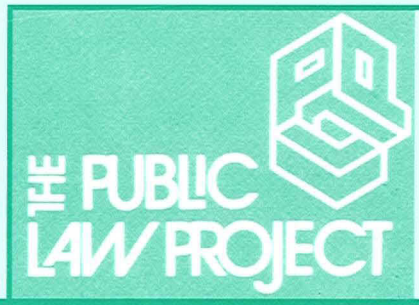

Third Party Interventions in Judicial Review

An action research study

About the Public Law Project

The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers;
- enhancing the quality of public decision-making;
- improving access to justice.

Public law remedies are those mechanisms by which citizens can challenge the fairness and/or legality of the decisions of public bodies and so hold central and local government and other public authorities to account. They include non-court-based remedies such as complaints procedures and ombudsman schemes and also litigation remedies, in particular judicial review.

To fulfil its objectives PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

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Executive summary

Background

This report describes the process and outcomes of an "action research" project conducted by the Public Law Project (PLP) with the financial support of the Nuffield Foundation. The aim of the project was to investigate the potential for third party interventions in civil judicial review applications raising public interest issues. It followed earlier publication by the Public Law Project and JUSTICE of "A Matter of Public Interest" (also funded by the Nuffield Foundation) which examined the extent to which the provision of specialist knowledge or expertise could assist the court in judicial review cases.

Research methods

The project involved an examination of all civil judicial review applications granted permission over an eight month period, between October 1999 and May 2000, to identify those raising public interest issues and with a potential for third party intervention. This was followed up by contacting relevant bodies to find out if they would wish to intervene, to offer advice and assistance where they wished to do so, and to identify potential obstacles to intervention.

Data were subjected to both quantitative and qualitative analysis in order to evaluate:

- the incidence of judicial review applications raising issues of public interest and which were suitable for third party intervention;
- practical barriers to making such interventions;
- factors influencing public interest bodies' decisions on whether or not to intervene.

Proportion of cases suitable for intervention

Although one third of cases granted permission raised issues of wider public interest, relatively few (18% of the total sample) were suitable for third party intervention on the grounds that further information could be provided to assist the court. In about two thirds of the sub-sample identified as suitable, intervention was not practical due to settlement or withdrawal or, to a lesser extent, expedition of the case. A few further cases suitable for intervention were not known about within sufficient time to make intervention practical. This meant that from a total of 831 cases granted permission, intervention was both suitable and practical in only 43 cases.

Two methods of intervention

In up to three-quarters of cases identified as suitable for intervention, the most efficient means of providing further information was by a witness statement in support of one of the parties. Evidence is commonly submitted in this way in judicial review proceedings, and this method of intervention does not significantly increase the length or costs of the full hearing.

Intervention as an independent party to the proceedings appeared the more appropriate method in only one quarter of cases identified as suitable, either to represent others whose interests differed from either of the parties or to assist on points of law. This represents just under five percent of all cases granted permission during an eight-month period.

Intervention at first instance

Only one third of cases identified as suitable for intervention on public interest grounds went on appeal. Thus unless an intervention is made at first instance, the opportunity to assist the court by the provision of information or expertise will be lost in the majority of public interest cases.

Factors inhibiting public interest interventions

Even where the practical barriers of expedition and settlement or withdrawal did not apply, three main factors inhibited third party interventions by public interest bodies:

- Lack of knowledge about relevant cases – most organisations contacted by PLP would not have known about cases of interest to them but for this study;

- Lack of knowledge about how to intervene in proceedings – some organisations were unaware that it was possible to intervene in judicial review cases, while others were uncertain of how to do so;

- Potential liability for other parties' increased costs as a result of making an unsuccessful intervention – most public interest organisations are unable to risk intervening as an independent party and the interests of vulnerable groups

may therefore be unrepresented in the proceedings.

Other potential, but less significant, barriers included lack of staff resources to conduct necessary research and prepare submissions, and difficulties in making contact with claimants' solicitors to obtain further case information.

Recommendations for overcoming barriers

• Development of a public access system

A system allowing public access to pending cases is necessary if public interest groups are to be aware of cases raising issues of interest to them. The development of a website for this purpose would be technically simple, making use of information already available in the Administrative Court Office, and would be easily accessible. To assist organisations in identifying cases of particular interest to them, this system should also provide a very brief summary - perhaps three lines or so - of the issues raised by each case. This summary could be produced most efficiently by the claimant.

• Practice Direction on third party interventions

The provision of procedural guidelines for making third party interventions would assist both potential interveners and the courts. This should ideally take the form of a Practice Direction, setting out general principles to be applied when granting permission to intervene, length and form (written or oral) of interventions and other case management requirements. The issue of costs against interveners could also be dealt with by the Practice Direction (see below).

• 'No costs' presumption for public interest interveners

A presumption against interveners' liability for the other parties' costs, rebuttable on grounds of misconduct or abuse, would remove the uncertainty that currently deters public interest bodies from making interventions. The "no costs" presumption should be included within the Practice Direction on third party interventions.

1. Background to the research

(a) Barriers to Intervention in England and Wales

Unlike some other jurisdictions such as Canada and the USA, third party interventions are relatively uncommon in England and Wales so that little is known about the practice and procedures involved. It is not yet clear why the potential for public interest interventions should be less fully realised in this country. However, the following factors may have served to inhibit development:

• Lack of access to information about potential judicial reviews

There is no public system for the registration of pending judicial review cases. As a result, public interest organisations are dependent upon informal networks to alert them to forthcoming applications. This process tends to favour groups with sufficient resources to actively seek out information or those with in-house lawyers with whom solicitors may discuss cases. Any information network, whether formal or informal, must be capable of identifying the issues at stake at an early enough stage in proceedings for interventions to be made. As greater emphasis is now being placed upon reducing delay in judicial review and encouraging early settlement of such cases[1], the need for an "early warning" system has become all the more important.

• Lack of legal expertise

Many social policy organisations have no in-house legal expertise and little, if any, experience of litigation. These organisations are less likely to know about the possibilities for making interventions in the public interest or to have access to the specialist legal advice necessary to test the procedures for doing so.

• Potential liability for costs

Unlike some other jurisdictions, interveners in this country are potentially liable for the other parties' extra costs resulting from the intervention. The court has the discretion to make costs orders departing from the general rule, but public interest groups litigating in their own names have so far been unsuccessful in obtaining orders for protective or pre-emptive costs[2]. The same stringent criteria[3] laid down by Dyson J (as he then was) have also been applied in an application for a more limited form of pre-emptive costs order restricting the applicant's liability to 10% of its annual turnover[4]. It remains to be seen whether the same principles would apply to a public interest intervener.

