond that Act.

8.2.2 *The Renton Committee on the Preparation of Legislation.* This Committee reported in 1975 and made four broad criticisms of legislation. First, it was said that the language of legislation was obscure and complex, its meaning elusive and its effect uncertain. Secondly, legislation is subject to over-elaboration, often in order to avoid uncertainty. Thirdly, the internal structure of legislation is illogical. Finally, and returning to the point canvassed at the end of the previous section, existing legislation is not amended by reference to new legislative provision.

8.2.3 *The categories of legislation.* Before a Bill can become an Act of Parliament, it requires the approval of Parliament and the Royal Assent. Bills fall into four categories:

(1) Public Bills;
(2) Private Bills;
(3) Hybrid Bills; and
(4) Private Members' Bills.

Most administrative powers conferred on the administrative agencies originate in Public Bills which become Public Acts of Parliament, such as the Education Act 1944, the Industry Act 1972 and the Housing Act 1980, to name but three. As Public Acts, each of these statutes has effected a change in the general law in pursuance of a Government's public policy. Private Bills, on the other hand, deal with the position of some individual, organisation or group of individuals on a matter of their private, personal or local interest. Hybrid Bills fall between Public and Private Bills because, as Public Bills, they nevertheless deal with some private interest, for which reason they are subject to special legislative procedures. As to the procedural differences between the Public and the Private Bill, *Erskine May*, the authoritative source on Parliamentary procedure states that:

> [T]he essential difference in procedure . . . is that, whereas a public bill is either presented direct to the House or introduced on motion by a Member of Parliament, a private bill is solicited by parties who are interested in promoting it . . .

The Private members' Bills, as their name suggests, are introduced by private members and can deal with any matter except the authorisation of expenditure.

8.2.4 *The legislative procedure for Public Bills.* When a Bill has been drafted, it is presented to Parliament for a first reading. Thereafter, the

second reading sees a discussion of the broad principles and structure of the proposed legislation. Some Bills will be regarded as non-controversial Bills while others will be unopposed. In the case of these Bills, where time on the floor of the House is short, they will be referred to a Second Reading Committee of the House. Following the second reading, the Bill is referred to a Standing Committee for what is appropriately described as the 'committee stage'. This is followed by the report stage where there is a report to the House on the Bill and any amendments to it. The third reading is usually a formality after the report stage and precedes reference of the Bill to the House of Lords where procedures are broadly similar to those in the House of Commons. Any amendments made in the House of Lords will be returned to the House of Commons. Subject to some restrictions, Bills can be and occasionally are introduced in the House of Lords. Whatever the sequence, following a Bill's approval by both Houses, it goes for the Royal Assent whereupon it has the force of law, although the new Act or parts of it may not come into force until an order (an item of delegated legislation) is made by the minister responsible and approved by Parliament.

An example of this procedure in action is the legislation of the Control of Pollution Act 1974 which was foreshadowed in the Queen's Speech on 12 March 1974 anticipating measures for 'the protection and improvement of the environment'. The Control of Pollution Bill started its passage in the House of Lords with the first reading on 30 April 1974 and a second reading on 7 May. Thereafter, the Bill went to a Committee of the whole House, an alternative to a Standing Committee and usually an indication of a Bill's importance, bearing in mind that all members can participate in the deliberations. The committee stage took place on 14 and 16 May, followed by the report stage and third reading on 21 May. The Bill went to the House of Commons on 17 June for a second reading and reference to a Standing Committee. The report stage and third reading were dealt with on 19 July. The Bill went back to the House of Lords subject to amendments made by the House of Commons. The amendments were dealt with on 25 July whereupon the Bill was agreed and received Royal Assent on 31 July. The Bill was introduced in the House of Lords as 'a development of existing legislation in the waste disposal, water pollution, noise and air pollution fields'. As such, it received considerable support from the Opposition which undoubtedly speeded its progress through Parliament. The Act comprises 109 sections in six parts and contains four schedules. Many provisions in the Act operate only when a commencement order is made by the Secretary of State for the Environment. In large part this seems to be explained by the cost of implementing the statutory provisions for monitoring and enforcing the requirements for solid waste disposal, among others. Part 2 of the Act, for example, is being introduced in phases over a period of four years from 1982.

8.2.5 *The legislative procedure for Private Bills.* The initial stages of the procedure require the promoter to give public notice of the Bill. A petition is then presented for permission to introduce the Bill, copies of which have to be deposited by 27 November in each Parliamentary session. The Bill is scrutinised for compliance with various Parliamentary formalities, after which it is decided whether the Bill should proceed. This initial stage is followed by a second reading when the broad principles of the Bill are examined. Thereafter, one of the most important stages occurs when the Bill is subject to the committee stage where much depends on whether the Bill is opposed or unopposed. Where there is no opposition or objection to the Bill the promoter is normally obliged to demonstrate formally that the Bill is an expedient measure in the circumstances. An opposed Bill is examined by an *ad hoc* committee before which the promoter and objectors are represented by lawyers in most cases. Although opponents may register their various objections, the promoter may challenge their *locus standi*, that is, their status or standing to raise objections, for example, because of remoteness of their interest in a project to be authorised if the Bill is approved. The atmosphere at this committee stage is essentially judicial with the committee having to make decisions on preliminary points like *locus standi*, and having to hear the evidence and witnesses presented by both sides to the argument and the necessary examination and cross-examination. This committee stage procedure will apply also to a Bill which, although regarded initially as unopposed, is to be treated as an opposed Bill by virtue of its importance or controversial nature. Following this committee stage in the House of Lords, a Private Bill goes for a third reading where as in the House of Commons there is a report stage unless there have been no amendments at the committee stage. Thereafter, a Bill will go for Royal Assent.

8.2.6 *The status of Private Bills.* Although a Bill is introduced as a Private Bill, there may be factors which indicate that it should be dealt with as a Public Bill. These factors are set out in *Erskine May* and are concerned with whether

(1) public policy is affected;
(2) the proposal is to repeal or amend Public Acts of Parliament;
(3) public matters are at the heart of the Bill;
(4) the Bill's provisions apply to a large area and affect a multiplicity of interests; and
(5) safeguards exist to deal with these foregoing matters.

At the outset it is the Department of the Environment which undertakes the examination of most Private Bills, usually by reference to a strong presumption that private, local powers are not necessary. This element of control prior to presentation is reinforced by Standing

Orders in Parliament, one of which calls on a committee dealing with a local authority Private Bill to consider, among other things, 'whether the Bill gives powers relating to police, sanitary or other local government matters in conflict with, deviation from, or excess of, the provisions or powers of the general law'. Further control appears in the Local Government Act 1972, section 70 of which prevents the promotion of a Private Bill for the purpose of changing a local government area, its status or electoral arrangements.

8.2.7 *The scope of Private Acts.* Even though the promoters have succeeded in persuading Parliament that additional statutory provision is required through a Private Act, the courts still insist that the statutory provisions are strictly interpreted against those promoters. In other words, any ambiguity will not be interpreted in the promoter's favour. The promotion of such legislation is not restricted to local authorities: various other public corporations and private organisations seek powers by means of Private Acts. Indeed, it appears that this method of acquiring powers is less popular than it used to be in the case of local authorities: in recent years, local authorities have promoted no more than about 30 to 40 per cent of all Private Bills. This matter will be taken up again in the next section of the chapter. It is of more immediate interest to give some examples of the Private Acts which have found their way to the statute book. First, a Private Act obtained by a private company, Gulf Oil Refining Ltd. The Act — the Gulf Oil Refining Act 1965 — authorised the construction and operation of an oil refinery at Milford Haven, in Dyfed. The second example comes from one of the many Private Local Acts promoted by local authorities over the years. The Act — the Leicestershire County Council Act 1970 — contains a number of provisions of local interest. One such provision, in section 6, empowers the County Council to enter into legally binding agreements with developers of land for a variety of purposes such as the phasing of any development of the land and the maintenance of open spaces. As such, this provision adds to broader powers in Public Acts, but it has been the case that local authorities have obtained Private Local Act powers to undertake functions normally outside their competence or to enlarge the scope of existing functions, or even to provide powers to deal with some matter or characteristic which is peculiar to their areas, for example in the area of support for industrial development. The county authorities have usually promoted Private Local Bills under the statutory powers given for this purpose by section 239 of the Local Government Act 1972, at the same time accommodating the requirements of constituent district authorities.

One final point concerns those occasions when some inconsistency may arise as between a Private and Public Act provision. Section 26 of the Housing Act 1980, for example, states that the Secretary of State may by order repeal or amend any provision of a Local Act passed

before the Act where it appears to him that the provision is inconsistent with any provision of the Act.

8.2.8 *Private Local Acts and reorganisation of local government.* There was a reorganisation of local government in 1974 by virtue of the Local Government Act 1972. One of the most obvious alterations related to the boundaries of the local authority areas so that for present purposes the crucial question was whether Private Local Acts should continue to apply in the redrawn areas or whether the area of their application should be amended. Section 262 of the Local Government Act appears to adopt the former solution, providing as it does that Private Local Acts in force on 1 April 1974 shall remain in force unless subject to an order made by the Secretary of State extending the Act to the whole of a new, redrawn local authority area. The Local Government Act also requires that Local Acts in the six metropolitan county areas shall cease to be operative at the end of 1980 and at the end of 1984 in the case of the non-metropolitan areas beyond Greater London. Local authorities are now obliged to consider the status and importance of their Local Acts and, where necessary, prepare new legislation for four purposes, covering:

(1) matters of general concern where the general law may not be sufficiently extensive;
(2) local matters;
(3) the updating of legislation governing the functions of local undertakings such as transport; and
(4) any further requirements requiring statutory authorisation.

With the advent of these important transitional provisions, local authorities may be seen to rely less and less on the Private Local Acts for the acquisition of their powers. Instead, there may be an increasing reliance on the regular Local Government (Miscellaneous Provisions) Acts which pass through Parliament, and the various adoptive Acts by which some areas of law apply in a local authority area only after a council's formal adoption of provisions from such Acts.

8.2.9 *Miscellaneous Provisions Acts and Adoptive Acts.* In one of the most recent Local Government (Miscellaneous Provisions) Acts one finds a considerable range of topics, including facilities for the control of the sale of food by hawkers, take-away food shops and the control of acupuncture, tatooing, ear-piercing and electrolysis. This Act of 1982 deals also with the control of 'sex establishments', defined to include sex cinemas and sex shops. In this context the Act of 1982 is an adoptive Act since a local authority is at liberty to decide whether the statutory provisions are to apply in its area. If this part of the Act is to apply to the area of a local authority then it is a requirement that any person wishing to use premises as a sex establishment should have a licence for

that purpose from the local authority. The local licensing authority is empowered to refuse applications on certain fixed grounds and any adverse decision is subject to an appeal to a magistrates' court. Failure to comply with the licensing provisions is a criminal offence.

8.2.10 *Provisional orders.* These orders are a means of avoiding the sometimes long-winded procedures for Private Bills. In practice, these orders tend to be used for the removal of Private Local Acts from the statute book by virtue of section 262 of the Local Government Act, dealt with previously. A local authority is required to apply to the appropriate minister for a provisional order, giving public notice of the application. If any objections to the proposed order arise, they will be heard at a public inquiry convened by the minister, after which a decision is made whether to make an order. If it is decided to make an order, a Provisional Order Confirmation Bill is presented to Parliament by the minister. Where the Bill is opposed in Parliament it will be dealt with as though it was a Private Bill.

8.2.11 *Special procedure orders.* These orders are governed by the Statutory Orders (Special Procedure) Act 1945 to 1965 and are subject to a special Parliamentary procedure. Once again, as with provisional orders, a local authority makes an application to the minister for the order. With the minister's agreement, the proposal is publicised and any objections are dealt with by a public inquiry. Where the minister decides to make the order it is laid before Parliament. Thereafter, objectors may petition Parliament and a joint committee of both Houses will deal with objections so made by persons with sufficient *locus standi*. Where the order is not approved by Parliament its contents can acquire the force of law only through an Act of Parliament. In practice there are very few objections so that the procedures are not as cumbersome as they might at first appear.

8.3 Delegated Legislation

Much of what has been said in this chapter so far has related to what is often referred to as 'primary' legislation, that is, Acts of Parliament. However, from time to time reference has been made to 'delegated legislation' which is a process by which different types of law are made under the authority and within the terms of an Act of Parliament. Accordingly, the Act delegates this law-making function to the administrative agency such as the appropriate minister or a local authority, usually in those cases where the Act itself cannot contain a large amount of detail or where some flexibility of response is required in order to deal with unforeseen contingencies. From what has been said, then, it can be appreciated that delegated legislation is sometimes referred to as 'subordinate' or 'secondary' legislation, although for the purpose of this chapter references will be to delegated legislation.

8.3.1 *Primary and delegated legislation in action.* Section 33 of the Housing Act 1980 states that the County Court shall not entertain proceedings by a local authority for possession of a council house unless the authority has served a notice on the tenant. The section goes on to state that a notice must be in a form prescribed by regulations made by the Secretary of State and must specify the ground, for example, non-payment of rent, on which the court will be asked to make a possession order as well as giving particulars of that ground. Elsewhere the Act states that: 'Any power of the Secretary of State to make an order or regulations under this Act shall be exercisable by statutory instrument'. The regulations actually made are called the Secure Tenancies (Notices) Regulations 1980 (SI 1980/1339).

8.3.2 *Statutory Instruments.* In any description of delegated legislation there has to be a reference to statutory instruments. In the example above the wording of the Act suggests that there is some importance attached to the term 'statutory instrument'. The status and importance of the statutory instrument emerges from the Statutory Instruments Act 1946. Where, after the passing of this Act, any Act empowers Her Majesty in Council (by Order in Council) or a minister of the Crown (by statutory instrument) to make, confirm or approve orders, rules, regulations or other delegated legislation, any resulting document is referred to as a 'statutory instrument' to which the provisions of the Act of 1946 applies. The Act itself contains provisions for the numbering, printing, publishing and laying before Parliament of statutory instruments: particularly important safeguards, bearing in mind the amount and complexity of delegated legislation which is generated each year.

8.3.3 *The classification of delegated legislation.* There are three items of delegated legislation which are of particular interest to local authorities, namely, bylaws, compulsory purchase orders and standing orders. These items will be described in the following sections of this chapter. Most other delegated legislation comes within the Statutory Instruments Act under the following categories: (a) regulations, (b) rules, and (c) orders. Regulations are concerned with the substantive detail of the law, as in the case of the Secure Tenancies (Notices) Regulations mentioned previously. The regulations require any notice served on a secure council tenant to state that the council is required to obtain a court order before a tenant can be evicted, and that he can obtain advice from a Citizens Advice Bureau, Housing Aid Centre, Law Centre, or solicitor. Rules are concerned with procedural requirements, as was seen in Chapter 3 where reference was made to the Town and Country Planning (Inquiries Procedure) Rules 1974 (SI 1974/419). Orders are divided into two categories: prerogative orders and statutory orders. Prerogative orders are not statutory instruments and can be used only to the limits of the Crown's prerogative powers. Statutory orders are

used for a variety of purposes but particularly for the purpose of bringing new statutory and certain EEC legal provisions into force. Where just one department of Government is affected, it is usually the minister responsible who is empowered to make the order. On the other hand, where a number of departments or governmental functions are affected, it is usually the practice that the power to make the order will be conferred on Her Majesty in Council.

One further category should be mentioned here: directions. It has been seen previously that there are various statutory powers which allow a minister to give directions to various administrative agencies which are directly or indirectly within his responsibilities. In some instances a direction must be given by means of a statutory instrument as was the case in section 4 of the Water Act 1973 by which the Secretary of State for the Environment was empowered to give directions to the National Water Council requiring that Council to discontinue any of its activities. On the other hand, any direction to the Council concerning national water policy was not subject to the same requirement.

8.3.4 *Bylaws*. Although various administrative agencies are empowered by statute to make bylaws, these items of delegated legislation are more often associated with local authorities. Their outstanding characteristic is that they apply in a specific area. Section 235 of the Local Government Act 1972 sets out the general power which permits the making of most bylaws: 'The council of a district and the council of a London borough may make bylaws for the good rule and government of the whole or any part of the district or borough . . . and for the prevention and suppression of nuisances therein'. The section goes on to say that the confirming authority for a bylaw is the Secretary of State for the Environment, representing an important measure of control in this process of creating delegated legislation. In practice model bylaws are maintained and it is highly unlikely that a local authority bylaw would be confirmed where it did not adhere to any such model. Bylaws are essentially local laws which regulate some unique local situation not already covered by some other form of statutory provision and may be enforced through the imposition of a fine by a court as a result of criminal prosecution. The Local Government Act stipulates the procedures to be observed in the making of a bylaw, for example, the need to make a copy of the proposed bylaw available for public inspection for at least one month before seeking confirmation. Because bylaws are subject to confirmation and usually adhere to model bylaws, it is very unusual to find that a bylaw has been struck down by a court as being legally invalid. Nevertheless, the validity of a bylaw can be challenged in two ways, either:

(1) directly, for example, through an application for a declaration in the High Court that a bylaw is *ultra vires* the empowering provision in the

primary legislation, that is, the Act of Parliament allegedly authorising the bylaw; or
(2) indirectly, usually where a person is prosecuted for a breach of a bylaw whereupon he argues that there can be no conviction for breach of a bylaw which is legally invalid.

Whatever the form of challenge, there are various grounds on which the legal validity of a bylaw maybe challenged:

(1) *ultra vires*, as previously indicated;
(2) uncertainty;
(3) inconsistency with the general law; and
(4) unreasonableness.

As to a challenge based on *ultra vires*, the Act in *R. v Wood* (1855) required occupiers of premises to remove dust, ashes, rubbish, filth, manure, dung and soil. The bylaw in this case was found to be *ultra vires* in requiring occupiers to remove any snow from the footpaths adjacent to their premises. The second ground of challenge — uncertainty — occurred in the more recent case of *Staden v Tarjanyi* (1980) where the bylaw prohibited any person using a park to 'take off, fly or land any glider'. The defendant in criminal proceedings for an alleged breach of the bylaw was a hang-gliding enthusiast who had twice flown over the park in his hang-glider. It was decided by the Court that he should not be convicted because the bylaw was uncertain in failing to explain how and in what respect a hang-glider could act in breach of the bylaw and in failing to set a lower limit below which a hang-glider should not fly. Inconsistency with the general law, the third ground for challenge, occurred in *Powell v May* (1946) where the bylaw prohibited betting 'in a public place' when two other Public general Acts permitted such activities. Finally, in connection with a challenge based on unreasonableness, in the leading case of *Kruse v Johnson* (1898) the bylaw in question was found not to be unreasonable in prohibiting any person 'playing music or singing in any place within fifty yards of any dwelling house after being requested to desist'. The Court set down four tests for the unreasonableness of a bylaw: where it is:

(1) partial and unequal in its operation as between different classes, for example, where controls are imposed on members of sporting clubs for a purpose totally unconnected with their social and sporting activities;
(2) manifestly unjust, for example, in imposing a heavier obligation on a person than is reasonably justified;
(3) made in bad faith, for example, where the motive is clearly contrary to the need for 'the good rule and government' of an area;
(4) oppressive or involves gratuitous interference with the rights of a person subject to the bylaw, for example, where the privacy of the individual is subject to unjustified interference.

8.3.5 *Compulsory purchase orders.* Although they serve distinctly different purposes, as another item of delegated legislation, the compulsory

purchase order is very similar to the bylaw with regard to the process by which an order attains the force of law. Many Acts of Parliament contain statutory powers which permit local authorities and, to a lesser extent, other administrative agencies to make compulsory purchase orders for the acquisition of land. Once made an order only becomes operative when it has been confirmed by the Secretary of State. The legal validity of an order can be challenged in the High Court on a limited basis, for example, that it is *ultra vires* the enabling Act, as will be seen in Chapter 13. The process of compulsory purchase is now very much more streamlined than it used to be, particularly in the nineteenth century when it was normal practice to seek an Act of Parliament as a means of acquiring land compulsorily. The modern procedures are to be found mainly in the Acquisition of Land Act 1981 whereas the specific powers are in the appropriate Acts such as the Housing Act 1957 authorising the acquisition of land for the provision of housing accommodation by local authorities.

8.3.6 *Standing orders.* The Local Government Act 1972 authorises a local authority to make standing orders for the regulation of its proceedings and business. Standing orders are concerned with the internal workings of local authorities and will regulate matters like the making of contracts, the operation of the committee structure within the council and the procedure for disclosure of members' pecuniary interests. Standing orders are extremely flexible and can be changed very easily so that any non-compliance would be difficult to enforce in law.

8.3.7 *The publication of statutory instruments.* Publication of statutory instruments is one of the most important safeguards in a system which permits the making of delegated legislation. Once it is made, the statutory instrument is sent to the Queen's Printer or the Controller of the Stationery Office where it is numbered and printed and arrangements are made for its sale. Some statutory instruments are not subject to the requirement of printing and sale:

(1) 'local' statutory instruments;
(2) statutory instruments of limited application where measures are taken for their publicity;
(3) statutory instruments whose size or nature make it unnecessary or undesirable they should be published, a matter which has to be certified by the appropriate minister;
(4) statutory instruments whose publication would be contrary to the public interest, as certified by the appropriate minister.

Each year about 2,000 statutory instruments are issued, two-thirds of which are published. The Act of 1946 requires Her Majesty's Stationery Office to publish lists indicating the date of issue of statutory instruments which have been printed and sold: such lists serve as conclusive evidence of the date on which an instrument was first issued.

This is a matter of great importance because the Act of 1946 provides a defence for the person prosecuted for non-compliance with the terms of a statutory instrument, to the effect that although *made* at the date of the offence, the instrument had not been *issued*. Nevertheless, such a defendant could be convicted of the offence where it is proved that reasonable steps had been taken at the date of the offence to bring the instrument to the attention of the public, anyone likely to be affected or the person charged with the particular offence. The courts have insisted that any statutory instrument should have been adequately publicised to those affected by it. In *Simmonds v Newell* (1953), for example, the Court quashed a conviction, even though steps had been taken to publicise the substance of a schedule to a statutory instrument, because there was no evidence before the Court of such publicity. By way of contrast, in *R. v Sheer Metalcraft Ltd* (1954) the Crown was able to prove to the Court's satisfaction that reasonable steps had been taken to notify those affected so that on this occasion the conviction stood.

8.3.8 *Parliamentary control of delegated legislation.* Delegated legislation normally requires the direct approval of Parliament except in some cases, as with bylaws and compulsory purchase orders previously discussed. On those occasions when such approval is required it is usually the case that delegated legislation is subject either to an affirmative resolution or a negative procedure. In either case, an item of delegated legislation will be laid before Parliament for 40 days. In the case of the affirmative procedure, a resolution is required within 40 days to bring the item of delegated legislation into force, whereas the negative procedure sees the delegated legislation in force after 40 days when no challenge has been made in that time. The more popular procedure is the negative procedure. Parliamentary control also occurs through the facilities for scrutinising delegated legislation for the purpose of making Parliament aware of any areas of concern. In general terms, there is usually some concern about delegated legislation which is not clearly defined and which may give administrative agencies unduly wide powers. There is similar concern where delegated legislation attempts to give a power to levy taxation, to alter or amend statutory provisions, or to preclude the judicial control of any statutory powers and their use. The scrutiny is undertaken principally by the Joint Select Committee on Statutory Instruments drawn from the House of Commons and the House of Lords, the House of Commons' Select Committee on Statutory Instruments, the House of Commons' Select Committee on European Secondary Legislation and the House of Lords' Select Committee on the European Communities. These committees do on occasions examine draft statutory instruments where drafts are required to be submitted.

One example of the scrutiny process comes from the Fifth Report of the Joint Committee on Statutory Instruments in the Parliamentary

Session 1978 to 1979. The Committee drew attention to the Medicines (Administration of Radioactive Substances) Regulations 1978. The Committee noted that a considerable measure of discretion had been left to those applying the Regulations for the purpose of deciding what substances are or are not to be regarded as radioactive for the purposes of the Regulations. The Committee considered this to be unsatisfactory unless there was a reasonably precise standard by reference to which decisions could be made. In a memorandum to the Committee from the Department of Health and Social Security, it was pointed out that there would be some difficulty in adopting a precise standard. The memorandum gave an example: 'a substance with a negligible concentration of radionuclides of a kind which accumulate in the body may yet present a hazard if administered over a long time'. For such reasons the Department did not consider that the public would be better protected if a radioactive substance was more precisely defined. This matter was concluded with the observation that '[the] Committee appreciate the Department's difficulties and acccept the explanation given. Nevertheless they consider that Parliament should be aware of the wide discretion which this Instrument gives to the Executive'.

8.3.9 *Delegated legislation and the courts.* While the courts have a crucial role to play in ensuring that delegated legislation is within the limits of the enabling Act, they are in no way able to challenge the validity of primary legislation, that is, Acts of Parliament (*Pickin v British Railways Board* (1974)). So, in the case of delegated legislation, the courts have to ensure that the doctrine of *ultra vires* is adhered to. It is unusual for there to be a direct challenge to the legal validity of delegated legislation, for example, through an application to the High Court for a declaration that a regulation is *ultra vires* its enabling Act. More usually the matter will arise indirectly, for example, in criminal proceedings for an alleged breach of a regulation. In *Chester v Bateson* (1920) the Defence of the Realm Act 1914 empowered the making of regulations 'for securing the public safety and defence of the realm'. A regulation made under this power enabled the Minister of Munitions to declare an area in which munitions were manufactured a 'special area'. The intended effect was to prevent any person, without the minister's consent, taking proceedings to recover possession of any dwelling-house in the area if a munitions worker was living in it and paying rent. It was decided that Parliament had not deliberately deprived the individual of access to the courts but that the regulation was *ultra vires* because it could not be shown to be a necessary or even a reasonable manner of securing the public safety or defence of the realm. In *Attorney-General v Wilts. United Dairies Ltd* (1921) the New Ministers and Secretaries Act 1916 imposed a duty on the Food Controller to 'regulate the supply and consumption of food in such manner as he thinks best for encouraging the production of food'. The Controller

attempted to impose a charge of 2 pence per gallon as a condition of issuing licences for the supply of milk. It was decided by the Court that the charges were *ultra vires*. It was stated by one of the judges that the charges were not justified by the express powers in the enabling Act: 'all the powers given appear capable of performance without any power to levy money'. Another case is *Customs and Excise Commissioners v Cure and Deeley Ltd* (1962), which is dealt with in Chapter 11. In deciding that the regulation in this case was *ultra vires*, the Court took the view that it sought to prevent the tax-payer proving in a court of law the amount of tax actually due and substituted for the tax authorised by Parliament some other amount to be calculated arbitrarily by the Commissioners. Another example is the case of *McEldowney v Forde* (1971), involving the Special Powers Act in Northern Ireland, an Act which is now repealed. By virtue of the Act the Government of the Province was empowered to make regulations 'for preserving the peace and maintaining public order'. One of the regulations made created a criminal offence to be a member of an organisation describing itself as a 'republican club' or of 'any like organisation howsoever described'. Relying very heavily on the feeling that the regulation was not made in bad faith, the House of Lords, by a slim majority of 3 to 2, decided that the regulation was not *ultra vires* the Act. Lord Hodson, for example, stated that:

> . . . the word 'republican' is capable of fitting the description of a club which in the opinion of the Minister should be proscribed as a subversive organisation of a type akin to those previously named in [a] list of admittedly unlawful organisations . . . On this matter, in my opinion, the court should not substitute its judgment for that of the Minister . . .

As to the words 'any like organisation howsoever described', the same member of the Court considered that the minister's regulation, although vague, did not affect the legal validity of the whole and emphasised that these words were not in contention in this case. A similar issue arose in *Dunkley v Evans* (1981) where the Court was concerned with a statutory order covering an area, part of which it could not cover under the terms of the enabling Act. The West Coast Herring (Prohibition of Fishing) Order 1978 was made under the Sea Fish (Conservation) Act 1967, which Act did not apply to certain waters adjacent to the coast of Northern Ireland which were nevertheless included in the Order. The master of a trawler and its owner were prosecuted under the Order for illegal fishing in an area to which it lawfully applied. It was decided by the Court that there should be a conviction since the invalid part of the Order could be severed from the remainder since it was not inextricably connected to the remainder of the Order.

8.4 EEC Law

It was said at the outset of this chapter that EEC law was to be dealt

with, not so much as a source of administrative powers but rather as a source of law and legal restrictions in relation to the functions and activities of the administrative agencies in the United Kingdom, as they fall within the objectives of the Community. This framework of EEC law and its impact on administrative law in the United Kingdom was illustrated in the previous chapter. In the remainder of the present chapter it is proposed to outline the institutions of the Community, including the European Court of Justice, and the sources of EEC law and their effect. In this latter area reference back to the relevant sections of the previous chapter will be helpful. Before these items are examined it is as well to appreciate that EEC law provides the administrative powers necessary for various agencies of the Community such as the Commission to implement and enforce their functions in Member States.

8.4.1 *The Community institutions.* The Commission is responsible for the co-ordination of national policies, and the formulation of Community policies and their administration. Governments of the Member States appoint the Commissioners. The Council consists of delegates from the Governments of the Member States and is responsible for decisions on policy and various other legal acts. The European Parliament represents the Community's population and acts mainly as a consultative body in relation to acts and proposals generated by the Council and the Commission, although it does have significant powers in relation to the Community's budget and in its power to force the resignation of the Commission. The broad framework for decision-making in the Community involves a proposal for action from the Commission being notified to the Parliament for consultation with a final decision being taken by the Council.

8.4.2 *European Court of Justice.* The functions of the Community's Court can be divided into four:

(1) to enforce and interpret EEC law;
(2) to adjudicate disputes between Member States and the Community;
(3) to adjudicate disputes between the Community's institutions; and
(4) to protect individual legal rights and interests against infringement by the institutions, particularly through the power of annulment which is examined in Chapter 13.

8.4.3 *Sources of EEC law.* The principal source of EEC law is the Treaty of Rome itself. Beyond this principal source, there are various other sources, often referred to as Community secondary legislation:

(1) regulations:
(2) directives;
(3) decisions.

Regulations set down general rules which are binding within the Community and its Member States. In the previous chapter reference was made to Article 48 of the Treaty of Rome and the free movement of workers. One aspect of this area of EEC law is that there shall be no discrimination based on nationality as between the workers of Member States. Equality of treatment for workers is defined in detail in Regulation 1612/68 which covers a worker's eligibility for employment, equality of treatment in employment and his right to bring his family to a Member State for these purposes. Directives do not have a general binding effect but are binding only on the Member States to which they are directed and in relation to the objective to be realised so that it is up to the Member State to decide the means and methods by which that objective may be achieved. A convenient example can again be taken from Chapter 7 where Article 48 was described. The Directive in question — 64/221 — contains exceptions to the coverage of the law in Article 48 by reference to matters of public policy, public security or public health. Decisions also do not have a general binding effect but bind only the individual or Member State to whom they are addressed, for example, a decision of the Commission that a company had been acting in breach of the law on competition in the Community. In the case of regulations, directives and decisions it is a requirement of Article 190 of the Treaty of Rome that in undertaking such acts the Council and the Commission 'shall state the reasons on which they are based'. Two other possible sources should be mentioned: recommendations and opinions. However, because these are usually concerned with hypothetical situations in many cases they are not legal acts and are not therefore binding. More generally, it was seen previously that the European Court of Justice has as one of its functions the interpretation of EEC law. Article 177 of the Treaty of Rome permits any court in the United Kingdom and other Member States to make a preliminary reference to the European Court of Justice for a conclusive interpretation of EEC law as it affects a case before that court.

8.4.4 *The direct effect and direct applicability of EEC law in Member States.* It has been seen previously that the European Communities Act 1972 permits the introduction of EEC law to the United Kingdom where it is superior to the UK's national law in areas of overlap. A provision of EEC law said to have direct effect gives individuals in the Member States enforceable legal rights in national courts: for example, Article 48 on the free movement of workers. A provision of EEC law which is said to be directly applicable is incorporated automatically into the national law of a Member State. This is the case with EEC regulations and all regulations are accepted into the law of the United Kingdom by virtue of section 2(1) of the European Communities Act either by Order in Council or by departmental regulations as described previously in this chapter. EEC laws which are not directly applicable are

given effect to in the UK by the same means but subject to various restrictions by which the orders or regulations proposed cannot increase taxation or operate retrospectively, for example. These items of delegated legislation are scrutinised by the specialised scrutiny committees of the two Houses of Parliament referred to previously in this chapter.

PART 3 JUDICIAL REVIEW, *ULTRA VIRES* AND NATURAL JUSTICE

9 Procedural *Ultra Vires*

9.1 Statutory Procedures

In conferring various powers on administrative agencies by statute, Parliament will usually find it necessary to prescribe various procedures which should be observed in the exercise of those powers. Procedural requirements will be found either in the statute itself or perhaps in statutory rules or regulations made under the authority of the statute or some other related statutory provision. On some occasions the court may prescribe that where the statute is silent on matters of procedure or where there is an inadequate procedure, common law rules of natural justice will be implied. These are essentially rules of fair procedure which, if broken, can render the resulting administrative action *ultra vires*. The rules of natural justice have also been applied to the non-statutory procedures of purely domestic organisations like trade union disciplinary committees.

In general, statutory procedures fall into two categories, those prescribed for the guidance of the administrative agency concerned and those prescribed for the benefit and guidance of the individual in his dealings with that administrative agency. The latter procedures provide an important measure of the extent to which the system of administrative justice provides any facilities for public participation in the process of bureaucracy. However, there is usually very little if any guidance in the statute concerned on the legal *consequences* of any failure to comply with the procedural requirements; does non-compliance render the administrative action *ultra vires* in a particular case?

9.1.1 *Mandatory and directory procedures.* Guidance on the legal effect of a failure to comply with procedures comes from *Howard v Bodington* (1877) where Lord Penzance said that 'In each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act . . .' In applying this test the court will be seeking to ascertain whether a statutory procedural requirement is either *mandatory* or merely *directory*. If the requirement is mandatory, non-compliance renders the administrative action *ultra vires*, while non-compliance with a directory requirement generally has no effect except, perhaps, where there is a need for 'substantial com-

pliance' with a particular requirement, for example, a requirement that an administrative agency provides *some* description of a proscribed activity in using statutory powers to regulate that activity. Whether a procedural requirement is mandatory or directory depends primarily on the court's interpretation of the relevant words of the statutory provision, although consideration is often given to the consequences of that interpretation both by reference to the supposed requirements of the 'public interest' as well as the individual interests of the person affected by the administrative action.

9.1.2 *Public functions.* In practice the court is reluctant to categorise a procedural requirement as mandatory, even though it is stipulated that the agency 'shall' undertake certain action, where this would severely prejudice the performance of public functions. In the New Zealand case of *Simpson v Attorney-General* (1955) the Governor-General failed to authorise the issue of writs required by legislation as a prerequisite to a general election as a result of which it was unsuccessfully alleged that the result of the election was nullified so that any legislation by the newly elected Parliament was of no effect. It was recognised that there was neglect of a public duty

> . . . but the case is clearly such that to hold null and void the acts which were done would work serious general inconvenience, and at the same time would not promote the main object of the Electoral Act 1927. The main object of that Act I conceive to be to sustain; not to destroy the House of Representatives; and I am satisfied that those provisions . . . which relate to the times when the warrant and the writs shall be issued are directory and not mandatory; and that neglect . . . cannot invalidate the election.

