CIRCULARS FROM CENTRAL GOVERNMENT DEPARTMENTS AND THEIR INTERPRETATION AND ENFORCEMENT BY ADMINISTRATIVE BODIES

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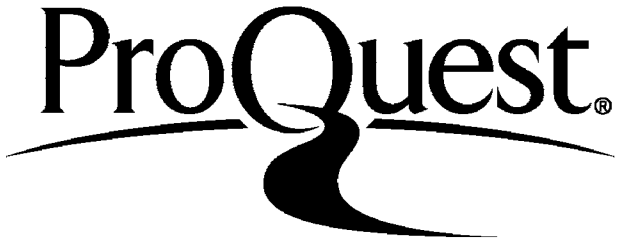

ABSTRACT

An examination of the formulation, interpretation and implementation of central government correspondence addressed in identical terms to a number of administrative bodies. Circulars are not required to conform to any legal standards regarding their form, content or publication and as a consequence have evolved unsystematically and haphazardly according to changing ideas about central-local relations, reflecting in a flexible manner the overridingly pragmatic style of the departments which issue them. Their initial role of guiding administrative practice while preserving local discretion has been supplemented by a more promotional national policy use. Certain post-war Acts gave important social services functions to local bodies but vested general supervisory duties in the appropriate Minister. Leaving these wide Ministerial responsibilities largely undefined paved the way for detailed policy intervention by the centre. Circulars began to introduce and enforce major policy changes throughout all local authorities. They have also been used to interpret or replace express statutory provisions, to elaborate legislative policy, to sub-delegate statutory powers and to lay down codes and procedures having legal effect. Although not deriving from statutory authority, these circulars must properly be regarded as law-making instruments forming a new third tier of legislation below Statutory Instruments. The legislative and judicial branches have lost effective control over these various policy and law-making functions performed by the executive. The constitutional dilemma is how to restore responsibility and democratic accountability without destroying the many practical advantages which circulars offer to central departments.

CONTENTS

INTRODUCTION

> "Circular Affecting or relating to a circle or number of persons; especially in circular letter 'a letter directed to several persons, who have the same interest in some common affair." (Oxford English Dictionary)

The subject of this study is correspondence from central government departments addressed in identical terms to a number of administrative bodies. Departmental circulars have assumed a wide variety of forms and been given a bewildering array of titles, including Ministerial Circular, circular letter, letter, advice note, practice note, code of guidance and administrative memorandum. This diversity of form and nomenclature is attributable to the absence of any statutory definition or recognition attaching to Ministerial communications. As a consequence they have not had to conform to strict legal requirements regarding their appearance or content and have evolved unsystematically and haphazardly.

The difficulty of establishing a convenient system of classification for administrative documents was considered in the Local Government Manpower Committee's Second Report which suggested:

> "a more constructive and logical pattern of documents for the future."

In relation to the Ministry of Education, they recommended that there should be four types - manuals of guidance, circulars, administrative memoranda and circular letters. Circulars should be reserved for:

> "announcements, often on matters of policy, and of major even though transient importance."

Circular letters, indicated the Committee, should be used:

> "where a particular matter does not appear to be suitable for inclusion

> in any of the official series of official pronouncements by the Ministry."

The lesser role envisaged for circular letters extended to their other suggested use. They should be:

> "kept for occasions, often annual, when a particular figure or item of information has to be communicated to each local education authority besides what is common to all."

Almost thirty years on, the editors of the Encyclopaedia of Housing, Law and Practice faced the problem of finding acceptable terminology for the correspondence sent to local authorities in March and May of 1979 which contained major statements of policy on the controversial issue of council house sales. Since the letters were not official circulars and had no reference numbers they were listed in the index under the separate heading of "Ministerial Communications". However, the "Ministerial Circular letters", as the Encyclopaedia described them, were included in the section of "Ministerial Circulars" and the separate sub-category of "Ministerial Communications" was not maintained outside the index. The March and May letters were sandwiched between the other official circulars in order of their issue.

Much interesting and highly significant material would be excluded from this study if it was limited to an examination of official circulars i.e. those which the central departments arbitarily choose to place in the official series. Instead, a wide definition of circular is adopted to include all types of central-local communication, from officially published instruments to more informal devices.

CHAPTER ONE CENTRAL DEPARTMENTS (1)

Part One Departmental and Ministerial circulars

Departments must have direct statutory authority to exercise legal control over local authorities:

> "central government departments have no legal control of the work of local authorities other than that directly conferred by statute. All formal control which the departments exercise must stem from a specific statutory provision." 1

When formal devices are non-existent, inadequate or inappropriate, non-statutory controls are used to exercise a more informal influence over local affairs. Circulars, in particular, have assumed increasing importance as a means of Ministerial intervention. Where does the statutory authority for such central guidance lie? The task of discovering the legitimate authority for this type of administrative activity is made more difficult by the failure of most circulars to state the precise powers under which they are issued. Although many circulars are resented locally as an unwarranted interference, the centre has often justified their use by stressing that it has an overall national responsibility. Ministers have periodically been given direct statutory duties to exercise supervision over particular public services run by local authorities and this gives them by implication the right to involve themselves generally in local government activity.

The scope for informal central involvement in local services was greatly expanded by a series of post-war Acts giving Ministers these general supervisory duties. Section 35 of the 1948 National Assistance Act requires local authorities to exercise their functions under the Act "including any discretion conferred on them thereunder" under the general guidance of the Secretary of State. Section 42 of the

1948 Children Act states that local authorities shall exercise their functions "under the general guidance and control" of the Home Secretary. The first section of the 1944 Education Act imposed a duty on the Minister for Education:

> "to promote the education of the people of England and Wales... and to secure 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."

More recently, section 7 of the 1970 Local Authority Social Services Act provides that:

> "Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State."

It is unlikely that specific authority is required for general Ministerial guidance in circulars since overview functions have been freely exercised without legal challenge in areas not covered by express statutory provisions. The practice established by the post-war legislation has been followed even where no duty was laid on the Minister to supervise the carrying out of local powers and duties. One of the main purposes of the legislation was simply to acknowledge the growing tendency for Ministers to interest themselves in the work of local authorities, a development which reflected the centre's new determination to control the exercise of local policy discretion. It is now common practice for every central department to be involved in all branches of local government affairs, however remotely connected with its work. Circulars were well suited for fulfilling this supervisory role and assumed greater significance as formal controls became an increasingly inadequate means of exercising the extensive detailed influence over local policy and administration which the departments believed was needed.

The development of circulars, then, has not been inhibited by statutory limitations and their adaptable nature has suited the pragmatic style of government departments. Because circulars easily accommodate change variations in their use have reflected prevailing political philosophies and changing ideas about what principles should govern central-local relations. The following section first traces the C19th origins and subsequent growth of central advice and guidance. From this long tradition of national responsibility for securing efficient local administration and uniform standards of service evolved the "departmental" circular. Over many years and changes in political control such circulars consistently reflect the department's characteristic long-term approach to the administration of its services. This departmental policy exists independently alongside temporary party policy and usually survives changes of government. For example, there are continuities in the management of education which persist throughout social and political changes. The origins of the other type of administrative circular, what may be termed the "Ministerial" circular, are then examined. While departmental circulars are generally managed by the permanent officials, Ministerial circulars are in the politician's domain. The post-war legislation not only consolidated departmental supervision, but strengthened central policy control by charging Ministers to make national policy and issue guidance accordingly. Armed with mandated party policies they have intervened in all areas of local government and sought to impose national policy at this level. The use of circulars for this purpose has not replaced but supplemented their original role.

Departmental circulars

The principle of having active central supervision of local administration originated in the early

1840 s with the enactment of the Poor Law. The nature of the subsequent development of circulars was a direct consequence of the philosophical approach of Chadwick's legislation. The writings of John Stuart Mill, in particular, had a profound impact:

> "there are many (local duties) which might with equal propriety be termed national, being the share, belonging to the locality, of some branch of the public administration in the efficiency of which the whole nation is alike interested...(they) should be placed under central superintendance...The principle business of the central authority should be to give instruction, of the local authority to apply it. Power may be localized, but knowledge, to be most useful, must be centralized; there must be somewhere a focus at which all the scattered rays are collected, that the broken and coloured lights which exist elsewhere may find what is necessary to complete and purify them." 2

The ideas of Jeremy Bentham also found support and were reflected in the Poor Law. He believed that central Parliament and its organ, the Ministry, should always preserve a supervisory control over local administration and that there is no province or function of public administration in which the central government in its administrative as well as legislative capacity is not entitled to interfere.

Combining central supervision with local administration, the Poor Law allowed the centre to lay down uniform procedures in firmly established guidelines and to provide national standards for the administration of relief. Advice would "guide and control" local authorities in the performance of their duties, words echoed in section 1 of the 1944 Education Act. By introducing this principle of central administrative control the legislation was the genesis of a particular style of intervention which went far beyond the limited concern that local authorities conformed to the strict letter of the law.

The Poor Law legitimated national involvement in local administration and central efforts to secure minimum standards of performance by local authorities, thereby establishing the conceptual and philosophical framework within which circulars came to be operated. The foundations were built upon by a series of social welfare Acts over the next forty years which consolidated the principle of central departmental superintendance.

The public health reformers wanted central supervision with administrative execution at the local level:

> "The part of central control is to provide indispensable preliminaries, to suggest useful methods, to check manifold abuses, but to leave the execution and detail of the requisite proceedings to local agency and effort." 3

The Royal Sanitary Commission was created by the 1848 Public Health Act and gave local agencies information and guidance, advising particular courses of action when they neglected their duties. Bentham's principle that central government must preserve ultimate control found full expression in 1871 with the formation of the Local Government Board, a well-equipped government department which operated as the central administrative authority for the supervision and control of all local activity.

The social welfare legislation of the second half of the C19th demanded a new approach from central government towards its administration. The traditional laissez faire attitude prevalent in the early part of the century lost support when it became apparent that the reforming legislation would ultimately be unsuccessful unless there was a strong central impetus to encourage local authorities not only to meet the minimum statutory requirements but to go beyond them. It would clearly be inadequate for the government to abdicate responsibility for

enforcement once the legislation was passed and to rely solely on the due process of law. Promoting national standards meant developing a system of central control and the civil service grew in response to the emergence of the welfare legislation. Initially central intervention was justified on the basis that it was essential to ensure that Acts of Parliament were being implemented correctly. The extent to which such control could be allowed to go was limited by traditionalists who opposed the new legislation on the grounds that it threatened local autonomy. Gradually the concern that there should be consistent standards of local service throughout the country overrode these objections and securing uniform administration was seen as a means of achieving a minimum level of national standards.

Increased departmental control over local administration during this century was partly made possible by a change in the nature of relevant legislation. In early Acts a local authority was:

> "empowered ("may") or directed ("shall") to provide a particular service. The later pattern of legislation directs it to prepare and submit to the appropriate Minister a scheme of arrangements for making the service available and empowers the Minister to accept, modify or reject the scheme as he thinks fit." 4

The series of post-war Acts were designed to achieve greater uniformity and local authorities were expected to adopt a subordinate position to central government. The 1970 Local Authority Social Services Act provides a recent illustration of the national government's determination to secure equality of provision. Local arrangements to help certain disadvantaged groups had developed in a piecemeal and inconsistent fashion. The Act insisted upon minimum standards of efficiency.

Like many of its predecessors the Social Services Act also recognised that there had to be a greater central interest in advocating national policies throughout all local authorities. This brings us to Ministerial circulars which are more obviously concerned with questions of policy. Seeking to achieve basic uniform standards and working towards national policies may be overlapping goals. Clearly, no easy distinction can be made between policy and administration in circulars. This point will be returned to subsequently.

Ministerial circulars

The reports of the Local Government Manpower Committee in the early 1950 s marked a new approach to central-local relations. Less emphasis was placed on central administrative control and more on Ministerial responsibility. The Committee acknowledged that local authorities are not agents of government departments and are competent to discharge their own management functions. However, it stressed the importance of local agencies as the bodies through which government policy is fulfilled and asserted the legitimacy of concentrated Ministerial control in key areas of local activity where responsibilities for national policy could be discharged. Circulars were to form an important part of the new strategy and the Committee envisaged a fresh role for them, actively encouraging their use as instruments of policy. Circulars should state the government's policy requirements and contain:

> "Broad central guidance...indicating what the Government wants the local authorities to do...(The objective should be to) leave as much as possible of the detailed management of schemes or services to the local authority and to concentrate the Department's control at the key points where it can most effectively discharge its

> responsibilities for Government policy and financial administration...There is a broad dis tinction in principle between departmental responsibility for policy and departmental supervision over the technical aspects of scheme. The one admittedly shades into the other, and it may not always be easy to apply the distinction in practice. The Department has an undoubted responsibility to ensure that Government policy is carried out, and the degree of control which it must retain to enable it to discharge this responsibility represents an irreducible minimum beyond which relaxation cannot go. If, however, the policy and technical requirements of the Government are clearly indicated in advance by the issue of circulars or manuals... there should be considerable scope for reducing or eliminating supervision on the technical side." 5

Ministerial circulars have been used to promote the short-term party policy of the government and are broadly distinguishable from departmental circulars which are the products of long-term administrative strategies developed largely by the permanent civil servants. The growth of Ministerial circulars was encouraged by a number of factors, only briefly mentioned at this stage. First, the post-war legislation which imposed duties on individual Ministers to formulate and execute national policy and sanctioned the use of circulars to introduce party policies. Secondly, the conferment of wide discretionary powers on Ministers in acquiescent legislation which enabled these policies to be developed by administrative means without having to resort to further Parliamentary legislation. Thirdly, the increasingly promotional approach of the centre which came to be identified with particular Ministers. Finally, the pragmatic style of government departments. Ministers often chose to use cirulars because they were the most expedient device for stating, communicating and implementing policy.

Policy and administration

Burton and Drewry have divided legislation into two categories 6. These are policy bills which state new policy and administration bills which deal with the implementation of existing policies. Such a scheme has not been used to classify circulars because the overlap between policy and administration is more pronounced in this area. Instead, administrative circulars have been termed either Ministerial or departmental. The term policy is too imprecise to identify a particular class of circular. J.A.G. Griffith considered it impossible to define policy with any degree of accuracy because:

> "it is used to mark the general from the more particular and because the line, which flows from a decision of some generality to the smallest, least important, action taken as a consequence of it, is continuous and unbroken." 7

Policy in circulars cannot be separated from circulars making administrative arrangements since all policy has administrative implications and all administration contains an element of policy. Circulars can simultaneously be instruments of policy declaration and policy implementation.

Griffith rejected the classification of central departments as policy makers and local authorities as administrators, preferring to describe the entire relationship as administrative:

> "because it concerns the execution of policy. And if the distinction could be made that the central departments make the policies while the local authorities put them into effect, the relationship would be more simple. But that distinction will not hold, first, because on any use of the word policy other than the most exalted, local authorities both make policies for themselves and have a considerable hand in influencing the policies

> made by the departments, and secondly, because the departments involve themselves often and sometimes very closely in the administrative process." 8

It would be similarly misleading to suggest that within central departments the politicians are only concerned with the policy aspects of circulars while the civil servants solely handle matters of administration. The two officials from the Department of the Environment commented that as administration is never completely divorced from the political issue, administrative processes cannot be distinguished from political processes. There is no strict division of function between politician and official. A mutual involvement is both essential and inevitable.

The civil servant's responsibilities include giving policy advice to the Minister. This active policy role is most evident in the Department of Education and Science whose:

> "permanent staff has in recent years become increasingly equipped, through the departmental planning organisation, to undertake systematic thinking about national policy objectives and their resource implications, and to identify longer term issues that may require policy decisions by Ministers." 9

Once policy is settled officials continue to perform policy making functions in addition to their administrative duties. M.J.C. Vile wrote:

> "The most extreme theorists of the policy-administration dichotomy suggest that the civil servant merely exercises a technical skill which is directed towards the execution of rules laid down for him by the political branches of the government. They think in terms of an 'administrative function'. But in fact civil servants, without any intention of abusing their powers, inevitably make rules, interpret them and apply them...statutes or other policy decisions can never present a rigid plan to be followed exactly by civil servants, who must be allowed a

> certain discretion in the administration of government programmes." 10

According to C.K. Allen, the administrator may become not only the strategist but the actual tactician of policy 11.

The overlap of policy and administration is most noticeable during the drafting of circulars. This is an unstructured and unsystematic process with no clear division of functions. Each circular receives different treatment depending on the particular individuals and relationships involved within the department. Party political circulars are likely to bear the characteristic style of the issuing Minister. For example, the series of promotional circulars on comprehensive education are clearly recognisable as the work of individual politicians. It is common for an incoming Minister, pledged to carry out certain policies, to exert a great influence initially. Ministerial and departmental interests are not always identical. The new Minister may attempt to interfere with what the permanent officials have been trying to achieve for many years in areas where previous administrations showed little interest and offered no political resistance. A number of local government officers said that it was not hard to identify those circulars which were the products of incoming and sometimes naive Ministers. As the dust of the election settles and political interest lessens, the civil servants gradually regain control and most circulars return to their more familiar format, reflecting departmental strategies rather than Ministerial policies.

The pressure on Ministers' time is such that much work has to be allocated to civil servants. This delegation of responsibility is formally recognised by the signature of the Permanent Secretary with the words "issued under the authority of the Secretary of State" on circulars. The DoE officials,

however, emphasized that though a Minister may leave this work to others, policy initiation rests with him and he will take a close interest in those circulars dealing with important political issues of concern to Parliament. Ministerial briefs on what such circulars should contain are often very detailed, including lengthy policy statements to be inserted by the civil servants. In contrast, the permanent officials are given considerable discretion with regard to the drafting and issuing of departmental circulars which do not contain party policy.

Part Two The pragmatic style of government departments

When describing central-local relations J.A.G. Griffith has wisely avoided making sweeping generalisations about central departments. Created in response to new needs, they have evolved in quite different ways to meet changing social conditions. As each department develops it acquires its own unique philosophy about local government. The three separate departmental philosophies identified by Griffith - laissez faire, regulatory and promotional - are only broadly distinguishable.

Since circulars are the products of government departments they have varied greatly in form and content, reflecting the unique styles of the issuing bodies. This lack of standardisation is one of their most characteristic features and makes generalising about circulars a hazardous exercise, for much the same reasons as Griffith discovered in the context of the departments. The imprecise non-legal nature of circulars has helped to multiply still further their variety of forms. The absence of any express statutory recognition or definition has meant that they have not had to conform to any legal requirements. Circulars can evolve unsystematically without statutory restraint. Their consequent flexibility

makes them an extremely effective means of government control and influence since they can easily be adapted to deal with all manner of problems and new situations as these arise.

Circulars offer several advantages over more formal statutory devices, all stemming from their flexibility which suits the pragmatic style of government departments. The non-legal nature of circulars allowed them to evolve outside the existing constitutional framework of controls, by-passing the scrutiny of Parliament and the courts. Created and developed out of expediency and practical convenience in place of traditional procedures, circulars have largely escaped the rigours of Parliamentary and judicial supervision associated with other forms of central control. Their importance has increased as other means of carrying out policy, notably Acts and Statutory Instruments, have become inadequate or inconvenient. Circulars have come to be used as a means of introducing and developing national policies independently of Parliamentary legislation. Within the one instrument the entire range of government pressure can be exerted, from information and advice to legal direction. Circulars can bridge the gap between policy formulation and its implementation. By stating policy and informing administrative bodies how it can be implemented they provide an alternative self-contained system of government policy making and policy execution. Local authorities rely heavily on circulars as working documents and they are one of the most useful forms of communication on a practical daily level presently available to central departments.

Throughout the subsequent more detailed examination of these points, considerable emphasis is placed on the crucial importance of pragmatism and expediency on the development of circulars. Their growth is

paralleled with the rise of delegated legislation in the early part of this century. The similarity of their origins suggests that departments periodically need to develop new and more efficient ways to govern. The use of informal circular letters in place of official circulars provides a recent illustration of this tendency. Having considered the general advantages of circulars to pragmatic departments, the examination then focusses on the nature of the central-local relationship in which circulars operate to discover their particular qualities in this specific context. This explains why they have proved invaluable to the central departments and why they have been so heavily used, frequently being preferred over Parliamentary legislation.

The aftermath of the Donoughmore Committee

A principal objection to circulars is that Parliamentary and judicial control is inadequate. In the 1920's delegated legislation had attracted similar criticism and concern over its use culminated in Lord Hewart's passionate outcry against what he regarded as the despotic power of the administration. There is an historical parallel between the growth of subordinate legislation, a second level of legislation, and the present rise of circulars, newly emerged as a third tier. Both these developments arose from the departments' need to devise more flexible systems of government beyond the straightjacket of traditional controls:

> "The strict rules of statutory interpretation have led to much of administrative procedure being embodied in administrative rather than statutory provisions." 12

On each occasion Parliament and the courts have sought to re-establish their control and influence. When the disorder surrounding delegated legislation was disentangled by the Committee on Ministers Powers and the

subsequent 1946 Statutory Instruments Act, the scope for departmental discretion in this area was considerably reduced 13. New forms of influence were pursued. Circulars, in particular, began to take on a number of fresh roles since they suited the non-judicial administrative style of government departments. Constitutional arguments from the Donoughmore era were borrowed to justify the imposition of restraints on their use. In some areas the effectiveness of these curbs has forced the executive to retreat still further and use even more informal procedures than official circulars, such as photocopied letters, to continue operating at the same level of practical government.

Practical expediency crucially influences the nature of executive action. The most easily available and convenient procedures will always tend to be employed. The boundaries of executive activity are consequently set by political and practical considerations rather than constitutional principles and departmental action is characterised not by notions of uniformity and precedent but by a haphazard pragmatic approach. One constant factor is the continual search for new forms of efficient government. Previous methods have to be abandoned if they become too formal, too inflexible or otherwise subject to controls which make them less effective.

Circulars have flourished as a result of the great importance attached to informal rules and procedures. In a comparative study D.R. Steel concluded that:

> "The consensual nature of British society and the gradual evolution of its institutions have led to greater reliance on informal rules and procedures than in most other countries." 14

Although the particular historical context in which

circulars have developed has been especially conducive to informality, it is a characteristic of every political system that informal procedures are an essential and vital part of the administrative process. In 1941 the United States Attorney-General's Committee on Administration reported that:

> "informal administrative procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."

Whenever possible relations between administrative bodies are conducted informally rather than on an official legalistic basis.

Over the last fifty years government departments have not shown any reluctance to retreat into using more informal procedures following the rationalisation and formalisation of previously used methods. In the early part of the century a mass of rules and regulations assuming various forms grew up on an ad hoc basis to meet government needs, leading Lord Hewart to attack this "new despotism" as:

> "a persistent and well-contrived system, intending to produce, and in practice producing, a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts." 15

His "creed of the ardent bureaucrat" described the executive's overridingly pragmatic attitude. Civil servants regarded Parliamentary Sovereignty and the Rule of Law as extraneous to the main governing purpose of the executive and were seen as obstacles to be overcome rather than fundamental doctrines to which all action must conform.

A number of general criticisms of subordinate legislation emerged from Lord Hewart's book. These were the absence of publicity, the lack of Parliamentary and judicial control and the threat of a

civil service exercising legislative and judicial powers. Similar criticisms of constitutional subversion are presently being levelled at circulars. This historical comparison suggests that when institutions and procedures evolve along pragmatic lines the same fundamental constitutional dilemmas will unavoidably arise. The Donoughmore Committee found that the defects of delegated legislation:

> "are the inevitable consequence of its haphazard evolution."

Constituted in response to public concern aroused by the attacks of Hewart and others on subordinate legislation, the Committee criticised the scope of powers exercised by officials. It recommended that limits on administrative discretion need to be stated to prevent them overstepping their duties. The Report concluded that the defects of delegated legislation were a consequence of the surrounding muddle and confusion. The system lacked coherence and uniformity in its operation. It was misleading to interpret legal authority indiscriminately as rules, regulations and orders. The Committee proposed that the terminology be standardised so that it could be clearly understood by all concerned. Rules and other forms of legislation needed to be drafted skilfully to avoid obscurity. The long-awaited result of the Donoughmore Committee's work was the 1946 Statutory Instruments Act which introduced a formal system of Parliamentary control and publication. The haphazard element of subordinate legislation was remedied and the doctrine of Parliamentary Sovereignty apparently strengthened.

Following this increase of control over rules and regulations, the executive made greater use of circulars since they were not required to undergo any Parliamentary procedure and did not have to be published. In the late 1940's the contents of certain circulars were held by the courts to constitute dele-

gated legislation. It emerged that they were being used in circumstances where prior to the 1946 Act regulations would have been made. Circulars had been substituted in place of Statutory Instruments as a means of changing the law. This law-making aspect is examined more closely in a subsequent section.

Due to renewed outside interest circulars used to introduce major policies are becoming too formalised to suit government needs. The decision of the newly elected Conservative administration in 1979 to reduce drastically the number of circulars issued was officially stated to be based on their declared policy of reducing central control of local government:

> "we are determined to reduce substantially the number of bureaucratic controls by central Government Departments over local government activities...we shall send out many fewer Government circulars and those other documents with which local authorities have been deluged. In addition, the Government have already decided that in future any circular sent out by the central Government will first be cleared by the Treasury and the Department of the Environment and it will carry out an estimate of both the manpower and financial implications for the local authorities concerned. They will give them more choice and flexibility and enable them to save money and manpower." 16

However, it appears that the government is intent on preserving the same level of central control in areas of major public policy:

> "there are certain national policies which it is the Government's duty to pursue even though they may be administered locally; for example ...where the Government of the day may have secured a particular mandate at a general election."

This wish to retain central control is also clear from the Secretary of State's response to the local

authority associations' Review of Central Government Controls over Local Authorities, published in February 1979:

> "the objective of the Government ...will be to develop further the central partnership between central and local government in a way that gives local authorities the fullest measure of autonomy consistent with the central government's responsibility for the control of public expenditure, and determining national policies and priorities, and with the special responsibilities of Ministers in relation to particular services." 17

Faced with increasing political and constitutional criticism about government by circular, recent administrations have set about devising still more informal procedures for maintaining central control. These are less well-known and consequently presently less controversial. One such development is the use of letters in circumstances where previously an official circular would have been issued. In the politically contentious and sensitive area of the sale of local authority housing, the new Conservative central administration followed the example set by the outgoing Labour government and distributed the general consent and appropriate advice by means of a letter. A further example of the recent use of this form of correspondence concerns heart transplants. Amidst a resurgence of these operations during 1980, the Department of Health's Chief Medical Officer informed regional and area medical officers that the department was giving further consideration to the issue of priorities and finance involved in cardiac transplants:

> "Until the advice is available, authorities are not expected to make any policy change in the direction of further heart transplant programmes."

The letter reminded surgeons of guidelines laid down

by the heart transplant advisory panel that transplants should be part of a planned programme.

Another significant development is the narrowing of links between central government and the various local authority associations. Instead of issuing circulars directly to individual authorities, the departments are improving communications and relations with the associations and informing them of the desired political and administrative changes. The associations are relied upon to send out their own circulars and inform local authorities of departmental policy in this indirect way. For example, the Department of the Environment wrote a letter to the Association of Metropolitan Authorities in October 1979 containing guidance on procedures relating to immigration offences:

> "If an authority finds reason to believe that an immigration offence has been committed...they would no doubt wish to consider whether they should draw it to the attention of the Immigration Department of the police."

Central-local relations

Circulars operate in the context of a political system which is neither entirely unitary nor wholly federal. Both central and local government derive strength and independence from their democratic election. For many years critics had regarded the centre as the dominant body, slowly removing effective power from local government. In 1933 William Robson referred to the:

> "subordination of local autonomy to the dictates of central power which, if pursued, will be the virtual end of local government. The complete abdication by the local authorities of the right to think and act for themselves; their transformation into mere receptacles for Government policy". 18

More recently, writers have demonstrated that local government has preserved considerable power and autonomy. The idea of two bodies operating on equal terms, acknowledging and respecting the strengths of the other in different areas, led J.A.G. Griffith to reject the conflict model of central and local government in constant competition and opposition. Instead, he described the relationship as one of partnership. In this section the relative strengths and weaknesses of central and local government are described. These reveal the importance of informality, flexibility, compromise and co-operation and help to explain why circulars in particular have become an essential ingredient of this partnership.

Most legislation and national policy originates in the departments. Central government is the focus of national political attention and all its activities directly or indirectly affect local affairs. The notion that the nationally elected party has a right to govern and carry out mandated national policies places considerable moral pressure on local authorities to respond to central influence. Authorities look to the national government for policy initiative and depend on Whitehall for direction and support even when they are free to act.

However, the majority party in Parliament cannot expect its local parties to follow national policy automatically. Central and local mandates may not coincide and regional variations may call for policies which conflict with national objectives. Local councillors pride their independence and are frequently prepared to defy their Parliamentary party on major policy issues, especially if they believe it is the government that is going against party principle and policy. When the local ruling party is politically different, the national government may be completely unable to command local support for its

policies, a particular significant factor in light of the recent trend for the opposition to gain considerable local electoral success.