Permission to intervene has sometimes been granted on condition that the other parties' costs are met, although this appears to have applied where the intervener had a private interest in the decision in addition to raising issues of public interest[5]. However, in a more recent Court of Appeal case, Lord Woolf, MR (as he then was) made no costs order against a public interest intervener who had made mainly written submissions and was economical in their oral submissions.[6]

• Lack of procedural guidelines

The absence of any procedural guidelines for making interventions in the Divisional Court and the Court of Appeal might in itself be a barrier to making interventions because organisations are uncertain of how to go about it. At the time this study was conducted, Ord. 53 r.9 expressly allowed interventions only in opposition to judicial review applications, although the court had inherent jurisdiction to allow a party to be heard in support of an application[7]. It is now possible for any person to apply for permission to file evidence or to make representations at the hearing for judicial review[8], but there is still no standard procedure for doing so[9] or any guidance in the form of rules on third party interventions. Again this is particularly likely to be a significant barrier for those organisations without legal expertise.

(b) The "Floodgates" Fear

There are anxieties among the judiciary that the development of more formal procedures for third party interventions will lead to a flood of interventions that would overburden the courts[10]. Some social policy organisations themselves have also expressed concerns about the potential for extremist groups to make vexatious interventions[11].

(c) The Growing Potential for Third Party Interventions

Despite the various barriers, the potential for making third party interventions is increasing as a result of both the sorts of issues now being raised in judicial review applications and the recent implementation of the Human Rights Act 1998.

• The need for specialist information

Judicial review cases increasingly raise fundamental social, moral and economic issues and require competing rights and interests to be finely balanced or difficult policy questions to be addressed. Often they raise issues of more general public significance beyond the interests of parties to the litigation. As a consequence, the judiciary increasingly recognises the need for specialist factual or policy information and expertise which, for various reasons, may not be provided by the litigants themselves.

The need for specialist information has been acknowledged in some cases by the appointment of *amicus curiae*. This 'friend of the court' intervenes at the court's own request to assist, for example, on a point of law that is not being fully argued by counsel to the parties themselves. Although a panel of barristers is maintained for this purpose, public interest interveners have sometimes been invited to act in this capacity[12]. The procedure is effective when expertise is required on, for example, comparative law, but does not lend itself so easily to cases raising issues of social policy. Here judges may be less aware of the wider public significance of the issues raised and may not know what sort of information might assist the court or who is best able to provide it.

Public interest organisations may be, by contrast, much better able to assess the impact of public decision-making upon the often vulnerable or disadvantaged groups they represent. Their knowledge and expertise is potentially of great assistance to the court when deciding issues of social policy or general public significance. Third party intervention provides a method by which such organisations may bring this information before the court in the public interest. Because interventions are initiated by organisations themselves or by claimants' own legal representatives, they circumvent the problem of the court being unaware of the existence of a potentially useful information source. The main problem is that the smaller and less well-resourced groups may be unaware of decisions affecting their constituents and/or that they are being challenged in judicial review proceedings. As a result, they are prevented from applying their expertise to the issues raised through making interventions, and the court is denied the benefit of their assistance.

• The Human Rights Act 1998

The incorporation of the European Convention on Human Rights into domestic law has enhanced the need for specialist information by the courts. Many previously untested issues of fundamental and competing rights are now coming before the courts and which must be decided within complex social contexts. The courts are now required to apply the doctrine of proportionality when determining whether any interference with qualified rights is justified, and in doing so may need to weigh the impact upon other groups who are not represented by the litigants. It appears that litigants in cases under the HRA must also satisfy the "victim test", thus restricting standing to those who have themselves experienced potential human rights violations. Organisations not directly affected may therefore bring submissions before the court only as a third party to the proceedings.

• Cost effectiveness

Third party interventions may provide a cost-effective alternative for organisations wishing to address public interest issues but lacking the resources to litigate in their own name. The ineligibility of organisations for legal aid means that they would otherwise have to commit a relatively large proportion of their financial resources to bringing judicial review proceedings whilst also bearing the risk of an adverse costs order if the case is dismissed.

Although interveners must still bear their own costs and may be liable to the other parties for their increased costs resulting from the intervention, they might be able to come to an agreement with the parties with regard to costs by making written rather than oral submissions.

(d) Interventions in Other Proceedings

Whilst this research project focuses upon interventions in judicial review cases, it is recognised that interventions may be permitted in other types of civil proceedings. For example, a person with a substantial interest in property involved in certain admiralty proceedings may intervene to protect their private interests[13], while in summary proceedings for the possession of land, a person in occupation may apply to be made a party to the proceedings[14]. Permission to intervene in the House of Lords may also be granted in civil appeals from any other court and is not restricted to judicial review cases[15]. More recently, the Social Security Commissioners have debated the possibility of permitting interventions by the Child Poverty Action Group in appeal tribunals where the applicant is unrepresented.

Thus many of the issues addressed by this research may be equally applicable to other types of proceedings, including those where private interests are at stake. However, it would have been impractical to investigate the potential for third party intervention more generally in such a wide variety of proceedings. The advantage of judicial review proceedings is that the permission stage allows a prior vetting of cases to ensure that real issues of public law exist, thus ensuring that the cases investigated have some degree of merit. Judicial review cases are also more likely than many other types of case to raise issues beyond the interests of the parties involved, thus allowing greater scope for the investigation of public interest interventions.

(e) Aims and Objectives of the Research

The aim of the project was to research and develop the legal practice and procedures for making third party interventions in judicial review cases raising issues of public interest. Its objectives were to:

- research the volume and type of civil judicial review cases having public interest implications and where third party intervention might be of assistance;
- investigate and test the scope and potential for third party intervention in such cases, as well as the barriers and difficulties;
- draw up practical recommendations to develop the practice of third party interventions, including a more permanent registration system;
- raise awareness among voluntary sector groups of the scope for third party intervention, to disseminate information about potential cases and to educate and advise such groups in the use of legal procedures.

(f) Outline of the Research

To meet these objectives, an 'action research' project was conducted over an eight month period, between 1 October 1999 and 30 May 2000 inclusive. This research involved the following key elements:

- An examination of all civil judicial review applications in which permission to proceed was granted to determine whether they raised issues of wider public interest and might be suitable for third party intervention. This part of the research covered all applications where a Notice of Motion was lodged by the claimant[16] within the above period and involved an assessment of the Form 86A as against a 'public interest checklist' specifically designed for the project. In addition, cases going on appeal to the Court of Appeal or the House of Lords within the same period were also assessed. This assessment was conducted by a researcher and lawyers of the Public Law Project, with the assistance of a panel of expert consultants within the main areas of civil judicial review.