9.1.3 *Individual rights and interests.* Where the public interest in preserving public functions is not paramount and the statutory requirement is sufficiently clear, the individual's rights and interests can be recognised. For example, the Coast Protection Act 1949 stipulates that a local authority is required to communicate to relevant property owners the charges due for coast protection work not later than six months from completion of the work. In *Cullimore v Lyme Regis Corporation* (1962) details of the charges were communicated nearly two years following completion of the work: this, it was decided, was in breach of a mandatory time limit of six months so that the notification was *ultra vires* and had no effect. Again, section 14 of the Employment Protection Act 1975 states that: 'In the course of its inquiries into a recognition issue . . . the [Advisory, Conciliation and Arbitration] Service shall ascertain the opinions of workers to whom the issue relates by any means it thinks fit . . .'. The issue for the Court in *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* (1978) was whether the Service was subject to a mandatory duty to consult those involved in a trade union recognition dispute or whether the Act

prescribed a mere discretion, as though the words of the above provision were merely directory. In finding that there was a mandatory duty, the Court's decision was summarised in the following observation, that:

> If ACAS makes a recommendation and the employer fails to comply with it, that may mean . . . that terms and conditions may be written into an employee's contract of employment without further reference to the employee himself, whether or not the employee is a member of the union in question or of a union at all and whether or not the employee desires to have his interests represented by the particular or any union . . . these powers given to ACAS are very large and . . . the court should ensure that the obligation and safeguards are strictly observed. [There is] no doubt that the requirement in section 14(1) [is] mandatory . . . In the context of this part of the Act it is unthinkable that Parliament should have left it to the discretion of ACAS whether they should or should not consult those to whom the issue relates before coming to their conclusion.

It is usually quite clear that a procedural requirement is incorporated in a statutory provision for the benefit of the individual. To that extent it is also clear that the provision confers a legally enforceable right where, for example, the administrative agency is obliged to notify a person of proceedings affecting his interests or of his right of appeal against a decision of that administrative agency. Failure to comply with such mandatory requirements would render any subsequent administrative action *ultra vires*. However, there may be occasions when the court feels that the individual's interests require protection in the present context but where the words of the statutory provision provide no options to enable such protection. In the Housing Act 1957, for example, it is stipulated that once a demolition order has been served on a house the local authority *shall* forthwith serve a notice on the occupants of the house requiring them to vacate the premises. Even though a local authority delays serving a vacation notice for the best motive of enabling the occupants to find alternative accommodation, the duty to serve the notice has been found to be mandatory and, as such, enforceable by the freehold owner of the house in question through an order of *mandamus* which compels the administrative agency (in this case, the local authority) to undertake its (mandatory) duty according to law (*R. v Epsom and Ewell Corporation ex p. R.B. Property Investments* (1964)).

9.1.4 *Individuals' procedural obligations.* It is not uncommon to find that procedural requirements have to be observed by individuals as well as by administrative agencies. For example, applications for grants and licences may have to conform to certain requirements as to form and content, appeals from certain decisions may have to be notified within a certain time limit and in a certain form, and objections to various proposals for administrative action may have to comply with certain requirements as to form and content. Again the court has to determine whether a procedural requirement is mandatory or directory and in

general there is an attempt to interpret the various requirements as liberally as possible in favour of the individual.

9.1.5 *Application requirements.* Statutory provisions will often make it abundantly clear what is the requirement in relation to an application, for example. By way of illustration, the Goods Vehicles (Operators' Licences) Regulations 1969 state quite explicitly that:

> A separate application for the grant of an operator's licence shall be made in respect of each traffic area in which the applicant has an operating centre but no operator's licence . . . An applicant shall not include in any application — (a) a vehicle specified in a current operator's licence . . . Every application shall be signed — (a) if made by a body corporate, by a person duly authorised in that behalf by such a body corporate . . .

Nevertheless, there is a tendency for the court to regard such application requirements as being directory, at least to the extent that an application may be accepted as such as long as there is substantial compliance with the statutory requirements so that the necessary details of the application are made known. The practice of many administrative agencies is to use standard forms for all types of application so that the defective application may be a rarity. On those occasions when the administrative agency deems an application to be deficient, statutory provisions may enable 'such further information as may be specified . . . to be given . . . in respect of an application'. This is a provision from the Town and Country Planning legislation relating to applications for planning permission. This legislation also requires an applicant for planning permission in respect of another person's land to inform that other person of his application and to certify to the local planning authority that this has been done when the application is submitted. In order to reinforce this protection for the landowner, the Act also stipulates that in the absence of a certificate for present purposes, the authority 'shall not entertain' an application for planning permission (section 27, Town and Country Planning Act 1971).

9.1.6 *Appeal requirements.* Statutory provisions frequently provide for appeals from many decisions of administrative agencies. For example, as was seen in Chapter 4, adverse local authority decisions on applications for planning permission are subject to appeal to the Secretary of State for the Environment (section 36, Town and Country Planning Act 1971), while appeals against local authority notices for the compulsory improvement of housing go to the County Court (section 91, Housing Act 1974). It is usually necessary to stipulate with some certainty the time limit within which any such appeal should be lodged. Accordingly, it is generally the case that *notice* of any such appeal must be notified, usually to the appeal body concerned, before the expiration of the appropriate time limit which means that in law the time limit is

mandatory (Howard v Secretary of State for the Environment (1974)). As a mandatory requirement, any failure to observe the time limit means that the appeal body is legally entitled to reject any purported notice and to refuse to determine the appeal. However, it is generally the case that the need to communicate the facts and grounds for an appeal is a mere *directory* procedural requirement (*Button v Jenkins* (1975)). Consequently, the facts and grounds do not generally need to be communicated within any time limit for appeals although there *will* be a mandatory requirement for their submission if eventually the appeal body requires them to be given. Again, failure to comply with this later requirement would be a breach of a mandatory requirement and entitle the appeal body to proceed to determine the appeal in the absence of the facts and grounds.

9.1.7 *Objections.* Some statutory administrative schemes provide a facility for objections to proposals for administrative action, particularly where such proposals, for example, to grant various liquor and gaming licences, might affect members of the public. Such objections will arise from the advertisement of the proposals, for example, to grant a licence, although in many cases the advertisement will simply relate to details of a particular application for a licence. Where this advertising obligation is prescribed by statute it is usually regarded as a *mandatory* requirement although in some areas of licensing there is no clear indication of the legal consequences of a failure to comply (*R. v Pontypool Gaming Licensing Committee ex p. Risca Cinemas Ltd* (1970)). In other areas there *is* a clear indication of the consequences of a failure to comply: section 26 of the Town and Country Planning Act 1971, for example, stipulates that a local planning authority 'shall not entertain' an application for planning permission for 'undesirable development' (which might include the establishment of, among other things, casinos and cemeteries) without proof of publicity for the application. Following the advertisement of licence applications and other administrative proposals, the submission of any objection or (perhaps) other representations is seen as a *directory* requirement. This is a reference to the fact that the law does not generally stipulate that an objection or representation should accord strictly with any mandatory requirement as to form and content. Consequently, in *Re L.(A.C.) (An infant)* (1971) an official of a local authority had led a party to child care proceedings to assume that an objection to a resolution of that authority need not be put in writing. In fact, the statute concerned required objections to be in writing but nevertheless the local authority was prevented from alleging that no written objection had been issued within the prescribed time limit.

9.1.8 *Specific areas of procedure.* In the remaining sections of this chapter the legal status of some more important areas of procedure will

be examined. These areas of procedure relate to consultation, delegation of decision-making and other administrative action, the communication of decisions and the obligation to give reasons for decisions and other administrative action.

9.2 Consultation

Consultation is one means by which public participation can be achieved in administrative action whether in relation to the making of policy, or in the making of actual decisions. It is not the only method of involving the public in administrative policy and decision-making: the public inquiry is an important example of the wider involvement of the public in many areas of decision-making. Consultation is usually required either where a person or a group may be affected by some administrative action or where they have some expert contribution to make to proposed administrative action. The statutory machinery for consultation tends to be less formal than that relating to the public inquiry and it is often the case that the administrative agency has a discretion as to who is consulted. In *Lee v Department of Education and Science* (1967), for example, the Court was concerned with section 17(5) of the Education Act 1944 which requires that the Secretary of State for Education, before varying the articles of government of a school, should afford 'to the local education authority and to any other persons appearing to him to be concerned with the management or government of the school' an opportunity to make representations. The Court decided that a governor and a teacher had a legal right to be consulted under this provision, but *not* a parent. The Court was also willing to define the limits of the discretion in *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* (1972) where, under the Industrial Training Act 1964, the minister was obliged to consult any 'organization or association of organizations appearing to him to be representative of substantial numbers of employers engaged in the activities concerned'. Because the minister had failed to consult the Mushroom Growers' Association, the Court declared that that part of the Board's order relating to the Association was *ultra vires*. Where, on the other hand, the authority has a very broad discretion as to whom should be consulted and exercises that discretion fairly and reasonably, the court may be reluctant to specify who should be consulted (*R. v Post Office ex p. ASTMS* (1981)). Even where there is no express statutory provision for consultation the court may be able to prescribe a limited common law obligation to consult, as in *R. v Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association* (1972). In this case the Corporation undertook not to increase the number of taxi licences until a Private Act was legislated controlling the operations of mini-cabs in the city. The Corporation sought to act in breach of this undertaking, as a result of which the Court decided that although the undertaking was not binding, there

was an obligation on the Corporation to act fairly and to consult the Association to hear its views before increasing the number of licences, even though the Private Act controlling mini-cabs was not yet on the statute book.

In pursuing a requirement to consult, the authority must ensure that the purpose of that consultation is reflected in the issues put forward for consultation. In *Legg v Inner London Education Authority* (1972) an injunction was granted by the Court in order to prevent the implementation of a scheme for comprehensive education because the proposals sent by the education authority to the Secretary of State differed from the proposals in the statutory notice which invited objections. Not only must the issues for consultation relate to the purposes of that exercise, the authority must supply sufficient information to the other party or parties to enable any advice to be tendered and must allow a reasonable amount of time for the consultation process. Furthermore, it has been said in one of the leading cases (*Rollo v Minister of Town and Country Planning* (1948)) that the authority 'with a receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to proffer in regard to a plan which [the authority] has tentatively evolved'. However, it appears that the existence of a policy in favour of a particular course of action does not necessarily mean that any consultation will not be undertaken without a receptive mind.

9.2.1 *Legal effect of a failure to consult.* In general, consultation is mandatory although the court may prescribe a directory obligation if the statutory provision seems to indicate a sufficient discretion, particularly in relation to those who are to be consulted, or where a person's interests are not prejudiced by a failure to consult in some respect. Two cases relating to statutory requirements for consultation in relation to the introduction of comprehensive education illustrate the contrast between the effects of mandatory and directory requirements in the present context. In *Bradbury v Enfield London Borough Council* (1967) the Court was concerned with various provisions of the Education Act 1944, one of which, section 13, stipulated that after proposals for comprehensive reorganisation (involving an intention to 'cease to maintain' schools and to 'establish new schools') had been submitted to the Minister of Education:

> . . . the authority . . . shall forthwith give public notice of the proposals in the prescribed manner, and the managers or governors of any voluntary school affected by the proposals or any ten or more local government electors . . . may within three months after the first publication of the notice submit to the Minister objections to the proposals . . .

This was a major prerequisite before any approval could be given by the minister to a scheme for comprehensive reorganisation, hence the

Court's decision that the requirement was mandatory. Failure to comply rendered the relevant resolutions of the education authority *ultra vires*. Following this decision the Education Act 1968 was passed whereby the 'section 13' procedure will now apply to a 'significant change in the character, or significant enlargement of the premises' of a school: whether a particular change is 'significant' is now to be determined by the Secretary of State for Education, not the court. The second, contrasting case is *Coney v Choyce* (1975) where the notice requirements of section 13 were regarded by the judge as being merely directory because the relevant regulations — the County and Voluntary Schools (Notices) Regulations 1968 — intended 'that notice should be published in a manner designed to show a representative number of people what their rights are'. The Regulations required notice to be given in a local newspaper, in some conspicuous place or places, at or near any main entrance to the school in question, and in such other manner as appeared to be desirable for giving publicity to the notice. In the case of two schools no notice was posted at or near the main entrance although notices were well publicised elsewhere and no person had suffered any substantial prejudice. Overall, therefore, non-compliance with the requirements did not affect the legality of the authority's action.

9.3 Delegation

An important element in many types of administrative action is the need to expedite the procedures and the need to recognise that many of the administrative and judicial functions cannot be undertaken 'personally' by the minister at the head of a Government department, the council of a local authority or the nominated board of a public corporation. A number of administrative and judicial functions may be and often are delegated by these agencies, at least to the extent that the law permits such delegation.

Whether the law permits delegation of functions depends on the maxim *delegatus non potest delegare*: an administrative agency with statutory responsibility for an exercise of powers cannot delegate them without statutory authorisation. However, the maxim *delegatus non potest delegare* applies strictly to *judicial functions*. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary inquiries, especially when it is a numerous body (*per* Lord Denning in *Selvarajan v Race Relations Board* (1976)). Even where the function is administrative its delegation may be expressly prevented by an appropriate statutory provision (*per* Lord Somervell in *Vine v National Dock Labour Board* (1957)). Whether delegation is permitted, therefore, depends on the terms of any statutory powers and, in general, on whether a particular function is 'administrative' or 'judicial'. A judicial function arises where 'any body of persons [have] legal authority to determine questions affecting

the rights of subjects' *R. v Electricity Commissioners ex p. London Electricity Joint Committee* (1924)). Only where there is clear statutory authorisation can this type of function be delegated.

One of the clearest examples of a judicial function relates to disciplinary functions which were in issue in *Barnard v National Dock Labour Board* (1953) where Lord Denning observed, on facts which showed that Barnard had been suspended from his employment as the result of a decision taken by a tribunal which had no power to take such action, that:

> [t]he Board are put in a judicial position between the men and the employers; they are to receive reports from the employers and investigate them; they have to inquire whether the man has been guilty of misconduct . . . and if they find against him they can suspend him without pay, or can even dismiss him summarily. In those circumstances they are exercising a judicial function . . . No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication.

Similarly, consideration of an information laid before a magistrate or a magistrates' clerk alleging a criminal offence is a judicial rather than an administrative function. Consequently, if such information is considered by anyone else who is not authorised by statute for this purpose, any subsequent conviction would be quashed (*R. v Gateshead Justices ex p. Tesco Stores Ltd* (1981)).

Administrative functions are less easily defined although by their very nature they tend to cover ministerial tasks such as the collection of information and the preparation of that information and other material for submission to a deciding body whose task *would* normally be seen as a judicial function. Where such a task of collecting information is lawfully delegated it is usually necessary for the delegate to submit *all* the information to the deciding body, failing which it might be said that there was a breach of the rules of natural justice inasmuch as any person submitting information or evidence might allege that a mere summary thereof could amount to a denial of a legal right to a reasonable opportunity for his case to be heard by the deciding body (*Jeffs v New Zealand Dairy Production and Marketing Board* (1967)).

9.3.1 *Government departments and local authorities.* Special attention needs to be given to the position of central government departments and local authorities. In the case of central government departments, a fundamental concept involves the idea that the civil servant is the minister's *alter ego* so that in law anything done by the civil servant is done in the name of and is binding on the minister. It was seen in Chapter 4 that local authorities enjoy a special position because the Local Government Act 1972 states in section 101 that:

> Subject to the express provisions contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of

> their functions — (a) by a committee, a sub-committee or an officer of the authority; or . . . by any other local authority.

Normally, any decision or other similar administrative action taken by the local authority only becomes a legally effective decision when passed in a resolution of the whole council. If the power to delegate in section 101 is used, the decision of the delegate committee, officer or other authority is legally the decision of the council. If this power to delegate is used, it is usually for the purpose of expediting the decision-making processes of the council. In practice the council will usually require a report from the delegate indicating details of delegated decisions actually taken. Those councils who make very little use of this facility tend to the view that the full, democratic process should apply to every decision or other administrative action of the council.

In the case of central government departments, it is generally recognised that the minister at the head of the department is not legally obliged to direct his mind to each case. In the leading case of *Carltona Ltd v Commissioners of Works* (1943) it was observed that:

> In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them . . . the duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department . . . Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority.

Applying this principle in *R. v Skinner* (1968), the Court was concerned with a statutory prerequisite that the Home Secretary should approve for use any breathalyser device before any person could be convicted of a drinking/driving offence under the Road Traffic Act. It was decided by the Court that approval could quite lawfully come from an Assistant Secretary in the Home Office Police Department. Again, in *Re Golden Chemical Products Ltd.* (1976) the Court was concerned with the Secretary of State for Trade's statutory power to present a winding-up petition to the High Court where it appears to him to be necessary in the public interest as provided for by section 35 of the Companies Act 1967. Such a requirement, it was decided, did not have to be undertaken personally by the Secretary of State.

An exception to the '*alter ego*' principle occurs where statute expressly or, perhaps impliedly, prohibits anybody but the minister making a particular decision. Section 13(5) of the Immigration Act 1971, for example, states that:

> A person shall not be entitled to appeal against a refusal of leave to enter,

> or against a refusal of an entry clearance, if the Secretary of State certifies that directions have been given by the Secretary of State (and not by a person acting under his authority) for the appellant not to be given entry on the ground that his exclusion is conducive to the public good . . .

9.3.2 *Implied authority*. In local government it appears that the effect of section 101 of the Local Government Act is that any delegation of powers must be *express*, leaving no room for any implied delegated authority. As far as central government is concerned, again there appears to be no room for the concept of implied delegated authority simply because administrative action is not regarded as being legally delegated: all action is taken theoretically by and in the name of the appropriate minister. In the case of any other administrative agency, including local government before the advent of express powers of delegation in the Act of 1972, implied delegated authority is sometimes recognised and provides a means by which administrative action taken without express statutory powers may be saved from being declared *ultra vires*. In *Nelms v Roe* (1969), for example, the issue related to the Road Traffic Act 1960 and the fact that under the Act information could be sought in relation to an alleged traffic offence 'by or on behalf of a chief officer of police'. The Court found that there was no written authority from the Commissioner of Metropolitan Police either to the inspector concerned with the case or his superintendent. It was decided that the '*alter ego*' principle did not extend to the case but there *was* implied authority delegated to the superintendent with the power further sub-delegated to the inspector dealing with the case.

In practice implied authority may be used by the court in order to save what would otherwise be seen to be an *ultra vires* delegation of powers. To that extent the court may be using a rather tenuous legal concept in order to fill a gap left in the relevant statutory powers in order to avoid a conclusion that the ultimate decision or other administrative action is *ultra vires* and that therefore the administrative agency is not bound by that action. Inevitably the court has to be able to conclude that Parliament must have intended that the particular statutory powers should be capable of being impliedly extended. In this task the court must be aware of the need to interpret the statutory powers, so far as is possible, as a workable entity. Consequently, it might be possible in some cases for the court to find that an administrative agency is legally able to establish a general policy and overall guidelines for the exercise of a particular statutory responsibility, leaving an officer of that agency with implied authority to process the administrative details relating to individual cases. Nevertheless, there can be no substitute for a comprehensive definition of statutory powers which avoids any recourse to implied powers, thereby putting beyond doubt the scope of an administrative agency's powers.

9.3.3 *Legal effects of delegation.* If there is lawful delegation, the agency retains concurrent powers (*Huth v Clarke* (1890)). Consequently, a delegate's decision may have no effect in law where it is taken *after* a decision on the same issue by the delegating authority. Furthermore, the delegating authority is able to revoke the delegated powers at any time (*Manton v Brighton Corporation* (1951)). However, where the powers have not been revoked the delegating authority is bound by the delegate's decision, as long as that decision is made *within* the terms of the delegated authority, that is, as long as the decision is not *ultra vires* the delegate's powers. The best illustration of this proposition comes from the local government context where the council of a local authority resolves to delegate certain powers to one of its chief officers, for example. Any decision of that officer within his delegated powers which is not revoked will be binding on that authority (*Lever (Finance) Ltd v Westminister (City) London Borough Council* (1970)).

9.4. Estoppel

Closely related to the foregoing principles relating to delegation is the doctrine of common law estoppel. The doctrine applies where an officer or other representative of an administrative agency:

(1) makes an adequate statement of fact or fact and law which is
(2) within his delegated or other lawful authority where
(3) the person dealing with that officer or representative relies on the statement to his detriment.

Where all these requirements are satisfied the administrative agency will be bound by and cannot deny the validity of the officer's statement. However, the doctrine applies to *statements and representations* as opposed to decisions. Where a decision is made by a delegate officer acting within his express authority in local government, for example, that decision is legally the council's. Where the officer makes a statement or representation short of a decision, for example to the effect that no licence is required for a particular activity or that a person is entitled to a grant for a particular purpose, *these* are the circumstances in which common law estoppel may apply.

A good example of common law estoppel in action occurs in *Lever Finance* where a planning officer working for the local planning authority indicated to an architect in a telephone conversation that the re-siting of a house shown on plans for which planning permission had been granted was an 'immaterial variation' *not* requiring a fresh planning permission. After the building work was commenced the planning authority threatened to serve an enforcement notice requiring the allegedly unlawful development to be discontinued because there was no planning permission. The company applied successfully to the Court for a declaration that they were entitled to complete the house on the amended site, and for an injunction to prevent service of the enforce-

ment notice. In the Court of Appeal Lord Denning observed that:

> If the planning officer tells the developer that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it . . . If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it . . .

Subsequently it was suggested that when a developer 'acts' on the representation he should be acting to his detriment. This suggestion was made in the High Court in *Norfolk County Council v Secretary of State for the Environment* (1973) where the Council resolved to refuse planning permission for a factory extension. In error the officer sent a notification to the developer indicating that planning permission *had* been granted. It was decided that the notification was *not* binding on the council since the officer had no authority to send the wrong notification with the consequence that the council was not bound, that is, estopped or prevented from denying the validity of the notification, so that in law no planning permission had been granted.

9.4.1 *Requirements for common law estoppel.* To be bound by a representation or statement of an officer then the three requirements for common law estoppel previously listed must be satisfied. The first of these requirements is that there should be an adequate statement of fact or of fact and law. In the most likely situation where a person seeks a determination of the question of whether he requires a licence for a particular activity or whether he is entitled to a grant for a certain purpose, the authority's statement or representation will relate the legal position concerning licences or grants to the facts of the inquirer's situation. Whether there is an *adequate* statement may depend on the court's satisfaction that adequate information was given to the authority's officer in the first place. In *Re Suruk Miah* (1976) it was decided that a letter from the Department of Employment indicating that a work permit would be granted to a person wishing to come to the United Kingdom to work was not an adequate representation: the law required that person to present a work permit on arrival if he was to be allowed to enter the country. In other words, the letter was not binding on the Department. Similarly, in *Wells v Minister of Housing and Local Government* (1967) deletion of words (on a form indicating the local authority's approval of plans under the Building Regulations) indicating that planning permission might also be required for the proposed development covered by the plans was *not* an adequate representation by the authority that planning permission was not required. Consequently and because the authority was not estopped or prevented from denying the validity of the representation, it could serve a legally effective enforcement notice on the developer requiring him to remove the building on the ground that it required but did not have planning

permission. The Court also decided that any such enforcement notice would not have been legally effective where the local authority responded to an application for planning permission by saying that in the circumstances no planning permission was, in fact, required. Even though such a determination can normally be made only on a formal basis following a specific application for such a determination, the informal response in this case would have been regarded as an adequate representation. It was argued in the case that the authority could only have been bound, that is, estopped, by a formal determination that planning permission was not required. This argument was rejected by the Court and Lord Denning said that: '. . . a public authority cannot be estopped from doing its duty, but I do not think it can be estopped from relying on technicalities'.

The second of the requirements for common law estoppel is that the relevant statement or representation should be made within the delegated or other lawful authority of the officer. This is a fundamental requirement, bearing in mind that no statutory authority can be bound by an *ultra vires* act or representation. In *Princes Investments Ltd v Frimley and Camberley Urban District Council* (1962) planning permission was granted for the building of houses, subject to a condition that the council should approve the sewerage arrangements. In fact, the council's engineer approved the arrangements but it was decided that his statement of approval was not binding on the council which could only fulfil its statutory responsibilities by formal resolution of the whole council at a time when local authorities had no facilities for the formal delegation of functions. The same conclusion occurred in *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* (1962) where an officer represented that no planning permission was necessary for a proposed development of land as a builder's yard. The council disagreed and it was decided by the Court that it was not bound by the officer's representation, which was made without any delegated authority, so that the council was free to exercise its statutory discretion to serve an enforcement notice to prevent the land's use as a builder's yard. Equally, if the authority in question is obliged to exercise a statutory duty, it cannot be estopped or prevented from so doing by a representation or statement of an officer acting without or outside any delegated powers (*Maritime Electric Co. Ltd v General Dairies Ltd* (1937)). This conclusion clearly upholds the essential requirements of the doctrine of *ultra vires* but this requirement is seemingly ignored in the case of *Robertson v Minister of Pensions* (1949). Colonel Robertson, an army officer, received a determination from the War Office that a disability was attributable to military service. The injury in question occurred in December 1939 but War Office responsibility for making these determinations only extended to claims for injuries incurred up to 2 September 1939: thereafter responsibility was transferred to the Ministry of Pensions. The Ministry subsequently determined that the colonel's

disability was *not* attributable to military service. This decision was upheld by the Pensions Appeal Tribunal but the High Court decided that the Ministry *was* bound by the War Office determination. Denning J. (as he then was) stated that:

> . . . if a Government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which it is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of that authority.

Although the *just* result was undoubtedly achieved in this case, it does indicate that the Ministry of Pensions was being bound by an *ultra vires* determination of the other ministry, the War Office. Subsequently it was stated in the House of Lords, in a reference to the *Robertson* decision, that there was no such principle in the law: 'The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a Government officer, however high or low in the hierarchy.' (*Howell v Falmouth Boat Construction Co.* (1951))

The third requirement in the present context relates to the need for detrimental reliance on the officer's statement or representation. In *Robertson* the detrimental reliance occurred when, having received a determination from the War Office, the colonel took no further steps to obtain an independent medical opinion in relation to his injury and disability. In the *Norfolk County Council* case previously referred to, the Court decided that there was no detrimental reliance in so far as the developer was able to cancel contracts for the purchase of machinery for the factory extension without incurring any contractual penalties. In the course of his judgment in this case, Lord Widgery observed that: 'What one hopes to achieve in a situation like this, where there is an honest mistake, is that everybody shall end up in the position in which they would have been if no mistake had been made'. It could be argued that this perceived need to restore the *status quo* was a significant influence in the court's finding that the 'detriment requirement' for common law estoppel was not satisfied.

9.4.2 *Restriction of estoppel.* That there is a reluctance to find an estoppel against an administrative agency is seen in another judgement of Lord Widgery in *Brooks and Burton Ltd v Secretary of State for the Environment* (1977). Here he observes that:

> Any attempt to expand the doctrine of estoppel expressed in *Lever* . . . is to be deprecated, because it is extremely important that planning authority officers should feel free to help applicants without having the shadow of estoppel hanging over their heads and the possibility of immobilising the authority by some careless remark.

The court certainly has a great deal of room for manoeuvre in this respect in determining whether, for example, any representation was

'adequate' or any reliance 'detrimental'. However, there is always the possibility that a person quite innocently relies on a statement or representation by an officer of an administration agency only to find that in law there is no estoppel against that authority: it is not bound by the officer's statement. That person, having suffered some loss, will find that, legally, there is no remedy: a considerable gap in the law which would be well filled if the law recognised that damages were available for an *ultra vires* act or statement. In Chapter 15 it will be seen that the giving of misleading advice could well amount to 'maladministration' enabling an investigation by one of the Ombudsmen according to whether the complaint relates to a central government department or a local authority and assuming that the alleged 'maladministration' has caused injustice. A successful complaint in this context could in some cases secure an *ex gratia* compensation payment to cover any loss which is suffered.

The court's attempt to cut down the application of estoppel, in local government at least, is seen in suggestions made by Megaw L.J. in delivering the Court of Appeal's judgment in *Western Fish Products Ltd v Penwith District Council* (1978). He first re-emphasised that: 'An estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty.' He then indicated that there are two kinds of exception:

> If a planning authority, acting as such, delegate to its officers powers to determine specific questions . . . any decisions they make cannot be revoked . . . *Lever Finance* . . . is an application of this exception . . . In the court's opinion [the] principle laid down by Lord Denning was not authority for the proposition that every representation made by a planning officer within his ostensible authority binds the planning authority . . . For an estoppel to arise there has to be some evidence justifying the person dealing with the planning officer for thinking that what the officer said would bind the planning authority . . . The second exception is that if a planning authority waives a procedural requirement relating to any application made to it for the exercise of its statutory powers, it might be estopped from relying on lack of formality. This is supported by *Wells* . . . There is other than these two exceptions no justification in extending the concept of estoppel . . .

In re-emphasising the fact that any determination made under lawfully delegated powers is binding on the authority, Megaw L.J. is also suggesting that an estoppel is available only where there is 'some evidence' justifying the person dealing with the officer in thinking that that officer had the requisite delegated powers. If this is eventually accepted as part of the law, estoppel would effectively become a dead letter since no individual dealing with an officer of an administrative agency could be expected to realise that he should ascertain the scope of any of that officer's delegated powers. As to the second 'exception' referred to by Megaw L.J. this relates to any situation in which an

officer of an administrative agency represents that there is no requirement for compliance with an inconsequential procedural requirement, as in the case of *Re L. (A.C.) (An infant)*, dealt with previously. Where, on the other hand, the officer indicates that a *mandatory* requirement may be waived, that *ultra vires* statement could not be binding on the administrative agency in question. By way of an example, a statutory provision might stipulate that a licence application 'shall be of no effect' or 'shall not be determined' in the absence of a certain certificate. Clearly, any statement indicating that a certificate need not accompany the application could *not* create an estoppel against the authority in question.

9.4.3 *Estoppel and Government policy.* It was decided in *Laker Airways Ltd v Department of Trade* (1977) that an estoppel could not operate against the Government in view of the Government's previous conduct, albeit the conduct of a predecessor Government. The issue arose following the Government's attempt to withdraw the designation of Laker Airways as one of the airlines recognised as an operator on an air route between the United Kingdom and the United States, despite encouragement from a predecessor Government as a result of which designation had been obtained, albeit subject to final confirmation. Although the members of the Court of Appeal had slightly different grounds for their conclusion, the main emphasis of this area of the decision (which, as will be seen later in Chapter 11 also related to other matters concerning statutory powers for air traffic licensing under the Civil Aviation Act 1971) was that an estoppel against a Government would effectively hinder its ability to act for the public good. Lawton L.J. for example, suggested that: 'Estoppel cannot be allowed to hinder the formation of Government policy.'

9.5 Communication of Decisions

Wherever there is a statutory responsibility requiring an administrative agency to make a decision or take similar administrative action, a time limit will normally be imposed within which any such action shall be taken. In general such a time limit — a period of two months is a fairly common stipulation — is regarded in law as being merely directory (*James v Minister of Housing and Local Government* (1966)). This is in contrast to the time limits for appeals within an administrative system, for example, an appeal against the decision of a local authority to the Secretary of State for the Environment, where (as has been seen previously) the time limit for the notice of appeal is regarded as being mandatory. In the case of the typical decision on an application for a licence or grant, the status of the time limit as a directory requirement may be explained by the fact that many decisions would be *ultra vires* even as the result of the shortest delay beyond the prescribed time limit. If the time limit was normally mandatory, this could also provide an

opportunity for the individual to escape his obligations under any conditions by alleging subsequently, for example, at the later time for compliance with those conditions, that the original decision was out of time and therefore *ultra vires*.

In practice, the individual does often have a legal right to press against any administrative agency which is at all dilatory in notifying a decision. That right will be prescribed by the appropriate statutory provision indicating (for example) that, 'Every decision shall be notified in writing to the applicant.' Such a provision tends to suggest that the *decision* is contained in the relevant resolution of the authority so that the above provision is in the nature of a ministerial requirement ensuring that the decision is promptly communicated to the applicant. This conclusion is certainly suggested by the decision in the *Norfolk County Council* case where it was decided that the Council had resolved to refuse a planning permission and that a notification to the contrary could not override that original refusal.

9.6 Reasons

English law provides no universal obligation for reasons to be given for administrative action. The most comprehensive requirement for reasons appears in section 12(1) of the Tribunals and Inquiries Act 1971 which covers decisions of administrative tribunals listed in Schedule 1 to the Act and decisions of any minister of the Crown either following a statutory inquiry or where a person concerned could have required the holding of a statutory inquiry. In this context: '. . . it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving of notification of the decision'. Tribunals and inquiries were dealt with previously in Chapters 3 and 5.

Under the same Act it has been seen that the Lord Chancellor is empowered to make procedural rules for certain types of inquiry. Such rules relate mainly to inquiries into compulsory purchase orders and planning appeals and contain a stipulation requiring reasons to be given, not merely on request, but as a matter of course. Accordingly, the Town and Country Planning (Inquiries Procedure) Rules 1974 indicate that: 'The minister shall notify his decision, and his reasons therefore, in writing to the applicant . . .'. Apart from the two foregoing categories, the existence of any legal obligation to give reasons for administrative action can only be discovered by a perusal of particular Acts of Parliament or regulations made under such Acts. By way of an example, section 80 of the Housing Act 1974 requires a local authority to state the reasons for any refusal of an improvement grant.

In view of the foregoing situations where there *is* an obligation in law to give reasons, it is a matter of the first importance to ascertain those areas of administrative action where there is *no* legal obligation to give reasons. Until recently, a local authority was subject to no obligation to

give reasons for evicting a tenant from council housing accommodation (section 111, Housing Act 1957). A statutory inquiry into a compulsory purchase order made for slum clearance under Part 3 of the Housing Act 1957 is not covered by the procedural rules for inquiries into compulsory purchase orders and the rules' requirement of reasons for the minister's eventual decision. Finally, section 20C(3) of the Taxes Management Act 1970 does not oblige an Inland Revenue officer to give reasons for a seizure of documents from an individual. The Tribunals and Inquiries Act also contains exemptions from the general obligation to give reasons imposed on tribunals and ministers. Reasons may be refused on grounds of national security and refused to any person not primarily concerned with the decision where such reasons, if furnished, would be contrary to the interests of any person primarily concerned (Tribunals and Inquiries Act 1971 section 12(2)). Reasons need not be given in connection with any decision of a minister relating to any matter of a legislative character (Act of 1971 section 12(4)). Reasons need not be given where some other statutory provision governs the giving of reasons. Where it appears expedient to the Lord Chancellor and the Secretary of State, following consultation with the Council on Tribunals, that the giving of reasons for certain decisions taken by tribunals and ministers is 'unnecessary and impracticable', an order may be made excluding the duty to give reasons in these cases (Act of 1971 section 12(6)).