All local government activity must be based on legally conferred powers which can only be created by Parliamentary legislation. Since the legislature's output is effectively controlled by the executive, in theory central government merely delegates certain functions and retains ultimate control. In practice, however, the departments have lost control over much local authority activity. Responsibility for large areas of policy, including social services such as education and housing, has been irreversibly given to local authorities. These functions have become entrenched and ingrained in the fabric of local life. Although central government may initiate national policies, it is the local authorities which determine whether they are to be administered in practice and in what way. This control over policy implementation is a great source of power, providing wide scope for local discretion and manoevre. National government can only regulate the exercise of locally conferred legal powers and duties within general policy parameters. As Griffith has written:

> "Within the terms on which these powers are bestowed, local authorities are autonomous bodies, and a department which proposes to control the way in which or the extent to which local authorities exercise their powers, must be able to point to statutory provisions authorising this intervention." 19

Formal legal controls are limited in their usefulness. By imposing a duty central government can require local authorities to conform to a minimum standard. However, this standard is generally lower than the government would ideally like to achieve. Sanctions against evasion are often ineffective and

provided the letter of the law is complied with local authorities may still frustrate its spirit. Conferring discretionary powers is even more limited in scope. No positive action is required by law and giving authorities the opportunity to act does not guarantee that they will choose to use their powers. Finally, there are the general difficulties associated with applying legal sanctions. These problems usually encourage the departments to use non-legal administrative procedures. Seeking a legal remedy for what is invariably a political dispute is often regarded by both parties an impractical and inappropriate course.

Central and local government are mutually dependent and cannot act in isolation. Local government relies on the centre for finance and expert political and administrative guidance while central government depends on local authorities to carry out its policies at a local level and not to frustrate its national economic strategies. There must be consultation and co-operation. For these reasons an informal partnership operates, characterised by negotiation and persuasion rather than strict legal rules and formal procedures. This relationship cannot work effectively unless there is good communication. Circulars provide an informal system, allowing scope for flexibility and compromise. The government needs to consult with local authorities and persuade them not to block its policies. Circulars are ideal instruments for this purpose. The opportunities for informal communication they provide enable the department's policy to work its way imperceptibly into the practice of local authorities.

According to Mr. Enoch Powell, circulars beneficially foster a close working relationship between the Ministry and the local authority and offer many advantages over legislation:

"It would be an impossible situation if

> the nature of these conditions (for the sale of council houses) which are subject to changing circumstances, had to be defined in detail in regulations and had to be approved by both Houses. It is in the nature of administrative efficiency in all Measures such as this that the Minister should be able, in consultation with the local authorities, to give them guidance. If, whenever he gives them guidance, he has to frame it in the legal terms of regulations and obtain the assent of Parliament, then that guidance will be much more inflexible and much more rarely given. The circular-making practice of Ministers of Housing and Local Government is, in the experience of local government, a most valuable one. Its very informality enables the Minister to guide instead of direct." 20

The Minister, Mr. Harold Macmillan, also maintained that the practical difficulties of enacting and amending legislation were such that administrative convenience demanded that general consents be put into circulars:

> "there is a good deal to be said for the flexibility that can come from these circulars, which are capable, first, of being considered with those who have to operate them, which is quite a valuable practice, and, second, of being altered from time to time and not being made too rigid. The Parliamentary procedure of both Houses is a pretty heavy burden to impose, in addition to all the other work of Parliament, and tends to make an Order of this kind, once passed, more difficult to amend or change as experience may show to be desirable. Therefore, as a matter purely of administration, it would be better to leave it to be operated, just as important matters are operated, as between the Minister and the local authorities." 21

For government policy to be successful there needs to be a close link between its formulation and

implementation. Pressman and Wildavsky considered that the difficulties of administration must be made part of the initial policy process:

> "Implementation must not be conceived of as a process that takes place after and independent of the design of policy. Means and ends can be brought into somewhat closer correspondence only by making each partially dependent on the other." 22

J.J. Richardson and A.G. Jordan commented:

> "In other words, policies are more likely to succeed if at the policy design/formulation stage the problems likely to be encountered at the implementation stage are recognised and taken account of." 23

Circulars provide this necessary link between policy and administration by fusing policy formulation, policy communication and policy implementation. The central departments discovered that they were a means of achieving the unison of policy design and implementation which is one of the most important ingredients of policy success.

Policy making and policy execution cannot be satisfactorily combined using more formal legislative devices. Acts and Statutory Instruments do not usually contain clear statements of policy or provide sufficiently detailed administrative schemes for its practical implementation at a local level since they are primarily concerned with binding codes. Bare statements of policy unrelated to specific legal powers and duties have no place in Parliamentary legislation, being superfluous to the main purpose of changing the law. Attempts to incorporate such statements, such as putting them into the preamble or the first few sections of the statute, are discouraged by the difficulty of tailoring these statements to fit in with subsequent precise legal provisions.

Although the ultimate purpose of Parliamentary legislation is to bring about changes in policy,

circulars are more suited for declaring these policy aims. They can clearly set out latest government policy and explain how it can be carried out in terms of local administrative practice, taking into account existing procedures and financial circumstances. Acts and Statutory Instruments are used to lay down the boundaries of permissable action and deal with exceptional situations while circulars provide for the practical operation of the scheme within these limits by prescribing the administrative norms with which authorities are expected to conform. As the Local Government Manpower Committee reported:

> "There are wide fields of educational administration where variation of practice is permissable within broad lines of policy and should be indicated in manuals of guidance, circulars, etc., rather than by regulations." 24

An additional advantage of circulars over legislation is that their flexibility allows scope for experimentation:

> "Circulars frequently supplement and go further than the statutory provisions enabling the administration to experiment with new procedures without being confined within the straightjacket of statutory provisions and their literal enforcement." 25

Increasingly, Acts lay down bare duties and powers while the details about how these are to be performed are left for circulars and codes of practice. For example, the 1977 Housing (Homeless Persons) Act placed certain legal obligations on local housing authorities but gave them considerable discretion with regard to interpretation and implementation.

Provided there is an effective partnership and local co-operation, the department may not even seek formal statutory authority if it believes that existing non-legal procedures are adequate. The case of Jackson Stansfield and Sons v. Butterworth, concerning building undertaken by local authorities from

1945-54 on behalf of the Ministry of Works, gave an instance of this practice 26. There was no statutory authority enabling the department to delegate its functions or empowering local authorties to undertake the building work. Instead, the form of the licensing was prescribed in central circulars.

Part Three A third tier of legislation

We have seen that circulars complement Parliamentary legislation by explaining, consolidating and amplifying its policies. They guide local authorities through the mass of detail concerning their statutory powers and duties contained in Acts and Statutory Instruments, providing schemes of administration by which this legislation can be operated in practice. In addition to these supportive roles, circulars are used as an independent means of introducing and carrying out policy. This exclusive self-contained system operates entirely separately from legislation. Circulars have thus been used by pragmatic departments to perform policy and law making functions traditionally reserved for Parliamentary legislation. In this respect they represent a new third level of legislation.

Detailed examination of the specific policy making uses to which circulars have been put is contained elsewhere. Instead, the following section considers from the viewpoint of the central departments the arguments put forward to justify this particular legislative use. The reasons why circulars are often preferred over legislation have already been explored. The section examines how the growth and acceptance of party government legitimated and made possible this substitution of circulars in place of legislation. Continuing the overall theme of the chapter, this examination emphasizes the value of circulars to pragmatic departments. The section

provides a background to the chapter on Parliamentary scrutiny and control by offering a different perspective on the constitutional propriety of circulars and the proper role of the legislature. The subsequent section deals with their other legislative use, that of law making, particularly with regard to the unexpected and apparently unauthorised substitution of circulars in place of express statutory provisions but also in its more general aspect of supplementing and explaining existing Parliamentary legislation.

Policy

Control of policy making has gradually shifted from the legislature to the departments and Parliament has become only one of a number of instruments used by the executive to govern. Policies can be carried out without Parliamentary legislation or the legislature's approval. Burton and Drewry wrote that:

> "(Parliamentary legislation) is one important product of a continuous process of formulation and implementation - though it is not necessarily a final product, nor is it the only product, of policy...Nor are Acts of Parliament an essential part of the legislative process...a change of public policy concerning Commonwealth immigration gave rise to the Commonwealth Immigrants Acts of 1962 and 1968 - but an equally substantial change was introduced in 1965 by administrative measures published in the White Paper Immigration from the Commonwealth". 27

With decisions being reached and policies implemented by methods not requiring formal legislative action, the influence of Parliament, the traditional processor of policy, has declined. This development has been noted by J.J. Richardson:

> "many of the outputs of the political system do not take the form of formal legislation. Increasingly, modern governments make decisions that do not

> go through the normal legislative processes and are not subject to effective legislative scrutiny and control." 28

Informal links with local authorities have been established and encouraged by a system of circulars, enabling important policy decisions to be introduced without resort to Parliamentary legislation.

Before looking at the factors which made this approach possible, we need to consider on what basis the ability to govern without invoking formal legislative processes or gaining Parliamentary approval can be defended. From the viewpoint of the departments, the ostensibly arbitary and undemocratic practice of party government instead of Parliamentary government is explained and justified by a "right to govern" conferred on the executive as a result of its democratic election. Having won national support for its policies, it is authorised to use all available means to implement these mandated policies and carry on the business of governing the country. This may include the use of circulars. In March 1978 the government persuaded the Building Societies Association to reduce the amount of funds available for house mortgages. This example of the operation of party government by influence and not by law indicates why opposed circulars still tend to be followed, even though only advisory in nature. The Association agreed to the government's proposals against their better judgment despite the fact that they lacked statutory backing:

> "angry as building society leaders are at the corner they find themselves in, there is little likelihood that they will rebel against the Government instructions. The more moderate among the council argue that the Government has the right to govern, no matter how misguided the societies may feel its conclusions to be." 29

The growth of party government necessitated the acquisition of wide powers to enable the central administration to act free of inhibiting constraints. This involved the transference of Parliament's traditional functions to the executive. The extent of present government control over legislative initiative and output is so great that legislation is properly described as a function of the administration:

> "The demand for social and economic reform which has characterised this century has given power to the Executive with a resulting loss by Parliament of its initiating functions." 30

Control over legislation has enabled successive governments to confer on themselves wide powers to develop central policies by such means as circulars.

Policy was traditionally contained in primary legislation and approved by the legislature. The highwater mark of Parliamentary Sovereignty in terms of its legislative authority occurred in the early C18th. Parliament had a monopoly in legislation and was so possessive of its powers and determined to preserve them that it would not pass general enabling legislation but only Acts having a specific limited application. Powers were heavily circumscribed to prevent arbitary action. Only when Parliament became more confident of its authority did it begin to delegate powers to the administration. Legislation took the place of the older method which had as Laski described:

> "regulated with a jealous precision each item of official activity." 31

Ironically, this relaxation marked the start of Parliament's legislative decline and loss of policy control. The growth in delegation gave wide policy making functions to Ministers. Skeletal or framework legislation provided only the barest outlines of schemes and contained no general statements of

policy to which legislative powers had to conform. Major policy was left to be determined by Ministers in the future and set out in circulars issued outside Parliament. Wide discretionary powers were conferred on Ministers in advance under major social welfare legislation. Consolidation and revision is a long and complicated task which can only be undertaken periodically. Since such legislation had to provide for future contingencies without becoming outdated, wide policy limits were set. Unrestrained by precise statutory provisions, successive Ministers could embark on contradictory courses of policy without abusing their powers and provoking legal challenge. The practice of legislating policy by circular in those many areas not requiring formal legislative action was thus made possible.

Law

Circulars seeking to explain and interpret Parliamentary legislation to authorities responsible for its implementation may contain misleading information concerning the legal effect of certain statutory provisions. Such circulars are heavily relied upon and consequently represent the effective law. They may offer differing advice about statutory purpose, placing administrators in the dilemma of whether they should adhere closely to the policy of the original legislation or follow alternative policy courses suggested subsequently. Departments may encourage authorities to apply additional conflicting non-statutory tests. Though possibly unauthorised and wrong in law, all such guidance must be treated as law making if widely adopted in practice. Similarly, circulars describing how Ministerial discretionary powers will be exercised have virtual legal force:

> "These announcements are not made with the formality of Statutory Instruments: they may be issued under statutes which confer no formal power of delegated

> legislation...in practice for a great many purposes these Departmental 'notes' are binding until the Department decides to change them." 32

The legislature has proved unable to regulate the law making aspects of many circulars. This has given rise to the criticism that government departments are using such circulars as a means of by-passing Parliament, turning them into a new uncontrolled third tier of legislation. In particular, concern that the legislature is being by-passed has been directed at those occasions where the departments have chosen to issue circulars instead of relying on an exclusively statutory system using instruments subject to Parliament's control. Aside from the constitutional legitimacy of this practice, there are doubts about whether it is legal for a delegated power to be exercised by circular where the statute provides that it is to be exercised by Statutory Instrument or whether an Instrument is valid if it exercises only part of the delegated power and purports to provide that the remainder is to be carried out by circular. Legislation by circular is often made possible by the failure of general enabling legislation to specify expressly the means by which delegated Ministerial powers are to be exercised.

A Special Report of the Joint Committee on Statutory Instruments has drawn attention to:

> "the recurring tendency of the Departments to seek to by-pass Parliament by omitting necessary detail from instruments (or alternatively by qualifying detailed provisions) and thus to confer wide discretion on the Minister to vary the provisions without making a further instrument." 33

Where primary legislation empowers the Minister to make regulations by means of Statutory Instrument, Parliament presumably intends such regulations to be made by this means alone. However, some Instruments are leaving gaps, allowing details to be filled in

by circular although the legislature may not have expected or authorised subordinate legislation to be made in this way. Departments have no power to make rules having the force of law unless Parliament has first delegated that power by statute. The Joint Committee has stressed that departments must not place in Statutory Instruments provisions amounting to sub-delegation to be exercised by non-statutory means where the parent statute does not so provide:

> "From time to time Your Committee have found that an instrument, instead of being complete in itself, contemplates and purports to authorise the issue of some further order and direction. In such a case they have endeavoured to ascertain whether this apparent extension of law-making is justified by the parent statute or is self-conferred."34

The question of legal validity revolves around whether Parliament has delegated the power to be exercised by circular or other means than Statutory Instrument. When departments substitute circulars for Instruments they expect them to perform identical functions and to have the same legal effect. However, terms contained in such circulars may not be legitimately made under statutory powers if the parent Act only allows the delegated legislative powers to be exercised by Statutory Instrument and does not authorise the use of circulars. In a Special Report the Joint Committee did not accept that departments should by-pass Parliament by employing instruments of delegation other than those intended by the legislature:

> "Your Committee remain unconvinced that, when Parliament by statute delegated to a Minister a power to legislate by statutory instrument, the delegation can or should be interpreted (in the absence of a specific provision to that effect in the statute) as authorising him to empower himself or other Ministers to make other ranges of instruments. They are not satisfied that a power to make consequential or incidental provisions by instrument can cover sub-delegation." 35

Where the Statutory Instrument refers to a circular already in existence, Parliament does have the opportunity to inspect the circular and discover what the law will be before approving the Order. Instruments which do not mention specific circulars or which refer to circulars to be issued in the future are more problematic since they enable the Minister to make changes in law and public policy outside the control of Parliament. The constitutional and legal problems associated with these types of circulars are illustrated by three examples.

The Seed Potato Regulations 1975

The first shows an instance of a Statutory Instrument conferring a wide discretion on a Minister to complete omitted details subsequently. The Joint Committee questioned the vires of an Order which allowed him to regulate the marketing of seed potatoes by an administrative scheme involving unpublished circulars, decisions and opinions.

Sub-paragraph 3 (b) of Part 1 of the Schedule provided that:

> "A certificate may be refused in respect of any such seed potatoes where an authorised officer is not satisfied in respect of any one of the following matters...the seed potatoes are or were grown and stored so as to minimise the risk of contamination by any disease or pest considered by the Minister to be harmful."

According to a departmental witness, the Minister would have a discretion to introduce new diseases "unknown at the present time". He was given power to legislate by direction or some decision of his own after the Order had been made. The Committee, however, doubted whether the Minister had legal power under the parent statute to produce a scheme which would be run entirely at his discretion.

The 1972 European Communities Act provided that seed regulations might:

> "make provision for regulating the marketing, or the importation, of seeds or any related actitivies (whether by reference to officially published lists of permitted varieties or otherwise)."

In the department's view, these words gave the Minister "a very wide discretion". Although "officially published lists" related to published lists in operation, "or otherwise" did not refer to documents already in use:

> "If there were to follow instead of 'or otherwise', 'or other document' then perhaps one would be on stronger ground in citing the eiusdem generis rule." 36

The Order did not refer to any known list but to circulars issued by the Minister to to decisions which the Minister might make. Parliament recognised that this would be the mode of operation, giving its approval and authorisation to this type of scheme by including the wide term "or otherwise" in the 1972 Act. The Joint Committee questioned whether "making provision for regulating the marketing etc. of seeds" enabled the Minister to do so in the manner adopted in the regulations and doubted whether he had legal power under the present statute to produce a scheme of this sort. The clause could be construed as requiring subsidiary rules to be set out in the seeds regulations themselves if not referred to in an officially published list i.e. "or otherwise" referred to the seeds regulations. The rules were subject to the requirement of publication or official announcement at least.

Part of the Order stated that the Minister:

> "may withhold an official label or official document or may withdraw an official label or official document already issued in respect of any lot or any part thereof where

he is satisfied that..."

The department's witness believed that the Minister would be able to say to a court "I am satisfied and that is an end to the dispute" provided he had full and detailed documents enabling him to be so satisfied. Without the ingredient of reasonablenss, the court would find it difficult to dispute a Ministerial decision. Because of the "ephemeral nature of the evidence" the department considered it inappropriate to confer a right of appeal to a tribunal. The absence of any system of internal appeal in the regulations, heavily criticised by the Committee, reflected the intention to create an independent administrative scheme which though initially sanctioned by the Instrument would subsequently develop outside statutory constraints. Parliament intended the scheme to be statutory, governed by rules either included in the regulations or published in official lists. However, the department envisaged an entirely administrative system operating beyond the supervision of Parliament and the courts under the complete control and discretion of the Minister through a system of unpublished circulars.

<u>The National Health Service (Transferred Appeals) Order 1975</u>

Article 5 (3) of this Statutory Instrument gave tribunals power to decide appeals against the conditions of staff transfers but gave no indication of the procedure to be followed. It failed to reproduce the provisions of an earlier Order that appeals would be determined:

> "in accordance with such arrangements as the Secretary of State may approve."

Consequently, the Minister was free to set out the procedure in whatever form he wished. The Joint Committee on Statutory Instruments considered whether the procedure should have been included in the Order

itself and whether it should have been legally binding. The department commented that:

> "The appendix of the Circular was headed 'Suggested Procedure' and we felt some difficulty in translating a suggested procedure into a firm cast-iron legally binding procedure." 37

The Committee believed that this could have been done by incorporating the terms of the procedure in the Order with the words "This shall be the procedure", if necessary adding the word "suggested" to make it voluntary. Alternatively, the Order could have referred to an outside circular by stating "The suggested procedure is that contained in the circular". Although only advisory in law, such a circular would have been legislative in effect. The Joint Committee was informed that tribunal chairmen would follow whatever procedure the department recommended they should adopt:

> "it was the understanding of all parties concerned that the procedure previously suggested and adopted by the Tribunals established by the Staff Commissions would, so far as practicable, be adopted by the Chairmen of the Tribunals set up under Article 3 (1) of this Order."

<u>The Remuneration of Teachers (Scotland) Amendment Order 1978</u>

This Order amended the 1976 Scottish Teachers Salaries Memorandum which, under the 1967 Remuneration of Teachers (Scotland) Act, set out the scales and other provisions required for determining the salaries of teachers. The Secretary of State for Scotland made the Order following recommendations of the Scottish Teachers Salaries Committee under the procedure laid down in section 2 of the parent Act. He amassed the original memorandum, considering it more convenient to make an

amending Order than a new draft memorandum. The 1967 Act authorised the Minister to prepare Orders setting out amendments to the scales and the provisions of the memorandum which, in his opinion, are needed to give effect to the recommendations of the Salaries Committee.

The Committee recommended that part of the Order be made by reference to their own circulars and the Secretary of State made a draft accordingly. Although he is not directed by statute to make an Order in the form suggested by the Salaries Committee, in practice he feels bound by its recommendations. The department's witness told the Joint Committee on Statutory Instruments that the Minister had a discretion whether to refer to the Salaries Committee's circulars or to set out the salaries in the Order. When drafting the amendments to the 1976 Memorandum the Secretary of State could either make a specific reference to documents outside the Order or set out in full the relevant provisions of any circular.

The 1978 Order failed to identify existing circulars and the Joint Committee believed that it could give legal authority to subsequent circulars. The Committee criticised this new development of Orders giving Ministers and various administrative bodies freedom to issue circulars in the future, the terms of which are unknown when Parliamentary approval is given:

> "Leaving circulars unspecified might make it possible for the Memorandum to be amended independently of Statutory Instruments by means of circulars issued from time to time by the Scottish Teachers Salaries Committee." 38

Article 6 of the Order contained a reference to unspecified "circulars issued by the Scottish Teachers Salaries Committee". The following clause provided

that no teacher shall proceed beyond a certain salary point unless he was entitled to a higher point during the salary year ending 31 July 1975 "or otherwise in accordance with the provisions of a circular issued by the Scottish Teachers Salaries Committee". Both sections allowed for legislation by future circular of the Salaries Committee outside Parliament.

When central departments choose to ignore an available statutory system operable by Statutory Instrument and adopt an alternative system involving circulars, there is usually no deliberate intention to derogate from Parliament's authority. Rather, their actions are governed by pragmatic considerations. In the first example we saw how the 1975 Seed Potato Regulations enabled a statutory scheme to be replaced by an administrative system at the discretion of the Minister. The department's justification for leaving him such wide discretion was that there needed to be flexibility to deal with future events:

> "It was said on behalf of the Department that the Minister would have discretion to introduce new diseases 'unknown at the present time' and that this discretion was intended to provide for the circumstances that other pests and diseases which are known in other parts of the world or which are as yet unknown may appear."

A non-statutory scheme was considered most convenient and efficient. The Select Committee on Statutory Instruments has recognised that it is this flexibility which commends the use of circulars:

> "Your Committee appreciate the administrative convenience of this type of devolution, they realise that there must be flexibility and that no more perhaps is contemplated than some document of an executive rather than a legislative character." 39

CHAPTER TWO CENTRAL DEPARTMENTS (2)

In this chapter the circular making practice of three departments will be examined. The Department of Education and Science, the Department of the Environment and the Home Office all oversee the local administration of services by issuing advice and guidance. A common feature of these departments has been their increasingly 'promotional' approach. The examples of specific circulars are chosen to illustrate this development. The chapter closes with a study of the use of circulars in the area of social security law.

Part One The Department of Education and Science

Circulars from the DES reflect the powerful nature of the department and its positive attitude to local authorities. J.A.G. Griffith considered the education department to be the clearest exponent of the 'promotional' approach and its activist policy stance dominates the permanent staff's work over and above their administrative functions. The department involves itself closely in all areas affecting national policy and expresses its policies more often and more clearly than most other central departments.

One feature of this active policy role is the department's extensive use of circulars which guarantees their prominence in matters of education. The department attaches great importance to circulars as a means of promoting national policy, flowing from its commitment to shape education policy at a local level. It strives to present its policies in the clearest form and DES circulars are the most systematic and ordered of all the central departments. Local education authorities are not overwhelmed by large numbers of trifling papers. Circulars are

reserved for general items and major policy statements while less important guidance and specialised information is put into administrative memoranda. The DES produces a regular series of circulars and memoranda, published collectively each year. Some policy branches have their own devices for communicating specialised policy statements and advice, for example the Further Education and Teachers' Branches issue 'circular letters' and 'college letters'.

The pre-eminence of circulars in the field of education results from the particular strengths and weaknesses of the central department derived from the 1944 Education Act. Section 1 encouraged the centre's promotional role by giving the Minister a national policy making responsibility. For the first time it was recognised that though locally administered the education service should be national in scope and aims and under the overall control of a central department. By charging the Minister to take the initiative in framing national policy the Act gave statutory authority to Ministerial policy guidance, advice usually contained in circulars addressed to local authorities.

Although the Education Act placed the department in a uniquely powerful position over local authorities compared with other departments some provisions were a source of weakness. The 1944 Act ensured that local authorities, first given total responsibility for education by the 1902 Balfour Act, continued to exercise wide powers. In a number of crucial areas, including the types of schools to be provided, responsibilities were given directly to local education authorities. The tenor of the Act is not to compel local authorities to act but to prevent them from acting unreasonably. Unable to force authorities to act

the department had to resort to using either indirect and cumbersome statutory devices or mere persuasion. In recent years the major educational issues have generally been outside the direct statutory control of the centre and circulars have been relied upon to state national policy objectives and guide local policy accordingly.

Comprehensive education

The decentralised system of education only works when there is a broad concensus about objectives and policies. The issue of comprehensive education provoked considerable political argument both nationally and locally, severely testing the partnership. The history of its introduction highlights the education department's strengths and weaknesses and the advantages and limitations of circulars. The majority of authorities followed the centre's lead in Circular 10/65, presenting schemes for the reorganisation of secondary education on comprehensive lines despite the political controversy and shortage of resources. The Ministry's impotence is shown by its inability to direct a reluctant minority of authorities to go comprehensive. Departmental efforts to influence the pattern of schools by circular were hindered by the absence of direct statutory powers of control, except where building resources were involved.

Anthony Crosland undoubtedly had statutory authority to issue Circular 10/65, namely section 1 of the 1944 Act. Originating at a local level the idea of comprehensive education had been taken up by the centre as national policy. A House of Commons motion had approved:

> "the efforts of local authorities to reorganise secondary education on comprehensive lines...the time is now ripe for a declaration of

national policy."

Circular 10/65 contained this declaration but could only use persuasion on local authorities since the Minister had no specific statutory power to require them to submit plans and go comprehensive. Although the 1944 Act expressly recognised the department's role in formulating national policies for education, it did not give the circular any compulsive authority.

The legal significance of section 1 is unclear. One possibility is that the powers of control and direction are those specifically given in a number of sections in the 1944 Act and that these general words do not in themselves give any direct supervisory authority. The subsequent sections only give the Minister limited powers to control local secondary education. The Act's failure to specify the type of schools in which secondary education is to be provided makes sections 68 (unreasonable exercise) and 99 (default) difficult to establish 1. Though not intended for this purpose section 13 has been used by the department to influence the pattern of secondary education with approval for new schools withheld because they were not organised on comprehensive lines rather than a dispute over their need. Apart from these sections the Minister had no direct statutory power to enforce the request in Circular 10/65 and since the circular was not written into law there were threats that its legality would be challenged. Faced with these difficulties the department officially embarked on a course of persuasion:

> "the Government are seeking the co-operation of local education authorities and those responsible for voluntary schools over a substantial period of time to work increasingly towards the application of national policy which they are starting." 2

Local authorities would retain policy discretion:

> "What we are proposing to do is to

> prepare a series of recommendations to local authorities being always in mind that for the moment at least, and I hope for a very long time, local authorities have the initiative in determining their own policy within very wide limits." 3

Despite its declaration to support local autonomy and not to rely on legal compulsion the department used all other available means to enforce its policy. Circular 10/66 made it clear that no funds would be forthcoming for projects not in accordance with a transition to a comprehensive system and capital loan sanction would only be available for secondary school building on comprehensive lines. A question in the House of Lords before Circular 10/65 was issued concerned the paradoxical situation of a government determined to reorganise secondary education without acquiring direct statutory powers 4. The Minister said that a statement would be published of the principles which local education authorities would be expected to follow when implementing the comprehensive policy but did not reveal government plans if local authorities refused to act. Lord Newton commented:

> "are we not to assume that it is, in fact, a misleading statement to say categorically that the Government will reorganise secondary education on comprehensive lines, unless the Government are going to take powers to be in a position to do it?" 5

He concluded that the government should either acquire sufficient statutory powers to enforce its policies on local authorities or make it clear that its guidance was only advisory and that no retribution, such as withholding building funds, would be taken against unwilling authorities.

It was not until 1976 that the Secretary of State finally acquired statutory authority to require local education authorities to submit proposals within a

specified time 6. In 1965 several factors persuaded the government to carry out its comprehensive education policy by circular instead of gaining new statutory powers. A decision to issue a circular had been made at an early date and the Labour Party had no draft bill prepared 7. A further factor was the government's apparent determination to preserve local autonomy. When there is intense local disagreement with central policies political opposition is often supplemented by a declared higher concern for the protection of local democratic principles. In a pre-election press conference Mr. Heath said that Circular 10/66 arbitarily interfered with the power of local authorities to put forward their own favoured proposals. By using advisory rather than prescribing circulars the department hoped to give the impression that local discretion was being preserved and maintain good central-local relations. The possibility of legislation ultimately being brought against rebel authorities remained and the department expected this threat would encourage wavering authorities to go comprehensive.

While operating within the limitations of the circular system the department was nevertheless determined to make Circular 10/65 as authoritative and influential as possible. Despite their purely advisory status the requests were framed in such forceful tones that for several months some authorities were under the mistaken impression that they were required by law to submit plans. Paragraph 44 stated:

> "Plans should be submitted within one year of the date of this circular, although the Secretary of State may exceptionally agree an extension to this period in the case of any individual authority."

It appeared that authorities were under an obligation to submit plans. As the Minister had no power to require authorities to act imposing time limits was

in fact completely inappropriate. Whatever the intentions of the department, the circular was certainly designed to place authorities under a strong moral obligation to carry out the newly declared national policy.