- Once cases had been identified as raising public interest issues and having a potential for intervention, suitable public interest bodies were approached to see if they might be interested in making such an intervention. They were offered advice and assistance by the Public Law Project, including an information pack specifically developed to inform them of the potential, procedures and problems involved in making third party interventions. The intention was to monitor such approaches to potential interveners, both to determine reasons for deciding not to pursue interventions as well as the outcomes of any interventions that did occur.

The next section describes the development of the research and its results.

2. Defining and operationalising the 'public interest'

(a) Developing the Public Interest Checklist

In order to identify public interest cases, it was necessary to develop a working definition capable of being applied objectively and consistently. According to one view, all judicial review cases raise public interest issues given that the general public has an interest in ensuring that public bodies act fairly and lawfully, but this approach was too wide to be of value in the context of this project.

Earlier definitions have focussed upon public interest law as a means of achieving social justice. Cooper and Dhavan describe it as "the use of litigation and public advocacy.....to advance the cause of minority or disadvantaged groups and individuals, or the public interest", to "solve social and economic problems arising out of the differential and unequal distribution of opportunities and entitlements in society"[17]. Similarly, Harlow and Rawlings view public interest law as "the use of law on behalf of disadvantaged groups in society to achieve social reform and legal change"[18]. These phrases are however too vague to be objectively and consistently applied for the purpose of practical analysis.

More recent definitions have tended to be rather broad. In considering the possible public funding of public interest cases, the Lord Chancellor has defined them as "those which affect or potentially affect a wider group of people than those directly involved"[19]. The PLP/Justice Working Party also adopted a similar definition of public interest cases as those "which raise a serious issue which affects or may affect the public generally or a section of it"[20].

A very different view was expressed by Dyson J (as he then was) when considering applications for protective and pre-emptive costs orders in favour of public interest groups applying for judicial review:

> *"The essential characteristics of a public interest challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, if not most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."*[21]

For the purpose of this research, it was not necessary for the claimant to have no personal interest in the case, only that it raised wider issues of public significance. Rather it was that potential *interveners* should have no personal stake in the outcome in order to act in the public interest.

In drawing up a working definition of public interest cases together with indicators to assist its application to individual cases, it was necessary to provide some degree of flexibility while incorporating sufficient precision to ensure its objective application by different people in different conditions. A number of senior public law practitioners and academics were consulted and as a result, the following working definition of public interest cases was developed:

> *Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern; and/or concerning systematic default or abuse by a public body.*

A number of operational indicators were derived from the various elements of this definition:

- The case affects, or may affect, identifiable sectors of the public, either directly or indirectly. A case with wide implications for large numbers of people may indicate that public interest issues are at stake[22].

- The case will have a significant impact on a vulnerable group which may be unrepresented. Such groups might include children or the mentally ill[23].

- The case aims to clarify an important aspect of the law, seeks to alter existing legal doctrine or will otherwise set an important precedent[24].

- The case raises a serious or controversial issue of general public significance. This includes issues of public morality or ethics, social policy or social justice with implications for the ordering of society, exercise of rights or freedoms and the regulation of individuals' behaviour[25].

- The case involves systematic default or abuse by a public body.

These operational indicators formed the basis of the 'public interest checklist' to be completed for each case included in the study, a copy of which is included in Appendix 1. The checklist also required brief notes as to why any of these operational indicators were considered to be applicable to an individual case. Where none of the indicators applied, the person completing the checklist was asked to provide reasons why (a) the case was a public interest case in spite of this or (b) did not appear to be a public interest case. Finally, a suggested potential intervener was requested for cases identified as raising public interest issues.

Comments on the use of the checklist were invited throughout the project from consultants who assisted in identifying public interest cases.

The validity of the Checklist was reviewed a few months into the study when it became apparent that it did not discriminate sufficiently between groups with the same, or a similar, interest in the case as one of the litigants and those with different interests. As a result, the first two items of the checklist were revised as shown in Figure 1.

In response to the invitation to comment upon the Checklist, one consultant very helpfully pointed out the possible need for some criteria for intervention given that not all public interest cases require intervention. The JUSTICE/PLP Working Party identified three types of case suitable for third party intervention. The first are those cases where the third party ought in the interests of justice to be able to canvas their own concerns. In the other two types of case, intervention is desirable to assist the court, either on questions of law or fact (thus equating to the role of *amicus curiae*) or on grounds of public interest[26]. The requirement that a public interest intervention should assist the court was emphasised more recently by Simon Brown LJ. In granting permission to two third parties to intervene in the Court of Appeal, he expressed the need for the court to "be properly informed of the difficulties created by the decision and of the various public interest considerations arising[27]. The mere fact that a case raises public interest issues does not necessarily mean that further information is needed to assist the court. Sometimes the parties themselves will have submitted sufficient information, perhaps in the form of an expert report, or else the public interest considerations may be sufficiently well known to the court. Other factors might also militate against intervention, for example difficulties in identifying affected groups or the absence of a suitable body able to provide the information required. For this reason a further question was added to the Checklist asking whether, if the case was considered to be a public interest case, it was suitable for intervention. Reasons were requested as to why it was/was not considered suitable.

The identification of two distinct types of affected group, as discussed above, also gave rise to further consideration about the appropriateness of different methods of intervention. Where a case affects others with a similar interest to the applicant (or, more rarely, the respondent), the sort of information most likely to assist the court might be background information on, for example, the number of others affected with examples of how the decision has affected them. In many instances this might most conveniently be presented in the form of a witness statement in support of the party whose interests are shared, as provided by the Public Law Project in *R v The Lord Chancellor ex p. Witham*[28]. This case concerned the removal of exemption or remission of court fees, which was challenged on the ground that persons on low incomes were effectively denied access to the courts in proceedings where legal aid is unavailable. The witness statement submitted by PLP in support of the applicant provided examples of various categories of case where those on low incomes had been prevented from going to court, often with potentially serious consequences. Where however the case affects others whose interests differ from those of the parties, it may be most appropriate for an intervener to have the status of an independent third party in order to properly represent those interests. Similarly, the

Figure 1: Revision of items on the Public Interest Checklist

Original items	Revised items
This case affects, or may affect, identifiable sectors of the public either directly or indirectly.	This case affects others who may have the same or a similar interest in the case (such as they themselves might be the applicant for judicial review).
This case will have a significant impact on a vulnerable group which may be unrepresented.	This case will have a significant impact on a wider group of vulnerable or disadvantaged persons whose interests may be unrepresented in the proceedings. (Please say who these groups might be.)

latter type of intervention is suitable where the intervention is necessary to assist on points of law. For this reason an additional item was inserted into the Public Interest Checklist following the question about whether or not the case would be suitable for intervention. The new item is shown in Figure 2 below.