9.6.1 *The purpose of reasons.* What purpose is served by the requirement that reasons should be given for decisions and other administrative action? Perhaps the most important purpose of giving reasons is to enable the individual concerned to know the basis of a decision so that he can effectively challenge that decision either by way of appeal or review, as the case may be. Consequently, reasons will be of interest for a variety of purposes in order to show how the facts and evidence were treated, together with the relevant law in relation to its application to the issues in the case. One of the leading statements of principle occurs in *Re Poyser and Mills' Arbitration* (1964) where Megaw J. states that:

> Parliament having provided that reasons shall be given . . . [means] that proper, adequate reasons must be given; the reasons that are set out, whether they are right or wrong, must be reasons which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised . . . I do not want it to be thought for a moment that I am saying that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing would be sufficient to invoke the jurisdiction of this court.

In some cases it may be all too easy to expect too much of a statement of reasons, particularly where there are two conflicting opinions arising from the evidence before the tribunal or other administrative agency. In these circumstances, it may not be possible to explain why one opinion

is preferable to the other: 'Such explanations are not possible. They are matters of judgment, impression and sometimes even instinct, and it is quite impossible to give detailed reasons to explain how the system of decision has worked.' (*per* Lord Widgery C.J. in *Guppys (Bridport) Ltd v Sandhoe* (1975)).

Although the court is often reluctant to define the major issue in a particular administrative decision, there are various instances where that reluctance is forgotten in a conclusion that there are no adequate reasons. Consequently, in *Mountview Court Properties Ltd v Devlin* (1970) it was found by the Court that a Rent Assessment Panel had failed to deal with 'substantial' arguments and facets relating to one of the flats referred. Again, in *French Kier Developments Ltd v Secretary of State for the Environment* (1977), Willis J. concluded that the reasons given were:

> . . . so vague, inadequate and unintelligible as to leave anyone reading the letter of decision from the Secretary of State quite unable to understand why, when so much of the factual conclusions were accepted by the Secretary of State, the inspector's recommendation was rejected.

Finally, in *Kent Messenger Ltd v Secretary of State for the Environment* (1977) Phillips J. considered that the reasons in issue were not proper and adequate '. . . simply because they omit any reference whatever to what was an important material argument . . . and one indeed which had played a substantial and influential part in the mind of the inspector in leading him to the recommendation which he made'.

9.6.2 *Legal effect of a failure to give reasons or adequate intelligible reasons.* Any failure to fulfil these important procedural requirements where they apply has to be examined against the background of the remedy which is available to the person challenging the decision in question. Generally, a failure to give reasons does not render any administrative action *ultra vires* (*Brayhead (Ascot) Ltd v Berkshire County Council* (1964)), so that an order of *mandamus* might be available from the High Court to compel reasons, or adequate, proper reasons to be given. However, where the legislation by which a minister takes a decision specifies the terms on which the High Court may review the legality of that decision, for example, a decision on a planning appeal, the court may be empowered to quash a decision for failure to comply with the legal obligation relating to reasons (*Givaydan v Minister of Housing and Local Government* (1967)). Where the legislation prescribes only an appeal on a point of *law*, usually from a tribunal's decision, failure to give adequate, proper reasons, might indicate an error of law so justifying the court in referring the case back to the tribunal for reconsideration in this respect (*Mountview Court Properties Ltd v Devlin* (1970)).

Where there is no legal obligation to give reasons, any failure in that

respect cannot be remedied in law. However, it was suggested by the House of Lords in *Padfield v Minister of Agriculture* (1968) that this might not always be the case. In this case the minister gave reasons voluntarily but Lord Upjohn thought that if no reasons had been given, '. . . it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he [the Minister] had no good reason for reaching [his] conclusion' Lord Reid equally did not consider that a decision of the minister could be immune from challenge in the court if no reasons are given in the absence of any legal obligation to give reasons if his refusal to give reasons appeared to frustrate the policy and objects of the Act. A good example of this approach in practice appears from the New Zealand case of *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* (1978) where the company applied to the minister for a game packing licence. Under the appropriate legislation there was a duty on the minister to grant a licence if he was satisfied on five matters. The minister refused the application, 'having regard to the criteria for new licences set out in' the legislation: no other reasons were given. The Court examined the available evidence and concluded that the minister must have rejected the application on a ground which was not authorised by the legislation. He had not submitted an affidavit to the Court indicating his reasons for the decision and a declaration was granted to the effect that the company was entitled to a licence. This approach by the court seems to be possible only where the statutory powers prescribe well-defined prerequisites to be satisfied before a licence can be granted or any other similar decision made. If the administrative agency has a very discretionary decision to make involving a large measure of policy, for example, it would be difficult for the court to speculate about the real reasons for the decision as they did in *Fiordland Venison*.

10 Natural Justice

10.1 Background to Natural Justice

Whereas chapter 9 was concerned with the scope and legal implications of procedures defined by statute, the present chapter is concerned with common law rules of fair procedure. These rules are developed by the courts and applied to certain functions of statutory administrative agencies and non-statutory domestic organisations. In broad terms, the rules of natural justice require that no person should be judge in his own cause (the rule against bias) and that a person whose rights may be affected shall have a reasonable opportunity of being heard.

10.2 Exclusion or Limitation of Natural Justice

At the outset it must be emphasised that the rules of natural justice do not necessarily apply to all exercises of powers. It will be seen subsequently that the court has previously drawn a distinction between 'administrative' and 'judicial' functions, applying the rules of natural justice to the latter. This distinction is now less frequently drawn so that even where a function might have been defined as 'administrative' there may now be a limited duty to observe some aspect of natural justice, that is, a duty to act *fairly*. It has been seen that the rules are in two categories: the rule against bias and the rule that no person shall be condemned without being given reasonable opportunity for his case to be heard. Before these two rules are examined, it is necessary to determine the broad circumstances in which the law may exclude natural justice, to define the legal distinction between 'administrative' and 'judicial' functions, and to examine the meaning of the rather nebulous duty to act 'fairly'.

In *Gaiman v National Association for Mental Health* (1971) Megarry J. observed that: '. . . there is no simple test, but there is a tendency for the court to apply the principles [of natural justice] to all powers of decision unless the circumstances suffice to exclude them'. On those occasions when the court has excluded natural justice the circumstances have usually involved (1) express or implied statutory limitations, or (2) the absence of any rights meriting protection.

10.2.1 *Statutory provisions.* Expressly or impliedly, some statutory procedures may seek to exclude or limit the rules of natural justice. The

Town and Country Planning Act 1971 contains many examples. In convening an Examination in Public of a structure plan, the Secretary of State for the Environment is empowered to nominate those objectors who are to be permitted a hearing at the Examination and to define the issues to be examined by the participants (Town and Country Planning Amendment) Act 1972). In determining an application for planning permission the Act indicates a limited category of applications which must be publicised (Act of 1971 sections 26 to 28). Any person making objections in response to such a publicised application is legally entitled to have his written objections taken into account by the local planning authority (Act of 1971 section 29). This clearly excludes any right to an *oral* hearing before the authority prior to a decision being taken and also excludes any *legal* right to make representations for any person in respect of applications which fall outside a category requiring publicity. In practice many authorities advertise most, if not all, applications and voluntarily take account of the written representations made. Finally, the statutory rules of procedure governing public local inquiries into planning appeals (and compulsory purchase and highway proposals) expressly exclude any questions being raised as to the merits of Government policy (Town and Country Planning (Inquiries Procedure) Rules 1974, rule 8(5)). This exclusion of discussion about the merits of Government policy was in contention at an inquiry into highway proposals in *Bushell v Secretary of State for the Environment* (1980). Somewhat surprisingly the House of Lords decided that the inspector's refusal to permit cross examination on traffic flow forecasts was justifiable since these forecasts are facets of Government policy relating to criteria for motorway construction.

10.2.2 *Absence of rights.* An absence of rights has usually given rise to a presumption that the rules of natural justice do not apply. A good illustration of the court's attitude comes in *McInnes v Onslow Fane* (1978). McInnes applied to the British Boxing Board of Control for a boxing manager's licence, demanding an oral hearing of his case together with notice of any case against him so that he could disabuse the Board of any allegations which might appear in such a case. His application was refused without reasons being given whereupon McInnes applied to the court for a declaration that the Board had acted unfairly and in breach of the rules of natural justice. The Court refused to grant the declaration on the basis that the Board had discharged its necessarily limited obligations in relation to natural justice by reaching an honest conclusion, without bias, without reference to any capricious policy. It was suggested by the Court that *all* the facets of natural justice would apply where a licence or other right was being forfeited or renewed whereas a 'first time' applicant for a licence would not have any legitimate expectation of a licence being granted so that in law he would have no right to notice of any case against him and no

opportunity to be heard. Where the licensing body is not a 'domestic' organisation like the British Boxing Board of Control but a statutory body, the relevant statutory provisions governing its licensing responsibilities will (as in the example of the local planning authority) tend to indicate that the rules of natural justice are either excluded or limited. The present case is one of a long line of decisions where the court has drawn a distinction between 'rights' and mere 'privileges' although even in this latter instance where no rights are at issue the court will usually insist that, as in *McInnes*, there is a measure of fairness in the procedures. That limited measure of fairness may involve the need to recognise either the rule against bias, as in *McInnes*, or the rule that no person shall be condemned without a reasonable opportunity for his case to be heard, as in *R. v Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association* (1972).

10.2.3 *Preliminary processes.* There has been resistance to the application of natural justice where the process in question has not led immediately to a final decision, prejudicing any rights. In other words, where there is something in the nature of a two-stage process, the first stage involving a preliminary investigation may not affect the individual's rights. This is frequently the case where a suspension takes place pending the outcome of a disciplinary investigation. In *Lewis v Heffer* (1978) the National Executive of the Labour Party suspended the local committees and officers of a constituency Labour Party, pending the result of an inquiry by the Executive. A local officer sought an injunction to prevent the suspension on the ground that the Executive had acted unlawfully and in breach of natural justice. Similar grounds were used subsequently by the plaintiff and another officer when they found that the Executive had it in mind to suspend them from Labour Party membership pending the result of the same inquiry. In refusing injunctions in both cases, the Court considered that suspension as a temporary measure may be a matter of 'good administration' pending investigation so that natural justice ought not to apply. Nevertheless, the House of Lords has taken the view that even in the course of preliminary proceedings, any provisional finding in the establishment of a *prima facie* case could significantly prejudice a person's rights and interest to the extent that a hearing ought to be given to that person (*Wiseman v Borneman* (1971)). In *Re Pergamon Press* (1970) Board of Trade inspectors appointed under the Companies Act to investigate and report on the affairs of a company were under a duty to act fairly and to give anyone whom they proposed to condemn or criticise a fair opportunity to answer what was alleged against them. It was claimed by the company's directors that they had a legal right to see transcripts of witnesses' evidence against them and to cross-examine those witnesses. This claim was rejected by the Court where Lord Denning indicated that there was no need to quote chapter and verse so

that a mere outline of the charge will usually suffice. Further proceedings in the case led to the Court's conclusion that there was no legal obligation requiring the inspectors to indicate their tentative conclusions for comment by the parties prior to publication of their report (*Maxwell v Department of Trade and Industry* (1974)).

10.2.4 *Absence of contractual or similar relationships.* The absence of any contractual or similar relationship with a non-statutory domestic organisation such as a trade union or professional association may indicate that natural justice does not apply to its transactions with individuals (*Byrne v Kinematograph Renters Society* (1958)). The main justification for this proposition is that the absence of a contractual or similar relationship means that the individual has not associated himself with the organisation and any express or implied obligation on its part to comply with natural justice. Nevertheless, the cases are unpredictable in this context. For example, in *Nagle v Feilden* (1966) the stewards of the Jockey Club failed to persuade the Court to strike out Nagle's claim for a declaration that the Club's policy of refusing trainers' licences to women trainers was contrary to public policy on the ground that the plaintiff's *right* to work was in issue. It is difficult to reconcile this decision, indicating the relevance of natural justice to a licence application, with the statement of principle in *McInnes* to the effect that the rules do not apply to an initial licence application but *would* apply to a revocation or renewal.

10.2.5 *Professional advice.* The rules do not apply to professional advice although there is an exception where a person's rights may be affected. This is seen clearly in *R. v Kent Police Authority, ex p. Godden* (1971). A police doctor and a consultant concluded that Godden, a police officer, was mentally ill but the Court required that their reports be produced to Godden's own consultant when the police authority sought to employ the same police doctor in order to certify Godden as permanently disabled for the purpose of the police pensions regulations. Had the authority chosen a *different* police doctor for this latter purpose then no doubt natural justice would not have applied in this doctor–patient relationship on the ground that Godden's rights might not have been prejudiced. The general absence of natural justice from the professional relationship can also be seen in *Hounslow London Borough Council v Twickenham Garden Developments Ltd* (1970). Under a contract of the Royal Institute of British Architects an architect gave appropriate notice that a contractor had failed to proceed 'regularly and diligently'. It was decided that the notice was not void for want of natural justice since although an architect must retain his independence when exercising his skilled professional judgment, there was nothing in the nature of a 'judicial' determination requiring application of the rules.

10.2.6 *Disciplinary proceedings.* In some cases, disciplinary proceedings can occur without reference to natural justice, usually where no rights of the individual are liable to be prejudiced. Whether the rights of the individual are in issue seems sometimes to depend on the severity of any punishment which may result from the disciplinary proceedings: a rather uncertain basis for the law. Accordingly, in *Ex p. Fry* (1954) a fireman was punished for disobeying an order. He alleged that the hearing was unfair but at first instance the Court decided that the law could not interfere with the exercise of a disciplinary power in a service such as the fire service. Such cases would suggest that natural justice should be excluded from disciplinary proceedings in institutions and organisations where discipline is perhaps the sole responsibility of the person in charge, such as a headmaster. In referring for present purposes to the governor of a prison, Lord Denning stated in *Becker v Home Office* (1972) that a governor's life would be intolerable if the courts were to entertain actions for breaches of natural justice from disgruntled prisoners. By way of contrast, it has been held in *R. v Hull Prison Board of Visitors ex p. St Germain* (1979) that natural justice *did* apply to disciplinary functions in prisons carried out by boards of visitors. Megaw L.J. emphasised a difference between the disciplinary functions of the governor and those of the board, acting as a 'judicial' tribunal:

> While the governor hears charges and makes awards his position in doing so corresponds to that of a commanding officer or a school master. Both good sense and the practical requirements of public policy make it undesirable that his exercise of this part of his administrative duties should be made subject to *certiorari*. The same, however, does not apply to the adjudications and awards of boards of visitors who are enjoined to mete out punishment only after a formalised inquiry and/or hearing.

There are difficulties in defining material differences between the disciplinary functions of the board and the governor outlined in the same case by Shaw L.J., for example, in relation to the levels of punishment to be administered, so that the law really seems to rest on judicial policy. Such policy would seem to be influenced by the court's view of the practical difficulties of applying natural justice to particular types of disciplinary function. Nevertheless, the court may be prepared to imply natural justice in the employment relationship, for example, for the purpose of defining a procedure for dismissals, but only where the employee enjoys a statutory status or office in public employment or service (*Malloch v Aberdeen Corporation* (1971)). Consequently, a private employer is able to dismiss an employee without a hearing at common law (*Hill v Parsons (C.A.) & Co.* (1972)).

10.3 Judicial and Administrative Functions

The distinction between 'judicial' and 'administrative' functions has

been of fundamental importance in determining whether natural justice applies in any particular case. However, in restricting the rules to 'judicial' or 'quasi-judicial' functions, the common law has perhaps failed to do justice in cases where an individual's rights and interests may be affected, albeit incidentally, in the context of what seems to be an administrative function. The possibility that such a situation could arise is in itself an indictment of this rather nebulous distinction between judicial and administrative functions. Nevertheless, it will be seen subsequently that it is a distinction which is still used by the court from time to time, in which case there will probably be reliance on the leading statement of principle from the House of Lords in *Ridge v Baldwin* (1963). In this case Mr Ridge, the Chief Constable of Brighton, had been acquitted of a conspiracy to obstruct the course of justice but two officers from the Brighton police force had been convicted. The judge, in passing sentence, referred to an absence of professional and moral leadership on the part of their Chief Constable. Following Mr Ridge's acquittal, the Brighton Watch Committee as the police authority dismissed him from office without notice and without hearing any case he may have wanted to present. Subsequently, Mr Ridge's solicitor was allowed to appear before the Committee but the dismissal was confirmed. The Home Secretary later dismissed an appeal by Mr Ridge against the decision of the Watch Committee. Thereafter, Mr Ridge, being anxious to protect his pension rights in the police service, sought a declaration from the court that he had been wrongfully dismissed. The House of Lords granted the declaration on the basis that natural justice applied to the Watch Committee's function and that Mr Ridge had no adequate opportunity of knowing the case against him so that he had no reasonable opportunity to put his case against dismissal. The important statement of principle is that a 'judicial' function arises wherever action is taken by any body of persons having legal authority to determine questions affecting the rights of subjects (*per* Atkin L.J. in *R. v Electricity Commissioners* (1924)). Such a function presupposes a dispute between the parties where they present their respective cases, perhaps by adducing evidence on disputed facts and/or by advancing legal argument on disputed points of law, as a result of which a decision finally disposes of the case. By contrast, the quasi-judicial function involves a decision on the parties' cases but also covers other matters such as policy and the public interest.

10.3.1 *The duty to act judicially.* The duty to act judicially applies to trade union disciplinary committees (*Taylor v National Union of Seamen* (1967)), academic institutions exercising disciplinary functions (*Glynn v Keele University* (1971)), and various other domestic organisations (*John v Rees* (1969)), among others. Prior to these modern cases it had been decided in *Cooper v Wandsworth Board of Works* (1863) that the Board of Works, a statutory body, was not empowered to demolish property

without affording the owner an opportunity of putting his case against such action. In contemporary times, many statutes empowering action to be taken by an administrative agency like a local authority will prescribe the terms on which any representations may be made. The Housing Act 1957 section 16, for example, requires a local authority to provide an opportunity for an owner to discuss the condition of a house before a demolition order is executed so that the authority can then be satisfied that the premises are unfit for human habitation and incapable of repair at reasonable expense. Because there is a statutory prescription expressly applying a relevant aspect of natural justice in these circumstances, it may be argued that no common law right to a hearing can be implied into a statutory power enabling a local authority to take *emergency* action to demolish any structure which is regarded as being dangerous. Accordingly, the need to identify judicial functions may now often be overridden by the express or implied terms of specific statutory provisions either limiting or excluding natural justice. Nevertheless, in some areas the definition of judicial and administrative functions may still be important in determining whether there has been a breach of natural justice, for example, on the part of a minister in the statutory context of deciding whether a compulsory purchase order submitted by a local authority should be confirmed. This area of activity has produced some of the leading cases on the identification of judicial and administrative functions where a minister is often charged with making a policy decision. Such a 'policy' decision frequently requires the minister to consider all manner of questions relating to the public interest and in law, he cannot be prevented from attaching more importance to the fulfilment of his policy than to the fate of individual objectors.

Against this background it was stated by Greer L.J. in *Errington v Minister of Health* (1934) that a minister, in dealing with objections to a compulsory purchase order, was 'exercising quasi-judicial functions' because 'the decision of the Minister is a decision relating to the rights of the objecting parties'. In another of the leading cases, *B. Johnson & Co. (Builders) Ltd v Minister of Health* (1947), it was found that natural justice did not apply to require a minister, considering whether to confirm a compulsory purchase order, to divulge information put before him before he considered objections, that is, before he assumed a quasi-judicial role. Lord Greene M.R. observed that the 'administrative' process in the present context:

> . . . may begin in all sorts of manners — the collection of information, the ascertainment of facts, and the consideration of representations from all sorts of quarters . . . long before any question of objections can arise under the procedure laid down by the Act . . . The administrative character in which [the minister] acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again

> . . . is purely administrative, *viz.* the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not based purely on the view that he forms of the objections *vis à vis* the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue . . .

10.3.2 *Reliance on the distinction between functions.* The distinction has been relied on in a number of important cases but not without considerable criticism in some instances. In *Franklin v Minister of Town and Country Planning* (1947) the minister was responsible for making orders designating sites for new towns. At a public meeting preceding a proposal to designate Stevenage as a new town, the minister insisted that he would discharge his statutory duty in this context despite any obstructive behaviour by the public. When an order was subsequently made under the New Towns Act 1946, an attempt was made to quash it on the ground that the minister had been acting unlawfully in breach of natural justice as a judge in his own cause. The House of Lords decided that there was no breach of the rule against bias: the minister's responsibilities were administrative: to appoint a person to hold a public inquiry and to consider that person's report. In *Nakkuda Ali v Jayaratne* (1951) the Controller of Textiles in Ceylon was empowered by statute to cancel textile licences where he had reasonable grounds to believe that any dealer was unfit to be allowed to continue as a dealer. The Controller dealt with some objections to a proposed licence cancellation by correspondence but it was decided that the Controller's functions here were administrative, not judicial, so that he was not obliged to afford a hearing prior to revoking the licence. The facts of the third case, *R. v Metropolitan Police Commissioner ex p. Parker* (1953) are similar to those of *Nakkuda Ali*, and involved the Commissioner's statutory power to revoke taxi licences. It was decided that Parker, whose licence was subject to revocation, was not entitled to produce witnesses to make representations on his behalf before the Commissioner prior to the decision being made. Finally, in *Essex County Council v Minister of Housing and Local Government* (1968) it was decided there was no right to be heard before the minister in respect of the making of a statutory Special Development Order designating Stansted Airport as the third London airport on the ground that a *legislative* function was involved.

The decision in *Franklin* emphasises the nebulous basis for the distinction between administrative and judicial functions. However, the decision together with those in *Nakkuda Ali* and *Parker* may be explained by the courts' post-war reluctance to question the legality of many exercises of executive power. A more satisfactory basis for the decision in *Franklin* would have been the statutory 'authorisation' for the minister's actions, recognising that by the very scheme of things he would be 'judge in his own cause'. Nevertheless it was suggested in the Report of the Committee on Ministers' Powers (1932) that a strong and perhaps sincere conviction as to public policy of the sort that seems to

have pervaded the situation in *Franklin* may operate as a more serious disqualification than some pecuniary interest in a decision. More recently, in *R. v Secretary of the Environment ex p. Brent London Borough Council & Others* (1981) it was held that a policy formulated by the Secretary of State by which he would reduce the rate support grant payable to councils which had overspent was unlawful, not on the ground of bias, but because he refused to hear representations from councils whose financial rights would be affected by a reduction in grant. Finally, the facts and decision in *Nakkuda Ali* and *Parker* would no doubt be seen in a different light if they had occurred more recently. In view of the legal recognition of rights in relation to the renewal and revocation of licences from cases like *McInnes v Onslow-Fane*, there can be little doubt that in both cases the court would have decided that there was a judicial function being exercised, attracting at least the right for the licensee to be heard.

Although reliance on the definition of administrative and judicial functions has declined for the purposes of natural justice, it has not been abandoned entirely. In *Hibernian Property Co. Ltd v Secretary of State for the Environment* (1974) the Court expressed its approval of the decision in *Errington* in quashing the Secretary of State's decision to confirm a compulsory purchase order on the ground of a breach of natural justice. The breach occurred when an inspector conducted a site visit following the close of the inquiry in the absence of any representative of one of the chief objectors to the order and when the residents of certain houses expressed their views about whether their houses should be demolished or improved. The Court was willing to quash the decision because there was a risk that the transaction might have prejudiced the chief objector's interests. In *R. v Barnsley Metropolitan Borough Council ex p. Hook* (1976) the Court was concerned with the revocation of a market trader's licence originally granted by the local authority. An allegation of misconduct and a breach of market rules was made by the market manager who was also present while Hook was excluded on the two occasions when the case was adjudicated by committees of the local authority. This was found to be a breach of both rules of natural justice by virtue of the fact that the trader's legal rights to use the market were subject to adjudication, a clear case of a judicial function, even though the local authority's control of the licensing of market stalls was essentially in other respects an administrative function. More recently, the House of Lords was concerned with the legality of the Secretary of State's order approving a motorway scheme in *Bushell v Secretary of State for the Environment* (1980). It was decided that objectors could not make representations on new traffic flow criteria adopted by the Department of the Environment following the close of the inquiry when the Secretary of State's function was essentially administrative. Not long before it had been decided that the Secretary of State was obliged to act fairly to the extent that he should have allowed repre-

sentations from objectors in relation to evidence obtained by an inspector following the close of an inquiry into a compulsory purchase order for slum clearance (*Fairmount Investments Ltd v Secretary of State for the Environment* (1976)). In this latter case there was no reference to the distinction between administrative and judicial functions.

It is very difficult if not impossible to reconcile the foregoing decisions although a great deal does seem to depend on the judicial policy of the court in relation to the facts of each case. Consequently, the court's reluctance to admit the rules of natural justice into the final stages of a minister's decision, particularly where it seems to involve significant areas of Government policy, may explain the decision in *Bushell*. The facts in *Fairmount*, on the other hand, could have confronted the Court with a dilemma if the definition of administrative and judicial functions from the other leading cases on compulsory purchase orders had been adopted. Had the definition of functions from *Errington* and *Johnson* been adopted, the 'post inquiry' stage might have been seen as the administrative function which excludes natural justice in a case where the rights of the landowner were clearly still in issue. The decision in *Hibernian Property* may be reconciled with the function definition of the earlier cases by saying that the site visit following the inquiry is still very much the focus of the objectors' rights, as is the inquiry itself. From the foregoing discussion it can be appreciated how rigid the definition of functions can be in many cases, for example, in failing to recognise that even in what may have been seen to be an administrative function rights may be at issue. Such difficulties may now be largely avoided through the adoption of the more flexible duty to act 'fairly' which is examined in the next section. It may be argued, therefore, that the definition of functions as the basis of natural justice tends to be used wherever the court is anxious to exclude natural justice, perhaps as a matter of 'judicial policy', as in *Bushell*, where the court is confronted by a clearly defined judicial or quasi-judicial function as in *Hook*, or where the case in hand involves the rule against bias which can only arise in the context of a judicial function.

10.4 The Duty to Act Fairly

The adoption of a flexible duty to act fairly has enabled a very much more sensitive reconciliation of the common law requirements of fair procedure with the many different bureaucratic functions and their requirements. One of the most significant cases in this area of the common law is *Re H.K. (An Infant)* (1967) where an immigration officer refused entry to a boy on the ground that he was over 16. The boy said that he was only 15, in which case he would have had a right of entry to the United Kingdom. Lord Parker C.J. doubted whether the officer was:

> . . . acting in a judicial or quasi-judicial capacity . . . But at the same time,

> I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at least give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or *bona fide* decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administration is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.

The duty to act fairly seems to connote an obligation to observe some aspect of the rules of natural justice, according to the circumstances and background of the particular case. Accordingly, there may be an obligation to make a decision impartially even though there is no legal obligation to provide a person concerned with that decision a reasonable opportunity of being heard. This variety of the duty to act fairly is illustrated by Megarry J. in *Leary v National Union of Vehicle Builders* (1971) where he refers to a situation in which a student has no right to be heard by examiners dealing with his work although he is entitled to have his case '. . . duly considered by whatever bodies have the power of decision'. Disciplinary proceedings, on the other hand, might well attract both rules of natural justice, in other words the right to be heard and the rule against bias (*Glynn v Keele University* (1971)). The duty to act fairly may well require observance of the requirement that a person is given a reasonable opportunity for his case to be heard, albeit on a limited basis. This was seen in Chapter 9 in *R. v Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* (1971) where the Corporation had a statutory power to license taxis. Discussions took place between the Corporation and the Association during which an undertaking was given by the Corporation that no further taxi licences would be granted until private legislation was enacted to regulate mini-cabs. Subsequently and without consulting the Association, the Corporation proposed to increase the number of licences before the legislation concerning mini-cabs was enacted. An order of prohibition was granted by the Court to the Association requiring the Corporation to grant a hearing before deciding whether to depart from the undertaking. Although the Association's rights were not in issue, the taxi owners were clearly affected by the Corporation's proposal to grant further licences which seems to account for the Court's willingness to require limited consultation.

By way of contrast, in *Re H.K.* the immigrant's rights were in issue and this was sufficient for the Court to suggest that the immigration officer should determine the case impartially, having given notice of

possible disqualification from entry and having provided a reasonable opportunity for that person to reply. In *Schmidt v Home Secretary* (1969), on the other hand, an alien applied unsuccessfully to remain in the United Kingdom beyond the period stipulated in his permit. He was not given a hearing and the Court decided that the Home Secretary had not acted unfairly because Schmidt had no right to remain and no legitimate expectation of remaining. Had there been an attempt to exclude him before the expiration of his permit then, it was suggested, the duty to act fairly would have prescribed a hearing in defence of a legitimate expectation that he would be permitted to remain in the country for the duration of his permit. The decision in a case like *Schmidt* does raise a comparison with *R. v Liverpool Corporation*. It seems that a very limited duty to act fairly may occur where, short of the circumstances creating a legally binding estoppel against a statutory authority, some promise or undertaking is made on which another person or organisation relies. Such a promise or undertaking may not be broken except where a reasonable opportunity is given for any objections or other representations, beyond which that promise or undertaking may be broken. Where, for example, a licence has expired, an undertaking may be given to the licensee by the licensor that the activity covered by the licence may continue informally for a certain period of time. Although that undertaking is not strictly binding in law, the court might be prepared to restrain any sanctions against the licensee's continuation of the activity until he is given a reasonable opportunity of making representations to the licensor, for example, in favour of a continuation of the 'informal' permission.

10.5 The Rule Against Bias

The first of the rules of natural justice — *nemo judex in causa sua* — stipulates that no man can be a judge in his own cause. This rule against bias is clearly consistent with the characteristics and requirements of a judicial function as seen previously in *R. v Barnsley Metropolitan Borough Council ex p. Hook* . Many cases concern magistrates, as in *R. v Altrincham Justices ex p. Pennington* (1975), where a magistrate was also a member of the county education committee. Consequently, she had an active connection with the 'victims' of an offence committed against the county council when short supplies of vegetables were delivered to two of its schools. The farmer in question had also supplied vegetables to a school of which the magistrate was a governor. Overall, therefore, the magistrate's interests were sufficient to disqualify her from hearing the criminal charges. This rule against bias applies also to statutory authorities (*R. v Hendon Rural District Council ex p. Chorley* (1933)) and to domestic organisations (*Roebuck v NUM (Yorkshire Area) (No. 2)* (1978)).

10.5.1 *Application of the rule against bias.* The rule applies:

> (1) where there is some direct interest in the matter to be adjudicated, and
> (2) where, short of a direct interest, there is some reasonable suspicion, appearance or likelihood of bias.

In the first case there are few problems, for example, where there is some direct financial interest in proceedings as in *R. v Hendon Rural District Council* where the local planning authority's decision granting planning permission was quashed by the Court because a member of the authority was an estate agent appointed to deal with that land. In the case of the more indirect type of bias, (2), the generally accepted rule is that:

> . . . in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be , nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice if that reasonable people might think he did.
>
> (*per* Lord Denning in *Metropolitan Properties Co.(FGC) Ltd v Lannon* (1969))

In this case the Court quashed the decision of a Rent Assessment Committee by which the rent of certain flats was reduced. The solicitor chairman of the Committee lived with his father and had dealt with disputes between the father and his landlord, a company which was a member of the group of companies to which Metropolitan Properties belonged.

Although there is a strong presumption that the rule against bias applies in the context of a judicial function, there are occasions when the court has regarded it as inappropriate to apply the law concerning a suspicion of bias. For example, the membership of an expert tribunal will not be disqualified by reference to their pre-existing knowledge and impressions. Any suggestion that a tribunal is affected by an unlawfully biased predetermination in a particular case is dealt with in the leading statement of principle by Lord du Parcq in *R. v Westminster Assessment Committee* (1940) where he stated that:

> . . . the experience of an expert tribunal . . . is part of its equipment for

determining the case. Litigants must take that experience as they find it, and because the tribunal is assumed to be impartial they have no grievance if they cannot test it by cross-examination.

Nevertheless, even in these circumstances, evidence of some overtly prejudicial views of a particular case by a member of the tribunal would amount to a reasonable suspicion of bias. Similarly, previously expressed views in respect of a particular case may suggest prejudgment sufficient to amount to unlawful bias (*R. v Kent Police Authority ex p. Godden* (1971)). However, where any administrative agency appears to be unlawfully prejudging a case by reference to a policy the court may well conclude that at that stage there is an administrative function in which case the rule against bias cannot apply (*Franklin v Minister of Town and Country Planning* (1947)). Whenever a policy affects a decision it is a factor which may prevent a wholly impartial adjudication of the competing rights and interests, hence the law's acceptance of the proposition that the rule against bias can only operate in relation to a truly judicial function. The policy of a Government department, for example, may be to encourage local authorities in a time of chronic housing shortage to buy land for house building even though some of the land is not wholly suitable for that purpose. Accordingly, any compulsory purchase order submitted to the Secretary of State by a local authority would probably be confirmed even though in normal circumstances any strong, well-founded objections based on the suitability of the land would normally lead to an adjudication in favour of the landowner and against the local authority.

10.5.2 *The test for bias.* Where the rule applies in relation to a judicial function any breach of the rule will lead to the eventual decision being set aside no matter what the effect is on the final decision and even though the breach is occasioned by one person only (*R. v Hendon Rural District Council ex p. Chorley*). Since the decision in *Lannon*, the court has tended to set aside any decision by reference to the objective test of a reasonable suspicion of bias. Another test was expounded by the Court in *R. v Barnsley Licensing Justices ex p. Barnsley and District Licensed Victuallers' Association* (1960) where Devlin L.J. considered that the members of the Court had to satisfy themselves that there was a real likelihood of bias. Compared with the test defined by Lord Denning in *Lannon*, this test is concerned essentially with the subjective estimation of bias by the members of the court. Another version of the objective test occurs in *R. v Sussex Justices ex p. McCarthy* (1924) where Lord Hewart C.J. said that it is '. . . of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. Applying the test of a real likelihood of bias in the *Barnsley Licensing Justices* case, the Court found that Justices who were members of the Cooperative Society which was applying for a spirits off-licence were legally disqualified. However, it was decided that

certiorari would not lie to quash the decision since there was no real likelihood of bias. It is probably the case that there is very little if any difference in the result of applying the two tests. The more objective test in *Lannon* does seek to avoid concern for the question whether *in fact* the adjudicator was biased, which seems to be the concern of the 'real likelihood' test, in favour of an emphasis on the question of whether 'reasonable people' might consider that there was a real likelihood of bias. On this view, the test in *Lannon* may result in the court's greater willingness to set aside a decision for a breach of the rule. Such a decision will be set aside even though there is conduct short of actual participation but where the court is satisfied that the adjudicator or prosecutor appeared to be participating (*R. v Barnsley Metropolitan Borough Council ex p. Hook* (1976)). However, where the person concerned makes it clear that, despite his presence, he is not actually participating the court will not intervene (*R. v London Justices* (1852)).