During the drafting stages of Circular 10/65:

> "there was a lot of argument inside the Department about whether we should 'request' or 'require' local authorities to produce comprehensive plans. Reg Prentice wanted 'require', the Department wanted 'request'. My decision to go for 'request' was strongly influenced by my meetings with the AEC and my judgment of the general mood of the local authority world." 8

The Minister could not legally have required local authorities to submit plans. By raising the fallacious spectre of compulsion he placed pressure on them to co-operate. Many authorities were uncertain about the extent of the Minister's legal powers:

> "To judge from the uproar among those opposed to reorganisation - in the Commons, the Lords, and on hostile education committees - it seems to have been taken as mandatory. At least for a while. For all the goodwill the government or the department hoped to gain by choosing to take the reform slowly and by agreement by circular rather than via legislation - they might as well have introduced a bill in the first place. It was some time, however, before local authorities and opponents of reorganisation realised that Circular 10/65 had no real teeth." 9

A number of Parliamentary Questions contained the misconception that local authorities could be compelled by circular 10. Rather than dispelling the uncertainty and confusion surrounding the issue of compulsion the Minister deceived local authorities into following the centre's lead by issuing ambiguous, ostensibly obligatory circulars.

The history of comprehensive education after Circular 10/65 is marked by reversals of policy with successive changes of central administration. Circulars continued to be preferred over legislation. Within three days of becoming Secretary of State Mrs. Thatcher announced in Circular 10/70 that authorities would not be expected to submit plans for reorganisation but in 1974 the new Labour administration returned to the policy of Circular 10/65. The new Secretary explained that Circular 14/74 was a clear statement of national policy and he would use his full power to ensure co-operation, including control over building programmes. Further delay would not be tolerated and legislation would be proposed to gain compliance by local authorities if this proved necessary. This tougher approach reflected a lack of confidence in the advisory propagandist system of circulars which had ultimately failed to bring about a nationally uniform framework of comprehensive education. Initially it was hoped that by using circulars to introduce the comprehensive idea gradually it could be seen as a progressive development of previous departmental policy. Favoured because it was thought that slow changes at the local level would provoke less hostility and permit time for the education of the public, circulars were in the end found to be an ineffective means of policy implementation where disagreement was so fundamental that a concensus could never hope to be reached. This eventual realisation led to the abandonment of persuasion in circulars.

Corporal punishment

Eliminating corporal punishment in schools by advisory circular instead of legislation has proved to be a difficult task. Circular 1/68 sought to communicate the department's policy to the recipient local education authorities and to teachers:

> "Authorities and schools are asked to bring the statement (an answer to a Parliamentary Question) to the notice of all teachers. My own view is that the practice of corporal punishment should disappear from our schools, and I hope that the local education authorities etc. will all use their power and influence to achieve this end."

Nine years after Circular 1/68 was issued the Secretary of State was still being encouraged by the Labour Party executive to begin discussions with interested organisations about phasing corporal punishment out of secondary schools 11.

The Plowden Report

The following two examples of the increasingly promotional approach of the DES concern action taken in response to the Report of the Central Advisory Council for Education 12. Circular 11/67 announced a special building programme to benefit the underprivileged in areas of educational priority. The department made building resources available, exercising one of the few available powers under the 1944 Act to control the type of schools provided by local authorities. Circular 2/73, issued by a new Conservative administration determined to expand the nursery service, aimed to increase educational provision for the under 5 s. Superseding the restrictions of Circular 8/60 it gave detailed guidance on the nature and scale of this expansion.

School curriculum

Recently central guidance in circulars has entered areas where the department was once reluctant to intervene and its role was traditionally strictly limited. Maurice Kogan has noted the shift from:

> "a pluralistic, detached, even agnostic view...(the department is becoming) more directive and committed in its policies, as in the intention to

> assess educational performance and to establish guidance on a common curriculum through the Assessment of Performance Unit." 13

We have seen that the DES has no express statutory powers under the 1944 Education Act to control the types of schools provided by local authorities, having to resort to advisory circulars to introduce the comprehensive schools policy. The department is placed in a similar position in matters of curriculum for the Act gives local education authorities direct control over secular education. In the late 1970 s there was a growing public insistence that the department should become more directly involved. Lacking specific statutory authority it has had to fall back on the general overview provisions of the 1944 Act to justify its new involvement. According to a 1977 Consultative Document the centre has a general concern with all local activity under the various education statutes:

> "The national level: the Secretaries of State are responsible in law for the promotion of the education of the people of England and Wales. They need to know what is being done by the LEA s, and through them what is happening in the schools. They must draw attention to national needs if they believe the educational system is not adequately meeting them." 14

A year earlier a Select Committee had reported that if the Assessment of Performance Unit's findings gave concern the Secretary of State should not shirk his responsibilities for drawing attention to the facts and stimulating, or if necessary, strongly persuading appropriate action to be taken. The Green Paper accordingly proposed that a curriculum review be carried out by each local authority to establish:

> "whether parts of the curriculum should be protected because there are aims common to all schools and pupils at certain stages."

Lacking statutory powers of direction circulars

have been used to impress Ministerial policy on local authorities. Circular 14/77, Curriculum Review, contained a questionnaire about local curricular arrangements. The NUT asked its members not to participate, fearing that it could lead to central interference. Although authorities were under no obligation to answer the questions the Secretary of State requested their co-operation. Aware of local authority and union opposition to her intervention she repeatedly referred to its statutory basis. The information requested was essential to the execution of her duties under section 1 of the 1944 Education Act. She was exercising her statutory responsibility for ensuring the best education of all children:

> "There is a central government responsibility just as there is a local government and professional teacher responsibility." 15

The questionnaire was a fact-finding exercise to enable the government to play its part:

> "They had to ensure that there were enough trained teachers and that the pattern of subjects offered and the multi-racial nature of education matched the national need... (the government also) had to ensure that the Acts of Parliament regarding religious education were complied with." 16

Denying any attempt to take central control, Mrs. Williams asserted the DES' responsibility to be involved in curriculum policy since this was a matter of national concern. The circular was not an unwarranted intrusion in local affairs since the gathering of information regarding curricular arrangements:

> "are subjects of genuine concern to this House and my Department, and it is not illegitimate of us to draw our concern to the attention of education authorities." 17

Although the Secretary of State referred to her own "clear responsibility" for standards of attainment, the statutory authority for detailed central interference in local curricular matters is not certain.

Section 1 was originally intended to allow for general supervision of the broad structural framework but not the content of local authority education.

Circular 14/77 contained no indication of the likely consequences if authorities refused to answer the questions or the DES considered local curricular arrangements to be unsatisfactory. Although not statutorily empowered to compel local authorities to change their curricula the Secretary of State said in a forceful and threatening tone that she would "have a talk" with authorities revealing any gaps or shortcomings and might issue "guidance" on how the practice of local authorities could best fit national needs[18].

The particularly active promotional approach of the DES in matters of curriculum is further shown by Circular 2/76 on the 1975 Sex Discrimination Act. Its stated purpose was to:

> "draw to the attention of the local education authorities, and other bodies responsible for the provision of education, the new duties and obligations imposed by the Act and the consequent need to examine current practices and arrangements in the light of the Act."

Most of the circular is limited to this declared intent but paragraphs 8 and 9 on "Curriculum" concern policy matters unrelated to the Act's legal ambit. Instead of referring to statutory sections they draw attention to Education Survey 21. This contained a clear statement of principle of "general application":

> "Whatever differences that may continue to exist ought to be based on genuine choice, choice openly offered to all who reveal the necessary interest, ability and determination, and not based on traditional assumptions about the 'proper' spheres of interest of men and women."

Deprived of any statutory reference to the curriculum in the Act the centre sought to influence local activity by placing a disguised statement of its own policy

in the unexpected context of an explanatory circular purporting to be a solely factual description of the new law. The misleading impression that matters of curriculum were specifically covered by the Act was fostered by the use of language which implied there was some legal obligation:

> "Responsibility for evaluating curriculum to provide equal access to experience, information and guidance rests with local education authorities."

Educating the handicapped

The final example of the promotional use of circulars by the DES concerns the ascertainment of handicapped children. The 1944 Education Act requires local education authorities to ascertain which children need special treatment but does not prescribe in detail how this ascertainment is to be carried out. D.E. Regan observed that:

> "government guidance on ascertainment has usually been very generalised... Procedure has been left to the discretion of local education authorities ...In a field of flux and experimentation like ascertainment there is much to be said for this approach by government departments, setting out only broad principles and allowing local authorities to adapt them to local circumstances and wishes. Nevertheless, after some years, a consensus usually emerges as to what has proved most effective. At this point a government department can become more specific in its advice, promoting what informed opinion accepts is the best practice." 19

Circular 2/75 elaborated the statutory requirements and placed greater emphasis on certain aspects, such as the role of parents. While the 1944 Act contained certain safeguards for parents, including the right to attend medical examinations, it had been easy for local authorities to view them negatively. The circular adopted a positive approach by insisting

that parents be involved at all stages of ascertainment. The Act only specifies examination by a Medical Officer but the circular indicated that a sound ascertainment decision should be based on a psychological examination, an assessment of skills and development and a full diagnosis of disability. By explaining that whether a child needs special education is an educational issue the circular attempted to reduce the medical element in ascertainment to equality with other factors. The medical element was felt to have been given undue weight, because it was the only ingredient specifically required by law.

Part Two The Department of the Environment

Throughout most central government departments there has been a shift towards a more promotional approach. Within the Department of the Environment this movement has been most apparent, particularly in the area of housing. Increased interventionism has necessitated a break from its traditionally predominantly laissez faire role. In the past the centre was reluctant to expand its influence. The Ministry left it to local authorities to provide the initiative in housing policy and only exercised regulatory functions, in the belief that there should be local responsibility for this local service:

> "One of the most important functions of local government is housing. The Government believe that the accurate assessment of housing requirements and the provision of housing and housing advice to the individual is of such paramount importance that the service should be operated as close to the citizen as possible." 20

A number of factors have encouraged the department to support local autonomy. There is no statutory duty on the Secretary of State to ensure that the

community is better housed. Unlike the education Minister he has no overall statutory responsibility for national policy. Although local authorities are legally required to provide free elementary education for all there is no corresponding statutorily defined obligation in the field of housing. Successive statutes have placed many specific narrowly confined powers and duties on local housing authorities and these have given the centre little opportunity to influence local practice. The Minister has no wide statutory powers of supervision. There has been no departmental machinery to assess local housing need and no inherited tradition of central inspection. As a consequence the department has failed to ensure that local authorities are fulfilling their statutory obligations to consider local housing conditions and provide accommodation where it is needed. J.B. Cullingworth considered the Ministry's role in housing policy formulation to have been remarkably weak:

> "They may 'encourage' local authorities to build more houses, to attain higher standards, to concentrate on the needs of particular categories of need, to charge 'reasonable' rents and so on. The local authorities, however, may see their local problems differently, or may interpret such concepts as 'need' and 'reasonable' in their own way." 21

A growing demand for a stronger government lead in housing has coincided with the realisation that local authorities are unsuitable agents for housing policy:

> "(they) have endeavoured to achieve the minimum instead of the maximum, and there has been no outside authority to force them to do otherwise." 22

The "great British failure" was blamed on the lack of a consistent clear central policy and the department's inability to ensure that local authorities performed their statutory duties 23. Of the post-war Ministers

only Bevan made it clear that authorities were to act as they were instructed. Others were too ready to emphasize the freedom of local authorities and their independence from central control. In the early 1970 s the DoE, prompted by a series of housing crises, responded to these criticisms by becoming more interventionist and promotional. Despite the various statutory constraints it has begun to accept a national responsibility for directing local housing programmes and central housing policy is less obscure. The department has improved its research and information facilities to enable it to assess local need and establish whether local authorities are fulfilling their housing responsibilities. Peter Shore recently referred to his department's eagerness to create a closer relationship with local government in the area of housing strategies and investment programmes:

> "We have established a separate Housing Consultative Council to consider all major issues of joint concern to the Secretary of State for the Environment and local authorities in the carrying out of their housing responsibilities." 24

By what means has the DoE sought to exercise this greater influence over local housing policy? New housing legislation has been largely ineffective, giving the Minister only crude powers to guide individual local authorities towards particular policies. It has been shown that existing statutes do not give the Minister extensive influence over local activity since important powers and duties are vested directly in local authorities with little or no Ministerial control. The department has had to supplement inadequate formal controls with circulars to reassert its influence and promote its policies. The growth in the use of circulars throughout all central departments reflects a decrease in the overall effectiveness of their control. In particular, the once powerful financial sanction has suffered a decline:

> "(though) the Government have formal

> powers to approve borrowing by local authorities which provide an effective means of regulating capital expenditure within narrow limits...(they) have no similar powers over the level and distribution of local authority current expenditure, nor can they control the income raised through rates." 25

Circulars recommending policies are often accompanied by threats or incentives with a statutory basis. The DoE has frequently used financial controls to persuade local authorities to follow its policies. This link between advisory circulars and financial sanctions is illustrated by three examples concerning building proposals, grants for house improvement and caravan sites for gypsies. The last example also reveals the inadequacy of legislation as a means of dealing with local inaction arising from political opposition and the necessity to complement such legislation with policy guidance in circulars.

Building proposals

Circular 55/61 required all local authorities to submit a statement, for subsidy purposes, of the reasons for new buildings. If these fell into a recognisable policy category the proposals would be approved:

> "In considering building proposals the Minister will wish to be satisfied with the fact that proper regard is being paid to those priorities and that any dwellings an authority may wish to build for other purposes are required to meet a need which is truly urgent...The purpose for which the authority wish to build should be stated when submitting the application for loan sanction for the erection of the dwellings."

House improvement and repair

Opening with a general statement of government policy on improvement grants Circular 46/71 offered

local authorities a financial inducement to follow this policy:

> "It is hoped that the few remaining authorities which do not pay grants, or do so subject to certain restrictions...will review current practice bearing in mind the contribution that a stock of well modernised older housing can make to the amenity and attraction of their neighbourhood as well as to the well-being of those who live in them...The Secretary of State for the Environment regards further progress with the rehabilitation of older houses as having a high priority in helping to meet housing needs and to improve housing conditions...The decision to approve individual applications for improvement grants rests with the local authority. As, however, was indicated in the circular of 28 September it is of utmost importance that local authorities should exercise this discretion as freely as possible."

As a financial inducement the government contribution towards the cost of such grants would be paid in all instances where the local authority was satisfied that the statutory requirements for payment of a grant were met. The circular added that any restrictive advice in circulars relating to improvement grants issued before Circular 64/69 should be regarded as cancelled.

Caravan sites for gypsies

Circular 26/66 had exhorted local authorities to establish permanent sites for gypsies but this advice was widely ignored and in 1968 the Ministry decided to adopt a tougher strategy:

> "Since these other local authorities have been deaf to the Minister's appeals, the time has come when a duty must be placed upon them to provide sites of their own." 26

The Caravan Sites Act accordingly placed an obligation on all authorities to provide sites and the Minister had power to give directions, enforceable by mandamus. The centre, however, found itself helpless when

confronted with inaction and open defiance on the part of local authorities. Since no time limit was specified in the Act for complying with the duty authorities justified their delay by maintaining that they intended to fulfill their statutory obligations when financial and administrative circumstances permitted. The enforcement provisions were weak, a typical feature of legislation imposing duties on large independent administrative bodies. The Minister refused to undertake the difficult process of a mandamus action and attempts by individual gypsies failed as the courts held that the remedy was already available to the Minister. The authorities which had defied the advice of earlier circulars refused to fulfill their obligations under the new Act in the knowledge that in practice no legal action would be taken against them.

The 1968 Act proved so ineffectual that nine years later the DoE returned to the system of circulars to persuade local authorities to adopt a more enlightened policy towards accommodating gypsies. The department decided to tackle the widespread non-implementation of the Act with detailed circular advice on:

> "statutory procedures, alternate forms of gypsy accommodation and practical points about site provision and management."

Local authorities had continued to blame the financial crisis for their inaction and Circular 28/77 suggested advice on solving some gypsy problems at low cost:

> "It may be that the curtailment of indiscriminate action - costly to carry out and fruitless in effect - could release resources for the provision of emergency stopping places equipped to a minimum level of facilities."

Following the Cripps Report Circular 57/78 proposed practical inducements:

> "finance may not be the only reason

> for the lack of adequate action over the past decade (but the new grant system) should give local authorities a stronger incentive to deal urgently with local situations...The effect of all the changes now proposed, within the basic framework provided by the existing legislation, should, it is hoped, remove obstacles which have hitherto discouraged local authorities, and should provide them with a much needed incentive to attack the problems with renewed vigour and determination." 27

Fair rents and capital values

The promotional approach is characterised by an active departmental concern to supervise, assist and guide the work of local authorities. This includes the communication of research findings. The Note for Rent Officers and Scretaries of Rent Assessment Panels issued in 1979 shows how such information can be subtly presented to shape local policy along central lines 28. When the concept of fair rent was introduced in the 1965 Rent Act the Minister promised that capital values would not be the basis of registrations. The Note contravened this undertaking by instructing rent officers to apply capital value tests, relying on the refusal of the courts to intervene in administrative decisions when capital values have been applied 29. A new basis for registering rents was introduced which Parliament was led to believe would not be used.

The DoE had commissioned a survey of the relationship between fair rents and capital values of houses with vacant possession. Although this information was circulated to rent officers the department insisted that they were not bound to use the information or to apply it in any particular way. Much of the material distributed was not directly related to their work but the department thought it reasonable to release the information it had gathered and make it widely availa-

ble. However, the information was presented in such a way that it was an implied instruction to officers to adopt a new approach towards assessing rents. Only selected information was provided, designed to present a set of statistics upon which to justify significant rent increases in the private sector. The Note shows how a circular ostensibly communicating information can be used to paint an incomplete and distorted picture which appears to indicate that a new policy should be followed. The DoE's Statistical Notes have dealt with such matters as registered rents, local authority rents, prices of dwellings and costs of repair and maintenance. The independence of rent officers is threatened if they are influenced by politicised instructions from the centre, disguised in the form of these Notes.

The sale of local authority housing

The increased promotional role of the DoE has been most apparent in the area of council house sales. This section traces the use of official circulars, and more recently of letters, to promote the department's policies. Two strategies have been employed. Through manipulation of the statutory general consent the circumstances and conditions under which houses are sold have been relaxed and restricted to provide encouragement or dissuasion. In addition to this direct though largely negative means of control, circulars have contained advisory guidance. The typical pattern, then, has been an opening general statement of central policy towards sales backed by appropriate modifications in statutory powers. Significantly, central government has resisted using direct statutory control and relied mainly on persuasion. Labour administrations have been reluctant to withhold or modify general consents introduced by the Conservatives to carry out contradictory policies. Conservative governments have had

to depend considerably on exhorting local authorities to act since consents only give them discretionary powers, although one Secretary of State has sought to convince authorities that they have a legal obligation to sell their housing stock.

Pending the introduction of the statutory right to buy, the sale of council houses still operates on the basis of a system of circulars established in the 1950's when sales was regarded as a matter for individual local decision subject to general administrative oversight by the centre. At that time the issue was not particularly politically controversial and formal Parliamentary control involving Statutory Instruments was considered unnecessary. Since 1957 the system has gradually become outdated and unwieldy as successive governments have sought to remove sales from local discretion. The difficulty of this task, already considerable in the light of entrenched local political differences, has been heightened throughout by an unceasing suspiciousness about whether sales really is:

> "a question for central government or, indeed, for a national political party to decide what local authorities should or should not do." 30

Out of frustration central government has finally resorted to legislation.

Circular 64/52 referred to the "general policy to encourage home ownership" and issued a general consent to assist local authorities to offer facilities for the purchase of council houses. This was consolidated by Circular 5/60 which reaffirmed the Conservative Party's policy commitment and clarified the terms on which authorities could sell. The Minister placed pressure on the local bodies by reminding them of their general responsibility for meeting the housing needs of their areas:

> "one way in which they can effectively

> do this is by helping those of their tenants who have the necessary means to become home owners." 31

Despite Labour's return to office in 1964 there was no immediate amendment to the 1960 general consent. Three years later the government finally decided not to withdraw the general consent but to rely on reason and persuasion to dissuade local authorities from indiscriminate selling. Circular 24/67 contained lengthy guidance about the need for caution:

> "in areas where there is still an unsatisfied demand for houses to let at moderate rents, they should not sell their existing houses (since this) reduces the stock of houses at moderate rents."

The government appealed to authorities to consider local housing need and to adapt sales policies accordingly. The centre's concern to apply a consistent needs approach to local housing programmes was also evident in Circular 42/68 which limited sales in the major urban connurbations to ¼% of the total housing stock annually. This signalled a partial abandonment of the reasoned advisory approach and the placing of greater reliance on more legalistic means to carry out government policy.

Central policy was again reversed following the change of government. In Circular 54/70 the quota restrictions were withdrawn, the terms of the 1967 general consent restored and local authorities given:

> "The right to dispose of council houses to their own tenants or to prospective owner-occupiers as they themselves think fit."

Circular 56/72 reiterated government policy, expressed concern at the lack of response to Circular 54/70 and noted:

> "with regret that many authorities continue to adopt policies which frustrate their tenants' desire to own their home."

The tone of this circular was more forceful than the Conservatives' earlier restrained approach:

> "The Secretary of State accordingly urges all local authorities who are reluctant to sell council houses to those tenants who wish to buy them to reconsider their policies."

Instead of providing gentle reminders about meeting housing need Circular 56/72 warned that:

> "The housing duties of a local authority extend to the consideration of all the housing needs of their area. In the opinion of the Secretary of State these needs include those of the tenants of the authority who aspire to home ownership."

A Parliamentary statement repeated the government's view that local authorities had a duty to use their selling power to meet the desire of their tenants for home ownership:

> "If they do not, they will be failing to take proper account of their housing responsibilities."

Another change of national government in 1974 led to a repudiation of Conservative policy:

> "The Secretaries of State refute the views expressed in Circular 56/72 (Welsh Office Circular 124/72) that local authorities should sell their houses indiscriminately whatever the local housing situation. The first duty of a local authority is to ensure an adequate supply of rented dwellings. In areas where there are substantial needs to be met for rented dwellings, as in the large cities, the Secretaries of State consider that it is generally wrong to sell council houses."

The approach of Circular 70/74 marked a return to 1967. The joint circular did not change the general consent substantially but hoped to alter local policy through reasoned argument of the place of sales in overall housing programmes. Reasonable authorities only had to evaluate the local impact of their policies to realise that they must limit sales. This view was criticised for not taking into account

the dogmatic nature of many Conservative councils' sales policies. In 1977 a Green Paper restated the government's disapproval of sales:

> "where this would reduce the provision of rented accommodation where there is an unmet demand." 32

On March 5 1979 the Secretary of State announced in the House of Commons that he was acting to curb:

> "indiscriminate and irresponsible sales of council houses and the level of discounts that some authorities wish to offer." 33

On the same day Mr. Shore sent to the local authority associations draft amendments to the general consent stopping options to purchase, the sale of houses and flats newly built for letting and the sale of empty property available for reletting:

> "The amended consent will still enable local authorities to continue with responsible policies of making sales to sitting tenants of at least two years' standing." 34

One Member of Parliament commented that if the Labour Party was truly opposed to the sale of council houses in areas of housing need the general consent should be withdrawn entirely:

> "(its replacement) with a specific consent based on a proper analysis of the housing position in local authority areas and of their building programmes would be a sensible solution." 35

Central government is, however, ill-equipped to assess individual local housing need. Placing sales in the context of overall housing need was left to individual authorities:

> "the government expect local authorities to make a careful and responsible assessment of their local housing need before deciding whether and how many council houses to sell." 36

The March correspondence was quite different in format to any preceding circulars, consisting of three

separate documents with a covering letter bearing a date but no serial number. The letter was typed on standard DoE headed paper, photocopied and distributed to local authorities. The covering sheet was probably not originally intended to resemble a formal letter. The handwritten words "Dear Sir" were awkwardly inserted above the heading "Sales of Council Houses". The three documents consisted of an explanatory memorandum concerning amendments to the Ministerial consents and "Policy considerations" which would:

> "form the basis of a Departmental Circular which will be issued shortly to all local authorities in England."

This circular never emerged. Secondly, a formal "Instrument" containing the amendments to the general consent, dated and signed by authority of the Secretary of State. Thirdly, a document "prepared for ease of reference...not a statutory instrument" which incorporated the amendments to Appendix 1 of Circular 54/70 and excluded those parts which no longer applied.

May 1979 brought a new Conservative government pledged to repeal Peter Shore's restrictive consent. On May 11 a letter was sent to local authorities foreshadowing "more flexible and generous arrangements". The new consent was issued a week later. As in March the correspondence took the form of a photocopied letter. However, explanation of government policy and the new terms was not contained in a separate explanatory memorandum but formed part of the main body of the letter to which the new consent was also attached:

> "It is the Government's policy to encourage the growth of home ownership...The Government have already announced their intention to introduce legislation giving council tenants a right to buy their homes. Meanwhile, in order to provide local authorities with the opportunity to advance that policy, the

> Secretary of State has decided to revoke the restrictive consent as set out in the Instrument dated 16 March and to revert in general to the form of consent in force from 1970 to March 1979 but, at the same time, to enable authorities to grant more generous discounts, particularly to long standing tenants. The Secretary of State urges all authorities to review their sales policies in the light of the new consent so that tenants and those who require a home for their own exclusive use may benefit from the improved terms."

In the House Mr. Heseltine explained that local authorities had a moral obligation to sell:

> "The Commons will note that all of these terms are conditional on the willingness of local authorities to sell. I profoundly hope that they will all do so. The Government have a mandate for this policy. The people have expressed a clear view in support of it... Every Member of this House recognises that national government elected with a mandate has certain policy priorities with which local government must be expected to comply." 37

Peter Shore's hurriedly written March directive caused considerable confusion. The Guardian reported that:

> "lawyers were advising many councils to abandon a wide range of council house sales programmes - including homesteading and certain equity sharing schemes - although Mr. Peter Shore, the Secretary for the Environment, specifically said last night they were exempt from the ban." 38

Other authorities were apparently prepared to ignore the block on new council house sales. Horace Cutler, Leader of the Conservative controlled Greater London Council, commented:

> "The more Mr. Shore reacts against the GLC the more successful our Sale of

> the Century schemes will become. The fact is that we aren't going to take any notice until the law changes and that may be never given the present position of the Government." 39

The sale of local authority housing quickly became an important election issue, forming a major plank of the Conservative Party manifesto. Each side decided that Parliamentary legislation was needed to embody their position in a symbolic declaration of national policy and to remove the uncertainty surrounding the precise terms of Ministerial consents. Labour plans to introduce legislation banning sales were thwarted by their election defeat and the Conservatives instead proposed to give tenants a statutory right to buy. Their determination to enact legislation was strengthened by the nationwide swing to Labour in the local elections with many councils immediately reversing sales policies and exercising their legal right to ban sales. At the same time the government also faced a growing revolt over its plans to save the grammar schools. Only legislation, it was believed, unequivocably compelling Labour controlled councils to sell their housing stock could prevent them from frustrating national policy.

Part Three The Home Office

One of the Home Office's many functions relates to the administration of justice and circulars are most prominent in this area. The Home Secretary has a general interest in the form, content and administration of the criminal law and in practice is closely concerned with magistrates' courts:

> "as a natural consequence of the Home Secretary's responsibilities in relation to the criminal courts it has long been the practice for him to issue circular letters, particularly to magistrates' courts, supplying them with information about their work, for instance about new legislation." 40

According to J.A.G. Griffith the department's approach to its functions regarding children, aliens, civil defence and the fire services exemplifies the regulatory attitude, coming between laissez faire and the positive promotion of local activity. In relation to the administration of justice the centre has generally also been regulatory although it has been moving towards a more promotional approach, most evident in circulars explaining and supplementing Parliamentary legislation. Home Secretaries have been eager to promote their own policies, even when they do not coincide with those of the relevant statutes.

The Home Office adopted this promotional approach for practical as well as political reasons. Magistrates need immediate advice about how newly enacted law should be administered. Guidance from the High Court may not be forthcoming for many months and in the meantime the lower courts must have statutory terms explained to them. Circulars establish a form of substitute case law before principles come to be settled by the judiciary.

From the viewpoint of the department, legislation is a clumsy and imperfect tool for carrying out policy. As proposed legislation passes through its various Parliamentary stages amendments invariably obscure and distort the original intention. Creating individual statutory rights, an activity in which the Home Office is closely involved, is particularly difficult. Circulars issued subsequently give the department the opportunity to repair some of the damage inflicted during the process of enactment and offset what are considered to be deficiencies in the final legislation.

Home Office circulars commonly contain pronouncements about how magistrates' courts should exercise sentencing powers conferred on them by Parliament because Ministers believe that the bare statutory

words inadequately convey the underlying intention. Once these powers are given to justices they can use them as they consider appropriate, provided they operate within the legal limits imposed by Parliament and the higher courts. Magistrates are not bound to follow Ministerial circulars but they are recognised as a proper source of guidance. Though purely advisory, they do heavily influence sentenc ing practice, receiving considerable attention from the press and the various associations. Difficulties arise when Ministers wish to change sentencing policy and maintain either that powers must be exercised in a particular way when the legislation allows a much wider approach or that the statute authorises a greater sentencing discretion than it does in law.