Figure 2: Item added to the Public Interest Checklist on method of intervention

> If the case is suitable for intervention, do you think the intervention could best/most conveniently be done by way of:
>
> ❑ Affidavit in support of the applicant/respondent (please delete as appropriate)
>
> ❑ Intervention as an expert third party
>
> Please give reasons for your response.

It was expected that there might be instances where either method of intervention might be equally appropriate, but where other factors such of lack of time before the hearing date would make the provision of witness statement the more practical option.

(b) Accessing Relevant Cases

As noted earlier, the project focussed upon civil judicial review applications where permission to proceed had been granted and a claim form lodged with the Crown Office[29]. In addition, judicial review cases going on appeal to either the Court of Appeal or the House of Lords were monitored for any that raised public interest issues and that were suitable for intervention.

Before beginning data collection, it was necessary to determine firstly what case materials would be necessary to identify the issues raised and secondly whether or not these are in the public domain. For first instance applications, the case is set out in the claim form. It was established that this becomes a public document once permission to proceed has been granted and a Notice of Motion has been lodged with the Crown Office[30]. Witness statements are not in the public domain unless they have been referred to in open court. For cases going to the appellate courts, issues can generally be identified from the judgment of the court below. However, it was considered necessary to have access to the Notice of Appeal lodged with the Civil Appeals Office to further identify the issues raised on appeal. The Notice of Appeal is not a public document, and therefore a privileged access agreement was obtained from the Lord Chancellor's Department allowing access to both these and any private documents (e.g. witness statements) required from the Crown Office. Similarly, petitions for leave to appeal to the House of Lords are not public documents, although by this stage the issues are usually clear from the Court of Appeal judgement and are in any event summarised on the Cause List published each term.

Consultants to the project were also named on the privileged access agreement in the event that they would need to see private case documents to determine whether public interest issues were raised.

Administrative Arrangements

In addition to the formal right of access to relevant documents, there was the question of administrative steps necessary in order to obtain such documents and access them within a reasonable time. In this respect, there were significant differences between the three levels of court at which we attempting to identify suitable cases for intervention.

(i) The Crown Office

The Crown Office now uses a computerised system by which to track all judicial review applications from the time of lodging the application for permission until closure of the case. A number of "staging reports" listing all applications that have reached a particular stage of proceedings are updated automatically on a daily basis.

Applications granted permission to proceed, and where the Notice of Motion had been lodged with the Crown Office, were identified from the appropriate staging report each week throughout the data collection phase. This report provided information including the case number, category, date on which the motion was lodged, and whether the case was to be expedited. The relevant case files were then located and the claim forms were photocopied. In a small number of cases it was also necessary to copy other documents to help determine whether or not the case raised issues of public interest. These were usually witness statements made by the applicant providing the factual context of the case or documents, e.g. grounds of appeal to the Immigration Appeals Tribunal, referred to in the claim form.

Cases identified as public interest cases suitable for intervention were "tracked" to monitor their progress through the various procedural stages to substantive hearing and, where appropriate, appeal. The outcome of all other cases was recorded in order to find out whether there was any difference in settlement rates between public interest and non-public interest cases.

While the Crown Office systems generally worked well, a few problems were encountered. Firstly, not all claim forms were easily accessible, either because the file could not be located or because the form was missing from the file. In the latter instance it was necessary to make a request, via

Crown Office staff, for case bundles to be brought up from another location. On occasions it took some weeks for the claim form to be located. Secondly, not all applications appeared on the "Motions Lodged" report and were only picked up at a later stage. Sometimes this occurred because the parties had agreed to the case being placed on the "warned" list, or even listed for hearing as soon as notice had been served on the defendant, but this did not always seem to be the explanation. As a result, four cases raising public interest issues were not obtained within sufficient time to contact potential interveners. One of these challenged the failure of the Secretary of the Central Office of the Employment Tribunals to enter sufficient details of employment tribunal claims on a public register. This was of particular interest to the project given that PLP advocates the setting up of a similar public register of judicial review cases. This case was not identified until after it had been heard, although an intervention might have been impractical in any event because it had been expedited. In the three other cases however, interventions might have been possible. Another concerned the classification of pornographic videos, an issue that might have been assisted by organisations representing children and other groups vulnerable to the effects of pornography. The other two linked cases challenged deportation orders as a violation of the right to family life under Art. 8 ECHR and were of particular importance in view of the complex family units existing in the UK and the previous criminal conviction of one claimant.

It had been intended to collect data from the Crown Office on all civil judicial review applications for which Notices of Motion were lodged with a ten-month period ending in August 2000. However, in March 2000 the Crown Office began a "blitz" to clear the backlog of pending cases prior to implementation of the Human Rights Act 1998[31]. As a result, many cases were being listed for substantive hearing at relatively short notice. There was concern that, allowing for the delay caused by firstly obtaining case documents and then sifting through them to identify those of interest to the study, there would be insufficient time to seek interventions, where suitable, in any new cases. By this time it also became apparent that the same number of cases would be obtained in eight months as had been expected during ten months. It was therefore decided to end the collection of any further cases lodged after the end of June 2000.

(i) The Civil Appeals Office

The Civil Appeals Office does not have the benefit of a computerised system at present. Applications for judicial review granted permission to appeal and where a Notice of Appeal has been lodged appear on a computer printout kept on public display in the Registry. However, this provides only the case number and the name of the claimant for judicial review. The defendant is not noted and there is no indication of when the Notice of Appeal was lodged or whether the case has yet been listed for hearing. Although the list is updated each week, cases often appeared on the list for some weeks after they had been heard. One case had been listed by the name of one of the defendants to the judicial review, rather than the claimant. Because only one copy of the list was available, it was also difficult to gain uninterrupted access to it for more than a few minutes at a time as other visitors to the Civil Appeals Office also wished to check the list.

Obtaining Notices of Appeal from the Civil Appeals Office was also less straightforward than obtaining materials from the Crown Office, although it is accepted that this is because the Notice of Appeal is not in the public domain. A number of case files were requested from the Civil Appeals Office and collected a week or so later. Sometimes case files were unavailable when requested and could not be obtained before the appeal was heard. This problem occurred mainly at the beginning of the data collection period when many of the pending cases listed in the public register were due for hearing within the following few weeks. In other cases the appeal appeared to have been expedited so that the Notice of Motion could not be obtained in sufficient time before the hearing. There is however no means of knowing whether cases have been expedited from the public register.