10.5.3 *Modification or exclusion.* The rule can be modified or excluded by statute. Equally, the common law may exclude or modify the rule, for example, on the ground of necessity or by reference to a party's waiver of his legal right requiring observance of the rule. Necessity might well be pleaded where no other suitable adjudicator is available while waiver requires that the party knows of the adjudicator's disqualification (*R.v Essex Justices ex p. Perkins* (1927)). The statutory exclusion or modification of the rule usually relates to some governmental function where the particular administrative agency is necessarily judge in its own cause in the absence of any other statutory machinery securing independent facilities for the performance of relevant functions. In *Wilkinson v Barking Corporation* (1948) the relevant legislation provided that a person's entitlement to a superannuation allowance was to be determined initially by his local authority employer with an appeal to the Minister of Health, even though both parties contributed to the relevant fund. In *Jeffs v New Zealand Dairy Production and Marketing Board* (1967) it was also decided that there could be no legal objection on the matter of bias to an order of the Board which allocated areas of supply among various companies, even though the Board had made large loans to one of the companies and so had an interest in its prosperity, since these were functions expressly conferred on the Board by statute. Statute may also expressly clarify areas of difficulty in relation to the rule against bias. Section 3 of the Justices of the Peace Act 1949, as re-enacted in 1979, prohibited a magistrate from hearing an action brought by a local authority of which he is a member. However, section 130 of the Licensing Act 1964 stipulates that a magistrate is not disqualified from hearing a licensing application merely because he is a member of the licensing planning committee. Nevertheless, section 193 of the Act states that:

> No justice shall act for any purpose under this Act in a case that concerns any premises in the profits of which he is interested . . . Provided that a justice shall not be disqualified under this provision by reason only of his having vested in him a legal interest only, and not a beneficial interest, in the premises concerned or the profits of them.

The section goes on to state that no act done by any justice disqualified by the section shall be invalid by reason only of the statutory disqualification.

10.6 The Right to Be Heard

The second of the rules of natural justice — *audi alteram partem* — states that no person shall be condemned without being given a reasonable opportunity for his case to be heard. There are two aspects to this rule requiring that adequate prior notice is given of any case, charge or allegation and that the person concerned should have a reasonable opportunity to put his case against the same. It has been seen previously that natural justice is generally presumed to be excluded in a number of circumstances. Nevertheless, the court may prescribe a duty to act fairly in these circumstances, to the extent that the context of any decision-making process may suggest that one aspect only of natural justice applies. Where, for example, a minister is conducting a preliminary inquiry into a company's affairs under the Companies Acts, there may be a duty to act fairly to the extent that prior notice may have to be given of any potentially contentious finding (*Re Pergamon Press* (1971)). However, where it appears that any administrative agency is obliged to act judicially then there is a presumption that all aspects of the rules apply, in which case the court would require clear statutory words in order to justify any exclusion of natural justice (*R. v Housing Appeal Tribunal* (1920)).

10.6.1 *Prior notice.* The first requirement of the rule is that adequate prior notice should be given of any charge or allegation. Accordingly, in *Fairmount Investments Ltd v Secretary of State for the Environment* (1976) it was found by the Court that there was no notice given to the owner of the building subject to a compulsory purchase order in respect of the inspector's findings on the condition of the structure. These findings had not been in issue at the inquiry but were made following the close of the inquiry and used by the Secretary of State as the basis for his decision, without any opportunity being made available for the owner to rebut them. Nevertheless, in some cases the facts may suggest that the substance of a charge or allegation is, in fact, known to the plaintiff so that the absence of any further information thereon does not amount to a breach of the rules (*Sloan v General Medical Council* (1970)). Statutory provisions may expressly require clear notice to be given of proposed action by an administrative agency as well as providing in many cases a definite opportunity for any person affected to be heard.

For example, section 28 of the Town and Country Planning Act 1971 requires a local planning authority to publicise any application for planning permission affecting land in a conservation area. Thereafter, in determining such an application the authority is obliged by section 29 to 'take into account' any representations made in response to the publicity. In practice, such representations are made in writing and there is no legal obligation on the authority to permit oral representations (*Local Government Board v Arlidge* (1915)).

In theory, the requirement relating to prior notice must extend to every person who is actually or potentially affected by any charge, allegation or other administrative action (*R. v Kensington and Chelsea Rent Tribunal ex p. MacFarlane* (1974)). Statutory provisions like section 28 of the Town and Country Planning Act recognise that the local planning authority cannot ascertain precisely who may be affected by development in conservation areas. In a slightly different vein, the same Act in section 88 allows the Secretary of State for the Environment, in an appeal against an enforcement notice requiring that unlawful development of land without planning permission should be discontinued, to disregard failure to serve the notice on everyone affected if there has been no substantial prejudice to interests as a result.

The notice actually served must contain sufficient detail to enable the person concerned to know the substance of any charge, allegation or action to be taken against him. Where, as in the case of an enforcement notice, statutory provisions stipulate the need to specify the details of any allegation of unlawful development, there may be few problems. In other, non-statutory cases the adequacy of the notice, for example in relation to the time allowed to respond or the definition of the allegation, will be a question of fact and degree for the court (*R. v North ex p. Oakey* (1927)).

10.6.2 *The opportunity to be heard.* The second requirement of the *audi alteram partem* rule, that there should be a reasonable opportunity for a person's case to be heard, is capable of applying to a justiciable issue between two parties. In this case it was stated by Lord Loreburn in *Board of Education v Rice* (1911) that each party must be given a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to this view. Equally, the requirement can apply where an issue relates to the rights or other interests of just one party (*Ridge v Baldwin* (1963)). As previously stated, there is no general obligation in law to accord an oral hearing so that this area of natural justice might be complied with where, for example, written representations were permitted. However, where an oral hearing is permitted it is generally required that the case shall both be heard and decided by the same adjudicators (*Jeffs v New Zealand Dairy Production and Marketing Board* (1967)). Nevertheless, in the case of decisions taken in the name of a minister within a Government department, there

is no right to be heard by the person taking the decision or even to know his identity. Indeed, an inquiry may quite lawfully be conducted by one of the minister's inspectors but the eventual decision may be taken by another member of the department (*Local Government Board v Arlidge*). The common law exclusion of the right to be heard before the person taking a decision in the name of a minister is considerably modified by contemporary legislation prescribing rights to be heard before the minister's inspector at a statutory public inquiry, previously referred to in Chapter 3.

10.6.3 *Scope of the rule.* Subject to statutory procedures administrative agencies (including statutory tribunals and inquiries) in complying with the rules of natural justice are not required to adopt and observe the various technical rules of evidence associated with courts of law (*R. v Deputy Industrial Injuries Commissioner ex p. Moore* (1965)). Accordingly, it will not be contrary to natural justice where hearsay evidence is accepted (*Miller v Minister of Housing and Local Government* (1968)). More generally, any information acted upon must have some probative value but beyond this the only substantial requirement is that there must be a preparedness to hear both sides, according to the type of hearing granted, and to allow an opportunity for comment and contradiction to both sides in respect of any information obtained (*R. v Hull Prison Board of Visitors ex p. St. Germain (No. 2)* (1979)). It must be emphasised that the *audi alteram partem* rule requires only a *reasonable* opportunity to be granted: there is, for example, no requirement that there should be an adjournment where a party absents himself from a hearing without explanation (*Glynn v Keele University*). On the other hand, the refusal of an adjournment to a party who reasonably requires additional time for the preparation of his case could be seen as a breach of the *audi alteram partem* rule (*R. v Thames Magistrates' Court ex p. Polemis* (1974)).

10.6.4 *Legal representation.* Whether the rule permits legal representation is by no means easy to determine. In *Pett v Greyhound Racing Association (No. 1)* (1968) the Court of Appeal was concerned with proceedings for an interlocutory injunction to prevent an inquiry by the Association into suspicions that one of Pett's dogs was drugged before a race. The injunction was granted on the ground that Pett was entitled to legal representation at the inquiry. Subsequently in a claim by Pett for a declaration that the Association was acting *ultra vires* in refusing legal representation, it was decided that there was no facet of natural justice requiring the provision of legal representation (*Pett v Greyhound Racing Association (No: 2)* (1969)).

Whereas the rules of the Greyhound Racing Association did not exclude legal representation, the rules of the Football Association in contention before the Court of Appeal in *Enderby Town Football Club*

Ltd v Football Association Ltd (1971) *did* exclude such representation. On this occasion an injunction to prevent the hearing of an appeal without legal representation was refused. Although difficult issues of law arose in the appeal, the Court considered that they might be adequately dealt with on an application to the Court for a declaration. In the meantime, the Association rules had to be observed. Consequently, it may now be the case that if the rules of an association do exclude legal representation, such an exclusion can be enforced except that, in its discretion, the association may be required to allow representation to any person who seems to be in need of such a facility, for example, because of difficulties with language or by virtue of a particularly serious charge or allegation. Any police officer appearing before the chief constable in respect of an alleged breach of discipline is not entitled to legal representation (*Maynard v Osmond* (1976)). The Court of Appeal justified this conclusion by reference to the requirement of the Police (Discipline) Regulations 1965 that representation be provided by a police officer, not a lawyer, which was found to be *intra vires*. Similarly, in *Fraser v Mudge* (1975) it was decided, again by the Court of Appeal, that a prisoner had no right in law to legal representation for the purpose of appearing before the board of visitors on a disciplinary charge.

10.7 The Effect of Breaches of Natural Justice

The effect in law of a failure to comply with the rules of natural justice seems to be that any decision or other administrative action is null and void (*Ridge v Baldwin*). There are also *dicta* to this effect in *Anisminic v Foreign Compensation Commission* (1969) where Lord Pearce, for example, observed that:

> Lack of jurisdiction may arise in various ways . . . the tribunal . . . while engaged in a proper inquiry . . . may depart from the rules of natural justice . . . thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. [This] would cause its purported decision to be a nullity.

If any breach of natural justice is to render a decision null and void it is because statutory powers and the rules of private organisations are impliedly subject to the rules of natural justice.

There are also dicta in *Dimes v Grand Junction Canal Proprietors* (1852) to the effect that a breach of the rule against bias renders a decision merely voidable but since this case involved a decision by a judge of a superior court the term 'voidable' may simply mean that the decision is 'appealable' to the next court in the hierarchy of superior courts. The same approach could apply to decisions of inferior courts such as Magistrates' courts except that here there *is* the possibility of seeking *review* of the decision. In the case of statutory administrative

agencies and voluntary domestic organisations there may also be an appeal available within the statutory scheme or rules of the organisations so that again there will be a similar choice as in the case of a decision by an inferior court. Generally, the court will entertain an application to set aside such a decision affected by a breach of natural justice, subject to any express restrictions in the scheme or rules of an organisation, as the case may be (*Leigh v National Union of Railwaymen* (1970)).

However, until a decision is declared null and void by the court, it may have some existence in law (*per* Lord Wilberforce in *Calvin v Carr* (1979)). Where, within the rules of a voluntary domestic organisation, a subsequent hearing is conducted by an appellate body, the decision may still be open to challenge in the court on the ground that the person aggrieved has been denied a right to an original hearing and then to an appellate hearing (*Leary v National Union of Vehicle Builders* (1970)). It was suggested by the Judicial Committee of the Privy Council in *Calvin v Carr* that the principle in *Leary* was too widely expressed. It was decided in *Calvin* that the result of a stewards' inquiry in New South Wales was affected by a breach of natural justice. The jockey in question was disqualified for one year but it was also decided that the original breach could be remedied by a subsequent hearing before the appeal committee of the Jockey Club which did comply with natural justice. It was suggested that the principle in *Leary* would apply only in cases where, for example, the rules of the organisation require observance of natural justice at every stage of the relevant procedures. As an alternative to the above situations, it is always possible that a failure to comply with natural justice may be made good by a fresh hearing, leading to a legally valid decision (*De Verteuil v Knaggs* (1918)). In *Ridge v Baldwin*, Ridge's solicitor was not fully informed of the charges against the Chief Constable of Brighton and the Watch committee did not annul the decision which they had already published and proceed to a *new* decision: an inadequate substitute for a full rehearing.

11 Substantive *Ultra Vires*

11.1 The Nature of Substantive Powers

Chapter 7 dealt with the nature and characteristics of administrative powers while Part 1 described the various administrative agencies which use those powers. Whereas the statutory procedures described in Chapter 9 and the rules of natural justice described in Chapter 10 determine the steps to be taken in pursuing the exercise of administrative powers, the present chapter is concerned with the rules of administrative law as they are developed and applied for the purpose of defining the scope of any functions conferred on an administrative agency.

11.2 Judicial Review of Substantive Powers

It was seen earlier in Chapter 1 that the High Court sets the limits of statutory substantive powers on any occasion when uncertainty about those limits has given rise to litigation. Through its inherent power to review the legality of administrative action, the High Court is able to ascertain whether an administrative agency or inferior court has exceeded or abused the legal limits of the substantive powers governing its functions. Any excess or abuse of those powers means that the decision or other administrative action is *ultra vires* and may be dealt with through a range of remedies, which are described in Chapter 13. However, merely because the High Court disagrees with a decision and considers it to be wrong on the merits of the case in question does not mean that that decision is *ultra vires*. To be *ultra vires* a decision has to be proved to have exceeded the express or implied statutory limits of the powers given to the administrative agency, that is, to have gone beyond the jurisdiction of that agency.

11.3 The Limits of Statutory Powers

The law prescribes various rules or tests for the limits of substantive powers. In general, these rules are applicable according to whether or not the powers are discretionary and whether matters of fact or law are in issue. However, before these rules are examined, it must be reemphasised very strongly that merely because the reviewing court considers a decision to be wrong on the merits, that is, matters within the limits of statutory powers, does not render it *ultra vires*. The law recognises here that an administrative agency should have some oppor-

tunity to exercise its expert skill or judgment in particular cases. Hypothetically, a furnished rent tribunal might have the power '. . . to determine disputes between landlord and tenant in respect of the payment of rent for furnished premises'. If the tribunal is to avoid an *ultra vires* decision it would probably have to decide correctly at the outset and to the satisfaction of a reviewing court that a case referred to it involved what is in *fact* a *dispute* on what in *law* is a *rent* payment as between parties who are in *law landlord* and *tenant* concerning premises which are, as a *fact*, furnished premises. (*R. v Fulham, Hammersmith and Kensington Rent Tribunal ex p. Zerek* (1951). Thereafter, any expert conclusions arrived at by the tribunal about the physical condition of the premises and that, for example, the rent should be reduced by 10 per cent in recognition of those conditions is a decision on the merits of the case and therefore generally beyond review for *ultra vires*. However, if Parliament had prescribed an appeal from the tribunal's decisions, the appeal court or tribunal *would* be able to re-examine the merits of the tribunal's decision in order to substitute its own decision for example, by reducing the rent by 20 per cent. Accordingly, there is a fundamental distinction between review, which is concerned to ascertain whether a decision should be quashed or declared a nullity as being in excess or abuse of statutory limits, and appeal.

The need for any administrative tribunal or agency to determine correctly the limits of its powers is well illustrated in *R. v Blackpool Rent Tribunal ex p. Ashton* (1948), where the tribunal had statutory responsibility for determining disputes in relation to furnished premises. The tenancy of a flat was referred to the tribunal where the flat contained a clock, curtains in two rooms, a gas cooker and a water heater. The Court quashed the tribunal's decision: the first two items were regarded by the Court as being *de minimus* while the other items were not 'furniture'. The fact that certain matters have nothing to do with the limits of statutory powers but relate entirely to the merits of a case, to be weighed and dealt with entirely by the agency itself, is seen in *Dowty, Boulton Paul Ltd v Wolverhampton Corporation (No. 2)* (1973). The Corporation decided to discontinue the provision of its municipal airport by virtue of the powers in section 163 of the Local Government Act 1933 which stipulated that: '. . . a council may appropriate for any purpose for which the council are authorised . . . to acquire land . . . any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation'. It was found by the Court that a decision of the Corporation under these powers by which the land's use could be discontinued in order to permit the building of houses was entirely a matter within their powers, that is, a matter for their judgment on the merits of the competing claims to the land. Even if the Court sympathised with the merits of the airport user's claim, this could not have rendered the Corporation's decision *ultra vires*.

11.3.1. *Defining the limits.* The task of identifying the limits of powers depends on the definition of matters of fact and/or law which are considered to be *fundamental* to the powers of any administrative agency. If such matters of fact and/or law are considered by the court to be fundamental, this is an indication of Parliament's supposed intentions in relation to the limits of an administrative agency's powers. Failure to interpret correctly a legal requirement which is fundamental to the limits of powers renders a decision *ultra vires*. Equally, failure to find evidence for a matter of fundamental fact is a prerequisite for an *ultra vires* decision (*Coleen Properties Ltd v Minister of Housing and Local Government* (1971)).

11.3.2 *Fundamental matters of law.* In *Padfield v Minister of Agriculture* (1968) the House of Lords dealt with the minister's refusal to refer a complaint about differentials in milk prices paid by the Milk Marketing Board to farmers in different regions of the country to a committee of investigation under section 19 of the Agricultural Marketing Act 1958. Section 19 stipulates that the minister shall appoint a committee of investigation which 'shall . . . be charged with the duty, if the minister in any case so directs, of considering and reporting to the minister on . . . any complaint made to the minister'. It was decided by the House of Lords that the minister had misconstrued the legal requirements of the Act which indicated that he was obliged to refer the complaint made if the objects and intentions of the legislation were to be realised. Although the minister had a discretion, there was a fundamental legal requirement that complaints be referred to a committee in order to provide protection for those affected by milk marketing schemes. In *Pearlman v Keepers and Governors of Harrow School* (1978) the Court quashed the decision of a county court in respect of a determination relating to the rateable value of a dwelling for the purposes of the Leasehold Reform Act. Under the Act certain requirements have to be satisfied before a long leaseholder can purchase the freehold of his property, one of which is a rateable value limit. Normally, any improvement or alteration to a property would have the effect of pushing up the rateable value beyond the limit so that the long leaseholder would no longer qualify for a purchase of the freehold. Accordingly, it is provided by the Act that in some circumstances such as where there is a 'structural alteration' to property, the rateable value should be subject to a notional reduction. Any long leaseholder is permitted by the Act to apply to a county court for a determination whether certain improvements amount to a 'structural alteration': any such determination is stated to be 'final and conclusive'. In this case the county court decided that the installation of central heating was *not* a 'structural alteration', a decision which was quashed by the Court of Appeal as being an *ultra vires*, fundamental error of law.

11.3.3 *Inferior courts.* The House of Lords in *Re Racal Communications Ltd* (1980) concluded that there is something akin to a presumption that errors of law by inferior courts like the county court are *not* generally fundamental, primarily by reference to the need to recognise the expertise of the judges in those courts. Consequently, decisions of inferior courts affected by errors of law will usually be, at most, *voidable* decisions (legally effective decisions unless quashed by the court) by virtue of there being a less than fundamental error of law on the face of the record of the decision. This concept is examined below. It will be noted that the principle in *Re Racal Communications Ltd* applies to inferior courts as opposed to other administrative agencies, including tribunals, where the House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission* (1969) remains the leading authority.

11.3.4 *Administrative agencies.* In *Anisminic* the British Government received from the Egyptian Government a sum of money in respect of outstanding claims following the sequestration of British property in Egypt. By virtue of the Foreign Compensation Act 1950, it has been seen that the Foreign Compensation Commission has statutory responsibility for the determination of claims made in respect of the money received from any foreign Government. A claim would be 'established' according to an Order in Council if certain requirements were met, one of which was that a claimant had to be British. In rejecting Anisminic's claim the Commission found that the company, although British, had not satisfied another requirement, that a claimant's successor in title should also have been British. It was found that the Commission had misinterpreted the Order in Council defining the limits of its powers. The Commission had made a fundamental error of law by taking into account the need for a claimant to prove that a successor in title was also British, something that amounted to an additional requirement which had not been specified in the Order in Council. Despite the words of section 4(4) of the Foreign Compensation Act to the effect that any decision on an application made to the Commission 'shall not be called in question' in any court of law, the House of Lords was willing to grant a declaration that the Commission's decision was *ultra vires*. Lord Pearce emphasised that it is possible to exceed or abuse statutory powers in various ways:

> There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not

directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

The decision in *Anisminic* and *Re Racal Communications Ltd* indicate that virtually any error of law committed by an administrative agency such as a local authority or an administrative tribunal will be regarded by the High Court as a fundamental error of law rendering any resulting decision or other administrative action *ultra vires*. In *Pearlman*, Lord Denning and the majority of the Court considered that such a principle should extend to all administrative agencies and inferior courts. Lord Denning stated that: 'No court or tribunal has any jurisdiction to make an error of law on which the decision of a case depends. If it makes such an error, it goes outside its jurisdiction'. In his important dissenting judgment, which was subsequently approved by the House of Lords in *Re Racal Communications Ltd*, Geoffrey Lane L.J. considered that the inferior court should have some leeway in which to make wrong determinations of law without any eventual decision being regarded as *ultra vires*. Clearly, expert judges are capable of arriving at differing views of the law on many occasions. Although the High Court may consider a county court judge's interpretation of the law to be wrong in a particular case, that does not necessarily mean that it is *so* wrong as to offend the fundamental limits of powers prescribed by Parliament in order to render a decision *ultra vires*.

11.4 Error of Law on the Face of the Record

It was noted previously from the case of *Re Racal Communications Ltd* that decisions of inferior courts affected by errors of law will usually be regarded, not as *ultra vires* for excess or abuse of some fundamental legal requirement of their powers, but as merely *voidable* decisions. A voidable decision is a legally effective decision until it is quashed by the court, in contrast to an *ultra vires* decision which is null and void *ab initio*, that is, a decision which has never existed in law. Because an error of law on the face of the record does not render a decision *ultra vires*, the error is not, therefore, made in respect of some fundamental requirement defining the limit of statutory powers. Accordingly, some incidental misconstruction of a statutory provision appearing on the face of the record of a decision by an inferior court is the most likely occurrence where the court would be invited to quash a voidable decision. In *R. v Crown Court at Knightsbridge ex p. International Sporting Club (London) Ltd* (1981) the court quashed a decision of the Crown Court, dismissing appeals from decisions of the justices, to the effect that companies' licences to operate casinos should be cancelled on the ground that there had been serious contraventions of the Gaming Act 1968 in the operation of the premises. The error of law appearing in the record of the judgment related to the judge's conclusion that the

question whether the companies were 'fit and proper persons' for the purposes of the Gaming Act could only be judged by their past conduct. This conclusion failed to take into account the legally relevant fact that the original companies had sold their interests and shareholdings to new owners: this failure to take into account company restructuring was an error of law appearing on the face of the record of the decision.

11.4.1 *Error of law on the face of the record and the doctrine of ultra vires.* Historically, error of law on the face of the record provided the basis for the High Court's control over inferior courts and other administrative bodies. Nevertheless, a decision could be quashed as being *ultra vires* if additional evidence beyond the record of a decision could be produced. Gradually in the case of error of law on the face of the record, *certiorari* would issue to quash even the most trifling, technical errors of law. Parliament responded by legislating that in many cases *certiorari* would not be available to quash certain decisions. Accordingly, efforts were made by the court to admit evidence more freely for the purpose of establishing that decisions may have been made in excess of powers conferred, that is, *ultra vires*. Thereafter, the doctrine of *ultra vires* became the real basis of judicial review and error of law on the face of the record was virtually forgotten until the Court of Appeal decision in *R. v Northumberland Compensation Appeal Tribunal ex p. Shaw* (1952).

Mr Shaw lost his job as clerk to the West Northumberland Joint Hospital Board when the National Health Service Act 1946 was passed. As a result he was entitled to claim compensation and he claimed in turn that his previous employment in local government should have been taken into account in computing the payment. Being dissatisfied with the amount of compensation awarded, Shaw appealed to the tribunal which rejected his claim that previous employment should have been taken into account. Shaw made a successful application to the Court for an order of *certiorari* to quash the tribunal's decision on the ground that an error of law resulting from the misinterpretation of statutory regulations relating to compensation appeared on the face of the record of the tribunal's decision. The error of law in misconstruing the statutory compensation regulations was not a fundamental error affecting the very limits of the tribunal's powers. As an error of law which appeared on the face of the record it merely rendered the decision voidable and quashable by *certiorari*. As for the record of the tribunal's decision, the error was admitted in open court and incorporated as reasons for the decision. Denning L.J. considered that:

> . . . the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision.

Although the availability of *certiorari* to cure error of law on the face of the record once assumed considerable importance, the remedy in this context is of increasingly less significance. First, the Tribunals and Inquiries Act 1971 provides an appeal on a point of law from many administrative tribunals to the High Court in an area which was previously dominated by *certiorari* where a tribunal's decision was affected by an error or law on the face of the record. Secondly, the House of Lords *dicta* in *Re Racal Communications Ltd*, as seen previously in the present chapter, seem to restrict error of law on the face of the record to the decisions of inferior courts, as opposed to tribunals and other administrative agencies.

11.5 Ouster Clauses and the Doctrine of *Ultra Vires*

It is sometimes the case that an Act of Parliament will attempt to prevent any challenge to an administrative decision, usually by attempting to oust the jurisdiction of the court. In *R. v Medical Appeal Tribunal ex p. Gilmore* (1957) the legislation provided that decisions of the tribunal should be 'final'. It was decided by the Court of Appeal that in the absence of any other clearer statutory words, the decisions of the tribunal were subject to *certiorari* either in respect of decisions beyond the limits of the statutory powers or for an error of law on the face of the record. The Court considered, therefore, that although a decision might be final as to the facts and (presumably) any expert conclusions drawn from those facts, it would not be final in respect of any matter of law. Therefore, the finality clause in the Act could be effective only to prevent any appeal against the facts and merits of the decision. Nevertheless, it is at least arguable that Parliament actually intended to exclude *any* challenge to the tribunal's decisions, including review.

Another significant ouster clause arose for the Court's consideration in *Anisminic*. It was seen previously that the ouster clause here related to decisions of the Foreign Compensation Commission. The Act stated that the '. . . determination by the Tribunal of any application made to them under this Act shall not be called in question in any Court of Law'. It was decided by the House of Lords that this ouster clause would not exclude any challenge by the court in respect of any decision which involved any error which took the tribunal beyond the limits of its statutory powers, that is, an *ultra vires* decision. In the event, a fundamental error of law rendered the Commission's decision *ultra vires*. The basis of the Court's decision is that a reference in the ouster clause to a 'determination' or a 'decision' implies a legally effective decision, as opposed to an *ultra vires* decision. While the ouster clause protects any determination or decision which *exists* as a legally valid decision, including a merely voidable decision, it *cannot* be taken to protect from review by the Court a determination or decision which does not exist in law, that is, an *ultra vires* decision. Accordingly, in

Anisminic the Court was prepared to declare that the decision was null and void as an *ultra vires* decision because the fundamental error of law had taken the Commission beyond the limits of its statutory powers. A similar approach is seen in the Court of Appeal decision in *Pearlman* where the Court was concerned with section 107 of the County Courts Act 1959 which states that: 'No judgment or order of any judge of County Courts, nor any proceedings brought before him or pending in his Court, shall be removed by appeal, motion, *certiorari* or otherwise into any other Court whatever'. Despite these words in section 107, it has been seen previously that the court was prepared to grant *certiorari* to quash a county court decision, following the reasoning in *Anisminic*.

Another ouster clause of considerable scope was before the Judicial Committee of the Privy Council in *South-East Asia Fire Bricks v Non-Metallic Mineral Products Manufacturing Employees Union* (1980). This clause appeared in the Malaysian Industrial Relations Act 1967 and stipulated that: '. . . an award of the (Industrial) Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any court of law'. Again, following the approach in *Anisminic*, it was decided that although these words would protect any voidable decision affected by an error of law on the face of the record from review by the Court, they did not prevent the Court reviewing a decision of the Industrial Court which was found to be *ultra vires* and void.

The foregoing ouster clauses can be distinguished from other clauses which *do* permit the High Court to review the legality of decisions but only where an application for that purpose is made to the Court within six weeks of that decision. Such clauses are examined in the context of judicial remedies in Chapter 13. These clauses are to be found primarily in legislation governing town and country planning and compulsory purchase. In both cases a decision of the Secretary of State for the Environment, for example, on an appeal from a refusal of planning permission by a local authority or in respect of a local authority's invitation to confirm one of its compulsory purchase orders, may be challenged, but only within the strict limit of six weeks (*Smith v East Elloe Rural District Council* (1956)). It is clear, therefore, that these statutory ouster clauses differ from the other varieties previously examined, particularly in so far as six weeks *are* allowed for a challenge in the High Court. It is probably this factor which has influenced the court more than any other in resisting an application of the principle in *Anisminic* so that any application to the court after six weeks would still be refused (*R. v Secretary of State for the Environment ex p. Ostler* (1977)).

11.6 The Limits of Discretionary Powers

Reference has been made to the general practice of conferring discretion on the initiators of administrative action to determine the limits of

their statutory powers whereas the adjudicators — tribunals in particular — usually operate without reference to such discretionary powers. Where an administrative agency's powers are discretionary so that it is able to make choices before acting, those choices must be made by reference to lawful factors which are expressly or impliedly recognised by and within the statutory limits under which the powers are exercised. Equally, any policy which is made by the administrative agency in order to guide the exercise of these discretionary choices must be within the same statutory limits.

Before these principles are explained and illustrated, reference must be made to the leading statement of principle by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948). He stated that when a discretion is granted:

> . . . the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion . . . is an absolute one and cannot be questioned in any court of law. What then are those principles? . . . The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters . . . [A] person entrusted with a discretion must . . . direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said . . . to be acting 'unreasonably'.

A good example of a statutory discretion is to be found in section 8 of the Education Act 1944 by which the council of a local education authority is obliged '. . . to secure that there should be available for their area sufficient schools for providing full-time education' suitable to the requirements of pupils. It was decided in *Meade v Haringey London Borough Council* (1979) that this discretion does not permit the council simply to provide school buildings. Through an interpretation of the Act the Court of Appeal decided that the discretion also required the provision of teachers and other essentials if the object of the Act — to secure the education of children — was to be realised. In other words, these wider requirements mark the limits of the council's statutory powers, emphasising the fact that it is the court which is the judge of the legal limits of discretionary powers. It was further suggested in *Meade* that the council would have been acting *ultra vires* had it been established that its schools had remained closed during a caretakers' strike as a result of political influences and considerations. In the event, the injunction sought by parents against the Council to restrain any

further breach of duty under section 8 and to require the reopening of the schools was not granted when, during the litigation, the strike was ended. From the foregoing principles it can be seen that any discretion, whether it relates to the limits of statutory powers (as in *Meade*) or to a determination of the merits of any case by an administrative agency *within* those limits, can only be influenced by considerations which are legally relevant to the legislation containing the powers. Hence from *Meade* political reasons for keeping the schools closed were regarded as being legally irrelevant to and *ultra vires* the Education Act powers. The same is true of the hypothetical furnished rent tribunal mentioned at the beginning of the present chapter. Where that tribunal, in the course of dealing with the merits of any claim by a tenant within its powers, takes into account some consideration which is regarded as alien to the Act conferring the powers, for example, that the tenant is an immigrant, its eventual decision will again be *ultra vires*. The same conclusion would be possible upon proof that the administrative agencies in question had used their various statutory powers for improper purposes, that is, unlawful purposes beyond the defined statutory limits.

Assuming that an administrative agency has correctly determined the scope of its statutory powers at the outset, either for the purpose of initiating administrative action or for the purpose of adjudicating some claim or dispute, then it will be acting *intra vires*, that is, within the limits of its statutory powers. Thereafter, the agency, in dealing with the merits of different alternatives for administrative action or the merits of competing claims, as the case may be, has to avoid the foregoing irrelevant considerations or improper purposes. If it does then its eventual decision or other action will not be *ultra vires* as long as that decision or other action is expressly or impliedly permitted by the empowering legislation. In so avoiding any review of the legality of its decision or other action, the administrative agency is free, within these legal constraints, to exercise its expertise, judgment and opinion in relation to the problem to be dealt with. Accordingly, and by way of illustration, the way in which educational facilities are provided by virtue of section 8 of the Education Act is entirely a matter for the responsible council acting as local education authority. If, therefore, it is felt that more resources are required for the provision of educational facilities to benefit particularly deprived members of the community, that is a matter entirely for the council acting within its powers: any such decision cannot be *ultra vires* where it is motivated by educational considerations.

The point is also illustrated in *Eckersley v Secretary of State for the Environment* (1978) where the Secretary of State confirmed a compulsory purchase order for the acquisition of land to permit the clearance of slum properties, by virtue of powers contained in Part 3 of the Housing Act 1957. It was decided that the confirmation was *ultra vires* on the ground that there was a failure to take into consideration

comparative costs of demolition and rebuilding. Had the Secretary of State lawfully taken these fundamental factors into consideration, his conclusions on cost would not generally have been of any concern to the Court. He may have had a policy to aid him in the exercise of his discretionary powers. The policy may have been in favour of saving houses where possible. Accordingly, any decision not to confirm a compulsory purchase order, even though renovation of the housing might cost £½ million more than demolition and redevelopment, is entirely a matter for the Secretary of State acting within his statutory powers, that is, it is a matter going to the merits of the decision, which cannot be challenged as an *ultra vires* decision.

11.6.1 *The problem of subjectively worded discretionary powers.* It has been emphasised that the High Court must be the final arbiter of the outer limits of any discretion conferred on an administrative agency. One of the leading statements of principle comes from the judgment of Sachs J. in *Customs and Excise Commissioners v Cure and Deeley Ltd* (1961). By virtue of section 33 of the Finance (No. 2) Act 1940 the Commissioners were empowered to '. . . make regulations providing for any matter for which provision appears to them to be necessary for the purpose of giving effect to the provisions of this Part of this Act and of enabling them to discharge their functions thereunder'. In a set of regulations made in 1945 it was stated that: 'If any person fails to furnish a return as required by these regulations the Commissioners may . . . determine the amount of tax appearing to them to be due from such person . . . which amount shall be deemed to be the proper tax due'. In a claim for purchase tax against the company it was decided that this regulation was *ultra vires* the empowering Act. In so deciding, Sachs J. rejected the view that the words 'appear to them to be necessary' when used in a statute conferring powers on a competent authority:

> . . . necessarily make that authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have. It is axiomatic that . . . 'the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention'. It is no less axiomatic that the application of that rule may result in phrases identical in wording or in substance receiving quite different interpretations according to the tenor of the legislation under consideration. As an apt illustration of such a result it is not necessary to go further than *Liversidge v Anderson* (1942) . . . and *Nakkuda Ali v Jayaratne* (1951) . . . in which the words 'reasonable cause to believe' and 'reasonable grounds to believe' received quite different interpretations.

In *Liversidge* the Home Secretary was empowered by Defence Regulation 18B to make orders for the detention of persons where he had reasonable cause to believe that they were of hostile origin or association. In an action by a detainee for false imprisonment against the

Home Secretary it was found by the House of Lords that there could be no inquiry by the court into the question of whether there were reasonable grounds for the Home Secretary's belief that a person should be detained, except on proof of bad faith. In exercising his considerable discretion the Home Secretary was responsible only to Parliament, not the court. By contrast, in *Nakkuda Ali* it has been seen in the chapter on natural justice that a Controller of Textiles in Ceylon was empowered by a regulation governing his powers to cancel textile licences where he had reasonable grounds to believe that any dealer was unfit to continue in that capacity. In giving judgment the Judicial Committee of the Privy Council sought to emphasise that *Liversidge* was a decision referable to its own peculiar wartime context. As to the words in the present case, Lord Radcliffe giving judgment considered that:

> . . . they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing . . . Their Lordships therefore treat the words in [the] regulation . . . as imposing a condition that there must in fact exist such reasonable grounds, known to the controller, before he can validly exercise the power of cancellation.