Partially suspended sentences

At a Magistrates Association conference in 1977 the Minister of State at the Home Office described the new partially suspended prison sentence 41. Part of the prison sentence would be served immediately and part suspended. Mr. Brynmor John was concerned that partially suspended sentences might replace suspended prison sentences instead of unsuspended prison sentences:

> "I cannot say categorically that this cannot and will not happen. I can say that it ought not to happen. All the argument in favour of the partially suspended sentence has been on the basis that there are times when a court cannot persuade itself a suspended prison sentence would be an adequate punishment, but would be content, if there were a half-way house, to order suspension of part so that, having exercised the deterrent effect of a relatively short period in prison, the offender is released with the suspended portion of the sentence acting as a powerful incentive to keep out of further trouble."

There is, however, no parallel provision in the 1977 Criminal Law Act corresponding to that in the statute

on suspended sentences which provides that a suspended sentence shall not be passed unless the case appears to be one in which a sentence of imprisonment would be appropriate in the absence of any power to suspend. The Minister impressed on magistrates the importance of subjecting the use of the new power to a proviso having no statutory recognition, implying that if a court imposed a partially suspended prison sentence in cases where it would otherwise have imposed a suspended sentence it would be acting wrongly. The speech contained the assumption that magistrates must exercise their sentencing powers in accordance with advice from government Ministers and that the courts will do so more successfully if implicit sentencing policies are explained to them. This detailed policy intervention by the executive with the functions of the judiciary, through such informal means as departmental press releases, letters and circulars on Ministerial speeches, is particularly undesirable if it appears to run contrary to express statutory provisions.

Community service

Community service orders were advocated in Parliament on the basis that they would result in fewer prison sentences. Once enshrined in legislation, the Minister announced that they were intended to be used only when the court would otherwise have imposed a prison sentence. The statute does not impose this limitation and it was expressly considered and rejected by the Wootton Committee which introduced the concept of community service.

Legal aid

In some instances circulars are used by the Home Office not to restore but to override legislative policy. Guidance in Circular 97/78 was at variance with a statutory provision on the awarding of legal

aid. Section 29 of the 1974 Legal Aid Act provided that:

> "where a doubt arises whether a legal aid order should be made for the giving of aid to any person, the doubt shall be resolved in the person's favour."

The circular undermined the authority of this section by asking clerks to justices to:

> "ensure that legal aid is not granted unless it is necessary."

Magistrates were invited to disregard a clear statutory provision that the defendant must be given the benefit of the doubt and to apply a conflicting non-statutory test. They faced the dilemma of whether to continue strictly applying the original clause or to follow central guidance and use the new criteria set out in the circular. Many courts have adopted the latter course and in the process ignored section 29, indicating that in some circumstances greater weight may be given to Home Office guidance than to express statutory provisions. The practical effect of Circular 97/78 was to amend an inconvenient statutory clause through non-Parliamentary means.

References to spent convictions

Circular 97/78 on the awarding of legal aid conflicted with an existing statutory provision. The original policy of the legislature on spent convictions did not even reach the statute book. A draft provision that there should be no reference to them in magistrates' courts was replaced by a circular which had an entirely different effect. The 1974 Rehabilitation of Offenders Act does not as a matter of law apply to criminal proceedings since it was decided to delete all references to them from clause 5. Instead there was an undertaking in Parliament that the Lord Chief Justice would issue a Practice Direction concerning references to spent convictions in Crown Court proceedings. Part 1V of Circular 98/75

anticipated this direction by giving its own guidance to magistrates' courts.

By removing the application of clause 5 to criminal proceedings the legal requirement that spent convictions must never be mentioned under any circumstances in magistrates' courts was lost. Justices have a discretion in this matter though they lack sufficient legal experience and judicial knowledge to exercise such a discretion satisfactorily. Deleting all statutory references to the criminal courts abolished the crucial distinction between proceedings in magistrates' courts and Crown Courts. The decision to use a circular in place of legislation completely changed the emphasis. Instead of the explicit ban on mentioning spent convictions envisaged in the original bill, justices now have to exercise a discretion. The initial principle that magistrates' courts were ill-suited to perform this function suffered at the hands of administrative convenience:

> "I did not wish to lay an even more complex amendment on top of all the other complex amendments which I had put up before the Committee, and I was anxious that we should proceed as quickly as possible in order to allow the Bill a swift passage through Parliament...I have thought it more convenient that we delete from Clause 5 all reference to criminal courts." 42

Mr. Weitzman M.P. was unhappy about this arrangement:

> "Admittedly, my honourable Friend has aimed at some sort of compromise by arranging that there should be a practice note given by the Lord Chief Justice, but practice notes may be altered from time to time, and it seems an unsatisfactory way to legislate to declare that a proposed provision should now give way to a practice note given by the Lord Chief Justice." 43

Circulars and Practice Directions substituted statutory provisions and removed the certainty and accountability pro vided by Parliamentary legislation. Policy on ref-

erences to spent convictions in the courts, recently considered and formulated by the legislature, was drastically changed in the process.

Custodial rights

The last example of a Home Office circular setting out a contrary policy to that intended by Parliament concerns the right of a person in custody to have someone informed of his arrest. The clause in the 1977 Criminal Law Bill giving persons this unqualified right was added against government advice and opposed by the Home Secretary. To remove the risk that unamended the clause would add to the difficulties faced by the police in dealing with crime and bringing offenders to justice the government proposed to give a discretion:

> "the amendments have the effect of enabling the police to delay sending the intimation if that is necessary in the interests of the investigation, prevention of crime or the apprehension of offenders." 44

Home Office Circular 74/78 gave the police guidance as to how they should exercise their discretion in the proviso. The Home Secretary was highly sympathetic to their problems, issuing advice on how the rigours of the section could be mitigated.

In a number of respects the guidance was inconsistent with the impression given in the House of Commons about how the discretion would be exercised. The Minister had reassured M.P. s that the spirit of the clause would be preserved by listing narrow criteria justifying a delay in sending the intimation of arrest:

> "The police could be dealing with a kidnapping case. They may have arrested one of the offenders without recovering the victim or being aware of his or her whereabouts... Other examples are customs cases and drug carrying." 45

These are different in nature to the situations referred to in the circular as justifying delay. One instance concerned large numbers of arrested football hooligans. Delays in these cases would not appear to help prevent crime, apprehend offenders or further the investigation. The circular failed to stress Parliament's primary concern that young people should be protected. Instead it accepted that police officers cannot justifiably be spared the time to make a long series of telephone calls. Mr. Price M.P. had said that absolute safeguards should be given to young offenders even though these might hinder the administration of justice but the Home Secretary indicated later that the administration of justice might itself justify delays.

Quite different criteria for a justifiable delay in communicating arrest were laid down in the circular to those suggested in Parliament and implied by the statutory section. Delay was stated to be justified when it was administratively necessary, even though unrelated to the success of the investigation. However, in a hostile House the Home Secretary had eased the passage of the proviso by confining his examples to those situations where delays were clearly necessary in the interests of the criminal investigation:

> "What does one say to a policeman in a case...where the link with the arrested person's wife might mean that weapons or drugs could be recovered?" 46

Again, these are examples where letting the accused intimate his whereabouts would jeopardise further criminal investigations. By carefully selecting his illustrations the Home Secretary gave the House the impression that the proviso would only be used in cases where the person to be communicated was himself likely to be involved in subsequent investigations. Those occasions where administrative convenience would

justify delays were left to be explained in the relative obscurity of a departmental circular sent only to the police. Once the proviso was safely enacted Circular 74/78 was issued containing guidance possibly against the proper observance of the section and certainly not reflecting the spirit of the legislation which it purported to explain.

Bail

The previous examples of Home Office circulars were all concerned with statutes already in force. Departmental guidance is also given pending legislation to prepare courts for the forthcoming changes and in the meantime encourage them to adopt the new general principles. Circular 155/75 shows how the centre may on these occasions be careless about the state of the existing law.

The Home Secretary notified the courts, the probation service and the police of his intention to introduce legislation reforming the law on bail which would create statutory presumption in favour of granting bail and require courts to give reasons for refusal in all cases. The circular was intended to promote a more liberal approach to bail applications and urged magistrates to adopt a prima facie presumption in favour before legislation making this statutory was enacted. Attention was drawn to the "three established reasons" for the refusal of bail and unless one of these was satisfied the circular recommended that bail should not be refused. Describing the reasons as established overstates their legal authority since they do not appear in Archbold or any other standard criminal law work. The Criminal Jurisdiction of Magistrates comments:

> "On no other subject so importantly affecting the liberty of the subject is there such a paucity of authority as bail." 47

The final two examples of the Home Office's promotional approach are not concerned with specific Parliamentary legislation but demonstrate the department's determination to give policy guidance and advice of a general nature.

Reports on accused persons

A major change of policy on the allocation of sentencing functions in magistrates' courts was brought about by two circulars which suggested that probation officers should give their assessment of the offender's likely response to various forms of treatment and that experienced officers should make particular sentencing recommendations. Circular 59/71 stated that when preparing social enquiry reports probation officers should, subject to the wishes of the court and if their knowledge and experience enable them to do so, give their assessment of the likely response of the offender to other forms of treatment besides probation. Circular 194/74 went a stage further:

> "if an experienced probation officer feels able to make a specific recommendation in favour of (or against) any particular form of decision being reached, he should state it clearly in his report."

A new emphasis was placed on the work of the probation officer who was expected to adopt a more general and active sentencing role. The circulars contributed to a shift in sentencing initiative away from lay magistrates to professional officers.

Attendance centres

Circulars 136/77 and 95/78 dealt with the use of attendance centres for juveniles found guilty of offences committed at football matches. Though issued within the space of a year they reveal a considerable alteration of sentencing policy. The first circular, Attendance Centres, acknowledged that as the centres

only open on Saturdays they are a particularly useful sanction against football hooliganism and encouraged their use for this purpose:

> "attendance centres should be made more widely available to all courts."

The subsequent circular, Experimental Use of Junior Attendance Centres for 17 and 18 Year Old Male Offenders, added new reservations:

> "Attendance centres should not be regarded simply as a convenient method of dealing with football hooligans. The centres are most effective for the petty offender with no history of violence and if unruly or recidivist offenders are sent to them they could adversely affect the established regime of a centre and place the system in jeopardy."

Before leaving this area of study it is worth noting that Home Office circulars are addressed to the court administrators and not the magistrates themselves. The information may not be given to the justices. While describing Circular 155/75 on bail at a Magistrates Association meeting the Home Secretary, Mr. Roy Jenkins, commented that few magistrates ever see circulars intended for their guidance:

> "though whether the fault for this is theirs or lies elsewhere we do not know. And while the clerk to the justices will certainly have seen and will probably have read and absorbed these communications from on high, the same cannot be assumed of all court clerks. It therefore behoves court practitioners, who may on any day be called upon to apply for bail on behalf of a client when this is opposed by the police, to acquaint themselves of the important advice to the courts on this matter which the circular contains."

Circulars provide an important, if not perfect, system of communication between the executive and the judiciary but this source of central guidance is generally unavailable to the higher courts. Crown Courts do not

receive Home Office circulars and often act in complete ignorance of recent government sentencing policies. This lack of communication has resulted in inconsistent treatment between the lower and higher courts 48.

Part Four Circulars and social security law

Supplementary benefits

Discretion is an essential element of the supplementary benefits scheme. Since the original legislation failed to lay down any general standards within which officials must operate the discretion conferred on them was a wide one. However, its scope has been confined by administrative codes in circulars instructing tribunals as to how this discretion should be exercised. In the absence of other statutory guidance these policies have in practice developed into firm binding rules since it was recognised that the only way to achieve the required uniformity throughout the system was to apply the policies rigorously and consistently.

In R. v. West London Supplementary Benefit Appeal Tribunal, ex parte Wyatt the Divisional Court held that the Supplementary Benefits Commission had an overriding discretion under paragraph 4 (1) of Schedule 1 of the 1976 Supplementary Benefits Act to pay an exceptional circumstances addition to meet medical requirements 49. The S.B.C. believed that this decision was contrary to the objectives of the legislation. The principal purpose of section 1 (3) was to prevent overlapping with services provided by the National Health Service. Section 6 of the Ministry of Social Security Act had provided in 1966 that certain requirements of a medical nature could be met by the supplementary benefits scheme but the 1973 National Health Service Reorganisation Act amended this so that all requirements of a medical nature were to be met by

the health service. Following Wyatt it appeared to the government that discretionary E.C.A. payments might be made in other circumstances prima facie falling outside the supplementary benefits scheme.

The Department of Health and Social Security quickly responded by circulating a statement to S.B.A.T. chairmen heavily criticising the decision. This was intended to prevent them widening the circumstances in which they would consider allowing an E.C.A.:

> "The Commission are anxious that the question should be re-examined in the Court of Appeal with a view to re-establishing the long-accepted interpretation...the Commission will be seeking an opportunity to have the Court of Appeal consider the matter of its power to make E.C.A. s for medical requirements."

In the meantime the statement sought to persuade tribunal chairmen not to adopt the new broad approach by restrictively defining the circumstances in which E.C.A. s should be made. Only in the very rarest of cases should the discretion, revealed to exist by Justice May, be exercised. The circular contained a lengthy statement about the proper policy basis of the Commission. The decision had been influenced by the judge's view that the S.B.C. was the ultimate source of financial assistance to the ordinary citizen:

> "(the S.B.C. accept) that they are an agency of last resort. But they do not accept that anything which costs claimants money is the concern exclusively of the Commission, or that whenever another source of help has failed to provide it, the Commission should necessarily help ...the Commission would not wish to exercise their discretion so as to make available to their claimants private medical treatment or facilities when there is a free comprehensive N.H.S. available to the population as a whole...(to do so) would be to discriminate unreason-

> ably in favour of their claimants and would be a misuse of public funds."

There is no formal system for informing S.B.A.T. chairmen of judicial decisions. Instead, transcripts are circulated accompanied by explanations and criticisms. This use of circulars to nullify the effects of case law appears to challenge the authority of the courts and threaten the independence of the tribunals. Although the D.H.S.S. considered that certain statutory provisions had been misinterpreted by the courts, it was reluctant to introduce further clarifying amending legislation and chose to substitute a departmental statement to restate the existing law and introduce new policy. The practical effect of this circular was to reverse an unfavourable judicial decision.

Medical evidence

The law governing the issuing of doctors' notices to their patients that they should refrain from work is contained in the 1976 Social Security (Medical Evidence) Regulations. An explanatory booklet, Medical Evidence for Social Security Purposes - Guidance for General Medical Practitioners, was distributed with a health service circular in February 1979 and gave doctors advice concerning the interpretation of statutory terms, such as "incapacity for work" 50. Although G.P.'s have no legal training they are required to determine difficult legal questions and there is no suggestion in the booklet that when in doubt they should decide in favour of the patient. Moreover, doctors are instructed to give a statement only if the patient is "definitely unable to work", a stricter test than that contained in S.I. No. 615. Instead of general guidance on the meaning of "incapacity for work", new non-statutory criteria are provided which go further than the test laid down by Parliament.

The procedure for adjudicating disputes is not explained. In the majority of cases the doctor's interpretation is ultimately the crucial factor and yet the booklet represents the only advice these non-judicial authorities receive on how to interpret the statutory provisions.

CHAPTER THREE LOCAL AUTHORITIES

Local authorities are the most significant recipients of circulars. Although this chapter concentrates on internal structures and procedures affecting the interpretation and implementation of central guidance, the first part briefly considers the interaction of surrounding political and demographic factors. While not attempting to be exhaustive, this introduction provides an indication of the wider context in which circulars operate and shows that departmental advice represents only one of many competing and often conflicting forces which contrive to influence the course of local government activity.

Part One The central department as pressure group

The idea that local authorities are mere agents of central government emerged from a tradition of study which regarded the local bodies primarily as only one constituent part of an overall national political and administrative system rather than as complete organisations in themselves. By analysing local authorities from the viewpoint of central government alone, a disproportionate emphasis was placed on the importance of formal legal controls and little attempt was made to examine how significant and effective these were in practice or to discover whether more important informal practices were operating. An overriding concern with central processes failed to provide an understanding of interpretation and administration at the local level.

This traditional approach to central-local relations has now been reversed and the local authorities form the starting point for most modern studies. Legalistic generalisations have been aban-

doned in favour of a method which takes into account the unique nature of each local authority and the many differences which exist between them. Local government is seen as comprising a number of separate and self-contained political and administrative systems. Central influence has been re-evalued and found to be not as effective as had once been thought. Local authorities are not passive instruments wielded by the centre to carry out its wishes. Rather, they have proved able and willing to resist explicit directives and policies coming from the central departments.

Variations in local practice are most pronounced in relation to circulars and treating authorities as unique political systems is particularly appropriate for studying their response. Advisory circulars usually leave scope for a wide range of action, depending on the political control of the council, its internal procedures and the environmental features of the area it serves. Regional rather than national conditions generally have the greatest effect on local behaviour. Although central government may occasionally exert a strong influence, especially when financial and legal sanctions are available, it remains essentially a remote pressure group which normally lies at the periphery and not the centre of local concern and affairs. Policy choices are mostly fixed by regional rather than national forces and it is these local conditions which predetermine the range of options open to the authority. Classifying government departments as lobbying pressure groups acts as a reminder that local authorities are independent systems, responding to local in addition to national pressures and not merely the agents of central government. Departmental advice forms only one of many competing influences on local decision-making processes.

The nature of action taken in response to advisory circulars is largely determined by local self-interest and guidance presenting a conflicting national interest is likely to be ignored. Since authorities owe greatest allegiance to their own electorates and not the national government, central policy advice will not be adopted unless it commands political support from the local ruling party. In his Memorandum of Dissent to the Report of the Royal Commission on Local Government in England, Derek Senior stated that local government has a general responsibility for the communities it represents:

> "in discharging its statutory duties it must put the general well-being of the local community before the sectional interest of the central government that is nationally responsible for the functions concerned." 1

The housing committee chairman of an outer London borough told me that reports from officers always give priority to local interests and emphasis is placed on the regional implications of the circular and its likely effects on the local housing situation. He added that the merits of national policy are not judged and acted on in isolation but interpreted in terms of its relevance and application to local conditions. Local authorities have always had the opportunity to bend central directives to local advantage. B. Miller has written that although the national government may lay down policy:

> "it is in the twists and emphases which councils give to central policies, and the degree or co-operation or unwillingness which they show, that their own power lies. They do not have the paper guarantees of local sovereignty which states in a federal system possess, but they have some of the reality of power which comes from being on the spot, knowing the special qualities and demands of the local people and being costly and difficult to replace

> if the central government finds them unsatisfactory." 2

The rest of this chapter considers local authorities' internal structures and procedures relating to the interpretation and administration of central circulars. Differing ideas about their nature among officers and council members means that circulars follow many paths. These wide variations in practice are partly explained by the informal, unsystematic and diverse characteristics of such instruments. Between authorities the same circular may be regarded as a matter of administration to be implemented by the officers, as a matter of policy to be dealt with by the members in committee or as a formal legal document to be interpreted by the council's lawyers. Even within a single authority, similar consecutive circulars may be treated quite differently since there tends to be no standard procedure.

Part Two Interpretation and the role of lawyers

While some authorities rely heavily on lawyers to supply legal advice on the interpretation of circulars changing the law, a number of housing officers stated that they were competent to interpret them sufficiently accurately for the purposes of implementation. Rejecting the legalistic approach, these officers characterised circulars as instruments of administration. One officer wrote that lawyers were irrelevant and superfluous to this administrative process:

> "the idea of taking Counsel's opinion on the wording of a circular sounds somewhat fanciful. After all, circulars are not statutes and are written not for lawyers to interpret, but for Administrators to implement."

Another housing officer "with years of experience interpreting circulars" agreed that they are "written

to guide". He reported that circulars are usually well-explained in notes and appendices. This belief that circulars belong exclusively to the administrative process partly stems from the training of officers to be administrators rather than lawyers. Their doubts and uncertainties about the law prevent them questioning and challenging the authority of circulars. Officers seldom have the expertise, experience and confidence to investigate and understand fully their legal implications. Only exceptionally is a housing officer a qualified lawyer.

Whether an authority adopts a legalistic approach to circulars depends considerably on the extent of its general respect for the law. Some councils pride their law-abiding nature. The law is given a symbolic importance and accorded a corresponding respect. This is characteristic of those authorities which display an independent spirit and do not maintain close communication with the centre. Continual liason with government departments tends to encourage a more pragmatic approach. Local authorities which respect professionalism also place much importance on the need to act within the letter and the spirit of the law. Some have a formal client relationship with the solicitor to the council and in these cases the general conservatism of the legal profession is reflected in the nature of the authorities' dealings with the central departments. The legality of every proposed act is tested thoroughly and counsel's opinion sought if necessary. If some doubt remains the council errs on the side of caution and does not proceed, only acting when fully confident of its legal authority and in accordance with the interpretation of the law supplied by its own solicitors.

Other authorities do not give the law such paramount respect. Its practical limitations, notably the ineffectiveness of legal sanctions and remedies

when applied to large authorities, are recognised and exploited. This does not mean that these councils deliberately defy the law in the knowledge that their actions are prohibited. Rather, where the law in the circular is ambiguous and open to a number of legitimate interpretations, in the absence of any definitive ruling the authority adopts the most favourable. Any possible legal loopholes are investigated. The housing officer may reject advice from the council's lawyers and instead choose the interpretation preferred by the members, realising that in practice there is no likelihood of an authoritative ruling on the correct interpretation of the circular. This can only be supplied by a court of law, a prospect too removed from normal administrative practice to be of concern to officers.

When there is little possibility of judicial processes coming into operation, local authorities are often prepared to go beyond what would otherwise be judged to be the legal limits. The notion that authorities are bound by the rule of law, that law must be given an absolute and unwavering respect regardless of the effectiveness of its provisions for enforcement, is discarded in favour of an approach which treats the law as merely one of a number of flexible and negotiable elements in the entire administrative process of interpretation and implementation. An administrative rather than legalistic approach is followed. The administrative officers assume primary responsibility over legal officers for interpreting circulars making legal changes and resort to legal advice only if a circular is exceptionally difficult or complex. Legal doubts are clarified in the same way as uncertainties about administrative details. By counsulting the central department an authority can discover the original intent behind the circular and in addition receive valuable advice on its implementation. This course is frequently pre-

ferred to relying on the strict interpretations of the council's own lawyers. These may fail to take account of the administrative context in which the circular is to intended to operate and their validity is in any case not likely to be ever tested.

The Department of the Environment is prepared to lay down guidelines for local authorities on acceptable legal practice, usually with the reservation that the legal interpretation of circulars is a matter for the courts. As one official in the department commented:

> "we cannot interpret what we send out."

In most cases it is the central departments which settle points of law. It is rare for a dispute over the legal effects of a circular to reach the courts as the threat of legal proceedings is generally sufficient to bring about agreement between the parties.

In matters of legal interpretation, the central departments exert great influence over local authorities. A rule that an authority could not offer discounts for the sale of council houses which would reduce the purchase price to below the cost of provision gave rise to queries about whether such items as rehabilitation costs could be included as capital costs. Although local authorities were told that the circular was a matter for their own interpretation, the DoE's advice was followed in practice by most councils. On another occasion the department wrote to an authority that while it was not their job to advise on the law and the construction of documents, the council's interpretation of part of Peter Shore's March 1979 circular letter concerning equity sharing had not been that intended by the department. A further instance involved a council which wished to buy a large house from an elderly

occupier who could not afford the maintenance costs. Legal advice was sought from the DoE over whether the authority would be able to sell the house immediately upon its purchase. The housing officer said that when the same political party is in control at both the national and local level, central civil servants are more flexible and generous in their interpretations of circulars. They are prepared to offer greater concessions and accommodate local wishes more often than when the parties are in opposition.

A local authority may deliberately avoid seeking departmental guidance if the centre's interpretation of a problematic circular is likely to be unfavourable and prefer to internalise the process by relying on its own local legal advice. One illustration concerns a council's interpretation of the historic cost proviso in Circular 54/70 on the sale of council houses. Paragraph 1 in Appendix 1 gave authorities dispensation to sell at full market price while paragraph 2 enabled them to sell houses subject to pre-emption clauses at less than full market price. Initially, the council's lawyers thought that the proviso that houses could not be sold below historic cost overrode paragraphs 1 and 2 and that if the market price was less than the cost price the authority would have to sell at cost price. Faced with the problem that purchasers would be paying more than the house was worth on the open market, the lawyers re-examined the circular and concluded this time that the clause on historic cost only related to the second paragraph. If the council sold houses at market value without pre-emption clauses they could be sold below cost but if they were sold at a discount the proviso would have to be taken into account. Although the placing of the proviso in relation to the two paragraphs made it unclear whether it was intended to cover both situations, the DoE was not consulted about the interpretation of the circular since the

Conservative controlled authority expected an adverse reply from the Labour government.

The converse situation arises where a local authority actively takes issue with the central department about the legality of a circular which is contrary to locally established policy. As a consequence of the intrusion of central circulars into highly politicised and controversial areas of policy, authorities are now less prepared to accept them without question. They discovered that central policies in circulars could be resisted by challenging the legal details. While generally ultimately unsuccessful, this may prove an effective delaying tactic. Instead of interpreting the circular and studying its effects on council policy subsequently, the process is reversed. One housing officer of a London borough said that he first looks at council policy and then decides how to interpret the circular. Another officer commented that by interpreting a circular in a particular way, the council's lawyers could defer its implementation. Circulars offer more scope for differing explanations than unequivocal mandatory statutes. He gave two instances of legal ambiguity detected by the council's lawyers in the March 1979 circular letter reversing the generous conditions of the general consent for the sale of council houses. Paragraph 13 stated:

> "These amendments to the consents do not apply where a local authority has made a firm price offer in writing to a sitting tenant, or in the case of a house which is unoccupied or has not been let to a person who requires a house for his own exclusive use, to sell a legal interest in any house, whether or not a flat, prior to 17 March 1979 and the offer has been accepted in writing by the purchaser by that date."

In some blocks in the authority all the tenants had been made offers but not all had been accepted. It

was suggested that the letter's comments did not apply to those who had not so far accepted the offers. The second instance concerns paragraph 5:

> "The purpose (of the amendments to the general consent) is two-fold: (i) to exclude from the consents the sale or lease of empty council houses and flats other than those expressly built for disposal..."

The council explored the possibility that rehabilitated council flats were "expressly built for disposal" and consequently included within the general consent.

The extent to which an officer will rely on legal experts to assist with the interpretation of circulars depends not only on his character and experience but also on the particular internal structures and procedures of the authority where he works. One significant factor is the physical proximity of the council's lawyers to the housing department. If legal advice is close at hand and easily available, for example if the solicitors occupy the same building, it will be frequently sought. Personal contact is not encouraged, however, in those scattered authorities where the departments are far apart and the telephone has to be the principal means of communication.

Councils run on a corporate management basis have project teams which give a corporate view of circulars meriting in-depth appraisal. Other authorities which have not fully adopted a corporate system may reflect the same approach by interpreting circulars interdepartmentally. A typical forum is the general housing working party at which the chief officers of the various departments affected meet to examine the effects of a circular. Often the process is informal with comments invited from other officers. A similar structure is to be found in those authorities operating a directorate system. When an impor-

tant circular is issued the Director of Housing will call for a meeting of the Directorate Team to discover the council's new responsibilities.

Not all authorities adopt this interdepartmental corporate approach. In many traditionally run compartmentalised councils there is no formal procedure for channelling information and ideas between the departments. The Chief Executive or Secretary distributes received circulars to what he considers to be the appropriate departments and legal interpretation is primarily the responsibility of the chief officer. He may seek help or advice from other departments on an informal basis.

In one authority studied the Chief Solicitor was instructed to examine all legislation, including circulars, and to report his findings to the relevant chief officers. Generally, the legal officer only scrutinises circulars and gives advice upon the request of the housing officer. If the solicitor is aware that a particular circular is likely to raise problems of legal interpretation, he may investigate it on his own initiative.

Part Three Policy and administration - the roles of officers and members

Whether a circular is regarded as a matter of policy or administration significantly affects the nature of the council's eventual policy response. The initial opinion of the professional officer determines the path the circular will subsequently follow for he decides whether it should be handled entirely by the administrative officers or reported to the members in committee. The power and influence of the officer cannot be understated. According to R. Buxton, he provides the link between central and local government:

> "The role of the official is of great importance even from the narrowly local government point of view, since one of the principal ways of impressing Whitehall's point of view on local authorities is through the links which exist between the authorities' chief officers and their professional opposite numbers in government departments." 3

Within the council the expert officer is also a strong figure:

> "on most issues councillors are content to be guided by their professional advisers, especially where the power of effective decision is, or is thought to be, removed from their hands by government regulation." 4

The Bains Committee exploded the myth that when studying the internal structure of a local authority it is possible to make a distinction between administration and policy:

> "we doubt whether it is possible to divide the total management process into two halves, one for members and the other for officers...the two elements in local government management are in fact likely to be present at every stage of the management process." 5

Most officers, however, continue to believe that they can properly separate policy from administration and do attempt in practice to distinguish administrative circulars from those which they consider policy, reserving only the latter for the attention of the councillors. This distinction is based on the officers' own often confused understanding of what constitutes policy and administration, much used terms which were frequently misapplied in a loose and inconsistent manner.