Unlike the Crown Office, the Civil Appeals Office was unable to allow access to their photocopier and relevant documents had to be copied elsewhere and returned. Case materials had to be collected and copied in the evenings in order not to interfere with the work of staff in the relevant offices. This proved a significant practical problem once the Civil Appeals Office was provided with a new security system whereby access to their offices could only be gained by using a swipe card. Case files could then be collected and returned only if members of staff were available to allow entry, which was rarely the case in the evenings.

(ii) The House of Lords

Information about cases going on appeal to the House of Lords is publicly available in the form of the Cause List issued at the beginning of each term. This includes the names of the parties, the citation of any report publishing the judgment of a lower court (although most cases are previously unreported), the solicitors representing each party and a brief summary of the subject matter of the appeal. Those cases expected to be heard in the current term are also indicated. An example of information available on the Cause List is included in the Appendix.

The House of Lords Minutes of Proceedings can also be accessed on the internet[32] and are updated each day. The

Minutes note any cases where a Petition of Appeal has been granted (and similarly, where any such Petitions have been withdrawn). Also included are any applications by third parties to intervene in proceedings as well as those cases where permission to do so has been granted. Although Petitions of Appeal are not public documents, brief details of any case where a Petition has been granted may be obtained from a card index maintained by the Judicial Office.

As for cases going to the Court of Appeal, judgments of the lower courts can be found on Casetrack[33] where these have not been published in law reports elsewhere.

(c) Identifying Public Interest Cases

Cases were sifted, with the assistance of a panel of consultants, to identify those that raised issues of public interest and, of this sub-sample, those suitable for intervention. Members of this panel were legal practitioners working for public interest groups or private practitioners with expertise in the areas of law expected to raise public interest issues, e.g. social security, housing, prisons, etc. Cases were firstly sifted by PLP and in most instances they could easily be classified as raising public interest issues or not. Some however required further knowledge or experience of the relevant area of law involved in order to determine whether public interest issues were raised and, if so, whether intervention would be appropriate. These cases were therefore sent to consultants. A copy of the public interest checklist was completed, either by PLP or a project consultant, for all cases obtained.

Because all cases had firstly to be sifted by the PLP's researcher in order to know which required a consultant's opinion, there was inevitably a delay between obtaining case materials and referring them to consultants. Although on some occasions consultants were able to return the completed questionnaire within a few days, it was usually several weeks before questionnaires were returned. Because the consultants were all experts in their particular fields of law, they often had many other professional demands upon their time. This problem became particularly acute as the number of applications eligible for inclusion in the study increased, followed by the Crown Office's "blitz" to clear the backlog of outstanding cases before implementation of the HRA. Due to the increasing volume of applications obtained for immigration cases in particular, new consultants were sought through the Immigration Law Practitioners' Association (ILPA). However, those volunteering as project consultants were also subject to an increased workload and as a result were unable to return cases promptly if at all. In many instances this had no practical effect as the cases either did not raise public interest issues suitable for intervention or had settled in the meantime. However, some cases that would have been suitable for intervention were identified with too little time available to make an intervention.

A total of 831 civil judicial review applications were granted permission and subsequently had claim forms lodged with the Crown Office between 1 October 1999 and 30 June 2000 inclusive. Copies of claim forms were obtained for all except two cases where all documents were kept in a locked safe pursuant to a court order[34]. Table 1 below shows the number of cases for which claim forms were obtained within the most common case categories.

Table 1
Number of cases obtained for the most common case categories

Case category	Number of cases	% of total cases
Immigration (asylum)	345	41.6
Prisons	57	6.9
Education	49	5.9
Immigration (non-asylum)	45	5.4
Housing Allocation	44	5.3
Town and Country Planning	43	5.2
Housing Benefit	33	4.0
Community Care	32	3.9
Mental Health	21	2.5
Disciplinary Bodies	17	2.1
Homelessness	16	1.9
EC	13	1.6
Costs and Legal Aid	12	1.4
Other categories	104	12.5

(d) The Incidence of Public Interest in Judicial Review

First Instance Applications

Of the 829 cases for which claim forms were obtained, three did not have enough information to determine whether or not public interest issues were raised. In one of these cases all documents except for the extremely brief claim form were locked in a safe pursuant to a court order. The other two were both drafted by litigants in person with insufficient detail and with no supporting documents that might have assisted in determining the cases.

Of the remaining 826 cases for which sufficient information was available, 549 (66%) did not appear to raise issues of public interest. This sub-sample included two cases, each sent to the same two consultants, where there was disagreement as to whether public interest issues were raised. In both cases, PLP agreed with one con-

sultant that the issues raised were not of particular public significance. There were a number of reasons why cases were considered not to engage the public interest, falling broadly into the following classifications:

■ The case involved settled legal principles and thus turned on its own facts. One example concerned the failure of a local authority to comply with an order of a Special Educational Needs Tribunal, where it was clearly under a statutory duty to do so.

■ Although the case sought to clarify some aspect of the law, this was of limited significance. One case, for example, raised a point of construction of an EC directive relating to the packaging of imported fishery products.

■ The case concerned the approach of a public body when considering facts or evidence specific to the particular case. This was typical of a large number of Asylum cases challenging a Special Adjudicator's findings on the claimant's credibility.

■ The case affected the claimant's private (often commercial) interests only, and had no broader impact. This included Town and Country Planning cases that challenged the grant of planning permission that would affect the claimant's business or financial interests but had no broader impact. In another example, the claimant, a large retail company, challenged an assessment of its liability for VAT.

The remaining 277 cases were identified as public interest cases. This sub-sample also included one case where there was disagreement between two consultants, but where PLP agreed that it did in fact raise public interest issues. Table 2 shows the number and proportion of this sub-sample meeting each of the public interest criteria.

Table 2
Number and percentage of cases identified by different public interest criteria

Public interest criterion	No. cases (n = 277)	% cases granted permission	% all PI cases*
Affects others who may have the same or a similar interest in the case.	236	28.4	85
Will have a significant impact upon a wider group whose interests may be unrepresented.	58	7.0	21
Aims to clarify an important aspect of the law, alter legal doctrine, or otherwise set an important precedent.	235	28.3	85
Raises a serious or controversial issue of general public significance.	68	8.2	25
Involves systematic default or abuse by a public body.	31	3.7	11

* Because many cases fulfilled more than one criteria, this column total more than 100%.