Decisions like that in *Liversidge*, where the Court was effectively saying that it could not define any statutory limits surrounding the minister's powers, are rare. Indeed, the trend is very much in the direction where the court will not often find that a complete discretion has been granted to a minister or any other administrative agency. In *Secretary of State for Employment v ASLEF (No. 2)* (1972) the Court found that the Secretary of State's decision to order a strike ballot under the Industrial Relations Act 1972 was not *ultra vires* his powers under the Act. Nevertheless, and despite the fact the he could take action 'where it appeared' to him that irregular industrial action had begun or was likely to begin, this did not mean, according to Lord Denning that:

> . . . the Minister's decision is put beyond challenge . . . [I]f the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but if he honestly takes a view of the facts or of the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong. After all, this is an emergency procedure. it has to be set in motion quickly, when there is no time for minute analysis of facts or of law.

Further important examples in the present context of the court's concern about discretionary powers are found in *Norwich City Council v Secretary of State for the Environment* (1982), referred to in Chapter 1, *Congreve v Home Office*(1976) and *Secretary of State for Education and*

Science v Tameside Metropolitan Borough Council (1977). In *Congreve* a large number of television licence holders had prematurely renewed their licences in order to avoid paying an increased fee when it came into force subsequently. They were told by the Home Office that unless they paid the balance between the cost of the old licence and the increased cost for new licences, their licences would be revoked. This action was taken under section 1(2) and section 1(4) of the Wireless Telegraphy Act 1949. Section 1(2) states that: 'A licence . . . may be issued subject to such terms, provisions and limitations as the Minister may think fit.' Section 1(4) states that a licence: '. . . may be revoked . . . by a notice in writing served on the holder'. It was found by the Court of Appeal that the powers were not unlimited and could only be exercised to revoke a licence for good reason and the Home Office's dislike of 'overlapping' licences was not a good reason so that the threatened revocation was *ultra vires*. In the *Tameside* case a Conservative-controlled education authority refused to implement proposals for the introduction of comprehensive secondary education which had been approved by the Secretary of State for Education when the Labour Party had controlled the authority. Section 68 of the Education Act 1944 empowers the Secretary of State to serve a direction against an education authority if he '. . . is satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act'. In the face of the refusal to implement the proposals for comprehensive education, the Secretary of State served a direction and now sought an order of *mandamus* to enforce observance of that direction. It was decided by the House of Lords that the direction was *ultra vires* because there were no grounds for concluding that the authority had acted 'unreasonably'. Following the *dicta* of Lord Denning in the *ASLEF* case, it was considered that although the Secretary of State might legitimately take the view that the authority's proposal to retain grammar schools and to implement selection procedures for certain schools was misguided or wrong, there were no grounds which could justify a conclusion that the proposal was such that no education authority, acting reasonably, would carry it out.

A similar conclusion to that in *Tameside* was reached by the Court of Appeal in *Coleen Properties Ltd v Minister of Housing and Local Government* (1971), using the so-called 'no evidence' rule. Once again the Court was confronted by a minister's statutory powers which appeared to confer a considerable discretion. The Housing Act 1957 empowers the minister to confirm a local authority's compulsory purchase order which includes land which is 'reasonably necessary', either for the purpose of securing a slum clearance area of convenient shape and dimensions or to secure the satisfactory development or use of the area (section 43(2)). The Court concluded that what is 'reasonably neces-

sary' is a fundamental question of *fact* so that if land is to be included in a confirmed order, the minister should have evidence to justify its inclusion. On this basis, the 'grounds' which were lacking in the Secretary of State's action in *Tameside* could have been provided had there been some evidence that the education authority had acted 'unreasonably' (a question of fact) in refusing to implement the proposals for comprehensive education.

11.7 Policy and the Exercise of Discretionary Powers

It has been seen previously that where statute confers a discretion on an administrative agency, that agency has an opportunity to make a choice in determining what action to take or decision to make. In order to guide the making of any such discretionary choice, the administrative agency may adopt a policy. A policy will often be made where the administrative agency is charged with the responsibility of distributing scarce resources in order to achieve what seems to be the most equitable distribution of that resource. A local authority, for example, may adopt a policy in relation to the payment of grants for the repair and improvement of houses by reference to the high priority needs of certain areas of urban decay. Whatever the policy adopted by an administrative agency, that policy must be within the limits of the powers of the Act in question (*Cumings v Birkenhead Corporation* (1972)).

11.7.1 *Lawful and unlawful policies.* If a policy is *intra vires* the Act under which an administrative agency is discharging its functions, that agency nevertheless acts unlawfully where the policy prevents consideration of the merits of each case. The essence of this legal requirement has been expressed in a number of cases. The requirement was dealt with by Lord Reid in *British Oxygen Co. Ltd v Minister of Technology* (1971):

> The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears' to an application . . . There may be cases where the Board should listen to argument against the policy. What it must not do is to refuse to listen at all . . . a large authority may have had to deal already with many similar applications and then it will almost certainly have evolved a policy . . . There is no objection to that provided it is always ready to listen to new argument.

In another leading statement of principle, Bankes L.J. in *R. v Port of London Authority ex p. Kynoch* (1919) expanded this all important distinction between lawful policies and unlawful, preclusive policies. Referring to a licensing function of the Authority, he observed that:

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear the applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is

> something exceptional in his case . . . If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two cases.

The basis of these legal requirements relating to policy is that the statutory responsibilities of administrative agencies cannot be fettered or frustrated. Wherever Parliament has specified by statute that administrative action should be initiated, that administrative disputes should be adjudicated or that applications should be processed, any attendant duty or discretion should be exercised according to law. In *R. v Secretary of State for the Environment ex p. Brent London Borough Council & Others* (1982) the Court was concerned with the Secretary of State's policy to reduce the rate support grant payable to local authorities affected by this policy. Because their rights were adversely affected by the potential loss of grant it was decided that the Secretary of State had not acted fairly towards the local authorities and in so doing had used his policy unlawfully to fetter any genuine exercise of his statutory discretion under the Local Government, Planning and Land Act 1980. As a result, the Court quashed the decision to reduce the local authorities' rate support grant.

In the same way that an unlawful policy may preclude or fetter the lawful exercise of a statutory duty or discretion, these statutory responsibilities may also be affected by contracts and other similar transactions. In *Ayr Harbour Trustees v Oswald* (1883) the trustees were subject to a statutory duty to acquire such land as was required for the construction of harbour facilities. Having purchased land, it was agreed that no construction would take place on that land which would injuriously affect other neighbouring land retained by the vendor. It was decided that this restriction in the agreement was *ultra vires* the trustees' statutory duty. Similarly, in *William Cory & Son Ltd v Corporation of London* (1951) the Court refused to imply a term in a contract between the parties that the local authority would not make a bylaw which was inconsistent with the contractual terms. However, there can be no such objection to such a contract or other similar transaction which is consistent with statutory duties or discretions. It was seen in Chapter 4 that local authorities have wide statutory powers to undertake a large range of functions involving the making of contracts of all sorts. That such contracts are usually compatible with underlying statutory powers is illustrated by *Birkdale District Electricity Supply Co. Ltd v Southport Corporation* (1926). It was agreed between the parties that the company would not charge higher prices for electricity than those charged by Southport Corporation. Subsequently, the Corporation sought an injunction to restrain the company charging higher prices in breach of the agreement. It was found by the Court that

the agreement was not *ultra vires* : it was an agreement which was compatible with the Corporation's statutory power to determine the rates for electricity supply. Finally in this context there seems to be a general presumption in the law that where the Crown is concerned, the court, in order to preserve freedom of executive action, will find that a contract or any other similar transaction cannot lawfully fetter the exercise of appropriate statutory or prerogative powers (*Crown Lands Commissioners v Page* (1960)).

11.7.2 *Acts under dictation.* There is resort to what is in effect an unlawful policy where an act is performed under dictation. This problem has occurred previously where local authorities in undertaking their statutory film licensing responsibilities have been prepared to grant licences to films approved by the British Board of Film Censors without themselves adjudicating the merits of each film (*Ellis v Dubowski* (1921)). In *H. Lavender & Son Ltd v Minister of Housing and Local Government* (1970) the minister, in determining a planning appeal in respect of a proposal to extract minerals from high-grade agricultural land, indicated that it was his policy not to permit such extraction in such areas unless the Minister of Agriculture was not against the proposal. The Court quashed the minister's decision on the ground that the policy precluded an exercise of the minister's statutory discretion so that in failing to determine the appeal himself, he had acted *ultra vires*. Even in the absence of a policy an administrative agency may act unlawfully under dictation. In *Laker Airways Ltd v Department of Trade* (1977) which was previously dealt with in Chapter 9 under the heading of 'Estoppel', the Civil Aviation Authority had to review Laker Airways' licence to operate 'Skytrain', acting under dictation from the Department of Trade. It was decided that any withdrawal of the licence was *ultra vires* because the Department had no power to give 'directions' to the Authority which, under the Civil Aviation Act 1971, was subject only to 'guidance' from the Department. Whether a policy is unlawfully preclusive is a matter of fact in each case. In *Attorney-General ex rel. Tilley v Wandsworth London Borough Council* (1981) the local authority adopted a policy that whenever any case of an intentionally homeless family was before the social services committee it would not provide accommodation by virtue of section 1(1) of the Children and Young Persons Act 1963 which allows 'assistance in kind' (including the provision of accommodation) as part of the local authority's statutory duty to promote childrens' welfare. There was evidence before the Court that exceptions to the policy could be made in appropriate cases. However, it was decided by the Court that the policy was unlawful: the committee would be much influenced by the policy to an extent that there would be doubts as to the fairness of decisions made. The mere existence of the policy meant that in operating section 1(1) there would

be differentiation between children according to the conduct of their parents.

11.7.3 *The interpretation and application of policy.* Where an administrative agency indicates reliance on a policy for the purpose of making a decision or taking any other administrative action, the law may require a correct interpretation and application of that policy. The precise requirements were set out in *Niarchos v Secretary of State for the Environment* (1978) where it was considered to be:

> . . . trite law that the Secretary of State is entitled to have a policy and to change it from day to day, and accordingly he is not bound to apply (although he must have regard to) the policy . . . However . . . when he expresses himself to be deciding a case under a stated policy, it must follow that if he decides the case other than in accordance with the policy he misdirects himself . . .

where there are no other considerations. Accordingly,

> . . . if he misdirects himself as to the provisions of the policy he acts in excess of his power.

Although this case related to the Secretary of State's determination of a planning appeal, where the Town and Country Planning Act 1971, section 29 requires him to have regard to the policy in the appropriate development plan and to any other material considerations, the principle could be applicable elsewhere in other statutory contexts.

11.8. Relevant Considerations

Whether or not a policy is being employed by an administrative agency in order to guide its exercise of discretion, the court will require that it avoids being influenced by irrelevant considerations. Equally, the administrative agency must not fail to take into account any relevant considerations. According to Lord Greene M.R. in *Associated Provincial Picture Houses* if:

> . . . in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters . . .

Failure to adhere to any of these requirements will usually render any decision or other administrative action *ultra vires*. However, where the administrative agency is responsible for a purely administrative function which does not affect a person's rights, the court will not apply these requirements (*R. v Barnet and Camden Rent Tribunal ex p. Frey Investments Ltd* (1972)).

Where statute prescribes the relevant or material considerations which can influence a discretionary decision there will be few problems for the court in determining the limits of the statutory powers in question. However, it is not uncommon to find that Parliament has merely stipulated, as in section 29 of the Town and Country Planning Act 1971 relating to the determination of applications for planning permission by local authorities and (on appeal) the Secretary of State, that there shall be regard for 'the development plan' and 'any other material considerations'. In *Stringer v Minister of Housing and Local Government* (1971) it was decided that the minister, in determining a planning appeal, was able to take into consideration possible interference with Jodrell Bank telescope by a proposed new residential development nearby. Looking at the overall objects of the Act, Cooke J. concluded that 'material' considerations '. . . have to be "planning" considerations . . . In principle . . . any consideration which relates to the use and development of land is capable of being a planning consideration'. Whatever the identity of a consideration which is legally relevant to a discretionary decision, the weight and significance to be given to that consideration is entirely a matter within the powers of the administrative agency. Accordingly, in *Sovmots Investments Ltd v Secretary of State for the Environment* (1976) it was decided at first instance that cost is a legally relevant consideration for the Secretary of State in deciding whether to confirm a compulsory purchase order for the acquisition of land for the provision of housing accommodation under Part 5 of the Housing Act 1957. Forbes J. went on to emphasise '. . . that the weight to be given to cost . . . is also a matter for the Minister and not one in respect of which the court is entitled to substitute its opinion'.

Two leading cases in the present context relate to local government finance. First, in *Roberts v Hopwood* (1925) the Court was concerned with section 62 of the Metropolis Management Act 1855 by which Poplar Borough Council was empowered to pay their employees '. . . such salaries and wages as . . . [the Council] may think fit'. The district auditor disallowed part of the wages paid by the Council. The Council had continued to pay a minimum wage of £4 per week in 1921–22 as in the previous year despite a fall in the cost of living. The auditor found that the payments were not wholly wages but were in part contrary to law as gratuities. The disallowance was upheld by the House of Lords on the ground that the discretion in section 62 had not been exercised reasonably, more particularly because there had been no regard for factors like existing labour conditions and other ordinary economic considerations. The second case, *Bromley London Borough Council v Greater London Council* (1982), was concerned with the legality of a supplementary rate levied by the GLC on constituent councils in order to finance a 25 per cent reduction of fares on London Transport. It was decided by the House of Lords that the rate was *ultra vires* the Trans-

port (London) Act 1969. The basis of the decision was that the GLC had failed to take into account the need for the London Transport Executive to avoid a deficit by disregarding their legal duty to operate 'economic' transport facilities. This occurred through the acceptance of the scheme to reduce fares which placed an undue burden on ratepayers in breach of a legal duty to ensure that, so far as was practicable, outgoings were met by revenue. In many cases involving local government finance the court has accepted the broad proposition that a local authority should have due regard for the interests of its ratepayers, as was seen in the section of Chapter 4 dealing with audit.

11.9 Improper Purposes

Closely related to the above requirements relating to relevant considerations is the requirement that a statutory power can be used only for the purposes expressly or impliedly indicated in the legislation. In many instances it may be the case that a decision or other administrative action may be *ultra vires* by reference to either of these legal requirements. Indeed, on those occasions when a decision is quashed as being *ultra vires* by reference to improper purposes, the likelihood is that the administrative agency has either taken account of irrelevant considerations or failed to take into account relevant considerations.

Whether a statutory power has been used lawfully for the express or implied requirements or purposes of the particular legislation is again a matter of statutory interpretation for the court. In *Sydney Municipal Council v Campbell* (1925) the Council was empowered to purchase compulsorily any land required for 'carrying out improvements in or remodelling any portion of the city'. Without any proposal or intention to improve or remodel any area, the Council resolved to purchase land, including land in the ownership of the respondent. It was found that the Council's intention was to obtain the benefit of an increase in land values following a highway extension into the area, a proposal which was not related, directly or indirectly, to the objects and purposes of the statutory powers. Similarly in *Webb v Minister of Housing and Local Government* (1965) it was decided that a power to acquire land for the provision of coast protection could not lawfully be used for the purpose of providing a promenade. However, in *Hanks v Minister of Housing and Local Government* (1963) it was decided that general highway and planning purposes were lawfully incidental to the prime purpose of powers in Part 5 of the Housing Act 1957 by which land can be acquired for the provision of housing and, more particularly in this case, a housing estate. Where the purposes for which statutory powers are conferred are not clearly and expressly indicated, the court will look to the overall policy and objects of the relevant Act or section of the Act (*Padfield v Minister of Agriculture* (1968)). Section 120(1) of the Local Government Act 1972 states that '(1) For the purposes of — . . . (b) the benefit, improvement or development of their area, a principal council

may acquire by agreement any land, whether situated inside or outside their area.' It was decided in *Costello v Dacorum District Council* (1983) that these powers are widely drawn. As a result the Council was found not to have used these and other powers under the Open Spaces Act 1906 for an unlawful, improper purpose when a lease was taken of land in order to enable the eviction of gipsies. This was despite a temporary planning permission given by the Secretary of State for the Environment under the Town and Country Planning Act enabling the gipsies to stay on the land.

Where there appears to be a plurality of motives for administrative action the court will seek to identify the dominant purpose for which the powers are exercised. In *Westminster Corporation v London and North Western Railway Co.* (1905) the court was concerned with a statutory provision which stated that: 'Every sanitary authority may provide and maintain public lavatories . . . in situations where they deem the same to be required'. The Corporation used this power to build lavatories underneath the middle of a street and provided access by means of a subway from either side. Consequently, the subway could be used as a means of crossing the street by persons with no desire to use the lavatories. It was argued that the Corporation had unlawfully abused its powers. This argument was rejected by the Court and in delivering judgment, Lord MacNaughton observed that:

> It is not enough to show that the Corporation contemplated that the public might use the subway as a means of crossing the street . . . it must be shown that the Corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place.

It seems, therefore, that as long as the Corporation considered that the lavatories were genuinely required at the point in question, it mattered not that some consideration may have been given to the need to provide a subway street crossing.

It is sometimes the case that an administrative agency is confronted by a number of different courses of action, any one of which could be adopted for the purpose of dealing with a particular problem. This was the case in *Asher v Secretary of State for the Environment* (1974) where local councillors refused to increase council house rents, as required by the Housing Finance Act 1972. The Secretary of State had four possible alternative options in order to deal with this situation. He could appoint a Housing Commissioner to take over the council's statutory housing responsibilities, require the district auditor to undertake an extraordinary audit of the council's accounts, reduce the council's housing subsidy, or apply to the High Court for an order of *mandamus* requiring the council to undertake its statutory housing responsibilities according to law. The Secretary of State chose an extraordinary audit of the accounts as a result of which the councillors were surcharged and disqualified.

The Court rejected an argument that the Secretary of State was motivated by an unlawful, improper motive, to see the councillors punished. It was emphasised that ministers frequently have to balance one course of action against another and in the absence of any proof of bad faith the Court would not interfere.

Finally, where statutory powers overlap so that it may be apparent that either power may be used by an administrative agency, it may be unlawful to use one power to the exclusion of the other, particularly if a person's rights are affected as may have been the case in *Costello*. However, statute may prescribe that the administrative agency may lawfully use particular powers, even though a person's rights may be prejudiced by the use of these but not the other overlapping powers. This was the case in *Westminster Bank Ltd v Minister of Housing and Local Government* (1970) where proposed development involving an extension to a bank could be restrained either by refusing planning permission under the Town and Country Planning Act or by imposing an 'improvement' line under the Highways Act. The latter powers involved a payment of compensation whereas a refusal of consent under the Planning Act powers did not attract compensation. It was decided by the House of Lords that in refusing consent under the planning powers, there had been no *ultra vires* decision motivated by any unlawful desire to avoid compensation primarily because the Town and Country Planning Act expressly permitted other powers to be ignored. The section in question stipulates that: '. . . the provisions of this Act . . . apply . . . in relation to any land notwithstanding that provision is made by any enactment in force at the passing of this Act . . . for . . . regulating any development of the land'. Nevertheless, this statutory 'immunity' in relation to improper purposes only extends to 'competing' powers in an Act in force at the passing of the Town and Country Planning Act where the authority is concerned with the 'regulation' of any development of land.

11.10 Total Unreasonableness

Lord Greene M.R. in *Associated Provincial Picture Houses* characterised any administrative act as having been performed 'unreasonably' in law where, for example, there is a failure to take account of relevant considerations. The same description would apply to any act motivated by unlawful, improper purposes. However, Lord Greene goes on to say such unreasonableness in law can also cover a situation where '. . . a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it'. Clearly, any such decision will be regarded in law as being *ultra vires* not because it is affected by irrelevant considerations, failure to take into account relevant considerations or improper purposes, but because it is such an *extreme* decision that the court will assume that Parliament could never have

intended that any reasonable authority would use the statutory powers in that way.

There are very few authentic examples of the court's use of this ground for the review of discretionary powers. One of the best examples is the Court of Appeal decision in *Hall & Co v Shoreham-by-Sea Urban District Council* (1964). The local planning authority granted planning permission subject to a number of conditions, one of which was that the developer should construct a road on his land to be dedicated to the public, as and when required by the authority. This condition was held to be totally unreasonable and therefore *ultra vires* on the basis that there was interference with the developer's property rights without a payment of compensation. There was no suggestion that the condition was influenced by irrelevant considerations since the provision of roads is clearly relevant where planning powers are exercised. Consequently, it is the extreme requirements of the condition alien to the presumed limits of the powers in the Act that render it totally unreasonable. In *R. v Hillingdon London Borough Council ex p. Royco Homes Ltd* (1974) planning permission was granted for the construction of flats subject to conditions which included the requirements that they should first be occupied by persons who had been on the housing waiting list for 12 months and that such persons should have security of tenure for ten years from the date of occupation. These conditions were found to be totally unreasonable and *ultra vires*, again on the grounds advanced in *Hall*. However, *Royco Homes* is not as clear an example of total unreasonableness as *Hall* if it is accepted that the local planning authority was influenced at the outset by an irrelevant consideration, that is, the provision of housing. In other words, if the provision of housing is not a legally relevant consideration for the purpose of a planning decision that would have been the simpler ground on which to base the conclusion about the legality of the conditions.

Accordingly, total unreasonableness is a ground for the review of discretionary decisions wherever they are beyond challenge by reference to irrelevant considerations, for example, or improper purposes. Total unreasonableness may also apply to any decision which cannot reasonably be justified on the evidence so that no other reasonable authority would have come to that decision (*Banks Horticultural Products Ltd. v Secretary of State for the Environment* (1979)). Again, such a conclusion must be justified only on the ground that Parliament could not have intended that the powers should be exercised except by reference to a certain minimum 'quantity' or 'quality' of evidence. This variety of total unreasonableness serves to emphasise the great difficulty in using and applying this ground for review. Indeed, of the few cases apparently decided by reference to total unreasonableness, it is clear that they could have been decided, as perhaps is the case in *Royco Homes*, by reference to irrelevant considerations, for example, or

improper purposes. A prime example is *Backhouse v Lambeth London Borough Council* (1972), previously seen in the section of Chapter 4 dealing with audit. Although it was decided that the resolution containing the proposal to increase the rent of one council house was totally unreasonable, the case could have been decided quite easily by reference to a failure to take into account some relevant consideration contemplated by the Housing Finance Act.

PART 4 REMEDIES FOR UNLAWFUL AND IRREGULAR ADMINISTRATIVE ACTION

12 Administrative Remedies

12.1 Administrative and Judicial Remedies Contrasted

A remedy can be described as an administrative remedy where it is provided for by statute and does not involve recourse to a court of law. Whatever the status of the remedy, be it administrative or judicial, the law provides such a facility for the purpose of enabling an individual to challenge administrative action. The nature and effect of any such challenge allowed by a remedy will depend on a wide range of factors. In the case of the administrative remedy, it is usual to find that the challenge available through the remedy permits a complete re-examination of a decision or some other administrative action. In the case of judicial remedies, which are the subject of the next chapter, the law seeks to ensure that administrative action takes place according to the requirements of the law. If it does not then the individual who is aggrieved and has a sufficient interest in the matter, for example, as the person directly affected by a decision, should be able to apply to the appropriate court for one of the judicial remedies. Such a judicial remedy is likely to be available once any administrative remedies have been exhausted. Where, for example, a local planning authority has served an enforcement notice under the Town and Country Planning Act alleging unlawful development without planning permission there is an appeal against the notice to the Secretary of State for the Environment and a further appeal on a point of law to the High Court against his appeal decision. Sometimes there may be a limit placed on any challenge to the validity of a decision taken by an administrative agency on an appeal through the use of an ouster clause of the sort described in Chapter 11. Such a clause might state that: '. . . the validity of any decision shall not be questioned in any proceedings whatsoever'. Such a clause appears to make the decision final and conclusive. However, important decisions in cases like *Anisminic v Foreign Compensation Commission* (1969) which are dealt with in Chapter 11 show that the decision of the administrative agency concerned may be final and conclusive in relation to its *intra vires* facts and merits but not on matters of law. Because it is the High Court which is final arbiter on matters of law and legality, there is always the possibility that the decision's legality can be challenged through one of the statutory or non-statutory remedies to be described in the next chapter. It is not unusual to find

that Parliament has already addressed itself to the question of the status of the decision which emerges from an administrative remedy like an appeal. It has been seen in Chapter 5 that the decisions of some administrative tribunals are subject to a statutory appeal on a point of law to the High Court. A decision of the tribunal affected by an error of law can be taken to the High Court although one of the non-statutory remedies, *certiorari*, could be employed to quash the decision where the error was considered so fundamental as to render it *ultra vires*. In some instances and particularly in relation to decisions of the Secretary of State for the Environment in the areas of town and country planning and compulsory purchase, it will be seen in the following chapter that an ouster clause often protects the decision while statutory provision is made for the limited terms on which the High Court can review its legality.

12.1.1 *Varieties of administrative remedy.* The administrative appeal is probably the best-known of the administrative remedies. There are two categories of appeal which are of considerable practical significance: appeals from decisions and other administrative action taken by local authorities and appeals from the decisions of Government departments. Examples of these appeals are given in Chapter 4 on local government and in Chapter 5 on administrative tribunals. In the case of local authorities, one of the best-known appeals is that which is available to an applicant for planning permission where the local planning authority has refused planning permission or granted it subject to conditions. The appeal is to the Secretary of State for the Environment who is at liberty to look at the case afresh (perhaps with the help of a statutory inquiry) so that he could, for example, impose conditions which were even more stringent than those appealed against. The procedural requirements for these appeals are outlined in Chapter 9. Appeals from some local authority decisions go to administrative tribunals, as with disputes concerning rating valuations, which go to the local valuation courts. Many appeals from decisions of Government departments relate to welfare rights where the usual practice, as seen in Chapter 5, is to give an appeal against an adverse decision to an appropriate tribunal. Whatever the destination of an appeal, statutory rules of procedure will set out the detailed requirements for the process indicating the nature of any documentation required, time limits to be observed and so on. In some cases there are very distinct procedural requirements arising from an appeal, as in the case of appeals to the Supplementary Benefit Appeal Tribunals where the initial decision is automatically reviewed when the appeal is notified.

In general, the administrative appeal stands out as the most common remedy for the person who is in some way affected by administrative action. There are, of course, other, more limited remedies for the individual such as the audit procedures dealt with in Chapter 4 and the

facilities for complaint to the appropriate minister in central government concerning the alleged failure of an administrative agency to undertake its statutory responsibilities. This latter facility will be dealt with later in the chapter. In addition, the individual can complain of maladministration which has caused him injustice at the hands of any one of a variety of different administrative agencies. Such a complaint of *intra vires* maladministration will go to one of the Ombudsmen and this important remedy is described in Chapter 15. In any description of administrative remedies it should not be forgotten that such remedies may be available to agencies within a system of administration in order to permit some control of other agencies. Again, there are references to remedies such as directions and other default powers in Chapter 4 in the context of central government's control of local authorities.

12.2 Administrative Remedies and the Question of Legality

At the beginning of this chapter it was seen that where any challenge to a decision or other action is through an administrative remedy such as an appeal, there can be a complete re-examination of the decision. In other words, all the *intra vires* merits of the decision can be re-appraised and, if necessary, the appeal body can substitute its own decision for that made originally and which has now been brought to appeal. However, when the original decision is made by the administrative agency it may be suspected, on the basis of legal advice, that the legality of the decision is in doubt. It may be suspected, for example, that the decision is, in fact, *ultra vires*. For the individual who is affected by the decision there may be something of a dilemma. The decision may be made in respect of that activity from which he proposes to earn his livelihood. The licensing authority may have granted a licence by its decision but imposed perhaps onerous conditions. Should the individual pursue an administrative appeal in the hope that the onerous conditions might be lifted, or should he attempt to challenge the legality of the decision as a whole by applying to the High Court for one of the judicial remedies in administrative law? If the latter course is possible and the High Court found that the decision was *ultra vires*, that decision would probably be quashed or declared a nullity, so enabling the individual to start all over again with a fresh application to the licensing authority.

12.2.1 *Administrative versus judicial remedies.* For the individual faced with the dilemma described above there is the vital question of whether, in law, it is possible to go for the judicial remedy in the High Court where there is an administrative remedy already provided. The answer to this question emerges from the decision in *R. v Hillingdon London Borough Council ex p. Royco Homes Ltd* (1974) where the administrative remedy was the appeal to the Secretary of State for the Environment against a conditional grant of planning permission by a

local planning authority while the judicial remedy was an order of *certiorari* from the High Court to quash the decision by reference to *ultra vires* conditions. The crucial point was whether *certiorari* was available or whether the High Court would have to admit that the only remedy was the administrative remedy provided in this case by section 36 of the Town and Country Planning Act 1971. Section 36 provides that the applicant who is aggrieved by the decision of a local planning authority on an application for planning permission '. . . may by notice . . . appeal to the Secretary of State'. On the face of it, the word 'may' seems to indicate that there is an option so that the aggrieved applicant does not necessarily have to take that route. It was decided by the High Court that the judicial remedy, that is, in this case, the order of *certiorari*, would be available in a 'proper' case, where the only issue (as in this case) is the legality of a decision. Consequently, in any case where the only complaint about a decision is its legality, for example, where there is an error of law on the face of the record, the administrative remedy can be ignored in favour of the judicial remedy from the High Court. The then Lord Chief Justice, Lord Widgery, giving judgment summarised the position by saying that:

> Whether the issue between [the parties] is a matter of law or fact, or policy or opinion, or a combination of some or all of those, one hearing before the Secretary of State has jurisdiction to deal with them all, whereas of course an application for *certiorari* is limited to cases where the issue is a matter of law . . .

12.2.2 *Administrative and judicial remedies serving the same purpose.* It has been seen in the previous section that the two types of remedy available may not necessarily serve the same purpose although there would have been no objection to an appeal to the Secretary of State by Royco Homes under section 36. Indeed an administrative appeal is likely to be the cheaper option unless the parties become embroiled in an expensive public inquiry into the issues before the final decision is made. Had Royco Homes appealed against the conditions attached to its planning permission, a finding by the Secretary of State that they were *ultra vires* would not have necessitated a dismissal of the appeal in view of the fact that the Secretary of State can look at the application afresh and substitute his own decision (*Robert Hitchens (Builders) Ltd v Secretary of State for the Environment* (1979)). In another case from the background of town and country planning, *Pyx Granite Co. Ltd v Minister of Housing and Local Government* (1959), the company sought a declaration (one of the judicial remedies to be described in the next chapter) that their quarrying operations could be carried out without planning permission because they were authorised by a 'private Act of Parliament' (the Malvern Hills Act 1924) for the purposes of a statutory order made under the Town and Country Planning Act. It was decided by the Court that it could grant the declaration sought. One member of

the Court, the House of Lords, observed that: 'It is surely proper that in a case like this involving . . . difficult questions of construction of Acts of Parliament, a court of law should declare what are the rights of the subject who claims to have them determined' (Viscount Simonds). In this case, the Court's declaration served the same purpose as the administrative remedy. This remedy, provided for in what is now section 53 of the Town and Country Planning Act 1971, provides that any person who wishes to ascertain whether proposed activities on land amount to 'development' requiring planning permission '. . . may . . . apply to the local planning authority to determine that question'. In other cases where there is no overlap so that the respective remedies serve different purposes the court will require that the administrative or any other exclusive statutory remedy be followed, as in *Barraclough v Brown* (1897), which was distinguished by the House of Lords as a different case in *Pyx Granite*. In *Barraclough* the Court was concerned with the statutory facilities which gave the plaintiff an entitlement to claim his expenses arising from the recovery of sunken vessels from the River Ouse. Such expenses were recoverable from a magistrates' court: this remedy, it was decided, was an exclusive remedy so that the plaintiff could not obtain a declaration from the High Court in respect of the validity of a claim, which was a matter entirely for the magistrates.

12.2.3 *Exclusive administrative remedies.* In the previous chapter reference was made to section 8 of the Education Act 1944 by which a local education authority is obliged '. . . to secure that there should be available for their area sufficient schools for providing full-time education' suitable to the requirements of pupils. The statutory definition of such broad duties is not uncommon: section 11 of the Water Act 1973 declares very broadly that: 'It shall be the duty of a water authority to supply water within their area'. However, any alleged failure of an administrative agency to undertake such a duty cannot be dealt with by means of a judicial remedy such as *mandamus*, which would direct that a statutory duty should be performed according to law. In many cases Parliament and the courts have foreseen that these very broad duties depend for their performance on all sorts of financial, economic and other considerations. As a consequence, the courts have decided that such duties are not legally enforceable, a conclusion which is often fortified by statutory provisions which provide an alternative, exclusive remedy for those occasions when there is a failure to perform the duty or, to use a technical legal expression, a 'non-feasance'. Such a remedy is necessarily associated with default powers exercisable by various ministers in central government departments as illustrated in a section of Chapter 4 dealing with this type of central government control. One example mentioned in this section came from the Education Act 1944, section 99 of which states that:

> If [the Secretary of State] is satisfied, either upon complaint by any person interested or otherwise, that any local education authority . . . have failed to discharge any duty imposed upon them by or for the purposes of this Act [the Secretary of State] may make an order declaring the authority . . . to be in default in respect of that duty, and giving such directions for the purpose of enforcing the execution thereof as appear . . . to be expedient; and any such directions shall be enforceable, on an application made on behalf of [the Secretary of State], by *mandamus*.

It will be seen from this provision that only at the end of the special procedure is there any possibility of enforcement by the law, but only through the Secretary of State's application for an order of *mandamus* where any directions have not been complied with.

13 Judicial Remedies

13.1 Judicial Remedies Generally

Despite the existence of a wide variety of administrative remedies such as the appeal, described in the previous chapter, the individual who wishes to defend, establish or assert his legal rights in the face of administrative action usually has an opportunity of so doing before a court of law. In this context the individual will look for the protection of the law through any one or more of the remedies which can be granted by a court of law, hence the reference to 'judicial remedies'. In most cases the remedy sought will attempt to deal with an *ultra vires* act or decision of an administrative agency in proceedings before the High Court, which has the inherent power to review the legality of the actions and decisions of administrative agencies and inferior courts. The judicial remedies for *ultra vires* actions and decisions are the declaration, injunction, *certiorari*, prohibition and *mandamus* which are described later in this chapter. It should not be forgotten that on a prosecution for non-compliance with an administrative order, notice, licence or some item of delegated legislation, it may be possible to raise what is, in effect, a defence of *ultra vires*. This form of remedy would apply equally to any civil enforcement where, again, the argument would be that there can be no breach of or non-compliance with something which does not exist in law, that is, something which is *ultra vires*. In some instances it is the case that statutory administrative schemes provide for general appeals to an inferior court where that court can look at the merits of any decision or other administrative action. In the case of such a general appeal the court has wide powers to look afresh at the decision or other action and to substitute its own decision, for example. Such general appeals are in contrast to the more restricted appeals on a point of law which go to the High Court. Both categories of appeal are dealt with in the present chapter which deals also with the limited remedy of damages in administrative law and the remedy of annulment before the European Court of Justice in respect of unlawful administrative action within the European Economic Community. It is proposed to deal first with the facilities for appeals, followed by the High Court's inherent powers of review by reference to the doctrine of *ultra vires*, the remedy of damages and the power of annulment in the European Court of Justice.