Officers' perceptions as to the general nature of circulars colour what they regard as their functions and those of the members they serve. Some

officers treat all circulars as matters of administration, designed to be implemented by the administrators to whom they are addressed. Circulars are primarily intended to help them decide the most appropriate way of dealing with problems. This particular administrative style of thinking is reflected in the comments of one borough housing officer interviewed who said that circulars should be interpreted and implemented flexibly rather than literally in such a way as to give fullest effect to their original intention. Although a circular may sometimes be intended to deal with one particular problem, possibly only affecting a few authorities, it may subsequently be interpreted strictly in a different context with no attempt made to discover its original purpose. Circulars issued quickly to solve isolated problems as they arise may be treated quite inappropriately as an extension of legislation and followed to the letter. The officer remarked that to interpret a circular correctly it is essential to appreciate the reasons why it was issued.

What policy role do officers perform in relation to circulars? This is a crucial question because the officials act as gatekeepers through which circulars must pass before reaching the members. The more cautious officers asserted that the role of the councillors is to decide policy and that of the officers to implement this policy. This serves better as an ideal than an accurate representation of actual practice since officers, deliberately or otherwise, make policy decisions before and after the consideration of circulars in committee. A few officers departed from this safe official line and were not so dogmatic about the division of functions, indicating that on some occasions they do play an active policy role. In non-contentious areas, officers may even assume the main task of formulating the council's policy response to a circular. Members rely on their

professional expertise and normally accept their policy advice when no political advantage can be gained by either party. In these circumstances, the policy initiative comes from the officers who present their proposals for implementation to the committee for approval. Although the theory that political responsibility resides in the members is preserved, control of policy in practice lies with the officials.

Whether an authority adopts and implements a circular may largely depend on the degree of enthusiasm shown by its officers. They are most receptive towards those circulars which reflect a general concensus of national and local opinion. To avoid attacks of political bias, officers are less inclined to adopt an active policy stance in relation to circulars likely to be contentious at the local level. In one politically marginal London borough the officers formulated policy recommendations in response to a circular on housing priority which were fully accepted by the Housing Committee, showing that officials may assume a positive policy role even in unstable authorities. The deputy housing officer stated that when the issue is not politically controversial, the officers may suggest that the council should change its policy to conform to the government's guidance. They may present a draft scheme for adoption. Following the circular on the Finer Committee Report on One-Parent Families, the officers' proposals were adopted by the committee and altered the council's allocation procedures by giving greater priority to housing single parent families. The officials instrumental in these changes considered it reasonable to make moderate recommendations to the committee. They generally attempt to follow government advice in line with council policy and based on a wide agreement of opinion rather than on the whim of an individual Minister. The officer

said that policy advice on politically controversial circulars is not offered to the council because the officials must be seen to be impartial.

Although local government officers prefer to be seen to operate outside the political arena and to leave all policy options to committee decision, they still exert an important influence on the council's response to circulars containing major policy. They make specific policy recommendations based on existing council policy. In addition, the officers formulate the range of policy options and only information relating to these suggested policy choices is provided. They set the limits within which the committee will make its decision by what they consider to be feasible in administrative terms. When officers explain that other favoured courses of policy cannot be carried out in practice, council members usually lack the information to challenge this expert opinion and begrudgingly accept it. Only if they are especially determined will they defy professional advice or instruct the officers to find some way of accommodating their policies. For example, one Director of Housing said that his officers recommended in line with most other housing officers in the London boroughs that for administrative reasons the council should not sell single flats in tower blocks. This recommendation was, however, turned down by the members. To preserve professional integrity, officers may have to submit suggestions and advice which they know will be rejected by the committee on party policy grounds.

The various policy alternatives offered by a circular are often presented as a number of self-contained packages drawn up by the officers and the committee is invited to select one scheme in its entirety. Because the administrative arrangements are said to be too complicated to be adjusted easily

without upsetting the whole scheme, councillors are dissuaded from making amendments. No single arrangement may be fully acceptable to the committee in terms of policy and it may wish to transfer parts from one scheme and incorporate them in another which is more acceptable overall. Councillors become frustrated and angry with their officers when told that administrative incompatibility makes this impractical. Unable to select their ideal system, they have to compromise by adopting the administrative scheme prepared by the officers which comes closest to fulfilling their policy objectives.

The extent to which an officer will contribute towards his council's political response to a circular depends much on his individual character and the views he holds. A strong-minded and politically aware official is likely to be particularly dominant and influential. Some officers admitted that the nature of their work required them on occasion to make political decisions and thought that councillors expected them to act in this way. An officer may justify his political actions on the grounds that he is charged by the council to give his expert assessment as to how the needs of the region can best be met and this judgment cannot be entirely non-political. The housing officer of a large rural council said that his duty is to recommend policies in line with the needs of the community and the wishes of the councillors. His function should be to advise on what is best for the community and this may or may not involve accepting a circular's recommendations. Although the judgment is political, it must be made by the officer since he is the professional expert who has access to all the relevant information. The officer believed that to break away from the "two nation" problem the authority should not develop any rented area of more than five acres and said that the council is beginning to acc-

ept his view that a housing mix is desirable.

When an officer first receives a circular he makes a decision which affects the subsequent path it will take within the authority. The procedure followed depends on his initial assessment of whether the circular can be dealt with by the administrative officers alone or whether it has sufficient policy implications to merit the consideration of the councillors by being placed on the committee agenda for information or policy decision. The grade of the officer, the nature of the department and the general structure of the authority all determine whether the policy aspects of the circular will be brought out.

For certain classes of administrative staff, their work in relation to circulars is limited to carrying out the various administrative changes made necessary. Low grade officers are unlikely to be aware of the policy implications since these are not directly related to their work. One assistant housing officer commented that circulars rarely made an impact on the roots of local housing practice in terms of daily administration. Many do not even reach the field officers. He seldom needed to refer to information in circulars since this was generally supplied by the chief officer.

A number of local government officials remarked that technical officers in departments responsible for such matters as road construction are more inclined to accept central circulars without question than their counterparts in housing and education. The more personal the service, the more officers are aware of the political aspects of circulars. As they do not usually raise political issues, scientific officers naturally view them in non-policy terms. One inner London council's environmental health officers treated departmental circulars as

"sacrosanct". Its highways department had found that the Department of the Environment offered good practice to high technical standards and thought it sensible to accept its expertise. Housing and education circulars, however, frequently contain major policy of a contentious nature and officers scrutinise them closely to bring this policy to the council's attention.

The internal organisation of the department affects the council's policy response to government circulars. In one large London authority a separate housing policy officer, the Assistant Borough Housing Officer (Policy and Special Projects), had the responsibility of reporting upon their long-term policy implications. He maintained that every circular has policy and financial repercussions, giving the example of a circular lowering the cost limits for council house doors. In time this will contribute to a gradual deterioration in the quality of the housing stock if the authority cannot afford to make repairs. Most councils do not have a specially assigned officer to consider the wider policy aspects of circulars and the chief officer is expected to perform this function.

The fullest policy appraisal of circulars emerges in those authorities operating a system of inter-departmental consultation between the officers. This may take the form of meetings of the directorate team. The type of local authority organisation which encourages the greatest amount of interchanging of ideas is that based on a corporate system. The corporate model envisages an overall planning scheme dealing with policy, allocating resources throughout the authority and relating the various activities of the departments to each other. An interdepartmental team is used as a co-ordinating vehicle for policy analysis. In 1972 the Bains Committee on the manage-

ment and structure of local government anticipated that the programme area committee would encourage a corporate rather than a departmental approach so that each committee could call upon and be serviced by the skills and experience of a number of different departments. To supplement this corporate management structure, the policy evaluation of particularly important circulars is reserved for special project teams which examine the long-term implications for the authority. One consequence of the introduction of corporate systems, recognised by John Dearlove, has been to give officers a greater role in decision formulation:

> "The attempt to introduce corporate planning into local government has probably served to strengthen the hand of those officers who are less intimately involved in the direct provision of services to the public and so are more able to take those decisions which are defined as being in the interests of the 'community' as a whole." 6

Despite this development, in both corporate and traditional authorities the officers stressed that members continue to have an overall domination in matters of policy. As one housing officer commented, in general councillors are still well in control of local affairs and policies.

The amount of attention a circular will receive depends on whether it raises issues which are of current concern to the council. The agenda of local politics consists of such issues. If council policy in a particular area is being reviewed, relevant circulars will be given priority. However, those dealing with stale issues lacking local political interest are not likely to receive instant consideration. As Peter Richards has written:

> "Committee members snowed under with papers containing information on trivial matters will have less time to read more important documents

> e.g. Ministry circulars. Indeed, where circulars are not immediately relevant to committee business, members may never know of the existence of a circular or will not appreciate its contents." 7

Circulars containing recommendations clearly contrary to recently decided council policy are likely to be shelved by the officers without being reported to the members.

Even when the councillors are willing to implement the suggestions of a circular immediately, administrative difficulties often cause delays. As we have seen, officials may have to remind members that a policy can only be carried out if it is feasible in practice. Administrative considerations tend to prevail over political principles and limit the scope of many proposed schemes. For example, the management problems connected with joint services and repairs which arise when single units in terraces or blocks of flats are sold are so complex that officers invariably add strong reservations if this policy is advocated. Some suggested that the administrative problems may be exaggerated or even invented by officers to prevent the implementation of what are considered to be ill-judged policies resulting from central circulars.

Some council members rely heavily on their officers to provide information about the long-term policy implications of adopting particular circulars. Others do not formulate long-term strategies but make decisions on the basis of short-term political criteria without considering their effects on related policies. One housing officer said that he leaves the initial policy decision entirely to the councillors and only subsequently indicates its likely future effects. These are difficult to assess since they depend on undecided policy decisions in

other areas.

The policy response of councillors to circulars is, then, affected by the level and quality of information supplied by the officers and the way it is presented. All relevant background information is not always provided and this may lead to ill-informed policy decisions. One officer said that only material directly relating to the decision before the committee is given. In his opinion, long accounts of previous council policy only cause unnecessary political rows which disrupt the decision-making process. Many officials referred to the amateur status of councillors and there was a commonly held view that they lack the ability, inclination and time to examine and assimilate the detailed papers distributed to them. Officers try not to burden committee members with superfluous paperwork and in most cases they receive a short report in place of a copy of the circular itself. Councillors may not even be able to cope with the abstract prepared by their officers. In one authority the summary of the central housing policy review put the four volume report into layman's language but was still too lengthy for the Health and Housing Committee to digest fully. Another council reported that it uses an "information circular" accompanying the committee meeting agenda to inform members of recently issued circulars from the central departments without filling the agenda with items not requiring decisions. Some officers thought that council members do not need to have all the facts before them when making policy decisions. Based on party political principles, these decisions are usually settled well before any factual information is supplied. One officer noted cynically that councillors do not let the facts bother them when making a decision.

It appeared that in the short-term councillors

are prepared to tolerate a disagreeable policy under protest if they are aware that the circular will soon be withdrawn. The housing officer of a Conservative controlled London borough said that if the Labour Party had won the 1979 general election, the legality of Peter Shore's circular revising the general consent for the sale of council houses might have been challenged. Since a Conservative victory was expected, the council instead sent a letter of protest to the Secretary of State after consultations with the Association of Metropolitan Authorities. An officer from a similar London borough also stated that if the March circular had banned all sales and there was no likelihood of an election, his authority would have explored every avenue to evade its effects.

In some areas of local housing practice, councils are not subject to central financial and administrative control and can pursue their own policies within the limits laid down by the law. The absence of any power to compel has not, however, deterred government departments from seeking to influence local policy formulation in these areas. As John Dearlove has written:

> "the central government has itself taken a variety of initiatives within spheres of concern that have traditionally been more within the province of local government." 8

A number of housing officers observed that while members preferred to co-operate with the departments rather than be deliberately obstructive, they only go along with central guidance if it coincides with local policy. One London officer said that council members take no notice of advisory circulars if there is a political disagreement. They have the power and right to ignore them on political grounds. In his view, much less notice is taken of advisory than mandatory circulars:

> "circulars are only any use if they say what we want to hear."

Many officers said they resented and tended to ignore central policy advice in areas where local policy control is still retained. Such circulars were regarded as an unwarranted interference with discretionary powers given to local authorities in the first place. It is not the business of central government to meddle with local democracy by seeking to influence the determination of local policies in fields outside their competence. Grandmotherly guidance in circulars was seen as gratuitous, patronising and unnecessary, the plaything of departmental civil servants who consistently failed to take into account the wide variety of problems facing authorities throughout the country. One housing officer of a Labour controlled inner London borough strongly criticised the Department of the Environment's greater involvement in problem areas where it never previously advised. In Circular 76/77 the department examined the use of vacant and underoccupied housing stock by local authorities. According to the officer, this interfering circular merely announced a problem with which they were already familiar and contained no useful practical advice. The same information could have been obtained by reading the professional journals. Although the department owned no housing stock itself, it assumed it had expertise in the matter. The officer accepted that the government may have wished to encourage a nationwide strategy. However, he considered the problem of underoccupation to be essentially domestic in nature.

Even when central advice is welcomed, its use is limited by its inevitable generality. Guidance issued to all types of local authority cannot hope to provide for the unique regional conditions facing each one and can only cover the broader features common to all. Being national in nature, central circulars cannot be tailored to be directly relevant to all local needs. Since each authority has its own structures and pro-

cedures, administrative suggestions tend to be either so specialised that they can only be applied by a minority of authorities or so generalised that they are of no practical assistance to any of them. There was widespread agreement among the officers that it is a formidable task to frame circulars in such a way that they are appropriate to the differing needs and problems of a wide variety of local authorties.

On one view, the role of central government is to determine national policy and that of local government to apply these principles to the peculiarities of local fact. Circulars which merely invite councils to adopt vague idealistic policy goals without offering practical advice on how these policies can be achieved are not conducive to a satisfactory relationship on this basis. A number of officers said that much central guidance consists of generalities and platitudes of insufficient import to merit separately issued circulars. Some attributed their generalised nature to the central civil servants' lack of grassroots experience and understanding of local administrative affairs. Policy advice displaying only a partial grasp of local housing practice was held in contempt. A circular giving guidance on empty property rating was particularly criticised by the local authority associations in their 1979 Review of Central Government Controls over Local Authorities. The report stated that councils rather than central departments are the best judges of local housing needs and the property market. One housing officer said that civil servants at the centre fail to appreciate that recommending a policy without suggesting a scheme for its implementation will not inspire local authorities to move from the stage of initial policy acceptance to that of taking positive action. A circular will only motivate a council to carry out central policy if in addition it presents a practical and realistic scheme for implementation at the local level.

According to the housing officer of an outer London borough, most circulars containing advice on ways to improve administrative efficiency are preaching to a converted majority and those small councils which still value expert central advice are gradually becoming more competent and less eccentric in their housing practice. Large resourceful authorities develop their own administrative techniques and are sufficiently equipped to solve problems internally, without relying on outside help. Circulars often describe difficulties identified and solved months earlier and the departmental advice merely confirms the advisability of existing local practices and procedures. Much guidance is based on the experience of the larger authorities. Their most efficient procedures are recommended as good practice to the rest. The central department periodically collects together the reported experience of a variety of authorities and circulates what has become the consensus of opinion. In this way, local government is partly self-regulating. Standards are agreed in discussions between central and local government and promulgated by the departments. Central advice is most welcomed by rural authorities which are slower to adopt new procedures and techniques than their larger counterparts in the cities. In these remote councils, circulars are extensively relied upon by officers who often feel too isolated to supply expertise.

Throughout all sizes of authority, officers spoken to agreed that many central circulars on local administration make their work easier to carry out. A circular on grants for disabled persons was frequently singled out as containing particularly useful guidance about which items were available for subsidy. When the administrative changes to be made are so fundamental and sweeping that all authorities are equally unprepared, circulars tend to be applied universally. One of the clearest illustrations in recent

years involves the reorganisation of local government in 1972, described here by Richards and Lucas:

> "Central government departments took an active part in guiding the transition from the older order to the new. A steady flow of circulars and memoranda gave detailed advice or instruction on how the various problems should be met. Where necessary, details of the legislation were provided by statutory instruments but their contents were explained in circulars which became the effective working documents. This central direction had the merit of securing uniformity of treatment throughout the country... The high level of central supervision aroused little resentment. Officials, in particular, were grateful for advice and instructions. Faced with unprecedented problems and a relatively short time to solve them, local government needed to be given a clear framework within which the essential changes could be made." 9

Turning to the impact of circulars on council policy, in the final anaysis this cannot be assessed in isolation from the complex interrelationship of political, administrative and organisational factors. These make it extremely difficult to separate and identify specific cause and effect. No attempt has been made in this study to differentiate these elements. One housing officer of an authority in southern England reported that as a result of a circular and design bulletin on providing accommodation for the physically handicapped, the council was building a number of bungalows for the disabled. Although an authority may claim that new policy was prompted by a circular, departmental advice often only acts as a catalyst which accelerates the adoption of what is an inevitable policy. A circular may be cited simply to give local policy greater authority and legitimacy. An authority may use departmental guidance as justi-

fication and thus insulate itself from local opposition by deflecting criticism to the national government. By this means, the supposed obstacle of central control may be used for internal political defence.

The chapter closes by considering the most commonly voiced local criticism of departmental circulars. This was that their large number makes it difficult to assimilate them all and identify those meriting especially close scrutiny and evaluation. One housing officer from a London borough commented that the departments cry wolf so often that important circulars tend not to be noticed. He complained of being "flooded with them" and of having to "sift the wheat from the chaff". The attention circulars are given in terms of reports and meetings has suffered as a consequence. Occasionally, they are missed entirely and only acted upon months after being received. The number of official circulars issued has declined since its 1976-1977 peak, partly because their content has been presented in other forms. Referring to the issue of council house sales, one housing officer wrote:

> "Latest advice has been received in the form of letters from the Under Secretary and from the Association of District Councils. The last proper circular was 54/70, dated 30.6.1970. The major problem recently has been the lack of circulars or other authoritative documents. Hurriedly-written letters usually contain ambiguities. There is a generally agreed feeling that Government ought to be by legislation, or by circular at worst, and some reservations about government by letter, especially because of the ambiguities which tend to creep in."

CHAPTER FOUR PUBLICATION

The publicity and availability of circulars is not governed by any statutory requirements and it is left to the issuing department to decide whether circulars are to be published or subjected to some other procedure. There are a wide variety of ways in which they can be made available. They may be printed and published as official circulars by Her Majesty's Stationary Office. At a lower level of formality, the central department may merely send out photocopied letters and make arrangements to supply copies to individuals who request them. Leaving such a wide discretion with the departments, whose activities in relation to the publicity of circulars tends to be motivated by pragmatic rather than democratic considerations, means that their action may easily come into conflict with constitutional principles.

One requirement of a democracy is that law and policy made by the legislative and executive branches should be available to the electorate. Without access to latest information about the actions and decisions of government, effective political accountability and responsibility is lost. Renewed concern about the need for open government was voiced in Justice's 1978 Report, Freedom of Information. This maintained that only when the public are adequately informed can they have the opportunity of:

> "understanding and evaluating the nature of, and the reasons and the grounds for decisions taken by or on behalf of government and its agencies."

Constitutional purists argue that people should have full access to public policies which affect them and that all relevant information should be made available.

In practice, however, there are other considerations and exceptions must be made to this principle of complete open government. We have seen in an earlier chapter that informality and flexibility are essential for the effective administration of law and policy. It is these pragmatic factors which have most significantly influenced the nature of the publicity and availability of circulars. The consequences of non-publication, in particular, offer departments a number of advantages in terms of efficient administration. Publication may be more consistent and compatible with a democratic system but non-publication is often preferred because its convenience suits the overridingly pragmatic approach of government departments. The fundamental constitutional question is how high a premium should be placed on securing good administration when democratic principles are sacrificed in the process.

Part One Policy and administration

Whether a circular is printed and published by HMSO largely determines the extent of its subsequent availability. Circulars "published under authority" in a numbered series are more accessible than those which remain unpublished. Published circulars are official government publications and recorded in the daily lists. The Local Government Manpower Committee suggested further improvements in this system:

> "The periodical lists of circulars issued by the Home Office and the Ministry of Health should indicate their subject matter in greater detail and similar lists might be issued by other Departments." 1

All circulars and administrative memoranda issued each year by the Department of Education and Science are collected in a bound volume. This exceptional practice is made possible by the relatively small numbers involved. Circulars in print are available

from government bookshops and a few public reference libraries hold copies. Other sources extensively used by practitioners are the various working manuals. For example, the updated Encyclopaedia of Housing Law and Practice contains all relevant circulars. Most importantly, published circulars are automatically distributed to all local authorities, courts etc. and each body can know whether it possesses a complete set.

Relative to other public documents such as Acts of Parliament and White Papers, access to published circulars is poor. Government booksellers often fail to stock even recent circulars and the difficulties encountered are aggravated by regular industrial disputes. Collections in public libraries are invariably haphazard and incomplete. The libraries in the central departments all have complete sets of published circulars, listed under non-Parliamentary publications. These libraries are not generally open to the public and because of heavy internal demand may only be used by outsiders for approved research purposes. Most require prior written permission.

Reports in the national press publicises circulars to a wider audience than their direct recipients. Occasionally, secret information in controversial areas of policy is leaked. An article in The Sunday Times revealed Home Office plans in the event of a nuclear attack:

> "The emergency arrangements, set out in 44 Home Office circulars - six of which are 'restricted' or issued on a 'need-to-know' basis - explain why the Home Secretary, William Whitelaw, has been reluctant to reply to questions in the Commons asking for details of the government's plans." 2

In addition to publicising circulars having important policy implications which might otherwise be overlooked, the press also performs a watchdog function

by exposing particular abuses. The Guardian's report on the use of secure units for troublesome prisoners suggested that the government had kept circulars establishing the scheme confidential because it was aware that the policy would be unpopular if made publicly known 3.

The specialist professional journals, such as the Housing Review, the Local Government Chronicle and the Municipal Journal, provide a more systematic and extensive survey of newly issued circulars than the national newspapers. Their readership comprises those concerned with the administration of circulars and apart from contributing to the debate on policy merits,the journals serve the important function of bringing circulars to their attention. Magistrates, in particular, rely considerably on articles in The Magistrate and Justice of the Peace explaining Home Office guidance. A journal on social welfare law described Home Office Circular 212/78 which gave guidance to Chief Constables about the help they could expect from the Department of Health and Social Security in tracing the whereabouts of missing children. The article noted that the information about the circular had been "checked with the Home Office" 4.

Technological improvements in copying have meant that the departments are now less reliant on traditional printing processes for the communication of information. In 1950 even conventionally produced circulars came under the criticism of the Local Government Manpower Committee:

> "Government circulars should be printed in larger and better type." 5

Duplicators could not compete with printing since they were not equipped to produce large numbers and the end result was invariably untidy in appearance. However, the present sophistication of photocopiers enables

many copies to be produced quickly, inexpensively and to a high standard of reproduction equivalent to that of the slower and more costly printing process.

The form of the 1979 departmental communications on the sale of council houses was shaped by the political desirability of quick and decisive action. It was administratively more convenient to distribute photocopied letters than print official circulars. The various processes involved in publication, including numbering and pricing, would have taken considerably longer than running off the desired number of photocopies. The consultations in March between the Department of the Environment and the local authority associations had an accelerated two week timetable due to the Labour government's determination to issue the new consent without delay. There was a sense of urgency within the department to have the consent in operation before the general election was announced. Furthermore, a senior official was shortly taking a period of leave and the letter had to be issued before his absence. The letters were posted personally by two senior civil servants on the morning of 16 March. The hastily produced letter was dated and signed but contained no series number and was not on the numbered list. It was apparently intended to be incorporated subsequently in an official circular but in the meantime the election intervened. The May correspondence was also issued in the form of a letter rather than a published circular. Having pledged in their election campaign to change the general consent, the new Conservative administration wished to alter the arrangements immediately upon entering office. The letter anticipated consultations about technical changes to facilitate the sale of council houses and an official circular was thought premature and inappropriate. The DoE

failed to issue a circular at a leter date consolidating the contents of this letter.

These decisions to use photocopied letters are instances of a new development in which matters traditionally covered by officially published circulars are being put into unpublished circular letters. This change was brought about by improvements in copying technology which have provided a viable practical alternative to printing and official publication to disseminate departmental information and guidance. Photocopied letters are more informal and flexible than published circulars and can assume the most convenient form dictated by time and cost. Although offering the departments many administrative advantages, such letters and other devices falling short of official publication suffer from inadequate publicity. Circular letters have a smaller circulation than official circulars. They are not automatically distributed throughout local government but only sent to those specific authorities to which the central department wishes to communicate the information. It may be difficult for a private individual to obtain copies of photocopied letters which resemble private letters. They may be no different in form and appearance from other restrictively issued departmental correspondence not intended to be made publicly available. The term "letter" suggests the presence of a confidential element and local authorities may be reluctant to release circulars indistinguishable from private correspondence and not manifestly public documents to which everyone affected is entitled to have access.

Although circulars now lay down major social policy, traditional ideas prevail that they are still essentially private letters rather than public documents and that publication is consequently inappropriate. Departments and local authorities

often mistakenly consider that central guidance is of little interest to anyone outside the relationship. Publication creates rights of access. The circular becomes an official document of general public interest. There is a danger that an unpublished circular may be treated as private correspondence and not as a public document, in the sense of being of public interest, merely because it has not been published. Non-publication may appear to suggest that the information is only of concern to the immediate recipients. Public access may be denied and the opportunity for informed external debate lost in consequence. Issuing photocopied letters instead of publishing official circulars, then, internalises the process between the department and the local authority and makes open democratic debate and public criticism more difficult.

It is no longer possible to discover all official government policy by relying on published documents. Increasingly, important statements of policy are contained in photocopied letters and circulars issued by the local authority associations. These have a limited distribution and are not easily available. Closed internal procedures surround their issue. The general public may be completely unaware of latest government policy or have no means of knowing whether the information they possess is current and complete. These difficulties have been recognised by the Housing Centre Trust which made arrangements to make information previously put in official circulars more widely available:

> "We know from the pattern of past sales that DOE Circulars were bought, read and used by many people other than the local government officers for whom they were primarily intended. It is now apparent that the present administration is not using the circular as the main means of conveying information or for

> interpretation of policy. Other means are being used including speeches, announcements in the House of Commons and letters to local authorities. Although these are reported in the Press we feel that a number of Housing Centre Bookshop users would like to obtain the full text. While the present situation lasts, therefore, the Bookshop will endeavour to supply a copy of any such papers at a price which covers our outgoings plus a small handling charge. The same arrangements could apply to consultation papers." 6

B. Lucas, Principal Housing Officer of the London Borough of Hackney, has warned that sending letters rather than publishing circulars is harmful to the democratic process which relies on all participants having access to relevant information. Referring to the practice of placing Housing Investment Programme information in letters instead of conventional official circulars, he concluded:

> "If this is the way that the number of circulars published is to be reduced, there will be serious consequences. For example, this information about HIPs will not be available in libraries nor will it be possible to purchase a copy of the letter from HMSO. Students, interested laymen, housing practitioners outside local government and compilers of housing texts will not have easy access to the information. If this process continues indefinitely, councillors and pressure groups will not find it easy to understand the background of housing finance and articulation of informed and constructive responses from local residents will be hampered." 7

Democratic power is abused when departments carry out policy by means of confidential circulars to avoid political debate and potential criticism. One instance involved the use of secret circulars to

establish the possibly illegal control unit system for prisoners. P5, the Prisons Department Division of the Home Office responsible for security and control, successfully advocated that the total period of stay should be as long as six months. Official prison rules, however, only allowed solitary confinement for one month before review. Mr. Emes of P2 Division, responsible for medium and long term policy, commented on 24 July 1974:

> "This is the kind of discrepancy which could be picked up by the prisoners or for that matter the Howard League or some other pressure group."

Aware of this likely opposition, the department's circular to prison governors setting up the regime was kept secret. It warned that there were bound to be pressures to modify its severities and insisted upon rigid censorship. Miss Owen of P5 noted that the circular would not be available to Members of Parliament:

> "Only circular instructions which modify standing orders are sent to the House of Commons Library. This one will not therefore go to the House of Commons."

Once exposed, the control unit system was widely criticised leading to its hasty alteration and eventual abandonment 8.

In 1979 Douglas Allen told all government departments that policy papers should be prepared with a view to publication. This step towards more open government was, however, short-lived for the instruction was subsequently withdrawn by Angus Maude. In practice, the effect of a requirement that all circulars must be published would be that the departments would seek another procedure for dealing with sensitive matters outside public knowledge. Although the telephone will remain a useful means of clarification, it suffers the corresponding drawback of impermanence

as there is no written record of the communication. For this reason, the new word processing technology is likely to make as profound an impact on central-local relations as the typewriter and the photo-copier. Local authority computers linked to the central departments could provide an instant means of political communication and a continually revised source of reference to assist local administration. Messages from the centre could be printed as they are received or if confidential remain stored to be retrieved in the form of a video disply when required. Once a comprehensive system is established, it may prove unnecessary to keep formal separate records of communicated information. The word processing revolution will make possible a permanent, internal and, most significantly, non-public system for the management of central-local affairs. This technology poses a threat to democratic open government as outsiders could, intentionally or otherwise, be denied access to important policy decisions and information. An independent system of watchdogs will need to be established to carry out random inspections of computer data banks to ensure that public knowledge is not being restricted unreasonably.