Table 3
Number of criteria by which public interest cases were identified

No. criteria	No. cases	% cases
1	28	10
2	153	55
3	87	31
4	9	3

The above criteria are not mutually exclusive as most cases fulfilled more than one public interest indicator. The number of different criteria by which individual cases were identified as public interest cases are shown in Table 3 (left).

The most frequent combination was that the case affected others with the same interest as the claimant *and* aimed to clarify the law or set a precedent (207 cases, or 75%). The second most common was that the case had an impact on others whose interests were unrepresented *and* aimed to clarify the law or set a precedent (55 cases, or

20%).

Certain categories of case were proportionately more likely than others to raise issues of public interest. Table 4 below shows public interest cases by the most common case categories within this sub-sample and as a proportion of all cases obtained in each respective category.

Categories with a relatively high proportion of identified public interest cases included, as might be expected, social welfare categories such as Housing, Homelessness, Community Care and Mental Health. Some categories with a particularly high proportion of public interest cases (e.g. Public Health) had too few total cases to draw any useful conclusions from this. Whilst the proportions of public interest cases in categories like Prisons and Education might also have been expected, the proportion of Licensing applications raising public interest issues was more surprising. Two cases in this category specifically raised human rights issues – one the right to privacy under Article 8 and the other the right to a fair trial under Article 6 ECHR. A third case was linked to the latter and challenged the same decision by the same defendant, although the claimants were represented by a different solicitor who did not specifically raise the Article 6 issue. Also included in this category was the video licensing case outlined above. It may be that human rights issues will be increasingly pleaded in licensing judicial reviews; otherwise there appears to be no general underlying theme within this category.

An alternative explanation for variations in the relative number of public interest cases in different categories might be that different consultants approached cases in different ways. The fact that in two cases two different consultants disagreed on whether public interest issues were raised might support this, although equally there were some instances where two consultants were in agreement. However, consultants tended to be specialists in only a few related case categories, and for some categories there was only one consultant. For this reason it was not possible to ascertain whether variations between case categories were a consequence of consultants' different approaches to determining cases (which might cast some doubt on the objectivity of the public interest criteria applied), or the nature of different categories of case.

Despite constituting the largest case category within the total sample and making up more than one quarter of all identified public interest cases, the asylum category yielded proportionately fewer cases raising public interest issues than other categories. This was largely due to the fact that many asylum cases challenged findings on credibility that had no wider application beyond the individual case. The proportion of public interest cases within this category was barely half that of the non-asylum immigration category, where cases more frequently raised issues affecting others with the same or similar interests as the claimant.

By contrast with other social welfare categories, relatively few public interest cases were identified within the Housing Benefit category. The majority of Housing Benefit

Table 4
Number and percentage of public interest cases within different case categories

Case category	No. PI cases (n = 277)	% category	% all PI cases
Public Health	3	75	1.1
Mental Health	15	75	5.4
Criminal Injuries	5	71	1.8
Homelessness	11	69	4.8
Licensing	6	55	2.2
Prisons	28	51	10.1
EC	6	46	2.2
Immigration (non-asylum)	19	42	6.9
Community Care	13	41	4.7
Housing Allocation	18	41	6.5
Education	18	38	6.5
Costs and Legal Aid	4	36	1.4
Miscellaneous	45	32	16.2
Housing Benefit	9	27	3.6
Immigration (asylum)	77	22	27.8

applications obtained in the study appeared to have no wider significance beyond claimants' own interests in that they concerned settled principles of law or turned upon very specific facts.

There were variations between different case categories in the criteria by which public interest cases where identified. Homelessness applications, for example, often challenged local authority policies with a potential impact upon all homeless people within a borough, not all of whom are likely to have sought legal advice. A typical example was provided by four cases (linked with three others not included in this study) that challenged the same local authority's policy of accommodating homeless persons in bed and breakfast accommodation outside of London. Other categories were more likely to include cases that had an impact upon other vulnerable groups whose interests differed from those of the parties to judicial review. For example, four applications challenging a new prison telephone system had an impact upon families of prisoners.

Human Rights

As mentioned above, some cases raised human rights issues in anticipation of the incorporation of the European Convention on Human Rights into domestic law, in addition to the traditional grounds for judicial review. The number of cases in which human rights issues were raised was quantified for both public interest and non-public interest cases. Table 5 shows the most frequently raised Articles of the ECHR and the number of cases in which they were raised.

It should be noted that some cases raised more than one Convention issue: in particular, rights under Art.14 (prohibition of discrimination) can only be raised in the context of other Convention rights.

The right to a fair trial under Article 6 was raised in cases across a range of categories, but more than one quarter (28%) of those were Prisons cases. This category also made up a relatively high proportion of cases in which Article 8 was raised (16%), but was far exceeded by Immigration cases (both asylum and non-asylum) which together accounted for about half of those raising the right to respect for private and family life.

Only one Convention right – protection of property – was raised more commonly in non-public interest cases. In all three (one VAT and two EC) non-public interest cases, the claimants for judicial review were large organisations seeking to protect their own financial or commercial interests. By contrast, the single public interest case raising the right to protection of property concerned the appointment of a social worker exercising rights over the claimant's social security benefit.

(e) Suitability for Third Party Intervention

One hundred and thirty of the identified public interest cases were considered unsuitable for intervention because there was no obvious need for further information to assist the court. There were a number of specific reasons why further information was not required, none of which are mutually exclusive:

- The issue raised was already being litigated in either a test case at first instance or on appeal. This was particularly common in asylum cases where, for example, several applications challenged the return of refugees to "safe" third countries – an issue that was recently heard on appeal to the House of Lords[35].

- The case turned upon statutory construction and no

Table 5
Number of cases in which different human rights issues were raised

ECHR issue raised		No. cases: PI	Non-PI
Art. 2	Right to life	8	-
Art. 3	Prohibition of torture (or inhuman) treatment	9	5
Art. 5	Right to liberty and security	8	-
Art. 6	Right to a fair trial	20	5
Art. 7	No punishment without law	1	-
Art. 8	Right to respect for private and family life	41	2
Art.12	Right to marry and found a family	1	-
Art. 14	Prohibition of discrimination	8	-
Art. 1, Protocol 1	Protection of property	1	3
Art. 2, Protocol 1	Right to education	1	1

further information was necessary to assist with the issue raised[36]. One such case for example aimed to clarify the law on certificates of lawful use in Town and Country Planning cases. The issue raised was whether such a certificate could be granted to a factory committing offences under the Environmental Protection Act.

■ The claimant adequately represented the interests of groups affected by the decision. In these cases the claimant was usually a union or other public interest group challenging the decision on behalf of its members or constituents. One such case was brought by the TUC challenging the implementation of the Parental Leave Directive.