13.2 Appeals

An appeal can be made to a court of law only where it is expressly provided for by statute. As was stated in the opening section of this chapter, there are two varieties of appeal: the general appeal and the appeal on a point of law. Each variety is dealt with in turn.

13.2.1 *The general appeal.* A wide variety of statutory provisions contain facilities for appeals to inferior courts and for present purposes three examples are given covering the magistrates' courts, the county courts and the Crown courts.

First, in the case of the magistrates' courts one function, seen in Chapter 8, may be to deal with appeals against licensing decisions of local authorities to which applications are made by persons wishing to set up sex establishments. The second example relates to the county courts' responsibility for appeals against repair notices served by local authorities in respect of houses which are unfit for human habitation and which may or may not be repairable at reasonable expense, as was explained in Chapter 5. Finally, the crown courts deal with appeals in connection with the validity of a local authority's rate as it affects a particular individual or hereditament, as seen previously in the section on rating in Chapter 4. In each case the scope of the court's powers on appeal depends on the particular statutory provision. In the case of an appeal to a county court against a repairs notice, the county court judge is empowered to uphold, vary or quash a repairs notice. Similar powers exist under the Housing Act 1974 where the county courts also deal with appeals from improvement notices served by local authorities requiring the provision of standard amenities such as a bath and wc in a house. Once again, a key factor is 'reasonable expense' and it is not uncommon to find that an appeal is being pursued on the ground that standard amenities cannot be provided at a reasonable expense so that the improvement notice should be quashed. In this case, the decision of the court whether to vary or quash the notice will depend on whether or not the cost of providing the standard amenities is more than any resulting increase in the value of the house on the market. Any such decision relates to the merits of the original decision of the local authority to serve the improvement notice, the crucial characteristic of an appeal which distinguishes it from review where the High Court is concerned only with the question whether a decision or other administrative action is outside the statutory powers, that is, *ultra vires.*

13.2.2 *The appeal on a point of law.* Such appeals are clearly more restricted in that the court is concerned only with questions of law, its interpretation and application. As was seen in Chapter 5, the decisions of various tribunals included in Schedule 1 of the Tribunals and Inquiries Act 1971 are subject to an appeal on a point of law to the High Court or, in more limited cases, the Court of Appeal.

Although the appeal on a point of law is primarily a feature of decision-making by administrative tribunals, there is one important instance where a minister's decision is subject to an appeal on a point of law. This is in relation to the decision of the Secretary of State for the Environment on an appeal against an enforcement notice served by a local planning authority under the Town and Country Planning Act 1971. Many such appeals are undertaken annually when the task of the High Court often centres on the question of whether, as a matter of law, the Secretary of State was right to confirm an enforcement notice alleging unlawful 'development' (as defined by the Act) without planning permission. Whether the decision subject to an appeal on a point of law is that of a tribunal or a minister, it is usual for there to be a requirement that if some error or mistake of law is found by the High Court the case is remitted back to the tribunal or minister for reconsideration and a fresh decision.

A person's legal standing or status (*locus standi*) to bring an appeal is closely controlled. In the case of tribunals, if the procedural rules say nothing about *locus standi* then the Tribunals and Inquiries Act requirement will apply, that is, that an appeal may be brought by '. . . any party to proceedings . . . dissatisfied' with a decision. At the outset it was emphasised that the appeal is restricted to a point of law. This is clearly of fundamental importance and has been emphasised by the High Court in many cases, of which *Jolliffe v Secretary of State for the Environment* (1971) is typical. In that case the judge, Lyell J., referring to the appeal on a point of law from the decision of the Secretary of State on an enforcement notice appeal, stated that:

> The Court is not a court of appeal from the Minister's decision. Its powers are closely circumscribed by statute, and it should not be tempted into substituting its own judgment for matters which fall to be decided by the Minister.

13.3 Review

While an appeal can be pursued only where statute provides for an appeal, the High Court has an inherent power to review the legality of acts and decisions of administrative agencies and inferior courts. This supervisory jurisdiction of the High Court operates by reference to the rules of law described in Chapters 9 to 11. Although the High Court's inherent power of judicial review owes much of its development to the common law, statute has intervened quite frequently in recent times in order to amend or cut down the inherent powers of judicial review possessed by the High Court. Statute has intervened in two ways:

> (1) to replace the inherent power of judicial review with a review process whose terms are found very largely in the legislation governing certain areas of decision-making and referred to in the present chapter as 'statutory review', and
>
> (2) to streamline the system of remedies in judicial review according to the

High Court's inherent powers under a relatively new procedure known as the application for judicial review.

Despite the intervention of statute in this latter case in order to deal with the substantive changes in law relating to what are essentially discretionary remedies, the procedures by which the remedies are sought continue to be governed by the Rules of the Supreme Court. In the next sections of this chapter it is proposed to describe the remedies which are available in the review process undertaken by the High Court, including a special section on statutory review, before going on to deal with the process referred to by the Rules of the Supreme Court as the application for judicial review which governs procedures for judicial review, with the exception of statutory review.

13.4 The Declaration

This remedy is one which confirms the legal status of a relationship and is now widely used in administrative law, even though it does not coerce or force a party to do or refrain from doing anything.

13.4.1 *Use of the declaration in administrative law.* The declaration has its most obvious use on those occasions when it is declared that the act or decision of an administrative agency is *ultra vires*, as in the leading case of *Anisminic v Foreign Compensation Commission* (1969) seen in Chapter 11. The remedy can be used also where a relationship is affected by a breach of natural justice, as seen in Chapter 10 (*Ridge v Baldwin* (1963)), where it is desired to challenge the legality of delegated legislation, as seen in Chapter 8 (*Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* (1972)), and where it is desired to establish that an administrative agency is bound by an act or statement of its representative, as seen in Chapter 9 (*Lever (Finance) Ltd v Westminster (City) London Borough Council* (1970). Most of these principal examples of the uses of the declaration indicate that in administrative law it is a remedy which, if granted, usually confirms that the act or decision of an administrative agency is *ultra vires*, that is, null and void. As such, the declaration is clearly unsuited to and will not be granted in respect of a merely voidable decision which is affected by an error of law on the face of the record which was explained in Chapter 11. In *Punton v Ministry of Pensions and National Insurance (No.2)* (1964) it was found that a decision of a National Insurance Commissioner was *intra vires* but voidable, being affected by an error of law on the face of the record. Unlike a remedy such as *certiorari*, which is dealt with later in this chapter, the declaration does not quash a decision, that is, it is not a 'coercive' remedy. Consequently, in this and similar cases, to grant a declaration would leave two decisions in force, the voidable decision of the Commissioner and the court's declaration. In these circumstances therefore, the remedy of

certiorari is needed in order to quash the voidable decision so that from the date of quashing it has no force in law so that no one can rely on it for any purpose.

13.4.2 *Exclusion of the declaration.* It has been seen in the previous section that a declaration will not be granted in respect of a voidable decision. There are other circumstances in which (usually as a matter of discretion) the remedy will be excluded, where

(1) there is some alternative statutory remedy;
(2) the issue before the court is purely hypothetical; and
(3) some alleged right or interest is not recognised by the law.

As to the first area of exclusion, there probably needs to be clear statutory words (*Barraclough v Brown* (1897)) as seen in the previous chapter on administrative remedies. The second area of exclusion is well illustrated by the decision in *Blackburn v Attorney-General* (1971) where a challenge to the treaty-making powers of the Crown was unsuccessful. The challenge arose from a suggestion that accession to membership of the European Economic Community by the United Kingdom as a result of signing the Treaty of Rome would lead to an irreversible loss of some of Parliament's sovereignty. Whether or not this would have been the case was regarded by the Court of Appeal as being purely hypothetical, for which reason the Court declined to intervene by refusing the declaration sought. The third area of exclusion, where some alleged right or interest is not recognised by the law, arose in *Malone v Metropolitan Police Commissioner* (1979) where a declaration was sought, to the effect that telephone tapping was contrary to the European Convention on Human Rights. The declaration was refused and the case serves to emphasise that telephone tapping is not unlawful, for example, as an unlawful trespass on a person's property, and that the European Convention has no legally enforceable status in the United Kingdom.

In addition to the foregoing categories of exclusion, it should be noted that there is one further category of exclusion — *locus standi*, that is, where the application for a declaration does not have the requisite standing, status or interest in the issue before the court to qualify for an award of the remedy. Before the *locus standi* requirements for the declaration are examined, a section of the chapter will be devoted to *locus standi* requirements generally as they affect the remedies.

13.4.3 *Locus standi generally.* Where an individual is directly affected by the decision or other action of an administrative agency, for example, as an applicant for a licence, he will have *locus standi* and so should be able to obtain his remedy to deal with what he alleges to be an *ultra vires* decision. This assumes, of course, that the allegation can be established before the court and that other requirements for the remedy

sought, such as an order of *certiorari* to quash, are present. Cases involving such a direct interest in the issue before the court do not usually raise any problems of *locus standi*, unlike those where a person has a less than direct interest. Typically, such a person will stand in a weaker position than the person with a direct interest. This being the case, the court has to decide whether Parliament could have intended that the application should have had any enforceable rights in relation to the administrative agency, its actions and decisions under the statutory provisions in question. It will be seen in a later section of this chapter devoted to the Application for Judicial Review in the Queen's Bench Division of the High Court that most applicants for the administrative law remedies are now required to establish that they have a 'sufficient interest' in the matter before the court. The underlying test for sufficiency of interest is to be found in the House of Lords decision in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* (1981). In this case it was seen that, by virtue of a well-established practice in Fleet Street, casual workers on national newspapers received their wages without tax deductions. In order to avoid tax deductions, such workers did not give their true names on receipt of wage packets. Later an arrangement was made by which it was agreed between the employers, workers and the Commissioners that there would be a tax amnesty in respect of unpaid tax prior to 1977 in return for an agreement that the workers would register for the assessment of tax in the future. The Federation, claiming to represent a body of taxpayers, sought a declaration that the tax amnesty was unlawful and an order of *mandamus* directing the Commissioners to assess and collect tax from the workers as required by law. Among other things, it was decided by the House of Lords that the Federation did not have a 'sufficient interest' in the issues before the court so that the remedies were not available. The basis for this part of the decision is the nature of the Commissioners' statutory responsibilities. Lord Roskill, one member of the House of Lords, explained the position as follows:

> The Revenue are responsible for the overall management of the relevant part of the taxation system . . . and for the assessment and collection of taxes from those who are, by law, liable to pay them. Such assessment and collection is a confidential matter between the Revenue and each individual tax-payer. Such confidence is allowed to be broken only in those exceptional circumstances for which the statute makes express provision . . . It is clear that the Federation is seeking to intervene in the affairs of individual taxpayers . . . [H]aving regard to the nature of the Revenue's statutory duty and the degree of confidentiality enjoined by statute which attaches to their performance . . . in general it is not open to individual taxpayers or to a group of tax payers to seek to interfere between the Revenue and other taxpayers.

Another member of the same Court in this case, Lord Fraser,

summarised the present law of *locus standi* in a statement of principle now applicable whenever it is necessary to ascertain whether an applicant has a 'sufficient interest' for any of the remedies of declaration, injunction, *certiorari*, prohibition or *mandamus*. He stated that:

> . . . a direct financial or legal interest is not now required, and . . . the requirement of a legal specific interest . . . is no longer applicable. There is also general agreement that a mere busybody does not have a sufficient interest. The difficulty is, in between those extremes, to distinguish between the desire of a busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates. In the present case that matter is an alleged failure by the Revenue to perform the duty imposed on them by statute. The correct approach in such a case is . . . to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

13.4.4 *Locus standi for the declaration.* It is by no means easy to generalise about the cases where *locus standi* has been in issue, very largely because each case depends on its own facts and individual judges' perceptions of the statutory background to administrative action and decisions for the purpose of deciding whether an applicant has a sufficient interest in relation to the remedy sought. The first two cases in this section come from the area of planning law. In *Steeples v Derbyshire County Council* (1981) the applicant for declarations was found to have *locus standi*. The County Council had by resolution granted itself planning permission to develop land as a leisure park, but the applicant persuaded the High Court that the decision had been taken in breach of certain statutory requirements under the Town and Country Planning Act. The strongest justification for the finding of *locus standi* lay in the fact that part of the proposed development involved the taking of a section of the applicant's land so that it could be said that his private rights were affected. This was not the case in *Gregory v Camden London Borough Council* (1966) where, again, the applicant sought a declaration that the decision of the local planning authority was *ultra vires*. The applicant was a neighbour of a convent for which the authority had decided to grant planning permission for the erection of school buildings. It was decided that the applicant did not have *locus standi* for a declaration since the Town and Country Planning Act did not give 'third parties' like Gregory any legally enforceable rights against the local planning authority. It will have been seen in the previous chapter that the applicant for planning permission does have *locus standi* to challenge the legality of a local planning authority's decision on an application (*R v Hillingdon London Borough Council ex p. Royco Homes Ltd* (1974)). In the case of *Gregory* involving a third-party neighbour, it appears that his remedies may be limited to objections

made to his local councillor in advance of an application or complaints of maladministration causing injustice made to a local Commissioner for Administration. Two recent cases involving *certiorari* — *Covent Garden Community Association Ltd v Greater London Council* (1981) and *R. v North Hertfordshire District Council ex p. Sullivan* (1981) — appear to put this view of the law in some doubt. These cases will be dealt with later under the section on *certiorari*. In many instances it is the task of the court to distinguish between an applicant's private rights and interests as they appear from statutory provisions, and purely public rights, which the individual cannot enforce in proceedings in his own name. The only exceptions to this latter proposition occur where the individual has suffered some special damage or loss peculiar to himself or where his own private rights are some way affected (*Boyce v Paddington Borough Council* (1903)). In *Gouriet v Union of Post Officer Workers* (1977) it was decided by the House of Lords that only the Attorney-General could sue on behalf of the public for an injunction to restrain a public wrong, more particularly a trade union threat to interrupt postal services to South Africa, contrary to provisions in the Post Office Act 1953. In the same way only the Attorney-General could seek declarations as to the scope of public rights. Because Gouriet had no private rights at stake and had not suffered any loss or damage from the threatened interruption of postal services, he had no *locus standi*. Had Gouriet's mail been interrupted then his case would have been similar to that in *Dyson v Attorney-General* (1911) where the plaintiff claimed that a notice served on him by the Inland Revenue Commissioners requiring certain returns within 30 days subject to a penalty, contained an unlawful requirement. Although other taxpayers could have made a similar claim, the Court granted a declaration that the plaintiff was not obliged to comply with the notice since he was defending his own private rights and was not seeking to act on behalf of the public.

Finally, in *Barrs v Bethell* (1981) three ratepayers sought declarations against the local authority and some of the controlling councillors to the effect that there had been a breach of the duty owed to ratepayers in the way in which the authority's finances were managed. The case was brought in the Chancery Division of the High Court whereas most cases involving disputes in administrative law now have to be brought before the Queen's Bench Division through the procedure known as the Application for Judicial Review, which is explained later in the chapter. This latter procedure is in two stages where the first stage requires the applicant to prove a 'sufficient interest' in the matter to which the application relates before he can go to the trial of the full case in the second stage. It was therefore decided in *Barrs* that, apart from this procedure and the audit procedure, which was covered in Chapter 4, a ratepayer is not able to sue the local authority except with the permission of the Attorney-General, whose role and status will be dealt with in the next section on injunctions, unless the ratepayer can show some

interference with a public right from which he has suffered damage peculiar to himself.

13.5 The Injunction

Unlike the declaration, the injunction is a coercive remedy which requires a party to proceedings before the court to discontinue or to undertake some specified act. In practice it is not uncommon to find that the court is asked for a declaration that some act of an administrative agency is *ultra vires*, and an injunction to prevent any reliance on or enforcement of the act. Indeed, there are some striking similarities between the declaration and the injunction, particularly in relation to questions of *locus standi*. In addition, there are circumstances in which the court may as a matter of discretion exclude the remedy, for example, where the applicant is guilty of delay, as in *Bates v Lord Hailsham* (1972) where the application was made at 2 p.m. for an injunction to restrain certain acts which may have taken place at 4.30 p.m. on the same day where the proposals had been known for ten weeks in general terms and for four weeks in specific terms. Other grounds for exclusion of the remedy include the availability of some alternative statutory remedy and any situation in which the applicant has suffered nothing more than a trivial loss or damage.

13.5.1 *Varieties of injunction.* There are three varieties of injunction:

(1) prohibitory;
(2) mandatory; and
(3) interlocutory.

13.5.2 *The prohibitory injunction.* This is perhaps the best known of the injunctions in so far as it seeks to restrain any action which is found to be contrary to law. As such, it is employed in various areas of interest to administrative law. One of the more obvious areas concerns *ultra vires* acts of administrative agencies, as in *Sydney Municipal Council v Campbell* (1925), a case which was covered in Chapter 11. Breaches of statutory duty may be restrained by the prohibitory injunction, as in *Attorney-General ex rel. McWhirter v Independent Broadcasting Authority* (1973) where a temporary injunction was at first granted against the Independent Broadcasting Authority to prevent the showing on television of an Andy Warhol film. The injunction was sought by reference to the Authority's duty in section 3(1)(a) of the Television Act 1954 '. . . to satisfy themselves that, so far as possible . . . nothing is included in the programmes which offends against good taste or decency or is likely to be offensive to public feeling'. A third area where the prohibitory injunction is used is in relation to continuing breaches of the criminal law where the courts have had little difficulty in resisting the argument that breaches of the criminal law should be prosecuted in the usual way without resort to the injunction. One of many examples is

Attorney-General v Sharp (1931) where bus operators could only operate with a licence from the local authority. Failure to adhere to the licensing system was a criminal offence. Sharp operated buses without a licence and was accordingly fined on many occasions for continuing offences whereupon the Attorney-General, acting at the request of the local authority, applied for and obtained an injunction to restrain the unlicensed bus services. Failure to comply with any such injunction is a contempt of court for which imprisonment is a penalty. On some occasions, the normal process of criminal prosecution may be ineffective in the face of some unlawful act which will bring lasting damage or loss unless it is restrained quickly by injunction. In *Attorney-General v Melville Construction Co. Ltd* (1968) an injunction was granted in order to restrain any further felling of trees protected by tree preservation orders, even though there had been no criminal prosecution.

13.5.3 *The mandatory injunction.* This form of the injunction commands a person to act according to law where the applicant has a private right which arises out of a failure to perform some public duty. In *Attorney-General v Bastow* (1957), the defendant had been fined on several occasions for failing to comply with an enforcement notice requiring the removal of caravans from a site which did not have the benefit of planning permission. Eventually, the Attorney-General applied for and obtained an injunction on behalf of the local authority. The injunction was mandatory in directing that the offending caravans should be removed from the site. It may be difficult to obtain a mandatory injunction against an administrative agency where the effect of such an injunction would be to bind that body to undertake specified acts for the benefit of an individual where those acts would frustrate or compromise the performance of statutory responsibilities (*Dowty, Boulton Paul Ltd v Wolverhampton Corporation (No. 1)* (1971)).

13.5.4 *The interlocutory injunction.* The interlocutory injunction is intended to preserve the *status quo* between the parties until the issue or issues between them can be tried fully. The court will grant an interlocutory injunction where:

(1) there is a serious question to be tried, and
(2) the court decides that on the balance of convenience the injunction should be granted (*American Cyanamid Co. v Ethicon Ltd* (1975)).

Where the interlocutory injunction may be granted against an administrative agency there could be potential problems which were recognised by the Court of Appeal in *Smith v Inner London Education Authority* (1978). The Court of Appeal allowed an appeal against interlocutory injunctions on the ground that the Authority's action in introducing comprehensive education was lawful: those who had opposed the reorganisation of secondary education failed to show the

Court that there was a real prospect of success in any later action for permanent injunctions. It was emphasised that the interlocutory injunction applies to bodies exercising public duties in the same way as it applies to other individuals and organisations. However, Browne L.J. added that:

> . . . where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom those duties are owed.

One final point concerns the usual practice whereby an undertaking is expected from the applicant in proceedings for an interlocutory injunction to the effect that he will indemnify the defendant against any loss where it is found later that the injunction should not have been granted. However, where it is the Crown which acts as applicant for an interlocutory injunction, such an undertaking is not normally required. This was the case in *Hoffmann-La Roche & Co. A.G. v Secretary of State for Trade and Industry* (1974) where the Secretary of State sought an injunction in order to enforce an order which reduced drug prices, pending a later decision on its legality. The injunction was granted and the strong view of the House of Lords was that because it is the Crown's duty to see that the law is enforced, there should be no legal liability to any person or organisation alleged to be in breach of the order, which is presumed to be legally valid until it is set aside.

13.5.5 *Locus standi for the injunction.* The *locus standi* requirements for the injunction are very similar to those for the declaration. Much of the law in this area has been clarified in *Gouriet* which was described in the section on *locus standi* for the declaration. There are four categories of individuals and organisations with potential *locus standi* for the injunction:

(1) the Attorney-General *ex officio*;
(2) the Attorney-General *ex relatione*;
(3) the individual; and
(4) the local authority.

The first category is a recognition of the Attorney-General's status as the defender of public rights and interests. Accordingly, the Attorney-General may take the initiative in seeking an injunction to restrain unlawful expenditure by a local authority where (in the unlikely event) the auditor does not take action, for example. Applications *ex officio* are the exception. The second category is a reference to the 'relator action' which arises where an individual does not appear to have sufficient *locus standi*. In these circumstances, a request can be made to the Attorney-General to use his name in the proceedings. Whether the Attorney-General agrees to relator proceedings is entirely a matter for his discretion. In recent times, the Attorney-General refused relator pro-

ceedings in *Gouriet* but agreed to them in *McWhirter*. Where relator proceedings are sanctioned, the relator (the individual) bears the cost of the action. Coming to the third category of the individual, whether he has *locus standi* for an injunction depends on the statement of principle in *Gouriet*, previously referred to in the section on the declaration. In that House of Lords decision mention was made of an important exception, the local authority, which is the final category. More particularly, this exception refers to the provision in section 222 of the Local Government Act 1972 which states that:

> . . . where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area — (a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name . . .

Prior to the appearance of this provision on the statute book, local authorities had to rely on relator proceedings in collaboration with the Attorney-General. Section 222 now allows a local authority to apply for an injunction in its own name although specific powers to apply for injunctions still remain, for example, under the Control of Pollution Act 1974 where criminal proceedings for noise nuisances prove to be inadequate.

13.6 *Certiorari*

Certiorari, Prohibition and *Mandamus* (the latter two will be dealt with later in the chapter) are all prerogative orders of great importance in the context of the remedies available in administrative law. These prerogative remedies were available only to the Crown historically and allowed the Crown an opportunity to monitor the activities of administrative agencies and inferior courts to ensure that they undertook their responsibilities according to law. Gradually these remedies were made available for individuals without any need to seek the consent of the Crown, and this explains the style of title for cases involving these remedies: *R.* (Regina — the Crown) *v Slagborough District Council* (the name of the administrative agency against which the remedy is sought) *ex parte* (on behalf of) *Jones* (the applicant). As to *certiorari* itself, the order removes proceedings from an administrative agency or inferior court with a view to any decision or similar action being quashed on any one or more of three grounds.

13.6.1 *The grounds for certiorari.* The three grounds for *certiorari* are:

(1) *ultra vires*;
(2) breach of natural justice; and
(3) error of law on the face of the record.

Examples of each of these three grounds in action can be drawn from previous chapters:

(1) *ultra vires R. v Blackpool Rent Tribunal ex p. Ashton* (1948 Chapter 11);
(2) natural justice: *R. v Hendon Rural District Council ex p. Chorley* (1933) (Chapter 10); and,
(3) error of law on the face of the record: *R. v Crown Court at Knightsbridge ex p. International Sporting Club (London) Ltd* (1981) (Chapter 11).

13.6.2 *Bodies amenable to certiorari.* *Certiorari* may be obtained against the following bodies:

(1) administrative tribunals:
(2) inferior courts;
(c) local authorities:
(4) ministers of the Crown;
(e) miscellaneous statutory and non-statutory bodies exercising public functions.

In relation to the first category of administrative tribunals, it was seen in Chapter 5 that a number of tribunals are within a special category where their decisions are subject to an appeal on a point of law to the High Court or, more rarely, the Court of Appeal. There are however, exceptions such as the Immigration Appeals Tribunal whose decisions are subject to review only, principally by *certiorari*. Inferior courts, such as the magistrates' courts, are subject to the High Court's supervisory powers by way of judicial review. The supervision of such courts by the High Court provides a reminder that the magistrates in particular undertook a great deal of local administration before the advent of local authorities as we now know them. That local authorities are amenable to *certiorari* means that, potentially, a great number of administrative powers are subject to the control of the law. The opportunities for control by *certiorari* of powers exercised by ministers of the Crown may not be as extensive as in the case of local authorities, very largely because any scheme of statutory powers is more likely to provide some exclusive system of statutory review, for example. As will be seen in the later section on statutory review, such a remedy will exclude the non-statutory remedies like the prerogative orders and substitute what may be a more restricted opportunity for the review of the minister's decisions under a particular statutory scheme. Finally, in the catalogue of bodies amenable to *certiorari* there is an ill-defined collection of miscellaneous statutory bodies exercising various public functions. In Chapter 10 reference was made to the disciplinary functions of prison boards of visitors in *R. v Hull Prison Board of Visitors ex p. St Germain* (1979). More recently, in *R. v Police Complaints Board ex p. Madden* (1983) a decision of the Board was quashed by *certiorari* when it committed an error of law in refusing to consider a complaint which the Director of Public Prosecutions had decided did not justify the initiation of criminal proceedings. Although *certiorari* applies to bodies created by statute, there has been one notable exception on those

occasions when decisions of the prerogative Criminal Injuries Board have been quashed. In the first of these cases, *R. v Criminal Injuries Board ex p. Lain* (1967), it appears that the High Court was concerned only with the fact that the Board performs public duties in conjunction with a duty to act judicially.

13.6.3 *Certiorari and the duty to act judicially.* As a general rule it can be said that *certiorari* applies to statutory bodies performing public duties with an obligation to act judicially. It was seen in Chapter 10 that the duty to act judicially arises where a body has legal authority to make decisions or take action which affects the rights of subjects (*R. v Electricity Commissioners ex p. London Electricity Joint Committee Co (1920) Ltd* (1924) and *Ridge v Baldwin* (1963)). In practice, the definition of this requirement has been very flexible. On the one hand, it may not be difficult to identify a duty to act judicially in a case like *R. v Crown Court at Knightsbridge ex p. International Sporting Club (London) Ltd* (1981) involving a decision of the Crown Court. On the other hand, it may be somewhat more difficult to conclude that a local authority has a duty to act judicially in deciding an application for planning permission as in a case like *R. v Hillingdon London Borough Council ex p. Royco Homes Ltd* (1974). Bearing in mind that the Town and Country Planning Act 1947 took away an individual's virtually unfettered legal right to develop his land, it can be argued that wherever he applies for planning permission to develop the land, he does so as a person without any rights, that is, he is applying to regain his right to develop. In view of this argument, it is perhaps as well that the courts have usually adopted a much wider view of the duty to act judicially.

13.6.4 *Certiorari and private bodies.* Whereas *certiorari* applies to statutory bodies, including the prerogative Criminal Injuries Compensation Board, as previously described, it does not, of course, apply to purely private, domestic organisations. Accordingly, the remedy would not be available to challenge the legality of decisions of trade unions and professional organisations, for example, where the relationship between member and union or organisation is based on a privately concluded contract. By way of illustration, in *R. v British Broadcasting Corporation ex p. Lavelle* (1982), Miss Lavelle, a tape examiner employed by the BBC, was dismissed from their employment as a result of what was described as a disciplinary interview and a decision of the managing director of BBC radio upholding the formal letter of dismissal. The justification for dismissal was the unauthorised removal of tapes from the BBC. It was decided by the Court that an order of *certiorari* was not available: although the BBC was a public corporation the matter in issue related to a private employment dispute and the decision of a domestic tribunal. It was pointed out that the scheme for obtaining *certiorari* and the other prerogative orders, through the Application for Judicial Review pre-

scribed by section 31 of the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court, is concerned only with activities of a public nature.

13.6.5 *Locus standi for certiorari.* Once again it can be said that *locus standi* is not a problem for the person directly affected by some administrative decision or other action, as in *R.v Hillingdon London Borough Council ex p. Royco Homes Ltd* (1974). In other problem cases involving third parties, reference has to be made to the requirement of a 'sufficient interest' as explained in the *Inland Revenue Commissioners* case (the 'Fleet Street Casuals' case). The question, therefore, is whether the statutory background to the challenge gives the applicant any express or implied right to complain of the allegedly unlawful act or decision. In the case of *R. v Hendon Rural District Council ex p. Chorley* (1933), the facts of which were seen in Chapter 10, Chorley was a third-party neighbour of land for which planning permission was obtained by a decision of the local planning authority which was quashed by *certiorari* for bias. Although the *locus standi* of Chorley was not discussed in the case, it may be explained by reference to the early Town and Country Planning Act under which the decision was taken. Where a grant of planning permission was made but later affected by a town planning scheme preventing the implementation of the permission, compensation was payable, the resources for which would come from the ratepayers, of whom Chorley was one. Such a case may be categorised as one where the statute gave Chorley an implied right to complain. In the later case of *R. v Bradford-on-Avon Urban District Council ex p. Boulton* (1964) (where the applicant, who merely used a road through the area of the local planning authority each day, had no *locus standi* to challenge the legality of a planning decision by the authority), the Court considered that Chorley had *locus standi* as an adjoining property owner. By contrast, in *Gregory*, the case where a declaration was refused, the Court considered that Chorley had *locus standi* as a ratepayer, the argument which is set out towards the beginning of this section. In two recent cases which were mentioned previously in the section on *locus standi* for the declaration, *Covent Garden Community Association Ltd v Greater London Council* and *R. v North Hertfordshire District Council ex p. Sullivan*, it was decided that third parties did have *locus standi* for the orders of *certiorari* although the order was not granted in the first case because an *ultra vires* decision of the local planning authority could not be established. In the *Covent Garden* case the local residents' interests were represented by the specially formed company which attempted to challenge the legality of the council's resolution to grant itself planning permission. In *Sullivan* a neighbour succeeded in obtaining *certiorari* to quash a decision granting planning permission and listed building consent in respect of a development of land in relation to which she had been an objector and

which would have interfered with her privacy. However, it was assumed without the point being argued that Sullivan had *locus standi* in this case, which may cast some doubt on the authority of the decision. The *Covent Garden* decision does, on the other hand, strengthen the position of third parties in the present context, but the question must be whether the present Town and Country planning legislation expressly or impliedly permits a third party to complain successfully to the High Court in respect of the legality of a decision of the local planning authority. The alternative approach to that in the *Covent Garden* case is that put forward in the declaration decision in *Gregory*, that the Act creates no legally enforceable rights for the third party. The basis of this approach is that the Act defines a very limited facility for objections and representations in respect of applications for planning permission, involving the democratic processes of the council (acting as guardian of the local planning process) and its members. If the courts prescribe that third parties have *locus standi* for *certiorari* in this context, the argument would be that there is no express or implied authorisation in the Act giving third parties such legally enforceable rights.

13.7 Prohibition

This remedy is very similar to the order of *certiorari* in seeking to prevent *ultra vires* action or action in breach of natural justice pending a final decision by a statutory agency exercising public functions with an obligation to act judicially. By way of illustration, an order of prohibition was granted in *R. v Broadcasting Complaints Commission ex p. Thames Television Ltd* (1982) where the Commission was restrained from continuing to deal with a complaint about the Czech dissident movement pending the outcome of legal proceedings for libel which were associated with the complaint. In granting the order the Court was enforcing a provision of the Broadcasting Act 1981 which places certain restrictions on the Commission's powers to deal with complaints. A second illustration comes from *R. v Kent Police Authority ex p. Godden* (1971), which was referred to in Chapter 10. The chief medical officer of a police authority certified that a chief inspector was suffering from a mental disorder. Thereupon, the policy authority, wishing to retire the inspector compulsorily, was obliged by statute to refer his medical condition to a doctor. The chief medical officer was selected for this purpose but an order of prohibition was granted in view of the likely impact of a decision on the inspector's future and the fact that the chief medical officer could have committed himself to a view in advance.

One final issue in relation to prohibition is the question of *locus standi* where the impression is that the law's attitude is perhaps more liberal than it can be in the case of the other remedies, almost certainly because the order is an interim remedy only. One of the most influential cases here is *R. v Greater London Council ex p. Blackburn* (1976) where

it was decided that a Mr and Mrs Blackburn had *locus standi* to prevent the local authority undertaking their film censorship functions by reference to a test which was found to be legally invalid. The applicants lived in the area of the local authority, Mrs Blackburn was a ratepayer and they had children who might be affected by pornographic films.

13.8 Mandamus

This prerogative order requires anybody obliged to perform a public duty by statute to perform that duty according to law. In most cases *mandamus* has been employed to compel the performance of a clear statutory duty on any occasion when the administrative agency has plainly and unlawfully refused to undertake the duty at the request of a person intended by Parliament to benefit from it. The need for a public duty means that *mandamus* would not be available to enforce a private duty arising by virtue of a contract, for example.

13.8.1 *The legally enforceable duty. Mandamus* can be used only in relation to a duty which, as a public duty, is also specifically enforceable. Such a duty, it was decided in *R. v Kerrier District Council ex p. Guppys (Bridport) Ltd* (1976), occurs in section 9(1) of the Housing Act 1957 which states that:

> where a local authority . . . are satisfied that any house is unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house, a notice requiring him . . . to execute works specified in the notice . . .

In this case it was decided that the local authority had refused unlawfully to serve a repairs notice so that an order of *mandamus* was available to enforce the specific public duty characterised by the use of the word 'shall' in the provision. In other words, once the requirements of the section were satisfied, the local authority had no choice but to serve the notice. By contrast, the duty set out in section 14 of the Water Act is not specifically enforceable. The section declares that: 'It shall be the duty of every water authority to provide . . . such public sewers as may be necessary for effectually draining their area'. As with any of the general duties covered in the previous chapter, the only remedy appears to be a complaint to the minister. Where, following any inquiry into such a complaint, the minister chooses to issue directions compelling compliance with some requirement arising from the duty, failure to comply with the directions may be dealt with through the minister's statutory power to apply for a *mandamus* in these circumstances.

In the same way that *mandamus* cannot be used to enforce a general duty, the order cannot be used to enforce the performance of a discretionary power. In *Re Fletcher's Application* (1970) *mandamus* was refused when it was sought in order to compel the Parliamentary

Commissioner for Administration to investigate a complaint of maladministration made by the applicant. The Court had no hesitation in finding that whether a complaint is investigated is entirely a matter for the Parliamentary Commissioner according to the words of the Parliamentary Commissioner Act 1967 which state that: 'In determining whether to initiate . . . an investigation under this Act, the Commissioner shall . . . act in accordance with his own discretion'. However, it is always possible that a discretionary power could be found to be linked with a duty and therefore enforceable by *mandamus*. This was the case in the important House of Lords decision in *Padfield v Minister of Agriculture* (1968), which has been encountered already in Chapters 9 and 11. Because the Agricultural Marketing Act gave rise to a well-defined object, the minister's discretion could be exercised only in conformity with that object. In other words, the minister could do nothing other than to refer a complaint to a committee without frustrating the object of the Act. The importance of this decision in *Padfield* lies in the fact that the potential scope of *mandamus* in judicial review has been extended considerably.