Part Two Law

It seems likely that circulars containing sub-delegated legislation do not have to be published to make them valid and that liability is not dependent on this element. There is no statutory direction regarding the promulgation of such legislation either relating to validity or liability and there is no common law rule that it must be published to be valid. The courts have not yet held that printing and publication are necessary condition precedents to the existence of liability. Although not a rule of law, it is a clearly established matter of principle that the maxim "ignorance of the law is no defence" can

only operate fairly if the law is both freely available and easily accessible. In Blackpool Corporation v. Locker, Lord Scott stressed that promulgation is an essential link in the theory of the liability of the individual:

> "It seems to me vital to the whole English theory of the liberty of the subject that the affected person should be able to ascertain what legislation affecting his rights has been passed under sub-delegated powers." 9

Ministers may exercise their statutory powers to provide guidance by issuing circulars. In a later chapter we shall see that these powers are now being used to systematise the exercise of local authority discretion by laying down priorities which the centre expect to be followed in accordance with established national policies. Since circulars containing such guidance are judicially acknowledged to have legal effect, they should be produced in a consistent recognizable form so that, like Acts and Statutory Instruments, they are gathered together into a standardised body of law. According to R.E. Megarry:

> "the main objection to administrative quasi-legislation is its haphazard mode of promulgation." 10

The publication of circulars in an official series might achieve the required uniformity and consistency. However, unlike Acts and Statutory Instruments, they do not fall conveniently into a self-defined and self-contained category of legislation. S.A. de Smith took the view that circulars would be out of place in the Statutory Instruments Series:

> "it is clear that in the majority of circulars, notes for guidance and similar documents, including the documents mentioned in court, the instructions (whether legis-

> lative or executive) that directly affect the rights of the public are over-shadowed by a mass of instructions and general administration that could not possibly be described as legislative. For these reasons, the Statutory Instruments Series is not the appropriate medium for publishing circulars. It is often difficult to say whether a circular sub-delegating a Minister's powers includes legislative material; even if partly legislative, a circular usually consists mainly of administrative advice." 11

The writer did not reject the systematic publication of circulars in some other form:

> "A possible solution might be to provide that circulars and analagous documents which are not Statutory Instruments but which purport to have mandatory effect should be published in a new series. No such document would bind the public unless published in this series, or unless exempted from publication as confidential or for some other reason prescribed by an independent Reference Committee."

Five years earlier in 1944 R.E. Megarry had described the legislative effect of many circulars, warning that:

> "the unrepealed words of the statute may be emasculated, not by the legislature or the judiciary but by mere administrative process."

Giving a number of examples of circulars and practice notes containing announcements about how various legislative provisions would be interpreted, he found:

> "the statute remains unaltered on the statute book but ceases to represent the effective law."

Megarry concluded that all such documents changing the law should be subject to:

> "some uniform official method of publication...under some title such as Administrative Notifications and Decisions."

In Jackson Stansfield and Sons v. Butterworth Lord Scott considered there was a strong case for extend-

ing the system of the 1946 Statutory Instruments Act to cover anything that in law amounted to sub-delegated legislation. The judge first explored the constitutional and judicial issues relating to the publicity and availability of circulars changing the law in the earlier case of Blackpool Corporation.

Blackpool Corporation v. Locker

Detailed regulations about the wartime requisitioning of houses, held to constitute delegated legislation, were contained a series of circulars and notes for guidance. They dealt with the form of requisition, the classes of persons to be housed and the rights of the owner to make representations and to occupy for his own use. The circulars not only affected the legal position of the recipient local authorities but also that of the general public by altering the rights and liabilities of individual citizens. The department could not reasonably be expected to have provided every property owner who was a potential victim of requisitioning with copies. However, the Ministry was deliberately obstructive when it frustrated Mr. Locker's attempts to discover his legal position by refusing him access to the circulars. For nearly six months the complainant asked to inspect them. Privilege was claimed for the letters on the basis that they were not public documents but "professional communications of a confidential nature." As the papers had not been published this indicated that they were intended to be private correspondence between the central department and the local authorities. This argument could be used to justify the disappearance of a wide range of circulars behind a veil of secrecy. In an attempt to explain the actions of the civil servants, Scott L.J. speculated that since the document was entitled a circular the officials may:

> "have regarded it as confidential and failed to realise that it was in fact a form of delegated legislation."

The court did not accept the Ministry's submissions. No legal privilege attached to the communications which made changes in the law and were consequently documents of a public nature. It is in the public interest that they should be known and available. Indeed, it is difficult to contemplate circumstances in which it would ever be justifiable not to inform an individual of the law applicable to him and thus deny his elementary right.

Jackson Stansfield and Sons v. Butterworth

The series of circulars examined in this case concerned the licensing of local authority building. The copies supplied to the court were typewritten and Lord Scott commented "perhaps they were never printed." In addition, there were three printed booklets containing serial numbers. The judge noted that "for some curious reason" Number 5 of the Notes of Guidance for Local Authorities was headed "Confidential: for circulation to local authorities only":

> "It would seem, therefore, that at the time material to our consideration there was nothing published for the information of the public... The 'circulars' of the Ministry of Health in the present case have been withheld from publication by HMSO as Statutory Rules and Orders, presumably because they are merely administrative in character, or, where legislative, because they constitute sub-delegated legislation falling outside the purview of the Statutory Instruments Act, 1946, and previous practice."

Lord Scott criticised the secrecy surrounding the circulars:

> "At the date material to the present proceedings, namely, June, 1946, there were no means at all open to the public affected by which a private owner whether an individual or a company, even with the asistance of his lawyer, could, as of right, ascertain what the detailed provisions were which in practice governed and limited his right or effective power to get a license, nor whether they were legislative or merely administrative...Both the circulars of the Minister of Health and the notes of the Minister of Works are largely mandatory in character...Whether and where the contents pass from the administrative to the legislative it may not always be easy to say, but the whole of the procedure was in practice obligatory from the point of view of the uninformed public, who could not lawfully do any building work without first getting a license, and till September, 1946, that public had no access to published information beyond regulation 56 A and the laudably concise orders thereunder of the Ministry of Works. That position of enforced ignorance was very hard and, I venture to think, constitutionally improper."

Referring to the report of the Donoughmore Committee, Lord Scott said that the content of delegated legislation should be within public knowledge and where there is a mixture of delegated legislation, sub-delegated legislation and general administration it is unjust not to make it public:

> "The gravamen of these criticisms is that when, especially in times of crisis, the government has to seek a solution of its difficulties in an elaborate system of delegated and sub-delegated legislation, it is essential that there should always be publicity."

The following examples from the reports of the Joint Committee on Statutory Instruments illustrate the problems connected with ensuring that individuals affected by circulars changing the law are made aware

of their legal rights. They show the dilemma facing the central departments as they strive to achieve a delicate balance between administrative convenience and constitutional requirements. Whether the steps a department takes to publicise a circular are adequate depends on the size of the class affected. Imposing duties on a small ascertainable group often creates rights in a larger unidentifiable class. Addressing circulars to everybody influenced by them is consequently a difficult and sometimes impossible task. Instead, their distribution is normally limited to the smaller and more certain group, namely the local authorities. In such cases, adequate access to others may be satisfied only by general publication. This is suggested when the persons legally affected, though perhaps small in number, are not ascertainable or when they are so numerous that it is not practicable to supply the circular on an individual basis. Publication may be unnecessary if the numbers concerned are small, provided each individual is discoverable and there is a procedure whereby persons affected in the future will receive the circular or otherwise be notified of its existence.

The National Health Service (Transferred Staff Appeals) Order 1975

The first example shows the practical difficulties individuals are confronted with when their rights are contained in restrictively distributed circulars rather than Statutory Instruments. Tribunals had been set up to consider appeals against the conditions of staff transfers as a result of the reorganisation of the health service. The Order ensured that the tribunals continued to possess the necessary authority to hear appeals. However, it gave no indication of the procedure to be followed and the department told the Joint Committee that it was set out in the

appendix of a circular sent to staff in 1974. The Committee felt that a potential appellant could have considerable difficulty in discovering for himself the procedure when he referred a question for determination. The circular was stated to have been "drawn to the attention of all members" by having been placed on staff notice boards. The Joint Committee had doubts about the effectiveness of this kind of publicity:

> "Lots of notices have come to me in various places where I have worked...I may well have read them on the board and filed away in the recess of my memory a little bit about it, but only when it happens to affect you do you start to find out more about it." 12

The Committee was not satisfied with the department's reply that an appellant could go to the management which would have copies of relevant circulars:

> "His right is to see that instrument and the procedure that is there for him, surely, so that he knows how he can conduct his case, but at the moment it is not available to him...the information should be there so that someone can go and look it up and decide whether it is appropriate to his case without having to consult management or his union...there are quite often people who do not like to seek guidance until they have tried to puzzle the whole thing out for themselves. They like to work their way through the regulations and decide what their rights are and when they have it clear they may want to put their case to the Tribunal, but they have done their homework."

The department placed faith in the good-will and initiative of management to inform the appellant of the procedure but the Committee considered that this should be personally available without him having to rely on an outside mediating body:

> "one ought to be very careful to lay down the rules and rights and duties as between employer and employee when it comes to a hearing before a Tribunal...You say that it is not necessary (to set out the procedure in the Order itself) because everybody would know what the procedure is and everybody would act on that procedure. Unfortunately everything is not quite so ideal as that; otherwise one need not lay down any law at all."

The Committee concluded that:

> "the circular should have been redrafted as a schedule to the Order or, at least, reference should have been made in the Order since without such reference it remains unclear how, under Article 5 (3), a Tribunal will 'determine'."

The Seed Potato Regulations 1975

The Joint Committee on Statutory Instruments was concerned that these regulations would enable the Minister to legislate by circular without any requirement of official announcement or publication:

> "Decisions can be taken under the Regulations by reference to circulars issued by the Minister (for instance as to the harmfulness of a particular disease or pest) which are not specified in these or any other Regulations; indeed, there is no statutory obligation to publish or publicise such circulars or decisions." 13

The memorandum from the Department of the Environment had stated that:

> "The detailed conditions and arrangements for certifications are communicated anually to all growers by administrative circular."

The department's witness told the Committee that when the Minister made a direction or decision:

> "obviously he would have to inform the trade of the development."

The grades which may be planted on farms are notified to all growers and from time to time the Minister

would tell them which grades were acceptable. Although the department was satisfied that in practice there would be no communication gap, the Joint Committee believed that the circulars and decisions would be legislative in effect and consequently should be published or announced officially.

The Remuneration of Teachers (Scotland) Amendment Order 1978

The Joint Committee criticised the failure of this Order to identify specific circulars:

> "it would be difficult for the teacher to know, from time to time, what rules are applying to him unless he can identify those circulars which set out the arrangements...The result for any teacher who wants to know what the salary is is he would have to refer to the Order, the memorandum and to any circular mentioned in the Order...Do the circulars vary very much, how do they know which is the latest circular? ...Should there not be a date on the circular?". 14

The terms of the circulars should have been included within the Order and the Committee suggested that this practice should be adopted in the future. Irrespective of whether the statute gave power to make reference to circulars, the Joint Committee doubted:

> "whether it is a desirable practice for subordinated legislators to have to look up other people's legislation to find out what it means."

Supplementary benefits

Despite the use of codes to fill gaps left by the original supplementary benefits legislation, the Department of Health and Social Security has consistently refused to make the rules public. The only

indication of their content is to be found in the Supplementary Benefits Handbook, 1977 revised edition, but this does not contain sufficient detail to predict with accuracy how the discretion will be exercised in individual cases. Under mounting political pressure to adopt a more open liberal approach to publication, the department's review of the supplementary benefits scheme published in July 1978 proposed a new legal structure 15. This would involve the incorporation of basic rules of entitlement and administrative policies into Acts and regulations together with a non-binding published Code of Practice.

In 1980 the government was again urged to publish secret codes of guidance governing the administration of supplementary benefits to the unemployed. Mr. Frank Field M.P. told the Social Services Secretary that such secrecy contradicted the government's promise to make as much information available as possible. He asked for details of the codes, commenting:

> "I presume that the rules governing whether B1 forms should be issued to claimants - like many other rules about which we know nothing as yet - are covered by the Official Secrets Act."

Control of Pollution Regulations

Section 10 (1) of the 1974 Control of Pollution Act gave power of appeal to the Minister "in accordance with regulations" against a decision of a disposal authority refusing or revoking a license authorising the deposit or disposal of waste. Regulations made under this section contained no details about the form in which appeals were to be made or the determination procedure. The Department of the Environment intended to set these out in a circular:

> "Every person who gives formal notice of appeal will receive from the Department a form of appeal (printed as an Annex to the Circular) which describes the appeal procedure in popular language in a note as follows ...The note is a summary of a fuller description of the appeals procedure which is set out in the body of the Circular...In view of the fact that the appeals procedure has been made fully public in this way, and in view of the doubt which has been expressed as to the extent of the power to prescribe that procedure in detail by means of Regulations, it is not intended to make further Regulations governing the procedure for appeals." 16

On this occasion, the Joint Committee on Statutory Instruments accepted that the department's arrangements, though "a surprising way to implement the requirement of the Act", would probably be sufficient to acquaint appellants of the appeals procedure.

CHAPTER FIVE PARLIAMENT

Part One Constitutional considerations

In a previous chapter we saw that as central government substituted Parliamentary legislation with more informal processes, such as circulars, to carry out its policies, the legislature largely lost its traditional policy and law-making functions. In their Memorandum of Dissent to the Royal Commission on the Constitution, Lord Crowther-Hunt and Professor Peacock observed that:

> "governments today increasingly by-pass the House of Commons in the policy-making process." 1

Confidential discussions with outside interests about proposed policies have the consequence of:

> "reducing the contribution which backbenchers make to the development of policy or the form of legislation."

Once the state extended its functions to areas of social welfare it had to be able to act in a pragmatic and flexible manner to adapt quickly to changing conditions. Being essentially a political forum, slow and lacking practical expertise, Parliament is not equipped to settle social policy. It can no longer be said to initiate or formulate policy and legislation except in a strictly formal sense. While Parliament must accept that the process of governing must be left to the executive, this does not mean that the legislature should be no more than a constitutional procedural device for legitimising their decisions.

The increase in the use of circulars has been synonymous with the rise of party government and what has been widely interpreted as the corresponding decline of the legislature. This chapter considers whether it is an unavoidable consequence that Parliamentary democracy must be eroded. The terms control

and scrutiny are frequently used interchangeably. In the following discussion, however, control denotes some formal Parliamentary procedure with power to approve, reject or amend while scrutiny implies more general examination and influence with political responsibility.

Since governments believe that they have a democratic right to govern and carry out their mandated policies, direct Parliamentary control over the settlement of policy in circulars is considered both inappropriate and constitutionally undesirable. The usefulness of circulars to pragmatic departments would be greatly reduced and government efficiency generally impaired if circulars were yoked to a formal system of Parliamentary control and had to gain the legislature's express approval before being issued. Party government can only be effective if the executive can at all essential times control the decisions of the legislature and would cease to operate if Parliament had the power to make its views heeded in the decisions of government by changing or defeating the ruling parties' policies and legislation. Circulars must remain creatures of the administration if they are to continue to serve as useful instruments of government. The Joint Committee on Delegated Legislation recently recommended against formal controls:

> "(there would be) too heavy a burden for too small an advantage if all these kinds of instruments were brought within any system of Parliamentary scrutiny and control." 2

With the continuing political dominance of the governing party in the House of Commons and the prevailing constitutional climate which appears to favour flexible government free from restraint, greater Parliamentary control over policy in circulars is at present most unlikely.

There is a stronger constitutional argument for allowing Parliament to exercise some degree of control, however formal, over circulars which change the law. The Donoughmore Committee was set up partly in response to a widespread concern that the haphazard growth of orders, rules and regulations, some having statutory force and others not, meant that there was no longer a clear distinction between law and administration. The 1946 Statutory Instruments Act attempted to introduce a rigid scheme whereby all law would be contained in Acts and Statutory Instruments subject to Parliamentary control. However, the definition of delegated legislation was by form rather than by content. This failure to distinguish subordinate legislation according to whether it was of a legislative or executive character enabled rules to be developed subsequently in circulars if Acts failed to provide in express form that legal provisions were to be made by Statutory Instrument alone. There is once again a muddled confusion as much administrative and legislative material has become embodied in circulars outside the control of Parliament and the rigours of statutory interpretation in the courts. It is not possible to discover all the law by referring to Acts and Statutory Instruments. One solution might be to distinguish law-making circulars and give them formal recognition as a new third level of legislation beneath Statutory Instruments by making them subject to a system of Parliamentary classification and control. This would also preserve the constitutional principle that the sovereign legislature alone makes statute law.

The present confusion surrounding terminology is evidenced by the Department of the Environment's uncertainty about how to describe the revised general consent for the sale of council houses attached to the letter dated May 1979. The "Instrument" was not an official Statutory Instrument

as defined by the 1946 Act but was an instrument made under statute. After much internal discussion within the department, it was decided to add this note:

> "The Interpretation Act 1978 shall apply to these consents as it applies to any Statutory Instrument made after the commencement of that Act."

Unclear themselves about whether the Instrument was a Statutory Instrument, the civil servants ensured that it would have the same legal authority and would receive identical treatment regardless. Much confusion has also been caused in the House of Commons through inconsistent and inaccurate use of the terms direction and circular. Dr. David Owen once had to remind a Member that:

> "The Department has only very limited powers to issue directions to local authorities: the majority of DHSS circulars contain advice and guidance." 3

We have seen that in the present constitutional context of party government, increased Parliamentary control over circulars is not favoured. It is generally accepted that the business of the executive is to govern and that it should be able to act freely and quickly, especially in matters of policy. However, there is a corresponding apprehension about the inherent dangers of authoritarianism and arbitrariness, identified in Alexis de Tocqueville's classic statement:

> "It is both necessary and desirable that the government of a democratic people should be active and powerful; and our object should not be to render it weak or indolent, but solely to prevent it from abusing its aplitude and strength."

In his evidence to the Donoughmore Committee, the Procurator-General and Treasury Solicitor said that government should be open, accountable and politically responsible:

> "the wider the range of our legisl-

> ation, the more difficult it is for a popularly elected legislature to exercise complete control over administrative policy. The utmost under present conditions that it can do in fact is to secure that competent administrators are chosen and to enforce strictly the principle of administrative responsibility; and fundamental changes would imply the adoption of a new theory of government."

These statements suggest that Parliamentary involvement should be directed towards scrutiny rather than control of circulars to ensure that there is full public knowledge and debate of government policy, democratic responsibility for Ministerial action and an opportunity for criticism and general oversight of central administration. As the Study of Parliament Group Memorandum to the Select Committee on Procedure reported, Parliament's role should be one of:

> "influence, not direct power, advice not command, criticism not obstruction, scrutiny not initiative and publicity not secrecy." 4

Central policies can now be carried out without recourse to Parliamentary legislation through advisory circulars supplementing consultations with influential bodies. Merely securing the agreement of outside pressure groups is, however, no substitute for the self-control and responsibility under the threat of exposure which Parliamentary scrutiny brings. If circulars contain what Parliament would consider policy changes they should come before the legislature and be open to political debate. Incorporation in Parliamentary legislation was the traditional means of legitimating policy. Bills continue to provide some of the best opportunities for Parliamentary scrutiny of executive action but policy is increasingly being left out of primary legislation. Central government should at least seek to legitimate major social policies in circulars by presenting them to

the legislature.

Part Two Parliamentary practice

Before examining possible forms of Parliamentary control over circulars, some reservations about the practical limitations of control need to be made. Obstacles relating to the daily operation of Parliament, notably the pressure of business and the shortage oftime, often make hard-won and jealously guarded controls illusory and ineffectual in practice, proving to be of greater symbolic than practical value. A Legal Action Group Bulletin editorial on the 1980 Social Security Bill drew attention to these problems:

> "Regulations are rarely given any advance publicity before being laid before Parliament...Normal Parliamentary procedures have the effect of ensuring that no debate will take place on regulations. Once laid before Parliament the regulations come into effect unless a negative resolution is passed. Only very rarely is there a debate, which, in any case, can take place only at the end of the day's business." 5

Bringing circulars within Parliamentary control would be a difficult task. Unlike Statutory Instruments they rarely have specific statutory authority and are often issued without resort to legislation. Even when control appears to have been secured, the executive could neutralize its effects simply by substituting more informal devices which are not subject to control.

What new procedures would bring about Parliamentary control over the contents of circulars? Two possibilities were considered during debate on the 1952 Housing Bill. The circular could be laid before the House in its entirety. Alternatively, on the principle that circulars should not be used to make

changes in the law, Parliament could require that those parts over which it wished to exercise control be removed and placed in Orders subject to the affirmative resolution procedure. On one view, control only truly exists where, in addition to undergoing a set procedure, the circular can be amended or rejected by the legislature. Even the second suggestion only partially fulfills these requirements of control.

At Report Stage a number of Members suggested that when a Minister intends to issue a circular laying down terms and conditions for the sale of council houses, the draft should be before the House to enable the elected representatives to make comments. Mr. Pannell said:

> "I understand...that it is the Minister's intention to release the circular to Members of the House on the same day he releases it for publication to local authorities. I would not have thought that that was a good course...I agree that in the present day and age with the multiplicity of statutes that come before us, a good deal of delegated legislation is necessary, but it is still necessary that the maximum amount of information should be laid before the House at the time that we consider these matters...(a circular) should be laid in a way that would give us subsequently or from time to time the right, if necessary, to speak against the Minister's Regulations." 6

The requirement that circulars be laid before Parliament would provide opportunities for scrutiny but would not represent an increase in control in the sense of being able to make changes in content. The issuing of the circular would be conditional not on its gaining some form of Parliamentary approval but only on its laying.

Some Statutory Instruments only come into oper-

ation when approved by affirmative resolution and in 1952 Members advocated that this most rigorous system of control should be applied to consents for council house sales to be issued under the forthcoming Housing Act. Mr. Gibson proposed the amendment that:

> "no general consent shall be given under this subsection otherwise than by an order stating any conditions of the consent and no such order shall be made unless a draft thereof has been laid before Parliament and approved by resolution of each House of Parliament." 7

The affirmative resolution procedure places an onus on the government to present its schemes for approval and if adopted would have ensured that no general consents could be issued lawfully unless Parliament had expressly approved them. Mr. Macmillan summarised the effect of the amendment thus:

> "The provision says that any of the instructions, the regulations, which are to be sent from the Minister to the local authorities giving them the broad outline of what they are to do, what is the minimum price they must obtain, how they are to calculate it, to what kind of people they are to sell - whether to sitting tenants or not - all that should be put into an Order and that the Order should be...subject to the affirmative procedure." 8

The precise effects of the amendment to Clause 3 were disputed. The proposer anticipated that the issuing of Ministerial consents for individual schemes would be subject to Parliamentary approval and thereby intended the Minister's discretion to be curbed substantially. Mr. Macmillan, however, expected there to be Parliamentary sanction only for general policies and Mr. Powell said that the mover was under an entire misapprehension as to the effects of the provision:

> "He constantly said that if the Amendment were made, the Minister would be obliged to place before

> the House an Order giving any agreement to schemes when local authorities asked his consent for selling houses, and this Amendment would oblige him to seek the approval of both Houses of Parliament. Under the existing Act the Minister can consent in response to a proposal from a local authority. If this Amendment were carried there would be nothing to prevent the Minister giving consent to dozens or hundreds of schemes without coming anywhere near the House...I think the House should be clear that this Amendment only deals with general consent." 9

The amendment, then, would have been limited in scope. Only general consents would have been brought under Parliamentary control and Ministerial approval of individual sales schemes would have remained unsupervised. Nevertheless, the provision would have secured some degree of control over this important area of law and policy.

In Standing Committee Mr. Gibson criticised the Minister's decision not to put the sales conditions into the Bill or to present them to Parliament in the form of a Statutory Instrument:

> "The one safeguard that there could be in the Clause is that it should be necessary for the Minister to impose conditions so that he could not slide out of his responsibility and leave no one with any control over what is happening. He asks us to leave it entirely within his discretion whether there shall be any conditions or not."

In the course of introducing his amendment, the proposer spoke of the general lack of Parliamentary control over circulars:

> "This Amendment raises a matter of first-class importance...(it deals with) the constitutional position under which at the present the Minister of Housing and Local Government administers the various housing laws by issuing circulars to local housing authorities giving advice and instructions, none of which have been laid before this House and none

> of which have been laid before this House and none of which can be prayed against in the House if honourable Members are opposed to them. I suggest that the issue which causes this to be raised is of such vital importance that we ought to have a new procedure for dealing with instructions issued by the Department ...The value at which the houses are to be sold is to be left to schemes prepared by the local housing authorities and accepted and endorsed by the Minister. We suggest that this is such a radical change in the financial relationships of local authorities - at any rate in relation to housing - that it ought not be left merely to the issue of circulars by the Ministry and to his agreement to schemes within the four walls of the Ministry without this House being consulted." 10

The government successfully resisted the amendment that all general consents be put into Statutory Instruments rather than circulars. The Minister explained that the scheme would not be put into the Bill for reasons of administrative efficiency and convenience:

> "I do not think that it would be practicable to put all this variety of detail into the Bill itself...it cannot be made statutory. With the passage of time these conditions may change." 11

The Minister opposed Parliamentary control on pragmatic grounds, reminding Mem bers that satisfactory procedures for scrutiny already existed. Throughout the debates he emphasized and gave priority to the administrative rather than legal aspects of the central-local relationship.

For effective scrutiny to take place, circulars must be freely available and easily accessible to Members. There is no requirement that they must be placed in the House of Commons Library and departmental officials are not usually disposed to supply copies. In 1976 an article in Parliamentary Affairs described the problems connected with information

retrieval:

> "The House of Commons Library, recognising the centrality of the Parliamentarian's position, has endeavoured to build up its holdings of legal materials and the number and competence of its research staff in support...The Renton Committee expressed the hope that the publication of Statutes in Force would be complete by 1980 and went on to look for the inclusion of subordinate legislation and eventually of case-law in the database at some uncertain date. Yet beyond this lies further the area that Bloom has called 'government by circular' ('help-yourself bureaucratic kits'); as he says, 'which works although it has no legal force'. Parliamentarians and those that serve them have to be able to find their way through this mass of information too." 12

The limited nature of the procedures governing the publicity and availability of circulars becomes apparent when contrasted with those relating to Statutory Instruments, as described in Erskine May:

> "the laying of statutory instruments on the table of the House of Commons means in practice that the paper, having been delivered to the Votes and Proceedings Office, is placed in the Library of the House...In 1954 the government undertook to ensure that at least fifty copies of Instruments and drafts subject to negative resolution should normally be made available in the Vote Office when such drafts or Instruments were laid ...It has subsequently become general practice to treat all Statutory Instruments and drafts as if they were covered by the undertaking...When papers are laid in the House of Commons, notice appears in the daily Votes and Proceedings. Separate lists of Statutory Instruments etc., are published weekly in the House of Commons, showing all the Instruments and draft Instruments against which negative resolution can be moved within the statutory period, the date from which the period

began to run and the number of days unexpired." 13

Ministers are generally reluctant to disclose details of circulars until they are issued. Once a circular has been sent to local authorities the Minister may exceptionally make arrangements for it to be printed in Hansard. Circulars are occasionally the subject of a statement in the House at the time of release and the Minister may be questioned on his explanation 14. More commonly, Ministers supply written answers to Members' mostly factual questions about circulars and these are printed in Hansard. Oral questioning in the Chamber allows some scope for debate on policy merits and enables backbenchers to cross-examine the Minister by asking supplementaries. As draft legislation passes through its various stages, previously issued and impending circulars may be discussed. In Standing Committee there is time for these matters to be debated more fully.

While opportunities for Parliamentary scrutiny of circulars exist once they have been issued, draft circulars are not generally made available. Members understandably wish to be able to scrutinise circulars at the formulation stage when there is still a possibility that if sufficient political pressure is applied their criticisms may have some effect. Although eager to discuss the merits of a proposed circular, they have little incentive to carry out a retrospective examination once it has been sent to local authorities and the period for consultation is over. During Report Stage of the 1952 Housing Bill Mr. Pannell voiced Members' concern at being left out of negotiations:

"This sort of idea by which the Minister can negotiate with a set of local authorities' representatives and tell Parliament afterwards and that we can argue

> in a kind of rarified atmosphere is completely fantastic." 15

Members felt frustrated and were angry that the Minister had kept secret the full details of his proposed circular due to be issued when the Bill was enacted. The circular was seen as an integral part of the overall scheme. Such important financial matters as the selling price of coucil houses should be made known when the Bill was before the House. Mr. MacColl maintained that general consents should be examined by the Members:

> "as we do in the case of fixing the price of all sorts of odd and miscellaneous things that come before us in the midnight hours in Prayers. Yet the sale of capital assets of the value of, perhaps £1,500 or £2,000, at some price below the market price, is not considered sufficiently important to come before the House." 16

The Minister said that although a copy of the circular would not be laid on the table before becoming operative, a copy might be placed in the Library. He also gave the assurance that by Report Stage the details would be common knowledge among local organisations and this information would have filtered through to Members. In the event, the House was no better informed apart from two Members who though entitled to inspect the circular were apparently not free to disclose its contents. A pledge of confidence had prevented local authorities communicating with Members in the way anticipated by the Minister. Mr. Ewart expressed his strong dissatisfaction thus:

> "Up to now, we have been completely in the dark. We are dealing with a Bill on which the Minister has, in effect, said, 'I am not going to tell the House of Commons what I intend to do. I have discussed the matter with the local authorities, I have produced a circular, and I have stated in the circular what my

> intentions are. That circular will go out to the local authorities after the House of Commons has given a Third Reading to the Bill, and when the House of Commons, which is at present in the dark as far as my intentions are concerned, has given the Third Reading to the Bill, I will produce the circular and tell them what I am going to do'." 17

Committees

By examining Statutory Instruments which omit details and confer power on Ministers to vary provisions subsequently, the House of Commons Select Committee on Statutory Instruments and the Joint Committee on Statutory Instruments have indirectly been able to draw attention to the legislative and administrative uses of circulars. Although the main function of the committees is to discover whether Statutory Instruments conform to specified standards, the annual and special reports provide an opportunity to consider more general constitutional issues, such as the growth of government by circular. There is a strong case for extending the scope of review of the committees to enable them to scrutinise all circulars directly and report where powers appear to have been used contrary to Parliament's intentions. There is presently no protection against the unexpected or arbitary use of Ministerial statutory powers not exercisable by Statutory Instrument.