■ Sufficient background information or documentary evidence had been submitted by the claimant(s). For example, three linked cases challenged the designation of Pakistan as a country in which there is no general risk of persecution, all of which submitted documentary evidence of human rights abuses in Pakistan. In another case concerning a local authority's housing allocation policy, the claimant provided background information about the number of properties available compared with other local boroughs.

■ Submissions of comparative law likely to assist the case had been made by the claimant. Two cases in particular made submissions not only on relevant EC law, but also the approach of other jurisdictions such as the USA and Canada to the issues raised.

■ There were difficulties in identifying groups who would be affected by the decision. This mainly applied to cases affecting others on a very localised level, and was common in Town and Country Planning cases.

■ Despite raising issues of public interest, the merits of the case were poor, so that it would not be worth an intervener becoming involved in the case. One Asylum case, for example, submitted that the refusal of leave to remain in the UK violated the claimant's right to family life under Article 8 ECHR. However, on the facts it was clear that the claimant was unlikely to succeed on this issue.

■ Groups who might be suitable potential interveners were already involved in the application. In one Town and Country Planning case raising important local environmental issues, both the WWF and the Yorkshire Wildlife Trust were joined as claimants together with an affected local resident.

The remaining 147 cases were considered suitable for third party intervention in that further information could be provided to assist the court on the issues raised. This included five cases where a consultant did not think that intervention was necessary on the grounds that counsel involved in the case were experienced in raising the public interest issues before the court. One of PLP's lawyers however disagreed as it appeared that background information, could be provided to assist the court. These cases all challenged the application of blanket policies by local authorities and might therefore have benefited from information, gathered from local advice agencies, about the likely number of affected individuals with examples of potentially serious consequences for those affected.

Broadly, there were four situations where intervention was considered desirable, based upon the reasons provided by consultants:

1) Where the court would be assisted by background information on how many others have been affected by a decision and examples of its impact upon members of this group;

2) Where the interests of a vulnerable or disadvantaged group would otherwise be unrepresented in the proceedings;

3) Where the court would be assisted by expertise in specialist areas of law;

4) Where there was some uncertainty about whether further information or expertise might be necessary. Here it was acknowledged that PLP might not always be best placed to decide what, if any, information was required, whereas a group with specialist expertise may be able to identify a need to present a particular perspective on the issue raised. Cases in this group often involved fundamental rights of general public significance, even if the issue raised might not have a direct impact upon a particularly large group. One example was a case challenging an ex parte order by a county court substituting a social worker for a mental patient's nearest relative where that relative was opposed to the patient's detention for treatment. This case is discussed in more detail in the next chapter of this report.

There was some overlap between the first two situations. For example, many cases raised issues that had an impact upon claimants' families. To some extent, family members could be said to have a similar, if not the same interest in the outcome as the claimant, but may also have other interests not shared by the claimant and which are therefore unrepresented in the proceedings.

Appeal Cases

Cases going to the appeal courts, other than those tracked from first instance level which were granted leave to appeal,

have not yet been subjected to the same analysis as those at first instance level and are not discussed in this report. No interventions were sought on cases going to either the Court of Appeal or the House of Lords, other than cases already tracked from first instance level to the Court of Appeal. These are discussed below.

Method of Intervention

For all cases identified as suitable for third party intervention, the most appropriate method of intervening was assessed. Table 6 summarises the number and proportion of cases suitable for the two different methods.

In more than half of cases identified as suitable for intervention, the provision of a witness statement in support of one of the parties was considered to be the more appropriate method of intervening. This was because the cases affected others with the same or a similar interest to that party and where the court could best be assisted by background information. In all but three of these cases, the witness statement would support the claimant rather than the defendant. By contrast, intervention as an independent third party was considered the more suitable method about one quarter of cases, either to represent the interests of a group that would otherwise be unrepresented or to assist on points of law.

In a further 16% of cases considered suitable for third party intervention, either method was considered appropriate because the decision challenged affected others whose interests overlapped with those of the claimant, e.g. children or other family members of the applicant. Although the method chosen would be dependent upon the extent to which the third party's interests accorded with those of the claimant, it appears likely that the provision of a witness statement might suffice in most cases. Thus this method might be the most convenient means of intervening in up to three-quarters of cases in total. The three remaining cases each affected two identifiable groups: one with similar interests to the claimant and one whose interests were different and where both types of intervention were equally desirable.

Table 6
Suitability of cases for two different methods of intervention

Method of intervention	No. suitable for intervention (n = 147)	% all cases granted permission	% all cases suitable for intervention
Witness statement in support of a party to the proceedings	86	10.3	59
Independent third party to the proceedings	35	4.2	24
Either a witness statement or an independent third party	23	2.8	16
Both a witness statement and an independent third party	3	0.4	2

3. Assessing the potential for interventions

(a) The Interveners' Information Pack

It was recognised that while some of the organisations invited to intervene in cases would have knowledge, if not experience, of making third party interventions, many would be unfamiliar with the concept of third party interventions and some would have no experience of litigation at all. An information pack was therefore produced to inform them of the potential for intervening in the public interest and of the practice for doing so. The aim of the information pack was to stimulate interest in the idea of intervening in the public interest while also being realistic about the possible problems involved for less well resourced groups.

The pack provided examples of some recent interventions in judicial review applications, both at first instance and in the Court of Appeal, which raised issues of public interest. Two case examples were used to illustrate both an intervention as an independent third party to the proceedings and the provision of expert evidence in support of an applicant. Because no formal procedures exist for making interventions in the public interest (other than in the House of Lords), general principles were derived from the experience of groups that had made interventions in the past, as well as drawing from foreign jurisdictions where interventions are common. Suggestions for issues to be considered before deciding to intervene were also given, e.g. the aims and objectives of an intervention, ability to apply promptly for permission to intervene, and the status sought in the proceedings. Information was also provided on the cost implications of making an intervention, including the current uncertainties surrounding this issue.

The information pack was evaluated by means of a short telephone questionnaire. Unfortunately it proved difficult to conduct this questionnaire with many of the groups to which it had been sent as some could not be contacted by telephone and others were unwilling to give a view because they had not had sufficient time to read the information. However, comments were generally very favourable about the quality and quantity of information given. Not surprisingly, organisations with in house legal expertise found the information adequate, while those with no knowledge of interventions would have liked more detailed explanations of some of the points covered. The latter group did however tend to find the case examples of the two different methods of intervening useful. One of the less favourable comments was that it appeared to have come from a "group of ambulance-chasing lawyers" until reading beyond the opening paragraphs.