13.8.2 *The scope of mandamus.* In its application to the enforcement of public, specifically enforceable statutory duties, the order of *mandamus* extends to administrative and judicial functions. In this latter respect, therefore, it can be seen that the remedy had a wider coverage than *certiorari* and prohibition and would apply equally to a statutory duty to undertake an investigation as well as to a duty to adjudicate a licensee's application for the renewal of a licence, for example. It was even suggested in *R. v Commissioner for Metropolitan Police ex p. Blackburn* (1968) that *mandamus* might have been granted had the Commissioner not withdrawn a policy directive that aspects of the Gaming laws should not be enforced by the police. One argument in this case was that *mandamus* should be refused because the applicant could resort to a suitable alternative remedy with private prosecutions against those who were allegedly acting in breach of the Gaming laws. Although the private prosecution was rejected as a suitable alternative remedy in this case, the court does have a discretion, as with the other remedies, to refuse an order of *mandamus* where a suitable alternative remedy is shown to exist, for example, an administrative remedy such as an appeal to a tribunal or a minister. On some occasions the court may have to employ its discretion in potentially difficult circumstances as seen in *R. v Bristol Corporation ex p. Hendy* (1974). In this case the Court was concerned with the duty of a local authority to provide suitable alternative accommodation, where such accommodation is not otherwise available on reasonable terms, for any person displaced from accommodation for various reasons such as the demolition of a house by virtue of a demolition order served under the Housing Act 1957. Hendy had to vacate his flat when another Housing Act order, a closing order,

required that it should not be occupied for the purposes of human habitation. Thereupon the local authority provided Hendy with temporary accommodation until more suitable, permanent accommodation was available. It was decided by the Court that the local authority's statutory duty had been satisfied. In his judgment, Scarman L.J. justified the Court's decision by saying that:

> . . . if, in a situation . . . there is evidence that a local authority is doing all that it honestly and honourably can to meet [a] statutory obligation, and that its failure, if there be failure, to meet that obligation arises out of circumstances over which it has no control, then I would think it would be improper for the court to make an order of *mandamus* compelling it to do that which either it cannot do or which it can only do at the expense of other persons not before the court who may have equal rights with the applicant and some of whom would certainly have equal moral claims.

13.8.3 *Locus standi for mandamus.* The order of *mandamus* was refused by the House of Lords in the 'Fleet Street Casuals' case, referred to earlier in the chapter. As to the broad legal principle in that case, it is difficult to speculate whether some of the older cases would have been decided in the same way had they occurred after the decision in the 'Fleet Street Casuals' case. *R. v Commissioner for Metropolitan Police ex p. Blackburn* referred to previously is one of the more interesting cases. Blackburn sought an order of *mandamus* as a private citizen in order to compel the Commissioner to enforce the Gaming laws. The Court of Appeal appeared to doubt whether Blackburn had *locus standi* although one member of the Court of Appeal thought that *mandamus* would be available to a householder where a chief constable directed that no housebreaker should be prosecuted in the district. In *R. v Hereford Corporation ex p. Harrower* (1970) the Corporation placed a contract with the Electricity Board for the provision of central heating in council flats. Standing orders were broken because the Corporation did not seek tenders. The Corporation maintained a list of approved electrical contractors who now sought an order of *mandamus* requiring compliance with the standing orders. That order of *mandamus* was granted but only by reference to the applicants' status as ratepayers. The Court also suspended the order to permit suspension of the standing orders in question. Whether there is *locus standi* in cases like these will continue to depend on the courts' conclusion as to whether the applicant has an implied right to complain of an unlawful decision or other action. While the first case of *Blackburn* would probably be decided in the same way, there may be a greater difficulty for the ratepayer if the *locus standi* requirements in *Barrs v Bethell*, albeit a declaration case, represent a trend in judicial policy.

13.9 The Application for Judicial Review

In 1976 the Law Commission published a report entitled 'Remedies in Administrative Law' which pointed to the deficiencies of the law then

governing the remedies available to the individual intent on questioning the legality of administrative action in proceedings before the High Court. A section of the report headed 'The dilemma of the litigant seeking judicial review' observed that:

> 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.

The report proceeds to summarise the deficiencies, looking first at the declaration. It was noted that the declaration is available in respect of a wide range of acts, proposed acts or omissions of public authorities, including the Crown. Proceedings, it was said, can be initiated without leave, that is, the consent of the court, without any time limit constraint and with the advantage of full discovery, that is, the production by order of the court of documents and similar evidence connected with the claim. However, the declaration only states the legal position: it does not order or prohibit any action, it does not quash and there are doubts about *locus standi*. The report then observes that where the litigant looks to the prerogative orders to avoid the disadvantages of the declaration, he may lose some of the advantages of the declaration. *Certiorari*, for example, appeared to be more generous in relation to *locus standi* although leave to apply was necessary, discovery was not normally available, any application for the remedy had to be made within six months of the decision and claims for damages or an injunction could not be joined to the application for *certiorari*. A similar situation was seen to exist with *mandamus* and prohibition which, although they do not apply to the Crown, were subject to conditions similar to those for *certiorari* in relation to leave and discovery. Finally, it was suggested that the litigant, wishing to avoid the disadvantages of the declaration, might resort to the injunction. This remedy, it was said, gave the same advantages as the declaration in relation to the absence of leave, the full discovery of documents and the facility for joining a claim for damages or a declaration. Interim, interlocutory injunctions are available to preserve the status quo between the parties, but the injunction does not lie against the Crown.

13.9.1 *Recommendation for reform: the application for judicial review.* At the conclusion of the Law Commission's report there was a basic recommendation:

> . . . 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 injunction. The litigant would have to specify in his application . . . which particular remedy or remedies

> he was seeking, but if he later desired to apply for a remedy for which he had not initially asked he would be able with the leave of the court to amend his application.

This recommendation was implemented with effect from 1 January 1978, when Order 53 of the Rules of the Supreme Court was amended accordingly. Some of the changes were confirmed by section 31 of the Supreme Court Act 1981. Nevertheless, references throughout will be to 'Order 53'.

13.9.2 *Remedies available on an application for judicial review.* Any application for *certiorari*, prohibition and *mandamus* is required always to be made under the Order 53 procedure known as the application for judicial review. The same is true of the declaration and injunction where either or both are sought in proceedings to challenge the legality of the actions or decisions of administrative agencies, that is, public authorities, arising from the exercise of their powers in public law. In other words, the Order 53 procedure will have to be used by a person seeking to establish that an administrative agency has acted *ultra vires* its statutory powers. On the other hand, such a person would be free to apply by writ to the Chancery Division of the High Court for a declaration where he is asserting that a local authority has no easement or right of way across his land, for example. In this latter case, the issue arises from the private law relationship between a landowner and another and does not involve the public, administrative law remedies prescribed by the Order 53 procedure. This important distinction is developed in a later section of the chapter.

13.9.3 *Procedures and other requirements.* Where the application for judicial review is made, any of the foregoing remedies may be claimed in the alternative or in addition to the remedy sought. Consequently, a declaration might be sought to the effect that the decision of an administrative agency is *ultra vires*, with an injunction to prevent any reliance on that decision by the agency.

The application for judicial review cannot be made unless the applicant has first obtained leave, that is, the permission of the Queen's Bench Division of the High Court. The application for leave is dealt with by a single member of that Court and it is the task of the applicant by sworn evidence to establish that he has a 'sufficient interest' in the matter to which the application relates. Even where it is decided that the applicant has 'sufficient interest' and can proceed, it was decided by the House of Lords in the 'Fleet Street Casuals' case that this question of *locus standi* can be examined again and decided on when, at the second stage, the application comes to full trial. Suffice it to say at the moment, that the application for leave is designed as a filter to eliminate busybodies for the protection of the public, administrative agencies.

Indeed, at this stage the administrative agency is not involved: the court is concerned only with the applicant's affidavits setting out his case. In granting leave, the court can impose conditions as to matters like costs. Any application has to be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending that period. Where it is considered that there has been undue delay in making an application, the application for leave or for any of the remedies can be refused where otherwise there would be undue hardship or detriment to good administration.

Where leave is granted notice of the proceedings is served on those who are directly affected, together with all relevant supporting documents. At the hearing of the application the court is able to amend the statement of claim by specifying different or additional grounds or remedies. This facility means that where the initial application is for (say) a declaration that a decision is *ultra vires* that is, null and void and of no effect, the application can be amended so that the claim is for *certiorari* to quash where it becomes clear that the decision is merely voidable. This power to amend is a notable feature of Order 53. Whatever the content of an application the court can award damages if specified. The subject of damages is taken up in a later section of this chapter. Order 53 also provides for applications in respect of the discovery of documents (subject to some restrictions in the case of the Crown examined in Chapter 14) and, in particular, those held by an administrative agency concerned with the proceedings, together with applications for interrogatories and cross-examination. Proceedings in this context are normally conducted by reference to the parties' evidence contained in their affidavits where, for example, one side will contend that there has been an *ultra vires* decision while the other will dispute the allegation. Consequently, the more traditional format of a trial involving questioning, cross-questioning and the discovery of documents is not commonly found in proceedings on an application in the present context. Indeed, there appears to be a well-founded fear that if this more traditional format does become more common there would be a temptation for the court to substitute its own views of the facts and merits of a case thus likening the court to a court of appeal whereas its only concern here is with the legality of an administrative action or decision. There are two final points about procedure. First, where an application is made for *certiorari* and the court finds that there are grounds for quashing, the decision may be quashed and remitted to the administrative agency for reconsideration and a fresh decision in a manner similar to the procedure on an appeal on a point of law to the High Court. Secondly, where an application has been made for a declaration, an injunction or damages and the court considers that any such remedy should not be granted, for example because the main issue is the applicant's rights in private law, the court can order that the

proceedings should continue as though they were begun by writ in another court.

13.9.4 *The importance of the application for judicial review.* This procedure is recognised as containing important safeguards, primarily for the benefit of the public, administrative agencies subject to the rules of public law. These safeguards, some of which have been seen already, are as follows:

(1) the need for leave to apply;
(2) the court's discretionary control of discovery, interrogatories and cross-examination;
(3) the ability of the court to expedite the proceedings;
(4) the avoidance of the court's involvement in the *intra vires* facts and merits of an application;
(5) the recognition of the consequences of delay in making an application;
(6) the channelling of applications through the Queen's Bench Division of the High Court with its judicial expertise in adminstrative law where the court has considerable control over the proceedings, so enabling the foregoing safeguards to be implemented.

13.9.5 *The application for judicial review and the protection of rights in public law.* It has been seen that the remedies available in the present context are concerned with the legality of action by public, administrative agencies arising from the exercise of their powers in public law. The applicant under Order 53 is therefore obliged to establish an infringement of his rights which are protected or mainly affected by public law. If that applicant attempts to avoid Order 53 and, for example, applies to the Chancery Division of the High Court for a declaration, the court would be obliged to strike out the action as an abuse of the court's process (*O'Reilly v Mackman* (1982)). Whether a case is one which must be pursued through the Order 53 procedure with its own special characteristics and safeguards rather than any other procedure is a matter of some difficulty. In *O'Reilly* it was decided by the House of Lords that a claim by a prisoner that a prison board of visitors should stay within their statutory jurisdiction and comply with the rules of natural justice should be dealt with under Order 53. In an earlier case from the same context, *Heywood v. Hull Prison Board of Visitors* (1980), a prisoner who had been found guilty of certain disciplinary offences and punished by a board of visitors sought a declaration by writ in the Chancery Division that the decision was a nullity by virtue of breaches of natural justice. It was decided that although the remedies — the application by writ to the Chancery Division for a declaration and the Order 53 procedure — were in the alternative, the characteristics of and safeguards contained in Order 53 meant that that procedure should be used. The decision shows the importance of the need for leave to apply in Order 53, a requirement that does not apply

in the proceedings before the Chancery Division. The decision also suggests some of the practical difficulties in distinguishing between a procedure such as that by writ for a declaration before the Chancery Division, as opposed to the Order 53 procedure before the Queen's Bench Division. The process of discovering which is the correct procedure through additional litigation in the courts could prove very expensive and time-consuming for the individual. Some guidance emerges from two recent cases. In the first, *Cocks v Thanet District Council* (1982), it was decided by the House of Lords that a decision of a local authority under the Housing (Homeless Persons) Act 1977 to the effect that the applicant was intentionally homeless and not therefore entitled to permanent housing accommodation could be challenged only under Order 53. In such a case the individual applicant's rights would be affected by what was alleged to be an *ultra vires* decision. On the other hand, it was emphasised that once a decision of a local authority, for example, to grant permanent housing accommodation, had been given, this conferred private law rights. Consequently, in the unlikely event of a local authority refusing to provide such accommodation subsequently, the individual applicant would be able to look beyond Order 53 for the legal enforcement of his rights in private law, for example, through an action for damages for breach of statutory duty (*Thornton v Kirklees Metropolitan Borough Council* (1979)). In the second case, *Davy v Spelthorne District Council* (1983), it was decided that an injunction to restrain a local authority's implementation of an enforcement notice was a matter to be dealt with under Order 53 since the notice was made by a public administrative agency under public law powers with the intention that it should have effect against the applicant. In addition it was considered important by the Court that the local authority should have the protection of the safeguards in Order 53. In addition a claim for damages was made in respect of allegedly negligent advice from the local authority as a result of which the applicant failed to appeal against the enforcement notice. In this case the claim arose from and affected the applicant's rights in private law so that although such a claim for damages could be pursued through Order 53, it would not be an abuse of the court's process if an alternative procedure was followed.

13.10 Statutory Review

In the case of some decision-making processes, Parliament has legislated to eliminate the process of judicial review as described earlier in this chapter. In its place Parliament has legislated a special scheme of review, hence the expression 'statutory review' where statute dictates the substantive terms on which the legality of decisions may be challenged in the High Court. Applications for statutory review are a particular characteristic of the legislation governing town and country planning and compulsory purchase. In both cases, the Secretary of

State for the Environment's decisions are subject to review by a single judge in the Queen's Bench Division of the High Court. For present purposes, the statutory review provisions of the Town and Country Planning Act 1971 will be used as an illustration.

13.10.1 *The background to statutory review.* Sections 242 and 245 of the Town and Country Planning Act contain the facilities for statutory review in respect of a full range of decisions by the Secretary of State under the Act. In practice, the most significant decision is that on an appeal from the decision of a local planning authority refusing planning permission or granting planning permission subject to conditions. Section 242 states that, subject to the provisions of section 245, the validity of any decision shall not be questioned in any legal proceedings whatsoever.

13.10.2 *The scope of statutory review.* Section 245 sets out a fairly common formula for statutory review. Where a person is aggrieved by a decision which is not within the powers of the Act or in respect of which relevant procedural requirements have not been complied with, he may apply to the High Court within six weeks of the decision. On such an application for statutory review, the High Court may quash the decision if it is found not to be within the powers of the Act, that is *ultra vires* . In the same way, the High Court may quash a decision where relevant procedural requirements are not complied with and the interests of the applicant are substantially prejudiced as a result.

13.10.3 *The grounds for statutory review.* The first ground, relating to substantive *ultra vires*, can be illustrated by referring back to Chapter 11 and, in particular, the case of *Lavender, H. & Son Ltd v Minister of Housing and Local Government* (1970). The second ground relates to the various rules of procedure which apply in the field of decision-making in town and country planning, as described in Chapter 3. However, it will be noticed that the court's discretion to quash applies only where the applicant's interests have been substantially prejudiced. Consequently, the court would not quash a decision affected by nothing more than a mere technical breach of the rules of procedure.

13.10.4 *The six-week limitation.* The need to apply for statutory review within six weeks is the outstanding characteristic of this form of review. The time limit here is absolute: there is no possibility of proceedings beyond six weeks, an issue which was referred to previously in the section on ouster clauses in Chapter 11 (*Smith v East Elloe Rural District Council* (1956)). The prescription of a six-week time limit does mean that there can be certainty as to the status of a decision granting planning permission, for example, after a relatively short period of time. Accordingly, the developer can go ahead with his

development without fearing challenges to the legality of his planning permission. The same comment can be made in respect of the many confirmed compulsory purchase orders subject to the same pattern of statutory review.

13.10.5 *The person aggrieved.* Once again it is necessary to look at the *locus standi* requirements for what is in practice a very important remedy. The applicant for planning permission who wishes to challenge an adverse appeal decision of the Secretary of State for the Environment who confirms the local planning authority's refusal of planning permission clearly has *locus standi* as a 'person aggrieved' (*Buxton v Minister of Housing and Local Government* (1960)). The Town and Country Planning Act itself specifies that the local planning authority has *locus standi* where the Secretary of State reverses his decisions on appeal. In *Buxton* the appeal against a local authority's planning decision resulted in a grant of planning permission to quarry chalk adjacent to Buxton's farm. Because the application for planning permission had not fallen into a category where there was a statutory requirement for publicity and a statutory obligation to take into account any objections arising from that publicity, and because Buxton's common law rights had not been infringed, for example by any nuisance, Buxton, it was decided, was not a person aggrieved. However, it was decided that had Buxton been a statutory objector within the above category, he would have been a 'person aggrieved' and able to seek statutory review of the minister's decision. More recently, in *Turner v Secretary of State for the Environment* (1974), the applicant for statutory review represented an amenity society which had objected to development at Richmond Hill. The society had been allowed by an inspector to appear at a public inquiry into the proposed development, which was a factor which weighed heavily in the decision that Turner was a person aggrieved. In practice most third parties have an opportunity of appearing at a public inquiry into a planning appeal so that the range of persons aggrieved is considerably widened by this decision in *Turner*. Desirable though this may be, it is probably contrary to the policy and objects of the Town and Country Planning Act which gives only limited statutory rights to the applicant for planning permission, the local planning authority and statutory objectors. Indeed, this limited background of statutory rights which must be presumed to be legally enforceable before the courts should be borne in mind when considering the question of *locus standi* for the declaration and *certiorari* in respect of decisions of the local planning authority.

13.11 Damages

English administrative law is concerned primarily with the quality of administrative action, that is, whether a decision is *ultra vires* and void or merely voidable. The law does not provide for damages in respect of

unlawful administrative action so that the victim of *ultra vires* action by an administrative agency has no legal right to compensation for any loss, damage or injury which may have been sustained. An illustration of the way in which this gap in the law may occur in practice comes from the reference to Estoppel in Chapter 9. Where an individual relies on an *ultra vires* statement from a representative of an administrative agency, it is not binding in law and can be denied. Any compensation which is paid will be *ex gratia* compensation, as will any compensation payable following a successful complaint to one of the Ombudsmen (depending on the status of the administrative agency) described in Chapter 15. Earlier in the present chapter, it was seen that damages can be claimed under the Order 53 procedure in the High Court. Whether this or any other appropriate procedure is used, any damages claimed against a public administrative agency must fall within pre-existing categories of the law such as negligence, nuisance and breach of statutory duty which were outlined in Chapter 4. The difficulties in this area of administrative law are well summarised by Lord Wilberforce in *Hoffman-La Roche*, referred to earlier in the present chapter. He considered that, at the root of the various phrases describing the quality in law of administrative action, lies:

> . . . 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 . . . and at the end of the day the subject can, if necessary, be compensated.

13.12 Powers of Annulment in the European Court of Justice

The nature and sources of EEC law have been dealt with previously in Part 2 where it was seen that the European Court of Justice has the task of overseeing the interpretation and application of the treaties governing the Community, the best known of which is the Treaty of Rome. One facet of this task is the review of administrative action although there are other closely related tasks including the need to deal with preliminary references from courts in Member States requiring a conclusive interpretation of EEC law, the adjudication of any alleged refusal to act by a Community institution, the adjudication of claims that regulations are illegal and the settlement of claims for damages against Community institutions. However, it is the power of review which occupies the place of importance for present purposes.

13.12.1 *The power of review.* The Court's power of review is found in Article 173 of the Treaty of Rome which states that

> The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. Any natural or legal person may, under the same conditions, institute proceedings against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

13.12.2 *The scope of review.* The first crucial point to notice is that Article 173 applies to directives, regulations and decisions in the case of Member States, the Council and Commission whereas review is more limited in the case of proceedings instituted by an individual or 'legal person', for example a company. Nevertheless, the Court has attempted to widen its sphere of influence in relation to review by giving a generous interpretation to the concept of a Community 'act'. In approaching its task in the present context of review, the Court assumes that the act complained of is legally valid until annulled, that is, in effect a voidable act.

13.12.3 *The grounds for annulment.* The four grounds for annulment listed above are closely related to each other and in some respects similar to the categories of the doctrine of *ultra vires* in English administrative law set out in Part 3.

The first ground, lack of competence, frequently arises from questions concerning delegation of functions by the Council to the Commission or any other Community institution. The leading case is *Meroni v Commission* (1958) where it was decided that there had been an unlawful delegation by the Commission of its functions to private organisations, as a result of which various legal safeguards could not operate as they would where the functions stayed within their authorised framework.

The second ground, the infringement of an essential procedural requirement, frequently appears in relation to the legal requirement for reasons to be given in respect of any 'binding' act (Article 190 of the Treaty of Rome) and in relation to the requirement for consultation arising from a number of provisions in the Treaty of Rome. It will be noticed that any procedural requirement for the purpose of Article 173 must be an 'essential' procedural requirement. Failure to give sufficient reasons has been justification for the annulment of a number of Community acts over the years. In the same way that the Court has developed a body of law on the sufficiency of reasons, so it has devel-

oped a body of law on the requirements for consultation, bearing in mind the need to consult with the European Parliament, for example, before certain legislative acts become legally effective.

The third ground involving infringement of the Treaty or of a rule of law relating to its application probably covers most situations which occur where the Court is invited to annul administrative action in the Community. Most action which is subject to annulment is likely to be an infringement of the Treaty in one way or another. Rules of law relating to the application of the Treaty include regulations, certain rules of international law at the foundation of the treaties and rules of law which crystallise particular fundamental rights from the legal systems of Member States and which provide guidance on the scope of EEC law where it is silent on certain requirements.

Finally, there is the ground of misuse of powers which is particularly relevant on those occasions when it is alleged that administrative action in the Community is based on the unlawful abuse of discretionary powers.

13.12.4 *Related functions of the European Court of Justice.* Reference has been made previously in this chapter and earlier in Part 2 to the function of the Court in dealing with preliminary references on the interpretation of EEC law made by national courts in Member States. This facility is particularly important on those occasions when the exercise of statutory powers for administrative purposes in a Member State may be subject to the constraints of EEC law. In very general terms it may be said that any administrative activity which involves economic or associated regulation may come under the influence and constraints of EEC law. Any doubts about the scope of that influence or those constraints can of course, be settled by a reference under Article 177. Another related function of the Court occurs in Article 175 and deals with the alleged refusal of the Council or the Commission to act, in breach of the Treaty. Before the Court can intervene, it is necessary to establish that a request was first made for the institution to act. In the face of a refusal to act, the institution has two months in which to define its position and any action that is then necessary may be brought within a further period of two months. As in Article 173, any individual or 'legal person' may take advantage of the facility in Article 175 where an institution has failed to address to that person any act other than a recommendation or opinion. Article 173 is reinforced by the provisions of Article 184 which relates to the regulations of the Community. Article 184 states that even though the two-month time limit in Article 173 has expired, any party may challenge the legality of a regulation on any of the four grounds in Article 173. Finally, Article 215 states that the Community shall make good any damage caused by its institutions or by its servants in the performance of their duties. However, provision is limited to non-contractual liability in conformity with the

general principles common to the laws of the Member States. Potentially, therefore, this provision could open up very significant areas of legal liability whereby the individual could benefit from compensation for a wide variety of unlawful administrative action in the Community.

14 Crown Proceedings

14.1 The Background to Crown Proceedings

Going back through the course of legal history a particularly harsh limitation prevented the Crown being sued in its own courts. This limitation resulted in considerable injustice. However, a process known as a 'petition of right' became available in some cases where legal proceedings could be brought against the Crown, but only with the consent of the Crown. This process did not unfortunately apply to torts, that is, civil wrongs, by virtue of the maxim that 'the Queen can do no wrong'. Nevertheless, there was an understanding that if damages were awarded against a servant or agent of the Crown for negligence, for example, those damages would be paid by the Crown. The legal liability of the Crown was altered quite considerably by the Crown Proceedings Act 1947.

14.1.1 *The Crown Proceedings Act.* In the House of Commons debates on the Crown Proceedings Bill, the Attorney-General stated that the new legislation put '. . . the Crown, so far as may be, in matters of litigation in the same position as the subject, so that a subject who wants to bring an action against the Crown may proceed as though he were proceeding against another subject'. That the Crown's position in litigation is not the same as that of the subject will be seen in the following sections of this chapter. Indeed, it has been seen already in Chapter 2 that certain of the remedies described in the previous chapter do not apply to the Crown by virtue of the Crown Proceedings Act and that the Act confirmed that the rights and interests of the Crown shall not be prejudiced by statute unless that statute refers to the Crown.

14.2 Contracts and the Crown

Section 1 of the Crown Proceedings Act states that if a contract could have been enforced by the pre-1947 petition of right process or by virtue of any Act repealed by the Act of 1947, such a claim against the Crown can now be enforced in law without resort to the petition of right. Although as a result of section 1 it now appears to be easier to sue the Crown in the law of contract, some of the restrictions previously existing still have to be taken into account. Those restrictions are of particular significance in three areas:

(1) employment contracts with the Crown;
(2) the funding of Crown contracts; and
(3) contracts which allegedly fetter future executive action by the Crown.

Before these three matters are examined, it should be pointed out that some statutory provisions repealed by the Act of 1947 permitted legal proceedings against a minister, without reference to the petititon of right. Such statutory provisions in various Acts are referred to in the summary of section 1 at the beginning of this section. However, the Act of 1947 is not concerned with those Acts which incorporated various Government departments and whose contracts are not made in the name of the Crown, as seen in Chapter 2.

14.2.1 *Employment contracts.* The legal position for the Crown servant is particularly weak and in the case of military servants there is virtually no legal protection at all. A member of the armed forces cannot resort to the law in order to enforce the provisions of any employment contract with the Crown. As far as the civil servant is concerned, his employer, the Crown, can dismiss him at will (*Dunn v R.* (1896)). Although it has been suggested, even within the last 25 years, that a civil servant does not have an employment contract with the Crown but simply holds an appointment with the Crown, the position in law would appear to be changing. Although it remains the case that a civil servant cannot sue the Crown for 'wrongful' dismissal in breach of contract, there exists in the Civil Service a large number of voluntary employment agreements, many of which are negotiated and concluded with the trade unions. In addition, a good deal of legal protection has emerged from recent employment legislation. Perhaps the best example relates to the provisions of the Employment Protection (Consolidation) Act 1978 among which is the statutory right of an employee not to be dismissed unfairly. The Act of 1978 indicates that this part of the Act applies to the Crown, together with other parts such as those relating to maternity rights for women.

14.2.2 *The funding of Crown contracts.* Although it was at one time thought to be a prerequisite of a legally enforceable contract with the Crown that Parliament should have appropriated, expressly or impliedly, the funds for the contract, this seems not to be the present legal position. In an Australian case, *New South Wales v Bardolph* (1934), a Government officer, on the authorisation of the state premier, purchased space in a newspaper for Government advertising. A number of Acts of Parliament permitted 'Government advertising' although this particular contract was not specifically authorised by Parliament. Following a change of Government, there was a refusal by the new Government to pay for the contracted advertising although the advertising continued. The newspaper sued the Government for damages. In giving judgment for the newspaper, it was confirmed that the

contract in question was a Crown contract and that while Parliament provided sufficient monies for its fulfilment it was binding on the Crown.

14.2.3 *Contracts fettering future executive action by the Crown.* This particular restriction is nothing more than a repetition of the broader legal principle governing other administrative agencies as seen previously in Chapter 11. One of the cases mentioned in this context in that earlier chapter was *Crown Lands Commissioners v Page* (1960). In that case it was decided that any implied covenant in a lease to which the Crown is a party and which relates to the quiet enjoyment of land would have to exclude executive acts undertaken in the national interest. Such acts might relate to national emergencies when the Crown, through the Government, initiates measures under the prerogative. A further case of significance here is *Robertson v Minister of Pensions* (1949) where it was decided that the minister was bound by an assurance in circumstances where it was not considered necessary to invoke the Crown defence of 'executive necessity'. As was seen in Chapter 9 where *Robertson* was dealt with in some detail, it is clear that the correct decision was arrived at although there are technical legal objections to the decision. As to the defence of executive necessity, the case illustrates the fact that such a defence may often be irrelevant and its employment unjust against individuals whose dealings with the Crown have nothing to do with 'public security' or the 'national interest'

14.3 Tortious Liability of the Crown

Section 2 of the Crown Proceedings Act provides that the Crown is subject to liability in tort in the same way that a private person of full age and capacity is so liable. The Act defines three main areas of liability:

(1) torts committed by a Crown servant or agent;
(2) torts arising from any breach of those common law duties owed by an employer to his servants and agents; and
(3) torts arising from any breach of those common law duties concerning the ownership, occupation, possession or control of property.

Three other areas of tortious liability dealt with by the Crown Proceedings Act should be mentioned:

(1) breaches of statutory duty;
(2) immunity from tortious liability in respect of acts or omissions by persons discharging responsibilities of a judicial nature; and
(3) immunity from tortious liability for certain acts of a member of the armed forces causing the death of or injury to another member of the armed forces.

Each of these six areas will be dealt with in turn.

14.3.1 *Vicarious liability of the Crown.* Although it has been possible to sue a Crown servant or agent personally for a tort which he has committed, the Act of 1947 adds to this remedy by stating that the Crown can be vicariously liable for a tort of its servant or agent, as long as that servant or agent would have been liable himself. One of the leading cases here is *Home Office v Dorset Yacht Co. Ltd* (1970) where it was decided that there was liability in damages to the owner of a yacht which was damaged by borstal boys who, during an exercise outside the borstal, were not supervised with reasonable care by the officers in charge. A crucial finding in the case was that the damage to the yacht could have been foreseen by the officers on any lapse of their supervision so that this gave rise to a duty in favour of the yacht owner to take reasonable care. Clearly, therefore, the Crown can be liable in a situation of this sort since the servant or agent himself would be liable in negligence.

14.3.2 *The employer's common law duties.* Although the welfare of most employees is governed in so many ways by statute, for example, by virtue of regulations made under the Health and Safety at Work Act 1974 governing various safety standards for the work place, there are some common law duties which fill any occasional gap in the statutory provision. One example from the area of the employer's common law duties is the duty to provide a safe place of work for the employee. Such a duty is owed by the Crown to any of its employees by section 2.

14.3.3 *Common law duties relating to Crown property.* It has been seen that the Crown is liable in tort for any breach of the common law duties relating to the ownership, occupation, possession or control of property. Consequently, where a person is injured while visiting Crown property it is likely that he will be able to sustain a successful action in tort where it can be established that there was a failure to maintain the premises in a safe condition. However, as in the case of the Crown's legal responsibilities as an employer, the Crown's tortious liability here is governed more often by statute. The Occupiers' Liability Act 1957, for example, binds the Crown and imposes a statutory duty on any occupier to take reasonable care to ensure that premises are safe for those visitors who are invited or otherwise permitted to be on those premises. A third area of liability which could be related to this part of the Crown Proceedings Act was mentioned in Chapter 4. It was seen in that chapter that, even in the absence of negligence, there may be so-called 'strict' liability where a person, for his own purposes, brings on to his land and collects and keeps there anything likely to do mischief if it escapes (*Rylands v Fletcher* (1868)). Although there may be some doubt whether the Crown is acting for its own purposes in performing its usual public functions, there is at least potential liability against the Crown in this context.

14.3.4 *Breach of statutory duty.* Reference has been made to various statutory duties which are binding on the Crown. Where any such duty is binding on the Crown it is declared by section 2 of the Crown Proceedings Act that liability will attach in the normal way as if the defendant were a private person of full age and capacity. Of course, the Crown is not subject to the provisions of a statute unless referred to expressly or by implication so that liability for any alleged breach of statutory duty is subject to this crucial precondition.

14.3.5 *The discharge of judicial responsibilities.* Section 2 of the Crown Proceedings Act gives the Crown immunity from tortious liability in respect of any act or omission by a person who is discharging responsibilities of a judicial nature vested in him or any responsibilities in connection with the execution of judicial process. The crucial problem in assessing the scope of the Crown's legal immunity here lies in the definition of the term 'judicial'. The immunity clearly applies to the activities of judges in the Crown's courts although the fundamental need for an independent judiciary means that they cannot be regarded as Crown servants in the conventional sense. However, there are areas of uncertainty, for example, in relation to the functions and responsibilities of administrative tribunals, although such uncertainty is reduced bearing in mind that the person allegedly responsible for the tort must be a Crown servant and that it is necessary to prove that he himself would have been liable. As to this latter point, a person with legal authority to undertake judicial function enjoys absolute privilege in relation to the words he uses. Such a defence could be used by the Crown in order to deny vicarious liability for the words used in these circumstances.

14.3.6 *Immunity in respect of certain acts of members of the armed forces.* The Crown Proceedings Act in section 10 prevents a member of the armed forces suing either the Crown or a fellow member of the armed forces in respect of personal injury sustained while on duty or on premises being used for the purposes of the armed forces where the alleged tort is committed by a member of the armed forces on duty. Where it is certified that the injury is attributable to pensionable service, the individual's claim for damages in tort is excluded by the Act. A similar immunity from liability extends to a situation where the death of or personal injury to a member of the armed services arises from the condition of equipment or property being used by the armed services.

14.4 Judicial Remedies and the Crown

Reference has been made at various points to the fact that some remedies are not available in legal proceedings against the Crown. In

general terms, these remedies can be described as 'coercive' remedies and in law it is not considered appropriate that coercive measures should be exercised against the Crown in order to enforce these remedies. This is illustrated in section 25 of the Crown Proceedings Act, which prohibits any form of enforced payment by the Crown. As far as the prerogative orders are concerned, it is clear that since it is the Crown that acts as nominal applicant, the orders should not be available against the Crown. In reality, the only potential difficulty relates to the order of *mandamus*.

14.4.1 *Mandamus and the Crown.* Where an enforceable legal duty is conferred by statute on the Crown then the order of *mandamus* is not available. The same is true on those occasions when an enforceable duty is conferred on a servant or agent of the Crown, acting as such (*R v Lords Commissioners of the Treasury* (1872)). On the other hand, *mandamus* will be available on those occasions when the duty is conferred on a minister who is not required to exercise the duty on behalf of the Crown (*Padfield v Minister of Agriculture* (1968)). This state of affairs was left unaltered by the Crown Proceedings Act for the good reason that very few duties are conferred directly on the Crown. It has been seen already that most such duties are conferred on named ministers or other administrative agencies.

14.4.2 *Injunctions and the Crown.* The Crown Proceedings Act provides in section 21 that the injunction is not available against the Crown and that, in the same way, the injunction is not available against a Crown servant or agent where the effect would be to make the remedy available against the Crown indirectly. In lieu of the injunction here the Act does permit a declaration of the rights of the parties.