The primary concern of the committees about the use of circulars in place of Orders has been the absence of Parliamentary publicity, scrutiny and control:

> "(the Joint Committee) are concerned with the difficulty of knowing in each case whether the directions, requirements or other details will or will not take the form of statutory instruments and whether they

> will or will not escape any provisions in the parent statute which would cause them to be laid before the house and be subject to annulment on motion." 18

On another occasion the Select Committee reported:

> "From time to time an instrument, instead of being complete in itself, contemplates or purports to authorise the issue of some further order or direction. The Committee have endeavoured to ascertain whether the subsequent order or direction will be published in the official series of Statutory Instruments or be issued in some less formal manner." 19

If Select Committees were able to discover and follow through policy changes made in circulars, a depository alone might be sufficient. At present, however, their work is limited to questions of legality rather than policy and a further drawback is their lack of power to remedy abuses. This handicap arises from the Chamber's apparent reluctance to accept that it lacks effective powers of control. Intent on remaining at the centre in matters of scrutiny, the House has avoided the United States experience where committees are dominant by carefully circumscribing their functions and powers. The Select Committees are the servants of the main Chamber to which they must report. According to constitutional theory, the whole House takes necessary remedial action on the basis of information reported by its committees.

Select Committees were set up because the ever-increasing volume of business made it impossible for the House to carry out close continuous scrutiny and criticism of government activity. It is an irony that the shortage of time now prevents the House from considering adequately reports and recommendations from its committees and from taking appropriate remedial action. The House rarely attempts to annul

Statutory Instruments criticised by its committees, including those allowing legislative schemes to be established by means of circulars. Although the committees are composed of Members, they are reluctant to become involved in this process. This was shown by one chairman's evidence to the Select Committee on Procedure in 1946:

> "I have myself made it a practice never to have anything to do with making a prayer. I do not think that it is my function to attack or defend a Minister. After we have drawn attention my work is finished." 20

Ombudsmen

As central government has increasingly sought to guide local policy and administration and to require local bodies to follow central direction, Parliament has proved ill-equipped to respond to this extra-legislative development by improving its superintendance. Constitutional consideration tends to be subordinated to political scrutiny. The party dominated House and its system of committees are essentially political forums not designed primarily for constitutional debate. The Parliamentary Commissioner for Administration, however, is able to perform a non-political quasi-judicial function by creating principles of good administration and applying these judicial standards to Ministerial action taken in relation to circulars. He examines administrative rather than legislative action and circulars are clearly within his review. Much of the ombudsman's work overlaps with recent judicial review and the three investigations described in this section provide an introduction to the next chapter which considers the role of the courts.

Circulars are used to inform local authorities about their new statutory duties and what action

they are required by law to take. They may also suggest procedures which authorities should follow to carry out the policy objectives of the legislation. What are the consequences for those bodies which deliberately disregard this non-statutory guidance? Provided all the express duties imposed by statute are fulfilled there can be no judicial remedy. The issue is not one of legality but whether there has been improper administration. The local watchdogs may find evidence of maladministration if a local authority fails to follow central guidance in circulars concerning good administrative practice and the central government may itself be guilty of maladministration if it fails to instruct authorities adequately. The first investigation concerns the Parliamentary Commissioner, the second the Commission for Local Administration and the final example involves both national and local ombudsmen.

Student grants

Department of Education and Science Circular 11/71 covered the calculation of the parental contribution for a student attending a teacher training course. The original complaint was that the department had incorrectly interpreted the provisions of their own circular in their application to the complainant's case. The department had legal advice supporting this interpretation of the circular and the Parliamentary Commissioner did not uphold this claim. The complainant also said that he had been misled by the wording of the circular and the Commissioner considered whether the department had been at fault in issuing ambiguous and misleading information. Before entering into heavy commitments connected with the purchase of a new house, the complainant had carefully studied Circular 11/71 and concluded that these new expenses would be taken into account when assessing his contribution for 1972/1973.

The Commissioner divided his consideration of whether the circular was misleading into two aspects 21. First, whether it was misleading in law and secondly, whether the circular was misleading to general members of the public unfamiliar with the subject matter. He accepted the department's contention that if the text of the circular was read carefully as a whole it would not be misunderstood and misinterpreted:

> "the Circular is something more than a document issuing information to the general public: it is (and this is its primary function) a document setting out arrangements approved by the Secretary of State in pursuance of a statutory provision. Those arrangements impose duties and confer powers and rights. (The department) saw a wide, clearly apparent, difference between the issue of misleading information and the use of words which could conceivably be represented as capable of ambiguity by ignoring the context in which they are used. And they declared themselves satisfied, after taking legal advice, that the Circular is not misleading in the sense that it can properly be interpreted in another way."

The Parliamentary Commissioner found that although the circular was technically unambiguous and legally correct, it could be misleading to the layman. He stressed the importance of clarity when a circular is to be studied by the ordinary citizen trying to discover how rules and regulations will affect him. The wording of the circular under investigation could have been made clearer without necessarily introducing any legal ambiguity:

> "I have seen no reason why the very wording used in the April Circular was not used also in the corresponding Circular issued five months later. And, I think, from what the complainant told one of my officers,

> that if the wording had been used in the later Circular, he would not have been misled and this complaint would not have arisen."

The investigation illustrates the difficulty of formulating a circular which is a proper legal document and also intelligible and informative to those whose rights are affected. These two objectives may conflict. On this occasion, the department favoured producing a formal legal instrument which was regrettably unclear to the layman.

Housing subsidies

This complaint concerned the misinterpretation by local government officers of the terms of a central departmental circular. Merton Council's 1976-1977 rent increase was partly based on a wrong application of advice from the Department of the Environment and the Commission for Local Administration found maladministration by officers in giving incorrect guidance to members 22.

In November 1975 the department informed local authorities of the future arrangements for paying the special element of the housing subsidy:

> "A further feature of the arrangements for 1975 (sic) - 1977 is that an authority who would otherwise have needed to make a substantial rate fund contribution to their HRA and are prepared to make a rent increase of more than 60p per dwelling per week to help reduce it, may qualify for an additional amount of special element subject to the overall ceiling for the year of £21 per dwelling."

Officer A decided that under the terms of the department's letter a subsidy could be obtained if the rate fund contribution to the Housing Revenue Account were reduced and the average annual rent per dwelling were increased by at least £31 i.e. 60p per week.

He concluded that a rise of 70p in the average weekly rent was necessary in order to maximise the special element subsidy available. However, he had not taken into consideration two other factors. First, an authority would be regarded as having increased their average rents by more than £31 per dwelling per annum if their average level of rents for 1976-1977 exceeded the average level for 1975-1976 by more than £31 per dwelling. The officer calculated the subsidy on the basis of an increase in the rents current in December 1975 instead of an increase in the average rents for 1975-1976 which were 20p per week lower. Secondly, the special element subsidy was only available to an authority which increased its deficit in the notional HRA by reducing the rate fund contribution. There needed to be both a deficit and a contribution to reduce. By failing to take these factors into account, the officer overestimated the amount of special element subsidy the council could claim.

Following a council meeting at which an 80p increase in the average rent per dwelling was approved, the DoE telephoned Officer A and referred to a report in the local press that:

> "If the rents had been increased by less than 70p on average, the Housing Department would have lost the Special Element of the Grant, totalling £251,600."

The central department stressed that to qualify for the special element subsidy, the average rent in 1976-1977 had to be 60p above the average of the rents in 1975-1976. The council need only have put up their current rents by 40p to begin to qualify for the special element and 50p to maximise the subsidy.

Home loss payments

This example shows the serious consequences which may result if a local authority fails to conform to central guidance in circulars. It also reveals the problems created when an Act fails to impose express duties and the government attempts to carry out its intentions using non-statutory means.

Under the provisions of the 1973 Land Compensation Act, certain disoccupied residents were entitled to compensation provided the claim for the home loss payment was made within six months of the occupier leaving his home. Department of the Environment Circular 73/73 noted that:

> "the intention of these special payments is to recognise the personal upset and distress which people suffer when they are compulsorily displaced from their homes."

Although the circular stressed that authorities were under an obligation to make home loss and advance payments, the Under Secretary of State for the Environment explained in the House that it would not have been reasonable to impose a legal duty on local authorities to inform claimants of their entitlements under the Act:

> "Authorities do not, by any means, rehouse all potential claimants. Many more are out of the area entirely and cannot be traced. Moreover, many potential claimants may be quite unknown to the authority - for example, private tenants." 23

A letter from the DoE to the London Borough of Ealing confirmed that:

> "There is of course no obligation imposed on local authorities by the Act to notify potential claimants of their rights to home loss payments or of the limited time for making valid claims."

The legality of the council's actions investigated by the Local Commission was, then, never disputed. An

authority which failed to notify claimants was not in default.

Circular 73/73 observed:

> "Some people who have been displaced since 17 October 1972 and who are entitled to a home loss payment may be unaware of the fact. Authorities are requested to take steps to ensure that wherever possible people are notified quickly so that they can put in their claims within the time limit of six months after the passing of the Act."

Circular 131/73 expressed the hope that authorities would continue to make every effort to ensure that early warning was given to possible claimants. In Circular 144/73 the DoE made special reference to the time limit and Circular 160/74 again asked authorities:

> "to take all necessary steps to ensure that those concerned are made aware of their rights in ample time to make their claims within the six month period specified."

Following these four circulars, local authorities were left in no doubt about the department's policy. Ealing Council had acted in accordance with the centre's repeated guidance by adopting a general policy of advising potential claimants of their rights under the new legislation. In the particular instance of alleged maladministration under investigation, however, the council had failed to notify the complainant individually. He stated in a letter that his application was eleven days out of time because he had not been informed of his rights. Baroness Serota concluded her report thus:

> "It is clear in this case that the Council failed to inform the complainant and this amounted to maladministration causing the complainant injustice in that his claim for a home loss payment was out of time as a result." 24

To understand the significance and implications of this result it is necessary to discover the precise basis on which maladministration was found. One possibility is that the sole source of wrong administration was the inconsistent application of the council's policy. Having adopted a general policy to inform potential claimants of their rights, the authority had to ensure that it was fairly and consistently administered. This meant informing everybody. Had the council uniformly not adopted the department's guidance and regularly failed to inform claimants this action might not have constituted maladministration. However, this interpretation is not supported by remarks made by the Local Commissioner which suggest that the fact that the authority had at one time followed an approach contrary to central advice in circulars itself supplied evidence of maladministration:

> "I am very conscious that legislation in this field is complex and it is extremely difficult for the ordinary citizens to understand what their rights are. It is therefore of paramount importance that persons whose homes are being affected by the actions of public bodies should be clearly told by those bodies what their rights are and what type of compensation if any is available. If a person is selling his home to the Council and has a legal advisor acting for him it would not be unreasonable for a public body to expect the advisor to make the position clear to his client; but this was not the case here. In January 1975 when the offer of the new tenancy was made it was not the practice of officers to inform tenants being moved from property acquired by the Council of their right to a home loss payment. This in my view was not in accord with the Department of the Environment Circular of 26 November referred to in paragraph 18 (160/74)."

The report serves as a general warning to local authorities of the dangers of failing to implement

fully or totally ignoring advice contained in central departmental circulars. While their actions may be lawful, they may be held to constitute maladministration. The ombudsman system is, however, restricted in its scope to the investigation of individual instances of alleged maladministration. Commissioners cannot themselves initiate investigations into local authorities' general administrative practices which appear to be contrary to guidance in circulars.

Before the Ealing Council investigation, the issue of out of time claims for home loss payments had already been debated in the House of Commons with concern directed at the actions of central rather than local government. Mr. Gordon Oakes, the Under-Secretary of State for the Environment, tried to satisfy Members that the department had taken adequate steps to publicise the Act's new provisions and ensure that local authorities did the same 25. The department chose only to sanction ex gratia payments in cases where it would have been unreasonable to expect the complainant to apply in time because there was a suggestion of maladministration by the authority. This was a politically unpopular decision and the matter was referred to the Parliamentary Commissioner for Administration. The department argued that since a council which failed to advise tenants that they could claim for home loss payments was not acting unlawfully, special payments were not justified. This explanation satisfied the Commissioner who also considered whether the circulars adequately publicised the new rights:

> "In my opinion, the Department took reasonable steps in these different ways to publicise the position themselves and to encourage the local authorities (who were in a better position than the Department to identify possible local beneficiaries of the new legislation) to invite anyone who might be eligible to make a claim within time."

CHAPTER SIX COURTS

Part One Judicial recognition

Circulars have no legal effect in themselves. However, they are legislative in effect when used to convey instructions and rules to which statute gives legal force, as described by S.A. de Smith:

> "It must not be assumed, however, that departmental communications issued in the form of circulars, notes for guidance or letters to local and regional authorities, or press notices, are necessarily destitute of legal effect. If they are issued in pursuance of statutory powers which authorise the Minister to confer rights, directly or indirectly, on members of the public, and if the Minister does purport to confer such rights (as where a Minister who is empowered to impose restrictions upon his own powers or the powers of local authorities in certain transactions with members of the public imposes restrictions in a circular letter or other document) the relevant provisions will be recognised and enforced by the courts; and to that extent these informal instruments may be characterised as having legislative effect." 1

Some statutes empower Ministers to prescribe administrative procedures and where the form in which they are to be laid down is not specified, we have seen that these procedures may be set out in codes. The standards prescribed for rehabilitation grants under the 1974 Housing Act and for caravan sites under the 1960 Caravan Sites Act have been put in circulars. Under the 1971 Immigration Act, the Home Secretary is required to lay before Parliament rules to be followed in the administration of the Act. The legislature's approval would appear to give them legal force. Similarly, the Highway Code is not a Statutory Instrument but is legislative in content. The 1974 Trade Union and Labour Relations Act required

the Secretary of State to maintain a code of practice, giving practical guidance for promoting good industrial relations. This was admissable in evidence before industrial tribunals which adjudicated employment cases and was to be taken into account on any question which the tribunal thought relevant.

The power to make rules may not be directly conferred by statute. Even where there is no formal power to make delegated legislation, circulars laying down good practices may be judicially recognised to have legislative effect. The court may take into account any matter which it considers relevant. In this sense, instruments having legal effect extend far beyond those having specific Parliamentary sanction or approval and include anything which may be legitimately raised in court. Even non-statutory advisory circulars may in some circumstances have some legal effect. Circulars containing statements of policy or giving instructions to local authorities are thus now established as a source of public law.

This judicial recognition of circulars has followed two different paths. On the one hand, the courts have upheld central guidance and judged the performance of authorities by reference to standards laid down by government departments. At this level of administration it is the legality of the council's response rather than that of the circular itself which comes under scrutiny. This judicial support of circulars, accepting the need for departmental advice, has tended to legitimate and consolidate central control over local authorities. The case of Bristol District Council v. Clark, in particular, judicially confirmed the centre's role as overseer of local policy discretion and affirmed the Minister's national responsibility for policy, strengthening this further by according advice in circulars a legislative significance. On other occasions, the

courts have sought to control and restrict the use of circulars by examining their authority and legality. We have seen how the traditional method of carrying out government policy was through statute and subordinate legislation. These laws and the manner of their execution were subject to scrutiny by the courts as and when disputes arose. Governments have recently resorted to a novel procedure which seems at times to withdraw executive action from the control of the courts altogether. A subsequent section shows how the judiciary has responded by developing established principles in an attempt to regain control over legislative action in circulars.

The common interest of these divergent developments lies in discovering the extent to which the courts have been able and willing to interfere with the administrative and policy uses of circulars - to pass from points of law to points of fact and finally on to merits. The judiciary has long appeared reluctant to intervene in disputes affected by national or local policy considerations, thought to stem from its determination to remain non-political. J.A.G. Griffith has suggested, however, that the judiciary is highly politicised. The courts have deliberately involved themselves in questions of policy, while at the same time attempting to preserve an appearance of political neutrality by always using reasoned legal arguments and applying established legal principles. H.W.R. Wade has written that:

> "if the courts chose to shelter behind literal interpretation, and take the words of each Act at face value, they would absolve themselves from many difficult problems. By insisting, as they do, that the implications of an enactment are as significant as its express provisions, and the powers given for public purposes are as it were held upon trust, they embroil themselves with the policy, motives and merits of ad-

> ministrative action. At the same time they must confine themselves to applying recognisable principles of law, since at all costs they must not expose themselves to the charge of usurping executive power." 2

Bristol District Council v. Clark

This 1975 case indicates that in certain circumstances the judiciary may treat requesting circulars containing non-statutory guidance as having legal effect. Two advisory circulars were effectively converted into a code to be used by the court to determine whether discretionary statutory powers had been exercised lawfully by local authorities. The judgments acknowledged the legislative nature of many circulars, arising from the increasing tendency for pragmatic government departments to use them in place of Parliamentary legislation. The case shows the courts' preparedness to come to terms with this practical use and accept that circulars may be intended to modify statutory powers.

Part V of the 1957 Housing Act which provides for the local management of houses is concerned with powers rather than duties. Its imprecision concerning the exact nature of these powers is characteristic of this type of general enabling legislation. Circulars have been issued subsequently to interpret the statutory purpose. The powers of local housing authorities were thought to be limited by the 1957 Act to the provision of permanent council houses. Department of the Environment Circular 18/74, however, suggested that responsibility for securing accommodation for the homeless should be undertaken by housing authorities. The Act was interpreted as giving them power to provide short-term accommodation for temporarily homeless persons.

In Lord Scarman's opinion, local authorities

exercising the power to provide housing have to:

> "give effect to the statutory purpose for which the powers under the Housing Acts are conferred." 3

Circular 18/74 was:

> "a good indication as to the purposes to be served by the Housing Acts"

and was a "relevant matter", within the principle of Wednesbury v. Minister of Housing and Local Government, that a local housing authority must take into account when deciding whether or not to evict:

> "the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account matters which it ought to take into account." 4

Lord Denning supported this view, adding:

> "the local authority shall not automatically evict a man when he falls into arrears with his rent. The Home Office have issued circulars which contain good advice as to the way in which local authorities should deal with problems of rent arrears. If a man is in good employment, the payment of rent may sometimes be secured by an attachment of earnings order instead of an eviction order."

Lord Scarman concluded that it could be an abuse of power for a housing authority to evict a tenant without first considering these circulars:

> "There will be cases where it would be the duty of the housing committee, after consultation with the social services department, to give consideration whether there should be eviction or an application for attachment of earnings order and an abuse of power not to do so."

If powers conferred on local authorities are not exercised so as to give effect to the statutory purpose,

the authority would, according to Wednesbury, be acting in excess of the powers confided in it by Parliament.

Although the court did not think it possible "to rely on those circulars as imposing any direct statutory duty on a housing authority", in certain cases a housing committee would have a responsibility to consider relevant circulars and a failure to do so could provide good evidence of an illegal abuse of power. As a result of the Bristol judgment, local authorities are now under a strong obligation to take note of Ministerial statements issued after the original legislation is enacted and containing explanations of the statutory purpose and detailed proposals about how the statutory powers should be exercised. In this way, circulars are being converted from voluntary guidance into codes which though not possibly entirely mandatory authorities are well advised to follow.

The Court of Appeal's approach in Bristol could easily be applied to other circulars giving local authorities guidance about how they should best exercise their statutory powers. Reasonableness and lawfulness could be determined in part by ascertaining whether the local action conformed to central guidance. Criteria of reasonableness are laid down in circulars and if an authority departs from central advice, this is a factor to be taken into account when assessing lawfulness. The courts might maintain that prima facie, at least, authorities which have not heeded central guidance have acted unreasonably. Lord Denning said that the Home Office circulars contained "good advice". This type of subjective political opinion is open to criticism, particularly in the case of short-term Ministerial circulars prompted by party political rather than departmental considerations. If the courts continue

to regard all counsel from central departments concerning the exercise of statutory powers as automatically constituting good advice, great weight may be given to circulars in the future when determining the reasonableness of local authority action.

It may be good administrative practice for a local authority to take circulars into account. In Bristol, Lord Denning attempted to turn this into law. It appears that the courts are now prepared to intervene when local discretion is not being systematically exercised in accordance with guidance contained in central circulars. These were recognised to be a method of interpreting statutory discretions held by local authorities and of regulating their priorities. By assessing the reasonableness of local action against political guidance in circulars, political decisions never sanctioned by Parliament were effectively enforced in a court of law. As the national government increasingly seeks to guide local policy, the judiciary is starting to require subordinate bodies to follow this central direction. Although some circulars now constitute public law, they continue to be primarily political instruments and the more they reflect Ministerial rather than departmental opinion the more the courts will become entangled in controversial matters of party policy.

Because of the difficulties of bringing public law cases, it may be some time before the implications of Bristol are further judicially explored but the approach taken and the ideas put forward have already had some some effect on central-local practice. The case has helped to change long-held beliefs about the precise nature of what were previously thought to be solely administrative documents with no mandatory authority. Government departments can now issue more forcefully worded circulars circumscribing the exercise of statutory powers with greater confidence that

local authorities will follow their guidance since in the last resort the courts may treat such Ministerial statements as having some legal effect.

Part Two Judicial control

The stumbling block in the way of greater judicial control of policy in circulars has been the difficulty of discovering a sound legal basis for exercising judicial review. Circulars often fall outside the normal ambit of review. In those cases which come before the courts, there is usually a strong political element and it has been imperative for the judges to support their decisions with solid legal grounds.

Since circulars are predominantly administrative, the opportunity for judicial activism in this area has been limited. For political and purely practical reasons, the administrative process has made a number of departures from judicial norms. Judicialised procedures are generally found to be an ineffective menas of developing national policy since they cannot meet the need for versatility and informality. James O. Freedman has described their drawbacks in the context of American government:

> "the effective discharge of responsibilities...could not be achieved within the case-by-case constraints of judicial procedures. These responsibilities demanded a more extensive and versatile set of possibilities - rule-making, adjudication, industry-wide conferences, advisory opinions - and greater flexibility in their employment, by formal and informal means, than the historic limitations of the judicial process permitted." 5

These departures from judicial processes, evidenced in Britain by the changing use of circulars, has meant that the administrative process has become less acc-

essible and susceptible to judicial control.

Many statutes have conferred extensive discretionary powers on Ministers and their decisions are generally subject to political rather than legal challenge. With the present size and complexity of central government departments, reliance on the convention of Ministerial responsibility can no longer be depended upon as an efficient means of regulation. Given the general inadequacy of political controls over circulars, can the courts respond to the challenge and exercise their own control? For this judicial control to be effective, they must learn to display a greater understanding of the distinctively pragmatic style of the administrative process.

Involvement by the courts in matters of local administration is relatively well-established compared with the review of central administrative action. At this level of administration, they have been less confident of their power to intervene and challenge the legitimacy of circulars. Traditionally, judicial review has operated within limits imposed by the doctrine of Parliamentary Sovereignty. The judicial branch is not there to challenge the authority of Parliament but to ensure that its will is respected by the executive. A further restraint has been the convention of Ministerial responsibility whereby the Minister is politically answerable to the legislature for all circulars issued by his department under his name. The courts have been reluctant to interfere with political instruments when this form of redress already exists. The judiciary also recognises that the legislature deliberately leaves wide scope for Ministerial discretion to allow for a number of policy choices between alternative courses of action. Provided administrators act within the law, and powers and duties are not usually exhaustively defined, the courts cannot interfere

with the administration of a policy which appears to discriminate against an entire class. The only circumstance in which they may act is where a particular individual has been unfairly treated. Despite these constitutional difficulties, there are indications that conditions now exist for greater judicial control of circulars. To understand how these conditions arose, it is necessary to explain how the greatest obstacle preventing judicial intervention in matters of central administration was removed.

The idea that administrative functions should be exercised by a civil service did not take shape until the 1890 s. In the C18th there was no administrative machinery available to the government to implement the law which was left to enforce itself through various judicial processes, as described by Henry Parris:

> "The notion that government needed administrative machinery to enforce the law, outside certain fields such as the collection of the revenue, was foreign to the thought of eighteenth century Britain. In the traditional view, law enforced itself through such agencies as common informers, grand juries and interested parties." 6

During the C19th, ways were gradually found to ensure that Parliament's wishes, i.e. those of the government, were carried out. With the growth of the civil service, arose such concepts as administrative functions and administering the government of the realm. At the same time the courts started to develop the principle that if a discretionary act was purely administrative it was not reviewable by certiorari and did not import a duty to act judicially in accordance with natural justice. To invoke judicial review it became necessary to establish that the act was not entirely administrative but contained a judicial element. A group of cases in the 1890 s held that the functions of licensing justices deciding the

granting and renewal of licenses were not judicial but administrative and consequently not controllable by certiorari 7. In 1948 the case of Franklin v. Minister of Town and Country Planning set particularly narrow limits to judicial intervention 8. The House of Lords held that the Minister, who in the face of objections by local citizens had decided to draft his own order for the designation of Stevenage as the site of a new town, was under no judicial or quasi-judicial duty and was acting administratively throughout. Allegations that the final order was biased were irrelevant.

Perhaps the most notorious attempt to distinguish judicial and administrative acts is contained in the report of the Donoughmore Committee:

> "If a statute is in general concerned with administration an executive Department should be entrusted with its execution; but if the measure is one in which justiciable issue will be raised in the course of carrying the Act into effect, the truly judicial determination will be needed in order to reach decisions, then prima facie that part of the task should be separated from the rest, and reserved for decision by a Court of Law - whether ordinary or specialised, as in circumstances Parliament may think right." 9

This distinction is naive and misleading. Issues only become justiciable when Parliament, or more accurately the executive, decides they ought to be and the circumstances in which a Minister chooses to propose a judicial form of decision to Parliament tend to be those where the government has no policy interest in the outcome. There is no difference in principle between matters which are already tribunalised and those which it would be impracticable to subject to a judicialised process, such as the allocation of council houses or accommodation for old

people.

It is only comparatively recently that the courts have discarded the self-imposed limitation that they could only intervene when the executive was under a duty to act judicially or quasi-judicially. This was made possible by the abandonment of the distinction between administrative and judicial acts. Once the courts realised that it was not possible to draw a realistic distinction, the fiction fell away. This liberated them by enabling them to enter areas which would have previously been labelled administrative and thus excluded from their control. The courts are now free to review all types of administrative activity and problems regarding the scope of judicial competence in the context of circulars no longer arise since there is no jurisdictional barrier 10. S.A. de Smith has noted that:

> "certiorari and prohibition may now issue, in a proper case, to a body which exercises functions which are analytically administrative and which is not even required to act judicially in the performance of those functions." 11

While the courts were rejecting the artificial distinction between administrative and judicial functions, the 1967 Parliamentary Commissioner Act was preserving it. The Ombudsman's role is to investigate complaints of maladministration by bodies performing administrative but not judicial or legislative functions. The courts have entered areas of investigation which have previously been his preserve. By remedying governmental malfunctioning which the political branch has been either unable or unprepared to correct, the judiciary has come to perform a virtual ombudsman function. Schwartz and Wade cite two American examples of this development in which the federal courts awarded relief for maladministra-

tion, although the administrative actions were political in nature:

> "When a proposed electrical utility plant threatened scenic beauty on the Hudson River and the relevant administrative agency declined to give weight to that factor, conservationist organisations sought redress in the federal courts... When a television station in Mississippi practised discriminatory programming treating race relations problems in a manner unfair to Negroes and the agency which regulates broadcasting refused to take action against the station, representatives of the listening public turned to the federal courts for a remedy...In both cases the federal courts granted relief, even though the refusals of the two administrative authorities were clearly acts of policy." 12

The underlying principle which has guided the courts during its tentative forays into the territory of general administrative activity has been that Ministers cannot act arbitarily but must conform to standards of good administration. According to the case of Padfield v. Minister of Agriculture, Fisheries and Food, they must always operate within the bounds of administrative propriety in keeping with good administrative practice:

> "It is said that the decision of the Minister is administrative and not judicial. But that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied."

The principle of natural justice is also implicit in this judgment from Re HK:

> "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."

Building on this principle of natural justice the courts have, then, evolved the further principle that Ministers must conform to good administrative standards. Parliament intends administrative power to be exercised in accordance with certain elementary principles of fair procedure and these are treated as being implied in the statute.

Justice has proposed that Parliament should enact "principles of good administration" which would be observed as a framework for all central departments and local authorities 13. Such a code of principles clarifying and expanding the common law principles of natural justice is much needed, as Wraith and Lamb have indicated:

> "The courts could not investigate what was administratively wrong in the absence of a statement of what would have been administratively right - in the absence, that is, of a body of law which defined how administrative decisions ought to be made, and of an enforceable code of procedure governing the steps which public authorities must take when deciding any matter affecting the interests of the public." 14

In the United States, the 1946 Administrative Procedure Act embodies a legally enforceable administrative code. At present there is no equivalent statutory code in Britain but the conditions now exist for a Division of the High Court to be set up to deal exclusively with matters of administrative law and to formulate principles of good administration which could be applied to all manner of administrative activity, including the use of central circulars by government departments.

R. v. Criminal Injuries Compensation Board, ex p. Lain

Will the courts become more closely involved in

controlling non-judicial administrative acts? The 1967 case of Lain indicated that the judiciary is prepared to adjudicate non-statutory administrative schemes and to give formal administrative arrangements the force of law 15. Certiorari might issue to quash a decision of the Board even though it has no statutory constitution. The Board distributes compensation to victims of criminal injury from funds voted by Parliament and administered under a published scheme which is laid before Parliament but not formally enacted. Although the Board makes ex gratia payments and claimants have no legal rights, Lain and subsequent decisions illustrated the courts' strong determination to preserve ultimate control over government decisions affecting individual rights and to frustrate attempts to use various legislative or administrative devices to avoid judicial review. Dicta in these compensation cases could equally be applied to other administrative schemes contained in circulars.

The government had announced in Parliament and distributed to potential applicants a document describing the system of distribution of compensation:

> "the published scheme as amended from time to time by successive Home Secretaries combines the two functions of informing the Board of the principles under which the Crown expects it to act in the distribution of the Crown's bounty and of informing the public, as prospective claimants, of the principles and procedure on which the Board will act." 16

The rules were administrative instructions from the Home Secretary to the Board by prerogative act of the Crown and not made any statutory authority. Nevertheless, Lain held that certiorari would lie to quash a decision of the Board not made in accordance with the rules. The claim failed on its merits

but later claims have been successful. Two concerned the meaning of providing compensation for "personal injury directly attributable to a crime of violence...or to an arrest or attempted arrest of an offender". Although the Board's decisions were intra vires, they were based on a misinterpretation of this provision and there were errors on the face of the record. The courts, then, treated the rules as if they were statutory. Non-compliance was itself a ground for quashing a decision of the Board and not merely something to be taken into account when considering whether the Board had acted fairly. When enforced in this way, the rules and instructions were legislative in effect and thus subject to judicial control. In the case of Lain, Lord Diplock referred to the historical origins of government without legislation:

> "It may well be a novel development in constitutional practice to govern by public statement of intention made by the executive government instead of by legislation. But this is no more than a reversion to the ancient practice of government by Royal Proclamation, although it is now subject to the limitations imposed upon that practice by the development of constitutional law in the 17th century...a proclamation cannot deprive any subject of any rights to which he is entitled at common law or by statute, or grant to him any immunities to which he is not so entitled."

The compensation cases established that certiorari is available to enforce published administrative rules which the public are intended to rely upon where there is a clear duty to give fair and correct decisions. A case concerning the Home Office's published instructions to immigration officers provided an opportunity to develop this principle further but the Court of Appeal refused to apply the analogy of the compensation cases in the 1977 case of R. v. Home Secretary,

ex parte Hosenball [17]. The rules were not delegated legislation or rules of law but simply rules of practice for the guidance of immigration officers and tribunals and a breach did not in itself provide sufficient ground for quashing an order of the Home Secretary. Mandamus would not be granted to make him observe the rules. Instead, the court held that it would have regard to them when considering whether immigration authorities had acted fairly. This is a similar judicial approach to that adopted in Bristol which suggested that the courts may treat any disregard of government guidance and instructions in circulars, although not legally enforceable in themselves, as establishing a strong prima facie case of unreasonableness.

Laker Airways Ltd. v. Department of Trade

Many procedures involving the use of circulars have been designed by the central departments to be entirely administrative, hoping to exclude judicial scrutiny and control. However, we have seen that the courts are no longer dissuaded from examining circulars merely because they appear to be administrative in character. The first means of subjecting circulars to judicial review is based on the principle that their policy must conform to that of the original legislation enacted by Parliament. They may explain and interpret but may not conflict with existing policy by exceeding the limits laid down. The courts interpret Acts of Parliament as authorising action which has some particular purpose and circulars must conform to and not go beyond this stated or implied purpose. In the case of Laker this first principle was invoked [18].

The decision halted a government attempt to bring about a major change of policy by issuing guidance which conflicted with the general object-

ives of the authorising statute. The Secretary of State intended to reverse the previous policy of encouraging competition between state-owned and privately-owned airlines not by an amending bill but by guidance "set out in writing, probably in a White Paper" 19. Instead of being used to supplement the objectives of the statute as intended by Parliament, the guidance overruled the statutory criteria and the Court of Appeal held that the Minister was acting ultra vires. In two respects the particular circumstances of the case were unusual. Ministerial guidance was specifically statutorily authorised and the policy objectives of the legislation were expressly stated and relatively clear. Could the court's approach nevertheless be applied to frustrate similar attempts to use guidance in circulars as a backdoor method of legislating?

Laker's Skytrain service had been licensed by the Civil Aviation Authority in accordance with the express policy of the 1971 Civil Aviation Act that British Airways should not have a monopoly. The The Labour government, wanting to reverse this policy, used their statutory power to give guidance to the C.A.A., directing them not to license competing airlines and to review existing licenses. In the High Court, Laker Airways argued that Mr. Shore's instructions in the second guidance were ultra vires his powers under the 1971 Act.

Section 3 (1) of the Act stated that in carrying out its functions the C.A.A. was to have regard to four criteria, one being that it should secure that at least one airline, not controlled by the British Airways Board, should have the opportunity to participate in providing air transport services. Section 3 (2) empowered the Secretary of State, after consultation with the C.A.A. and on the approval of both Houses of Parliament, to give written

guidance to the Authority on the performance of its functions. Section 4 (3) empowered the Minister to give directions in a number of specified circumstances. According to Lord Roskill:

> "if it had been intended that the guidance could so override the criteria this could have been stated in the simplest terms."

In his introductory speech at Second Reading of the Bill, the Minister of Trade said:

> "The power of general direction contained in Clause 4 (3), common to public body statutes, cannot override the general objectives in Clause 3 (1); in other words, it cannot be used to upset what Parliament decides the objectives to be." 20

It can be inferred that the power to issue the lesser form of guidance was also not intended to be used to reverse the general policy criteria.

The government's lawyers argued that the policy of the Act could be overridden by guidance but the Appeal Court decided that this strained the powers beyond what could have been contemplated by Parliament. Lord Denning held that since the 1971 Civil Aviation Act required the C.A.A. to perform its functions in such a way as to achieve the general objectives, any guidance must be consistent with these objectives. Contrasting guidance with directions, he said that the former could not reverse or contradict the general objectives of the statute. The guidance was subordinate to Acts of Parliament and could not override the law of the land. Paragraphs 7 and 8 disclosed:

> "so complete a reversal of policy that to my mind the White Paper cannot be regarded as giving 'guidance' at all."

It went beyond the Secretary of State's powers:

> "In marching terms it does not say 'right incline' or 'left incline'. It says 'right about

> turn'. That is not guidance but the reverse of it."

While the Minister was entitled to reverse previous policy:

> "he should have introduced an amending bill and got Parliament to sanction it. He was advised apparently, that it was not necessary, and that it could be done by 'guidance'. That, I think, was a mistake."

The element of Parliamentary approval was not crucial to the decision. Although the guidance had been sanctioned by both Houses, the court still held that it was invalid. Lord Roskill agreed with Lord Denning that Parliament intended guidance and directions to be separate and different. The latter powers could overrule the policy criteria but only in the exceptional circumstances specified by the Act.

The court held the Minister's guidance to be ultra vires even though it was only discretionary. The C.A.A. was not under a duty to follow the guidance. The 1971 Act provided that the Authority had to perform its functions in the manner which it considers is best calculated to achieve the objectives and M.P. s were told that it would exercise considerable discretion. Lord Denning said that the C.A.A. had to follow the Secretary of State's guidance but added this qualification:

> "Even so, the Authority is allowed some degree of flexibility. It is to perform its functions 'in such a manner as it considers is in accordance with the guidance'. So, while it is obliged to follow the guidance, the manner of doing so is for the Authority itself."

The guidance could only be said to be mandatory in the sense that it explained and amplified the objectives which the C.A.A. had to follow.

The case of Laker may be authority for the general proposition that where an administrative

body is authorised to exercise statutory powers, Ministerial guidance in circulars as to how these powers should be exercised must conform to the general policy objectives of the original legislation and if contrary to these principles the Minister is acting beyond his powers and the authority is under no obligation to obey him. The case of Bristol has shown that to the extent that circulars contain good advice as to how statutory powers should be exercised, they may be authoritative and obligatory in effect if a court would be more inclined to conclude that an authority ignoring central guidance had acted unreasonably and unlawfully. The court presumed that the circulars contained good advice about legislative policy and by not examining whether they conformed to the general policy objectives of the original legislation strengthened the authority of the central departments to legislate by circular. Laker, on the other hand, represented a different development since it questioned the validity of central guidance contrary to the overall policy objectives of the authorising statute.

The potential for administrative law courts after Laker to curb the practice of legislating by circular may be limited by the difficulties of applying the case to less straightforward but more typical situations. The 1971 Civil Aviation Act specifically authorised the Secretary of State to give guidance. It was a relatively simple matter for the court to declare the guidance invalid since it could hold that it clearly conflicted with the Act's express policy. The policy objectives of the legislation were contained within the statute which enabled the court to reach its conclusion more readily. The judges decided that the instruction in paragraph 7 of the 1976 guidance that the C.A.A. should not allow competition with the state-owned airline was contrary to the criteria in section 3

of the Act that the Authority should ensure that at least one other independent airline should have the opportunity to provide air transport services. Although this interpretation was strongly disputed by the government's lawyers, the legislative policy appeared clear compared with most Acts. Discovering their objectives is made more difficult when they are not written into the statute but only vaguely implied. In Bristol, the court referred to the circulars themselves to supply the intention of the original statute, a dangerously circular approach. It is doubtful whether there is any impartial non-political basis on which the courts could decide whether the policy of the circular conflicted with that of the statute.

The Laker decision countered the philosophy of the 1971 Civil Aviation Act. The court adopted a narrow, literal and legalistic approach towards the interpretation of the Act's objectives which defeated the intention of the pragmatic department to design an administrative scheme allowing major policy changes to take place without having to amend the broad framework of existing legislation. The guidance was envisaged to be the means by which government policy would be laid down. In 1969 the Committee of Inquiry into Civil Air Transport suggested that desired modifications of policy would be promulgated by a change of guidance 21. The Act would allow for major policy changes to be made within its widely stated policy objectives. The government's lawyers maintained before the Appeal Court that the policy of withdrawing Laker's licence was within the objectives of the Act and not contrary to the criterion relating to competition. The Act did not demand competition on each individual route and a second airline, British Caledonian, continued to operate. The Civil Aviation Authority was not intended to be independent of the government but subject to its

control of the broadest policy lines in civil aviation, including the private/public sector balance and general competition. By asserting the C.A.A.'s independence, the court's decision further undermined the conceptual basis of the scheme. It appeared to take policy control out of the government's hands to such a great extent that it prompted this comment in The Times on competition between airlines:

> "One question raised by the judge's decision is whether the Government are able to have a policy in these matters." 22

Ironically, the original intention was that the scheme would operate independently of the courts:

> "the objectives and the guidance, which will be in general terms, mainly about economic considerations, are not suited to ultimate decision by the courts. Appeals, therefore, must lie with the Secretary of State." 23

Ministerial consents for the sale of council houses

The second principle developed by the judiciary to curb the growth of policy in circulars not subject to Parliamentary scrutiny is that statutes only authorise reasonable action. The courts may consider the circumstances surrounding the issuing of a circular to discover if the departmental action arose from improper motives or a wrong assessment of the legal position. The crucial question is whether the decision not to use legislation was a proper one. The courts again rely on the notion that it is Parliament's function to introduce major new policy. The Minister may be wrong to accept civil service advice that a policy could be carried out by circulars alone since a deliberate attempt to by-pass the legislature may constitute improper motives. This chapter closes by examining the legality of Ministerial consents for council house sales, in particular the

Minister of Health's blanket refusal to give his consent in the late 1940 s and early 1950 s. Although never challenged in the courts, Mr. Bevan's action was probably unreasonable and an unlawful fetter of his discretion.

The power of local authorities to sell their housing stock has always been subject to the consent of the Minister. Judicial review may be made easier by the lesser legal status of consents contained in circulars compared with more formal subordinate legislation. Because Statutory Instruments exercising legislative powers delegated to Ministers are required to be laid before both Houses of Parliament, the courts have been reluctant to attack them on the grounds of their unreasonableness. Consents put in circulars are not presented to Parliament and as a consequence review is not so constrained by concepts such as Parliamentary Sovereignty and the separation of powers. All executive power has legal limits and is accordingly subject to the control of the courts. As the central departments have striven to create wide discretionary powers in legislation, the judicial branch has responded by developing principles governing the proper exercise of statutory powers. The extent of the legal parameters within which Ministers must operate when dealing with the sale of council houses is now considered.

Whether the Minister gives his consent for individual sales or for general local authority sales schemes is a policy decision made in a political rather than judicial capacity. Its merits are essentially a matter for Parliament. However, the decision has a legal impact since statutory powers are invoked and the courts are legitimately interested in the legal consequences. Although judicial review is concerned with the legality rather than the merits of Ministerial action and limited to an

examination of the manner in which consent is given or refused, evaluating the reasonableness of a policy decision may inevitably involve examining the policy motives of the Minister. The line separating law and policy becomes blurred and the merits of the exercise of a Ministerial discretion may indirectly come under review, although the courts maintain reluctance to encroach openly on executive activity.

Until 1980 statutory authority for the sale of council houses was contained in section 104 of the 1957 Housing Act:

> "the consent of the Minister may be given generally either to all local authorities or to any local authority or authorities and either in relation to all houses or to any house or houses, and may be given subject to such conditions as the Minister thinks expedient..."

The Minister had a very wide statutory discretion as to how and when to exercise his power to give consent. There was no statutory guidance about how the discretion might be exercised or the requisite state of the Minister's mind before he might lawfully issue consent (the section probably involves a difficult subjective test) or the standards to which the exercise of the power must conform. Although statutes often contain no criteria by which the Minister's actions can be judged, the courts have developed their own rules for ensuring that wide discretionary powers are not abused. What constitutes abuse was determined by the judiciary whose rulings placed legal limitations on the Minister's power to consent to council house sales. This judicial control has been based not on detailed interpretation of express statutory provisions but on a general assumption that Parliament must have impliedly intended the conferred powers to be exercised in a reasonable manner. The limits, then, have been developed by the courts according to principles of vires.

One such principle is that where a Minister has a statutory duty to exercise a genuine discretion in each individual case, he cannot lawfully abdicate from performing this duty by making a general policy statement that under certain conditions he is not prepared to even consider applications. Parliament intends the Minister to exercise a genuine discretion. Strictly applying a general policy without making a proper investigation is an unlawful fetter. In the 1970 case of British Oxygen Company Limited v. Board of Trade, Lord Reid was of the opinion that it was not illegal for a Minister to adopt and adhere to a policy or rule provided any special case was still considered on its merits:

> "He may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good administration requires it, provided that he listens to any applicant who has something new to say...the general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'...A Ministry or local authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided that the authority is willing to listen to anyone who has something new to say." 24

In the following year, the case of Stringer v. Ministry of Housing and Local Government confirmed that while the Minister could adopt a particular policy and refuse applications on the basis of that policy, there remained a duty on him to form a judgment on the facts of each case presented to him 25.

An instance of a likely unlawful fetter of discretion took place in 1946 when the Minister of Health issued a circular informing all local authorities that no consent for council house sales under section 79 of the 1936 Housing Act would be forth-

coming "except in particular cases". The section provided that:

> "the authority may...(a) with the consent of the Minister, sell or lease any houses on the land... subject to such covenants and conditions as he may think fit to impose."

Did this place a statutory duty on Mr. Bevan to form a judgment on the facts of each application? In the 1968 case of Padfield v. Minister of Agriculture, Lord Diplock said that the imposition of a duty by a statute does not require any particular form of words:

> "It is perhaps unusual for a duty to be imposed in respect of an act mentioned in a mere protatic phrase such as that under consideration in the present statute. But even such a phrase can do so if the subject matter with which it deals compels the conclusion that Parliament must have intended to impose a duty in respect of the doing of that act."

Lord Pearce added that to allow the Minister to throw a complaint away unread would enable him to set aside:

> "the obvious intention of Parliament, namely, that an independent committee...should investigate grievances."

The court concluded that the Minister was under a duty to consider whether a complainant should have access to a remedy.

The 1936 Housing Act did not expressly place a duty on the Minister. However, it is likely that this was Parliament's intention since it would not have sanctioned the Minister to ignore entirely a reasonable application sent to him for determination. He probably not only had a discretion whether to exercise his power to give consent but was also under a duty to consider every application from a local authority, an interpretation given weight by Mr. Macmillan's comment at Second Reading of the 1952

Housing Bill that in cases where a claim was put forward by a local authority which seemed to him unwise it would be his duty to give reasons why he did not think it was a scheme to which he should give his consent. Nevertheless, some doubt remains. The House of Lords in the case of Padfield was not unanimous in its remarks. Lord Morris dissented and Lord Upjohn maintained that if Parliament had intended to place the Minister under a duty to refer every complaint to the committee it would have used different words.

The legality of Mr. Bevan's circular on the issue of fettered discretion turns on the significance of his statement that he would give his consent "in particular cases". The total absence of consents for a period of six years after the circular was issued suggests that the Minister was not in practice prepared to consent to any proposals. Whether he adopted a general policy involving a blanket refusal to even consider the facts of proposals suggested to him is a disputed question of fact. The 1874 case of Macbeth v. Ashley established that a course of conduct involving the consistent rejection of applications belonging to a particular class may justify the inference that the competent authority had adopted a policy to refuse all applications. During the Report Stage of the 1952 Housing Bill Mr. Enoch Powell said that the Minister had intimated in his circular that under existing conditions he was not prepared to consider any applications for consent. His general policy not to consent to council house sales evidently covered all circumstances. The six year block on sales suggests that the phrase "except in particular cases" was inserted to reassure local authorities that the Minister would operate within the law by considering all proposals on their individual merits, although he had little intention of doing so in practice.

Mr. Bevan's complete refusal to consent to council house sales might also have been challenged on the grounds of unreasonableness. Lord Wrenbury stated the doctrine in general terms in the 1925 case of Roberts v. Hopwood:

> "A person in which is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably." 26

In Padfield it was held that by refusing to refer the milk producers' complaint to the statutory committee the Minister had unlawfully used his discretion to frustrate the policy of the Act, even though its words were merely permissive:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

Accordingly, the legality of Mr. Bevan's actions could have been contested on the basis that Parliament not only intended the Minister to exercise a genuine discretion in each case but, by enacting the section, intended consents to be actually given. By effectively banning council house sales, the Minister defeated the objective of the Act which was to provide

for the continuing sale of local housing stock. By not using the power in the way intended by Parliament, he had acted unreasonably and the court could intervene in this policy decision. The success of this argument would have depended on the court's own interpretation of the true intent and purpose of the Act.

It is not possible to state with any certainty which approach would have been followed by the courts had Mr. Bevan's circular and his subsequent actions been litigated. As S.A. de Smith has written, they will often:

> "characterise a discretion as judicial when they wish to assert powers of review but as executive or administrative when they wish to explain their inability or unwillingness to measure it by reference to any objective standard." 27

The courts might have rejected the argument of unreasonableness or refused to interfere, in the view that the exercise of Ministerial was governed by general considerations of national policy.

CONCLUSION

In the 1949 case of Patchett v. Leathem, Mr. Justice Streatfield severely criticised the use of circulars to sub-delegate legislative powers. His observations on these "cursed" instruments provide a short summary of the constitutional imperfections of circulars:

> "Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; thirdly; it is a jumble of provisions, legislative, administrative or directive in character, and sometimes difficult to disentangle one from the other; and fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible to the ordinary canons of construction."[1]

A major theme of this study has been the way in which the nature and development of circulars has been shaped by the pragmatic style of government departments. We have seen that departmental action in this area has been motivated by such practical considerations as administrative convenience, flexibility and expediency rather than by any desire to conform to good standards of constitutional practice. Indeed, departments have resorted to using circulars with the deliberate intention of avoiding conventional constitutional controls which inhibit government efficiency. Adopting pragmatic standards very often leads to action which is constitutionally undesirable. It would appear that the most effective and

valued processes of government inevitably tend to be those which unfortunately are not subject to effective democratic accountability and control but tarnished with the brush of authoritarianism.

APPENDIX A

Questionnaire

To which department are circulars first sent?
Which departments receive copies of housing circulars?
Who is responsible for the interpretation of housing circulars?
When housing circulars contain legal aspects who supplies the legal advice?
Are there lawyers attached to the housing department or does the authority have a separate legal department?
Is counsel's opinion ever sought about the wording of housing circulars?
Have there been any particular problems of interpretation with recent sales circulars?
Does the authority have consultations with the DoE about the interpretation and content of housing circulars? What form do they take?
How are councillors informed about housing circulars? Do they receive copies?
By what criteria are housing circulars reported to the relevant committee?
What effect did the March and May letters have on the council's sales policy?
How did the authority react to the letters?

Questionnaire completed and returned by the following authorities:

Mid-Bedfordshire District Council
Bletchley District Council
Chesterfield District Council
Chiltern District Council
Crewe and Nantwich District Council
Dorking District Council
Gloucester District Council
Borough of Hartlepool
Huntingdon District Council
Lancaster City Council
Newcastle City Council
Northavon District Council
Nottingham District Council
Nuneaton District Council
Ryedale District Council
Scarborough District Council
Sedgfield Borough Council
Sevenoaks District Council
North Shropshire District Council
Southend-on-Sea District Council
Stoke-on-Trent District Council
Thurrock District Council
Borough of Torbay

Interviews conducted at the following authorities:

London Borough of Bexley
London Borough of Bromley
Chelmsford District Council
London Borough of Ealing
London Borough of Enfield
London Borough of Haringey
London Borough of Harrow
London Borough of Islington
London Borough of Kingston-upon-Thames
London Borough of Merton
South Oxfordshire District Council
London Borough of Redbridge
London Borough of Sutton
City of Westminster
Woking District Council

APPENDIX B

The World at One BBC Radio 4 October 22 1980

Robin Day:
Some magistrates are reported to be critical of the Home Secretary's circular suggesting that fewer people should be remanded in custody and that fewer people should be given prison sentences because of the worsening crisis in the pris ons. The Home Secretary's circular to magistrates was issued after consultation with the Lord Chancellor and the Lord Chief Justice...Mr. David Kidner is Clerk to the Coventry City justices and is honourary secretary to the Justices' Clerks Society. I asked him why he had attacked the Home Office circular to magistrates as "an unwarranted interference by the executive with the judiciary".

David Kidner:
By implication the circular is suggesting that somehow or other magistrates' courts can approach the everyday task that they have of deciding whether or not someone should be in custody in some different way.

Robin Day:
Is not the circular very carefully worded so as not to be an instruction but to be a suggestion to magistrates as to how a public emergency might be dealt with?

David Kidner:
I appreciate the very careful wording but I go back to my initial point that by implication it is being suggested to magistrates that they can approach their decision making in a different way and my contention is that magistrates' courts already properly apply their minds to these important decisions and

that any suggestion from outside that other factors should make them look at these decisions in a different manner is objectionable.

Robin Day:
I understand that view but presumably the Home Secretary and the Lord Chancellor might say to you if they were here that here is a grave crisis with hundreds, indeed thousands, of people in police cells who ought not to be there and it is only right to draw magistrates' attention to the nature of the crisis so that they may bear it in mind when dealing with people before them.

David Kidner:
I accept to some extent that magistrates like anyone else must be aware of the crisis within the prison service and the difficulties the police are undergoing at the present time but viewed from the bench they cannot allow that situation to deflect them from the proper exercise of their functions. I think that the function of the executive is to provide the necessary secure accommodation that flows from the decision making of the court. The ball is firmly in the court of the executive.

Robin Day:
Is it new, however, for Home Secretaries and Lord Chancellors to draw magistrates' attention to a particular problem and to suggest that sentences might be shorter or longer or other suggestion of that kind? That has happened before, has it not?

David Kidner:
Naturally the Home Secretary has certain duties in relation to Parliament and legislation and the other high judicial offices can make pronouncements about the way matters should be approached within the normal legitimate sphere of their activities but I

just question whether this is right at this stage. I certainly recall no similar intervention in my long experience as a justices' clerk.

Robin Day:
I then asked the former Lord Chancellor, Lord Elwyn Jones, for his comment on Mr. Kidner's opinion that this Home Office circular is an unwarranted interference with the judiciary.

Lord Elwyn Jones:
I do not think that it is an interference at all. What has been done is to draw the magistrates' attention to facts that may not be known to them, namely, the crisis which has arisen about the inability to accommodate people sent to prison. The direction, or rather the circular, is not in terms of taking away from the magistrates the ultimate disposal of cases of persons on bail. The language is very carefully expressed - it may be desirable to adjourn the proceedings.

Robin Day:
But Mr. Kidner's point on that was that the implication is perfectly clear that the executive are telling the magistrates how to carry out their judicial discretion in dealing with people before them.

Lord Elwyn Jones:
It is telling them to give consideration to the special difficulties arising temporarily in a period of crisis and I should have thought that if they failed to do that the executive, if that is the right way of describing us, the Lord Chancellor, the Lord Chief Justice and the Home Office would be neglecting their duty.

Robin Day:
You said the circular drew magistrates' attention to certain facts which may not be known to them about the prison crisis but Mr. Kidner's answer to that was that magistrates know perfectly well about the prison crisis and it is not their responsibility to deal with people before them on the basis of what is wrong with the prisons.

Lord Elwyn Jones:
That may well be so but all the courts have got to face the reality of the existing situation. You cannot just wash your hands off in an aloof way and say that it is none of our business what will happen to people who are sent to prison if it is consistent with the magistrates having the ultimate decision as it is here temporarily to postpone the business if they think that a case may result in a term of imprisonment for the time being.

Robin Day:
Mr. Kidner also said that he could never remember in his long experience of working in magistrates' courts any circular of this kind which went so far as it did in advising or telling magistrates what they ought to do.

Lord Elwyn Jones:
I prefer your first phrase advising and suggesting rather than telling. It is an exceptional situation calling for temporary measures.

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On October 24 1980 Mr. Michael Heseltine, Secretary of State for the Environment, announced an indefinite halt to local authority capital expenditure on housing. A circular instructed authorities not to enter into any further contracts for the acquisition of land and buildings, or for building works, not to authorise their direct labour organizations to start further capital projects and not to make further grants or loans, except where required to do so by statute.

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44 Merlyn Rees, House of Commons debates, July 27 1977, vol. 936, col. 721.
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48 The prison officers dispute prompted the Home Office to issue a circular to magistrates' courts on October 21 1980 which raised the issue of the proper relationship between the executive and the judiciary. The department exhorted magistrates to refrain from sending defendants to prison "Where persons on bail are due to appear for summary trial in respect of matters for which they are likely to receive a custodial sentence, it may be desirable to adjourn the proceedings. Courts might also give very careful attention to the matter before imposing periods of immediate or suspended imprisonment in default of payment for such matters as maintenance, fines and rates". The circular was immediately criticised by magistrates and judges as an unwarranted interference with their functions. Sir Thomas Skyme, chairman of the Magistrates' Association, claimed it was an unprecedented example of the executive trying to influence directly courts' discretionary decision-making powers as to how to deal with offenders. A magistrate in Peterborough said that the law must "take its course and not suit the administrative convenience of any Minister". Judge James Pickles, a Huddersfield Crown Court judge, commented "If I feel it is my duty to order that a

person should lose his liberty, then to prison he will go and it is for the executive to make room for him". The department stressed that the carefully worded temporary circular had the approval of the Lord Chancellor and the Lord Chief Justice and was not an insturction but only advisory in nature. They would be failing in their duty if they did not draw magistrates' attention to relevant facts, especially in an emergency. Despite these reassurances, the impression remained that the circular carried the implication that courts needed reminding how they should perform their everyday functions. The circular was addressed to magistrates' clerks and many resented the assumption that they were supposed to interfere with the sentencing powers of justices. Appendix B contains a transcript of two radio interviews on the controversial Home Office guidance.

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CHAPTER THREE

Most of the material in this chapter is based on interviews with officials from central and local government. Principal and deputy housing officers from a random sample of district councils in London and the South-East were contacted by letter and over half were willing to see me for periods ranging from half an hour to an entire afternoon. The meetings were informal in nature. Contemporaneous notes were taken. The interviews took place from May-September 1979 and covered housing circulars generally with special attention being focussed on those relating to the sale of council houses. This was an important political issue at both national and local levels during this period. Most councils had recently altered or were in the process of changing policy in the light of the March and May correspondence. To preserve confidentiality in this politically controversial area, the comments of the housing officers spoken to are not attributed to any individually named authority in the text. To supplement the personal interviews with material from authorities further afield, a questionnaire was prepared which was completed and returned by over three quarters of the housing officers approached (see Appendix A). In addition, interviews were conducted with representatives from three local authority associations - the Association of Metropolitan Authorities, the Association of District Councils and the London Boroughs Association. Finally, two senior civil servants responsible for the drafting of council house sales circulars were spoken to at the DoE's main London offices in Marsham Street.

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