14.5 Procedure

Where proceedings are brought against the Crown the litigation follows the usual procedures. In most cases the plaintiff will know the identity of the Government department to be named as defendant but on those occasions when such a department cannot be identified the Attorney-General will be the defendant. Whether the proceedings are dealt with by the High Court or a county court will depend on the amounts involved in any claim in contract, tort or for the recovery of property. During the course of the trial, discovery of documents is available against the Crown by virtue of section 28 of the Crown Proceedings Act. The Crown can also be required to answer any interrogatories. At the conclusion of the trial, any damages and costs will be payable by the department responsible although the normal measures of coercive enforcement of judgments are not available. In the same vein, the court may well make use of the declaration as a substitute for the coercive

remedies, for example to declare the plaintiff's rights in property alleged to be in the unlawful possession of the Crown. Returning to the availability of discovery and interrogatories against the Crown under section 28, it should be noted that these facilities cannot affect any rule of law which:

> (1) authorises the withholding of a document, or
> (2) requires a refusal to answer a question, on the ground that any disclosure or revelation would be injurious to the public interest.

For a long time the Crown's ability to refuse to disclose certain documents or to answer particular questions in litigation was referred to as 'Crown privilege'. However, the law governing the sometimes difficult balance between the need to disclose and the need to retain information has wider implications so that this area of concern about disclosure is now more widely referred to as 'public interest privilege', which is the subject of the remaining sections of this chapter.

14.6 Public Interest Privilege

Before the Crown Proceedings Act came on to the statute book, a famous test-case came to the House of Lords for decision, a decision which was to influence the course of the law on disclosure of documents by the Crown for a long time. The case was *Duncan v Cammell, Laird & Co. Ltd* (1942) and it arose from the loss of the submarine HMS *Thetis* in Liverpool Bay during trials after its launching. A claim for damages in negligence was made against the builders who were required by the Admiralty not to produce various design documents which had been demanded because their disclosure would be injurious to the national defence. This claim of Crown privilege for the documents was upheld by the House of Lord which decided that '. . . a court of law ought to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens that, on grounds of public policy, the documents should not be produced'. It will be remembered tht the facilities for discovery of documents against the Crown given by section 28 of the Crown Proceedings Act are subject to any rule of law which authorised the withholding of a document. That rule of law seemed to be clearly defined as a result of the decision in *Duncan*. But notice that the claim of privilege for the documents was on the basis that their disclosure would be injurious to the national defence whereas the decision of the House of Lords apparently goes wider in referring to 'public policy' as the justification for a refusal to allow disclosure. This was just one crucial area of uncertainty left by the decision in *Duncan*. In addition, there was no certainty as to the circumstances in which a minister might oppose discovery in the public interest where two individuals are involved in private legal proceedings against each other, and no certainty whether a minister's claim for privilege would be conclusive in the eyes of the court.

14.6.1 *The conclusiveness of claims opposing discovery.* It was some years before there was any clarification of the uncertain position concerning the conclusiveness of a claim that documents should be protected from discovery. The important turning point came in another House of Lords' decision, *Conway v Rimmer* (1968). In this case, a probationer policeman had been prosecuted for the theft of a torch, acquitted and then dismissed from the force. In an action by the probationer against a superintendent for malicious prosecution (a tort), the probationer sought the discovery of certain reports which had been made about him by his superiors. Although both parties wanted this evidence produced, the Home Secretary resisted discovery on the ground that these documents belonged to a class whose production would be injurious to the public interest. In an important decision, the House of Lords ordered five of the documents to be produced for the court's inspection, indicating that it might not accept the Home Secretary's claim of privilege for at least four. The decision of the House of Lords shows that any claim of privilege which may be raised by a minister is not conclusive so that the court may balance any prejudice to the public interest if there is disclosure against any harm to the interests of justice if there is no disclosure. In balancing these factors to decide whether a claim of privilege should or should not be allowed, the court may examine the documents in private without disclosing them to the parties.

14.6.2 *Public interest privilege recognised.* In another decision of the House of Lords, *Rogers v Home Secretary* (1972), it was considered that the whole issue of discovery of documents should be seen against the broader background of the public interest. Lord Reid thought that the:

> . . . real question is whether the public interest requires that [a document] shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence. A minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest . . . But, in my view, it must always be open to any person interested to raise the question and there may be cases where the trial judge should himself raise the question if no one else has done so.

In this case, a senior police officer wrote a report on an applicant to the Gaming Board for a gaming licence. The application for a licence was unsuccessful whereupon the applicant started legal proceedings against the officer alleging criminal libel arising from the letter sent to the Gaming Board. An attempt to obtain discovery of the letter was resisted by the Home Secretary and the Board. It was decided that the letter should remain confidential, primarily because any disclosure would make it that much more difficult for the Board to fulfil its function in relation to the issue of gaming licences where there was a need for candid assessment of applicants' characters. Consequently, the public

interest in ensuring the suitability of applicants outweighed the possibility of injustice to a suitable applicant who might be concerned with possibly defamatory material in correspondence with the Board.

14.6.3 *The application of public interest privilege.* Public interest privilege is an issue which has arisen quite frequently in litigation. The final sections of the chapter contain an outline of some of the more significant cases where the privilege has been in issue. In *D. v NSPCC* (1977) the Court refused to allow the disclosure of the identity of informers in cases of alleged child abuse while in *Neilson v Laugharne* (1981) there was again a refusal to allow disclosure, this time of documents concerning police investigations of a complaint made by the plaintiff, for the purpose of an action in damages against the police. In refusing disclosure it was decided that the documents in question belonged to a class of documents whose disclosure would impede the proper functioning of the public service. It was in *Duncan* that the House of Lords decided that Crown privilege could be sought in two different ways, either on the ground that a document falls into a certain class, as seen in *Neilson*, or on the ground that the content of a document is such that its disclosure would be contrary to the public interest. The decision in *Neilson* emphasises the need for confidentiality in police investigations. As will be seen in some later cases, confidentiality is but one factor to be weighed in the balance when deciding whether there should be discovery. The 'class' basis for privilege was used in *Williams v Home Office* (1981) when it was claimed that documents about the formation of Government policy on 'Control Units' in prisons should not be disclosed. In deciding that there should be disclosure to the judge, who eventually released some of the documents, the Court considered it reasonably probable that they contained material which was relevant to the plaintiff's case that he had been detained unlawfully in a 'control unit'. The competing argument was that disclosure would attract criticism to the Home Office as the Government department responsible for prisons. This objection to disclosure was not considered sufficiently serious to disallow disclosure if the parties concerned in the litigation undertook to use the documents only for the purpose of the litigation. Inspection of the documents took place in *Burmah Oil Co. Ltd v Bank of England* (1980), but further disclosure was not permitted by the Court following its inspection. The company had sued the Bank of England for the purpose of setting aside a sale of stock which formed part of its assets and sought discovery of certain documents which contained details of the Government's intervention in the transaction. The decision not to allow disclosure provides a good example of the court's view that, on balance, the evidential value of documents to the individual may be outweighed by the fact that they belong to a class whose disclosure would impede the proper functioning of the public service in relation to the formation

of important Government policy. At a slightly less exalted level there are many day-to-day situations in which administrative agencies find themselves in possession of confidential information. The legal implications of any request for disclosure are dealt with in the following, final section of this chapter.

14.6.4 *Administrative agencies and the disclosure of confidential information.* It was seen previously in this chapter that on an application for discovery the factor of confidentiality is but one matter for the court's consideration. Two cases involving the Commissioners of Customs and Excise provide an illustration of the law in practice. In the first case, *Norwich Pharmacal Co. v Customs and Excise Commissioners* (1973), the plaintiff company was the owner and licensee of a patent for a chemical compound. The company was aware that the compound was being imported into the country in breach of their legal rights. The names of the importers were in the possession of the Commissioners who refused to disclose them to the company. It was decided by the House of Lords that the company had a right to know the names of the importers since there were legally enforceable rights at stake so that, on this occasion, the interests of justice for the individual predominated. In the second case, *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (1973), the Commissioners had obtained information in connection with the fixing of purchase tax on the wholesale value of the plaintiff's amusement machines. The plaintiff company now sought disclosure of the information which had been obtained from their customers. The Commissioners' claim of privilege was upheld by the House of Lords whose decision emphasised that even though information is given in confidence, this is not necessarily a reason for a refusal of discovery. It was decided that the arguments for and against disclosure were evenly balanced but it was decided finally that the information should be protected on the ground that its disclosure might be harmful to the efficient working of the legislation under which the Commissioners exercised their powers.

15 Remedies for Maladministration

15.1 The Ombudsman Remedy

It was seen in Chapter 1 that administrative law is concerned with the legal control of administrative action, that is, control by the courts. Chapters 9 to 11 and Chapter 13 have shown that such control is centred on the power of the High Court to review the legality of those mainly statutory functions exercised by the administrative agencies. However, to complete the picture of the controls available in respect of the administrative agencies and their functions it is necessary to appreciate that there are certain non-legal remedies which do not depend on the courts. Such non-legal remedies include the administrative remedies examined in Chapter 12 and the so-called Ombudsman remedy which is to be examined in the present chapter. The various Ombudsmen who have been established throughout the United Kingdom deal with and investigate complaints of injustice in consequence of maladministration. Any such complaint must relate to maladministration by an administrative agency where that agency is undertaking its administrative functions almost always within the scope of its statutory powers. The term 'Ombudsman' is of Scandinavian origin and refers to a person who deals with grievances.

15.1.1 *Ombudsmen in the United Kingdom.* The first Ombudsman to be established was the Parliamentary Commissioner for Administration whose office was created by the Parliamentary Commissioner Act 1967. The Parliamentary Commissioner Act (Northern Ireland) 1969 established the office in Northern Ireland to deal with complaints against the Northern Ireland Government until it was suspended. The Commissioner for Complaints Act (Northern Ireland) Act 1969 established a Commissioner for Complaints who deals with complaints in the province against local bodies and certain other public bodies. In the remainder of the United Kingdom, the Local Government Act 1974 and the Local Government (Scotland) Act 1975 established Local Commissioners for Administration with responsibility for investigating maladministration in local government. Finally, in the National Health Service Reorganisation Act 1973 provision was made for Health Service Commissioners, with similar provision in Scotland under different legislation.

15.2 The Parliamentary Commissioner for Administration

The Parliamentary Commissioner is, as the name suggests, accountable to Parliament. In exercising his statutory function, the Parliamentary Commissioner reinforces the capacity of Parliament to deal with complaints against the executive. The Parliamentary Commissioner reports to Parliament through a series of annual reports, including reports of particular investigations and matters of concern, and his activities come under the scrutiny of the Select Committee on the Parliamentary Commissioner for Administration. Complaints to the Parliamentary Commissioner are required to be referred by a member of Parliament, a requirement which emphasises the reinforcement of the M.P's role as the elected representative dealing with complaints against the executive.

15.2.1 *Government departments and authorities subject to investigation.* The Act of 1967 contains a schedule which includes all of those Government departments and authorities whose administrative functions may be investigated on a complaint to the Parliamentary Commissioner. The list may be amended but may not include any body or authority whose functions are not exercised on behalf of the Crown. By way of an example, the Post Office was removed from the list when it was created a public corporation in 1969. The Parliamentary Commissioner is also empowered to investigate action taken by or on behalf of any of the bodies or authorities listed in the schedule. In general terms, the bodies included in the list are the Government departments headed by their respective ministers, and certain other bodies which are related to those departments, such as the Inland Revenue Commissioners. References to particular departments includes their respective ministers, whose own contribution to any maladministration can be investigated. One of the most famous investigations carried out by the Parliamentary Commissioner arose from many complaints from individuals who considered that the Government had contributed to their loss when the holiday firm Court Line Ltd failed in 1974. The essence of the complaints was that holiday-makers who had booked with Court Line were given the impression by House of Commons statements from the Secretary of State for Industry two months before the failure that the firm was financially viable. In a special report, the Parliamentary Commissioner concluded that a misleading impression had been given by the Secretary of State. The conclusion was rejected by the Government which refused to accept liability for any compensation for those who had suffered loss.

15.2.2 *Matters excluded from investigation.* The Act of 1967 expressly excludes certain matters from investigation by the Parliamentary Commissioner. The areas of exclusion are:

(1) foreign relations;

(2) action taken overseas;
(3) action affecting the administration of government in overseas territories such as colonies:
(4) action taken to extradite individuals by virtue of extradition treaties and to extradite fugitive offenders;
(5) investigation of crimes;
(6) proceedings before any court of law, international court or tribunal or disciplinary body in the armed forces;
(7) action taken in connection with the prerogative of mercy;
(8) the health service; see the Health Service Commissioners, whose functions are dealt with later in this chapter;
(9) commercial and contractual transactions;
(10) personnel matters in the civil service and armed forces;
(11) the grant of honours, awards, privileges and charters.

15.2.3 *Complainants.* The Act of 1967 prohibits any complaint by local authorities, public service bodies, nationalised corporations, bodies whose membership is appointed by the Crown, a minister or a department and bodies funded from monies provided by Parliament. Beyond these categories a complaint can be made by an individual or body which may or may not be incorporated. Consequently, a complaint may be made by a company or an unincorporated group of individuals such as a residents' association. In the more common case where the complaint is that an individual has suffered injustice in consequence of maladministration, that individual must complain personally as an 'aggrieved' person to the M.P. although there are exceptions to this requirement where, for example, an agent is used if a person is unable to act for himself, or where that person has died and the complaint is pursued through a personal representative. Any complainant is required to have been in residence in the United Kingdom or at least 'present' in the country when the action subject to the complaint occurred. The complaint to an M.P. must be made in writing not later than 12 months from the date when the complainant became aware or should have been aware of the issue which forms the basis of the complaint. In some exceptional cases, the Parliamentary Commissioner will allow a complaint to be considered beyond this time limit.

15.2.4 *Alternative remedies.* The Act of 1967 states that the Parliamentary Commissioner shall not undertake an investigation where the person aggrieved has or had a right of appeal, reference or review to or before a tribunal established by statute or under prerogative powers, or where the person aggrieved has or had a remedy by way of proceedings in any court of law. However, there is an exception in these circumstances, allowing the Parliamentary Commissioner to investigate where he is satisfied that it is not reasonable to expect the complainant to rely or to have relied on these remedies. This exception indicates that there is no clear division between the legal remedies and the non-legal Ombudsman remedy. This lack of clarity is well illustrated in *Congreve*

v Home Office (1976) referred to in Chapter 11, where the Court of Appeal decided that a threatened revocation of television licences prematurely renewed was *ultra vires* the Home Secretary's powers under the Wireless Telegraphy Act 1949. This decision followed a successful complaint to the Parliamentary Commissioner who was critical of the Home Office for a number of reasons, including the fact that there was a failure to advise the parties adequately of the department's attitude to premature renewal of licences. In many instances, the availability and suitability of the alternative remedy will be quite clear, as, for example, where a decision of the Secretary of State for the Environment on a planning appeal can be challenged by way of statutory review within six weeks where the only issue is the legality of that decision. On the other hand, it may not be at all clear whether there is any matter of law or legality in issue so that the Parliamentary Commissioner might be more inclined to investigate the case. On the other hand, where the alternative remedy is a general administrative appeal to a tribunal involving all the facts and merits in the case, it is less likely that the Parliamentary Commissioner would consider it necessary to investigate the case himself.

15.2.5 *The investigation of administrative functions.* An important element in the Parliamentary Commissioner's powers is the limitation of investigations to administrative functions, as opposed to legislative (law-making) and judicial functions. While legislative functions such as the drafting and promotion of various types of statutory provision are outside the powers of the Parliamentary Commissioner because such functions are the concern of other Parliamentary processes, judicial functions are excluded because, as was seen in the previous section, there should be some remedy arising from those functions before a court or tribunal. In general, therefore, it can be said that if judicial functions are in issue, the individual's legal rights can be enforced in proceedings before a court and any appropriate tribunal. This is well illustrated in a complaint by an ambulance driver against the Department of Health and Social Security in respect of his classification for national insurance purposes (Case No. C96/T: First Report of the Parliamentary Commissioner, 1973–74). The ambulance driver had been paying national insurance contributions as a self-employed person but he considered that he should be classified as an employed person, in which case the contributions are payable by the employer. When he applied to the Secretary of State for a decision, an inquiry was convened and the complainant was represented by a trade union official. Subsequently, it was decided that the complainant had been a self employed person for national insurance purposes. The complainant and his representative then complained to the Department about alleged procedural irregularities at the inquiry and requested a new inquiry. At about the same time, the complainant's M.P. wrote to the Secretary of State

about the matter and, not being satisfied with the response, referred the case to the Parliamentary Commissioner. It was recognised at the outset that the decision of the Secretary of State on a question of classification is final, subject only to an appeal on a point of law to the Court of Session in Scotland or, in England, the High Court. It was also recognised that the Secretary of State may review the decision if new facts are brought to his notice, or if he is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact. Although the existence of the appeal on a point of law was noted, it appears that the investigation proceeded because it was not considered reasonable that the complainant should have to rely on that remedy, possibly because the complaint appeared at that stage to raise questions relating to the Secretary of State's power to review a decision. Following the investigation it was found that there had been criticism of the conduct of the inquiry but that the complainant and his representative recognised that the decision had been taken on the correct facts. In conclusion, it was stated by the Parliamentary Commissioner.

> . . . that the complaint is fundamentally a disagreement with the Secretary of State's judicial decision, which is not a matter I am entitled to question; alternatively it may constitute a contention that the Secretary of State did not correctly apply the law to the facts, in which case the proper course open to the complainant was to exercise his right of appeal to the Court of Session.

15.2.6 *Procedures for investigations.* Whether a complaint should be investigated is entirely a matter of discretion for the Parliamentary Commissioner (*Re Fletcher's Application* (1970)). If a complaint is to be investigated, the Parliamentary Commissioner proceeds in private and gives the head of any department or official concerned an opportunity to make comments. Relevant files are examined and officials interviewed. In some cases the complainant will be interviewed, which is what happened in the investigation described in the previous section where the Parliamentary Commissioner was particularly concerned to ensure that, despite procedural irregularities at the inquiry, the correct facts had been reported to the Secretary of State for the purpose of his decision. The Parliamentary Commissioner has wide powers through which he can obtain his information. However, no person can be compelled to provide information which relates in any way to Cabinet proceedings and a certificate from the Secretary to the Cabinet for this purpose is regarded as conclusive in relation to such information. Otherwise, the Parliamentary Commissioner cannot be met by any claim from the Crown that any documents or other information are privileged from disclosure. Where the Parliamentary Commissioner considers that he has been obstructed or in any way prevented from carrying out an investigation he can apply to the High Court which can deal with any such difficulty as a contempt of court. In the course of an

investigation the Parliamentary Commissioner may permit a person concerned in that investigation to be legally represented while, in addition, an investigation may sometimes comprise a more formal hearing. Whatever the form of investigation adopted, the Parliamentary Commissioner has a power to require that evidence is given on oath. At the conclusion of an investigation, a report is sent to the M.P. who referred the complaint in the first place. The Parliamentary Commissioner may be prohibited from including information in a report on the ground that its disclosure would be contrary to the public interest as certified by a minister. In addition, the Parliamentary Commissioner is subject to the Official Secrets Acts.

15.2.7 *Injustice in consequence of maladministration.* The Act of 1967 allows the Parliamentary Commissioner to investigate complaints from those who allege that they have suffered injustice in consequence of maladministration where they consent to a reference of that complaint by the M.P. to the Parliamentary Commissioner. This central feature of the Act of 1967 is also a prime characteristic of the powers conferred on the other Ombudsmen in the United Kingdom. However, the Act fails to define the meaning of these important terms. 'Injustice' receives a wide interpretation in practice which goes beyond some tangible loss or damage which may be suffered when there is an unjustified delay in adjusting a person's liability for income tax, for example. Inconvenience, frustration and annoyance are all facets of injustice even though they may not be capable of being quantified. When the Act of 1967 was being debated in Parliament it was considered that 'maladministration' would include 'bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on'. In the early years of his office, the Parliamentary Commissioner tended to concentrate on what may be described as 'procedural' maladministration comprising things like delay, loss of documents or a failure to follow internal procedures in decision-making. With the encouragement of the Select Committee on the Parliamentary Commissioner, there has been a greater willingness to investigate complaints of 'substantive' maladminstration where the decision itself is 'bad' in quality as where a successful objector to an administrative scheme is refused the costs he had incurred in that context. However, the Parliamentary Commissioner is in no sense an appeal body so that he is not able to substitute his own decision for that of the administrative agency subject to investigation. Nevertheless, he is able to point out the areas where the decision-making exercise has departed from the standards of good administration. That the Parliamentary Commissioner is in no way an appeal body is emphasised by the Act of 1967 which states that the merits of a discretionary decision taken without maladministration cannot be questioned.

15.2.8 *Maladministration and injustice in practice.* To illustrate the

operation of the Parliamentary Commissioner's powers of investigation, one particular case has been chosen: Case No. 213/T from the First Report of the Parliamentary Commissioner, 1973–74. The complaint was made against the Property Services Agency of the Department of the Environment which was acting for the Post Office (not subject to investigation by the Parliamentary Commissioner in his powers under the Act of 1967) in the sale of a strip of land. The land in question was at the rear of the complainant's garden and the gardens of her neighbours on either side. Despite instructions from the Post Office, the surveyor employed by the Agency failed to approach the complainant and accepted the view of one of the neighbours that the complainant's husband would not want to buy the strip of land at the rear of his garden. As a result, the Post Office undertook to convey the strip of land passing at the rear of all three properties to the neighbour. When the complainant indicated that she and her husband would be interested in buying the strip of land at the rear of their garden, they were told by the Agency that there had been an exchange of contracts for the sale of the complete strip to the neighbour and that they had had many years in which to secure a purchase of the land in question. Subsequently, the ground behind the complainant's garden had been levelled, trees and bushes removed and old building timber deposited on the land. The complainant and her husband had incurred expense in erecting a new fence, planting new trees and bushes and seeking legal advice. On investigation it was found that the failure to give an opportunity to make an offer for the land, compounded by wrong information about an exchange of contracts together with a lack of sympathy and understanding in dealing with the complaints made amounted to maladministration. It was also found that injustice through distress and expense had been caused as a result of the maladministration. The status quo could not be restored and the injustice removed but the Department agreed to make an *ex gratia* payment of £100 to cover the distress suffered and the expenses incurred.

15.3 Health Service Commissioners

Since the National Health Service Reorganisation Act 1973 and similar statutory provisions in Scotland, the Ombudsman remedy has been established with Health Service Commissioners for England, Wales and Scotland. The Parliamentary Commissioner for Administration also acts as Health Service Commissioner in each of these areas of the country. Many aspects of the Ombudsman remedy in the Health Service are very similar to those previously described in relation to the functions of the Parliamentary Commissioner. One of the oustanding differences lies in the fact that the Health Service Commissioners are empowered to investigate injustice or hardship. A complaint must be pursued within 12 months of the date when the complainant had notice of the issue.

15.3.1 *Matters excluded from investigation.* As with the Parliamentary Commissioner, a complaint may not be investigated where the complainant has some alternative remedy in a court of law, for example. The Health Service Commissioners are excluded from investigations into:

(1) clinical decisions;
(2) the functions of any Family Practitioner Committee where it operates as an administrative tribunal;
(3) personnel issues;
(4) contracts and commercial matters except in so far as they relate to the provision of services for patients;
(5) matters subject to a statutory inquiry by the Secretary of State.

In addition, various individuals and organisations are excluded from investigation. Of particular interest here are the community health councils and general practitioners who provide the basic medical, dental and other services.

15.3.2 *Complaints.* Any complaint is made directly to a Commissioner, even by a health authority which may be anxious to have an investigation of a matter for which it is responsible. The person directly affected and aggrieved by a failure to provide a service, or a failure of a service or any other action taken by or on behalf of a health authority or other body subject to investigation may also complain through a representative where he is unable to undertake a complaint himself. A personal representative may also complain on behalf of a person who is deceased. Complaints range across a wide field and include the treatment of patients by hospital staff, the management of hospital waiting lists and the transfer of patients between different hospitals. In all of these complaints, it is the task of the Commissioner to investigate injustice or hardship in consequence of a failure to provide a service or a failure of that service, or injustice or hardship in consequence of maladministration in relation to any other action. Following an investigation, a report is sent to the complainant and the Secretary of State for Health or the health authority. Annual and special reports are made to the Secretary of State and laid by him before Parliament.

15.4 Local Commissioners for Administration

The Local Government Act 1974 created two Commissions for Local Administration, one for England and one for Wales. The English Commission comprises a number of Commissioners with responsibility for different areas of the country while one Commissioner deals with complaints about maladministration among local authorities in Wales. Parish councils and their equivalent community councils in Wales cannot be investigated by the Commissioners. Otherwise, the Commissioners are empowered to investigate all local authorities including the

regional water authorities and police authorities, except for the metropolitan police authorities, which are the responsibility of the Home Secretary. The Commissioners are responsible for investigating complaints of injustice in consequence of maladministration in these authorities. As in the case of the Parliamentary Commissioner, there is an exclusion of cases where the complainant can reasonably resort to a suitable alternative remedy although another alternative applies under the Act of 1974, namely where the complainant can pursue an appeal to a minister. Because third-party objectors to a grant of planning permission do not have an appeal to the Secretary of State for the Environment against a grant of planning permission, many complaints have been entertained by the Commissioners in this area.

15.4.1 *Matters excluded from investigation.* Apart from the complaint which may be pursued through a suitable alternative procedure, there are five areas of exclusion from Commissioners' investigations:

(1) decisions in relation to legal proceedings;
(2) the investigation or prevention of crime;
(3) personnel matters;
(4) the internal organisation and operation of schools and other educational establishments;
(5) contracts and commercial matters.

It is notable in Northern Ireland that the Commissioner for Complaints is not excluded from the investigation of complaints about commercial and personnel matters. On the same parallel, the Northern Ireland Parliamentary Commissioner is empowered to investigate personnel matters. As in the cases of Parliamentary Commissioner for Administration and the Health Service Commissioners, the Local Commissioners have a general discretion in deciding whether to investigate a complaint.

15.4.2 *Complaints.* As in the case of the Parliamentary Commissioner and the Health Service Commissioners, there are few limitations on the categories of complainant who need not be ratepayers, residents or electors. Complaints must be made in writing to a member of the local authority within 12 months but, exceptionally, when a complaint cannot be so referred, it may be made directly to a Local Commissioner. Whatever the method of referral, the Local Commissioner can refuse to undertake an investigation where the complaint appears to affect all or most of the inhabitants in the local authority's area. Where a complaint is accepted for investigation, the Commissioner responsible is obliged to give the local authority concerned a reasonable opportunity to investigate and comment on the complaint. At the conclusion of an investigation a report is sent to the complainant, the member who referred the complaint and the local authority responsible for the action

which forms the basis of the complaint. The authority is obliged to make copies of the report available for public perusal and to advertise the fact of its availability. If the report concludes that there has been injustice in consequence of maladministration, the local authority is obliged to consider the report and to advise the Local Commissioner of the action to be taken to deal with its findings. Where the local authority fails to advise the Local Commissioner in this respect a special report can be prepared by that Commissioner, highlighting the problem. Each Commissioner reports to the Commission on an annual basis while the Commissions report to a Representative body, one for England and one for Wales, comprising persons from those local authorities subject to investigation by the Local Commissioners. The Parliamentary Commissioner is a member of the Local Commissions as well as being an *ex officio* member of the Council on Tribunals, so emphasising the importance of a close relationship between bodies which operate in areas where complaints of administrative injustice can be closely related.

15.4.3 *Maladministration and injustice in practice.* Some of the more frequent complaints to the Local Commissioners arise from the functions of local authorities in relation to town and country planning and housing. By comparison, the Parliamentary Commissioner, operating by reference to the same formula of injustice in consequence of maladministration, also finds most of his complaints in the area of town and country planning, in addition to income tax disputes. Both Ombudsmen suffer from the fact that there is no facility for the legal enforcement of any suggested remedy for a finding of injustice in consequence of maladministration. By contrast, any such finding by the Northern Ireland Commissioner for Complaints permits the person aggrieved to apply to a county court for damages or an injunction. The Attorney-General also has the opportunity to make application to the High Court where any maladministration is likely to continue, despite the efforts of the Commissioner for Complaints.

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Self-assessment Questions

Why is the judicial review of administrative action such an important characteristic of administrative law?

What is the essential task of the High Court in relation to the doctrine of *ultra vires*?

In what circumstances could it be said that statutory powers conferred on an administrative agency are contrary to the Rule of Law?

Why is it true to say that accession to membership of the EEC has radically altered the sovereignty and supremacy of the United Kingdom Parliament?

Identify any matters of interest to administrative law arising from any separation of powers that occurs in the United Kingdom.

What are the main differences between prerogative and statutory powers?

Why is it so important to ascertain whether it is the Crown, or a Crown servant or agent which is responsible for the discharge of administrative functions?

In the absence of any express definition of an administrative agency's Crown status, what factors may nevertheless suggest that that status is implied?

What broad guidelines are there for the allocation of functions to administrative agencies involving (1) the adjudication of disputes and (2) the initiation of administrative action?

Why is the element of policy in any decision-making process an important factor in deciding the type of administrative agency to which that process should be allocated?

What is the status of the statutory inquiry in relation to decision-making in many central government departments?

To what extent can it be said that the statutory inquiry is a facility which is provided in order to satisfy the public that there is a proper

reconciliation of competing interests in certain areas of decision-making?

What legal safeguards are provided to ensure a proper functioning of the inquiry-based decision-making process?

In the case of planning inquiries, what are the essential differences between a decision to be taken by the Secretary of State and a decision to be taken by an inspector?

What reasons may justify any exclusion, restriction or modification of the system of statutory, public inquiries?

What are the disadvantages of the conventional system of planning inquiries as a means of dealing with proposals for large-scale energy developments?

What is the essential legal relationship between the council of a local authority and its members?

Why is it necessary for there to be a realistic application of the doctrine of *ultra vires* to the functions and activities of local authorities?

Define the possible legal effects of an *ultra vires* contract which is approved by a local authority.

What means are available to control unlawful expenditure by a local authority?

Identify the respective roles of the local valuation courts and the crown courts in the rating system.

Do local authorities enjoy any autonomy in relation to the management of their finances?

What part does the law play in the audit of local authorities' accounts?

To what extent can it be said that the relationship between central and local government is based on 'collaborative partnership'?

Does the law provide the local authority with any significant immunities from legal liability in the exercise of its functions?

How do administrative tribunals differ from courts of law?

What is the distinction between administrative tribunals and statutory inquiries?

Why may the standards of 'openness, fairness and impartiality' be in doubt in the case of some administrative tribunals?

Identify the main factors which determine the allocation of functions to administrative tribunals.

To what extent does the Tribunals and Inquiries Act govern the operation of administrative tribunals?

What part is played by the High Court and the Court of Appeal in the supervision of administrative tribunals?

What factors will tend to indicate that an administrative function should be conferred on a public corporation?

To what extent are public corporations subject to central government control?

What are the possible legal consequences where a public corporation has the status of a Crown servant or agent?

Can it be said that a public corporation is more amenable to judicial control if it is not one of the so-called nationalised industries?

To what extent can the common law be described as a source of administrative powers?

Define the extent to which EEC law is superior to the law of the United Kingdom.

Why is EEC law of interest to the administrative lawyer?

What is the essential difference between the discretionary and non-discretionary statutory power? Indicate which administrative agencies are more likely to have discretionary powers with which to perform their functions.

Are there any special factors which will tend to determine the characteristics of administrative powers to the extent that a system of licensing may be preferred to contractual regulation, for example?

What are the disadvantages of legislation as a means of providing the statutory framework for an administrative system?

In what circumstances is it likely that the promotion of a Private or Local Bill will fail?

Define the importance of the statutory instrument.

What functions are normally undertaken by regulations, rules and orders?

What is the purpose of bylaws?

Explain the background to each of the grounds on which a bylaw may be found to be unlawful.

Summarise the basic sources of EEC law and define their different characteristics.

How might a Belgian worker, required by order of the Home Secretary under the Immigration Act to leave the United Kingdom, enforce his legal rights under Article 48 of the Treaty of Rome?

What is the legal consequence of a breach of a mandatory and a directory procedural requirement?

Identify some of the factors which suggest that a procedural requirement is mandatory or directory.

Indicate the broad legal requirements for consultation.

Is it always true to say that administrative functions can be delegated, but not judicial functions?

What is the likely effect of section 101 of the Local Government Act on the delegation of functions by a local authority?

Define the requirements for common law estoppel and indicate how the courts may be able to avoid the application of estoppel.

Why should the law presume that the time limit for the communication of a decision is directory while the time limit for notification of an appeal is mandatory?

To what extent can the law ensure that there is an effective, universal obligation to give adequate, intelligible reasons for all administrative decisions?

In what circumstances will the law exclude the rules of natural justice?

Outline the circumstances in which the law is likely to require that all the rules of natural justice will apply or that some of the rules will apply or that the rules will not apply.

What is meant by the duty to act 'fairly'?

How important is the requirement of a 'judicial' function in relation to natural justice?

What are the legal requirements for the rule against bias?

What are the basic requirements for the *audi alteram partem* rule?

Do the rules of natural justice insist that a person should be able to put his case with the aid of an oral hearing and legal representation?

If there is a denial of natural justice at the first stage of a two-stage disciplinary process within a domestic organisation, can this omission be remedied at the second, appeal stage?

Where it is claimed that a decision of an administrative agency is *ultra vires*, but not in relation to matters of procedure, what will the court look for to confirm that claim?

Are the rules of substantive *ultra vires* more or less stringent in the case of decisions taken by inferior courts?

What is the difference between a decision which is *ultra vires* as opposed to a decision which is affected by an error of law on the face of the record?

How can the court identify those matters which relate to the merits of a decision within the powers of an administrative agency and beyond judicial review?

In what circumstances will an ouster clause exclude judicial review of a decision?

What are the difficulties confronting the judicial review of decisions taken by reference to discretionary powers? How are they overcome?

Why are some policies regarded as unlawful, 'preclusive' policies?

Where it appears that there is an administrative and a judicial remedy available to challenge a decision of an administrative agency, what are the requirements which will indicate whether the remedies can be sought in the alternative?

What is the difference between review and appeal?

What is the task of the High Court in dealing with an appeal on a point of law?

Comment on the role of the declaration in administrative law and outline the circumstances in which the court is likely to refuse to grant this remedy.

In what circumstances is the injunction available to the administrative agency and the individual in order to restrain unlawful action?

Are there any significant restrictions on the availability of *certiorari* to control the unlawful actions of any organisation?

Is *mandamus* available to enforce the performance of any public, statutory duty?

What purposes are served by the application for judicial review?

Outline the criteria by which the law insists that certain claims against public, administrative agencies are pursued through the application for judicial review.

Identify the significant distinctions between the requirements for statutory review and those for judicial review in general.

Indicate the general legal criteria for *locus standi* in relation to judicial review.

What are the main effects of the Crown Proceedings Act in relation to the legal position of the Crown?

In the course of legal proceedings against the Crown what approach is the court likely to adopt where the Crown claims privilege for certain information?

Describe the various limits beyond which the Parliamentary Commissioner for Administration cannot pursue an investigation of maladministration.

In the case of the Parliamentary Commissioner for Administration's investigations, explain the significance of the complainant's alternative remedies and the fact that the merits of a discretionary decision cannot be questioned.

What are the main differences between the functions of the Parliamentary Commissioner for Administration, the Health Service Commissioners and the Local Commissioners for Administration?

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