(b) Contacting Potential Interveners

For cases identified as suitable for intervention, an appropriate organisation was contacted provided there was sufficient time before the hearing to make an intervention. Organisations known to PLP, and who were aware of the project and its objectives, were initially contacted by telephone to discuss the case concerned. If they were interested, copies of the claim form and the Information Pack were sent to them. Organisations with which PLP had had no previous contact were sent a letter explaining the purpose of the project. A case summary outlining the pertinent facts and the public interest issues raised was enclosed together with a copy of the Information Pack. They were followed up by telephone about 10 days later and if they were interested, were sent a copy of the claim form.

In a few instances, organisations not previously known to PLP were contacted by telephone either to find out if they would in theory be interested in certain types of case or where relatively little time remained before a substantive hearing date.

All organisations were contacted, if they had not already responded, to find out whether or not they wished to consider intervening in the cases sent to them. Reasons for not wishing to intervene were elicited, firstly by open questioning and then by reading a checklist of other possible reasons for declining. Further regular contact was maintained with organisations that did wish to consider making an intervention in order to follow up the process of decision-making and the progress of any attempted intervention.

(c) Practical Barriers to Intervention

Only a small proportion of cases identified as suitable for intervention was referred to organisations that might have an interest in the public interest issues raised. Reasons why some cases were not sent to any potential interveners are shown in Table 7.

A further 11 cases were either settled or withdrawn after

Table 7
Reasons why some cases were not sent to potential interveners

Reason	No. cases
Expedition of substantive hearing	15
Known to have been settled or withdrawn	73
Not aware of application in sufficient time	4*
Stayed or stood out pending other procedures	5
Appeared about to settle	3
PI issues had been settled in other cases	2
Pilot case for which no potential intervener could be identified	5
Delay in obtaining case materials or determining case	6
Total	**113**

* These cases did not enter the Crown Office's "Motions Lodged" list and were not picked up until after they had been listed for hearing.

Table 8
Settlement / withdrawal of cases suitable for third party intervention by case category

Case category	No. suitable for intervention	No. (%) settled or withdrawn
Community Care	9	8 (88%)
Housing Allocation	13	10 (77%)
Immigration (non-asylum)	13	9 (68%)
Mental Health	14	8 (57%)
Immigration (asylum)	29	19 (66%)
Homelessness	8	4 (50%)
Prisons	20	8 (40%)
Other categories	41	18 (44%)
Total	**147**	**84 (57%)**

having been sent to potential interveners, bringing the total to 84 or 57% of the total sub-sample of cases considered suitable for intervention.

There was a wide variation in settlement rates between different case categories, as shown in Table 8 above:

The combination of expedition and settlement or withdrawal meant that interventions were impractical in all of the Homelessness and Community Care cases identified as suitable. Similarly, intervention was potentially possible in only one Housing Allocation case. However, of these expedited cases, one of the Housing Allocation and four of the Homelessness cases went on appeal, thus creating the potential for intervention at this stage.

Another barrier to making interventions was the delay in obtaining case materials from the Crown Office and/or delays in identifying cases within sufficient time before they were listed for hearing. As already described above, case files were not always readily available and claim forms were not always found in the case file. For some cases, other documents such as witness statements or copies of grounds of appeal to tribunals were required in order to determine whether public interest issues were raised, and these were sometimes only to be found in the case bundles which had to be specifically requested from another storeroom. Further delays occurred during the process of sifting through the increasing volume of cases and, where necessary, referring them to consultants for their opinion on whether public interest issues were raised. To some extent therefore, such delays were an unavoidable result of the

project design.

The fact that a number of cases were stayed or stood out pending other events also limited the scope for making interventions within the time period available in this project. In addition to the five cases that were not sent out, another three were either stayed or stood out after being sent to potential interveners. All eight cases were awaiting the outcome of procedures that would not be known until several months after the conclusion of the project. The potential for intervention may however exist in the longer term provided that cases do not settle as a result of these other outcomes.

(d) Cases Referred to Potential Interveners

Forty cases were either discussed with or sent to 20 potential interveners. This included six cases which had been expedited at first instance but which later went on appeal to the Court of Appeal. As described in the above section, three cases were either stayed or stood out pending other litigation by the claimants so that the possibility of making an intervention was not pursued further. Another 11 cases settled, but these have been included in the further analysis because potential interveners had by this point expressed their views about making an intervention.

Potential interveners were selected on the basis that they appeared to have the appropriate information or expertise to assist the court on the issues raised by the relevant identified cases. The aim was also to include public interest groups of various sizes in order to assess whether greater barriers existed for smaller groups. Some were previously known to PLP, but others were selected from *The Voluntary Agencies Directory*[37] and the *Community Legal Service Directory*[38] based upon the group they represented, their organisational objectives and/or area of law in which they specialised. Although particular efforts were made to contact groups previously unknown to PLP, in some cases it was more appropriate to send them to groups with regional networks or with specific expertise in European Convention law who were well known to PLP.

Some of the organisations had considerable knowledge or experience of making third party interventions both in the domestic appeal courts and in the European Courts. Another had previously considered making an intervention as an independent third party in *Bournewood*[39] and, like some of the other groups contacted, had much experience of providing evidence in support of applications. In addition, some board members of one relatively small organisation had had past experience of making a third party intervention, although this was not known before sending cases to them.

The following is an account of the outcome of all cases sent to and/or discussed with potential interveners.

The Prison Telephone System

Four applications lodged within a few weeks of each other challenged the introduction of a new telephone system in various prisons. This system was operated by means of a telephone card from which the cost of calls was debited, and prisoners were able to contact only numbers approved in advance by the respondent prisons. When a call was answered, the recipient was immediately played a recorded message to the effect that the call was from a named inmate at the named prison. The recipient was then required to press a number to indicate that they wished to receive the call before being connected to the caller. The system was challenged on the grounds that it violated the right to respect for privacy or family life under Art. 8 ECHR (although this was not specifically pleaded by all claimants). One of the claimants did not wish a young grandchild to know that he was in prison, while another complained that his partner shared a telephone line with others to whom they did not wish this information to be disclosed.

Since this issue had an impact upon families of prisoners, the cases were sent to an organisation representing the interests of this group. They were also discussed briefly with an organisation representing prisoners' interests, which was aware of the cases but agreed that the first organisation would be a more appropriate group to intervene. Unknown to PLP, this body had in fact been campaigning against this telephone system for several months and was very interested in making an intervention, either as an independent third party or by way of a witness statement in support of the claimants. This was discussed at a subsequent meeting of their Managing Board where it was agreed that they had a moral obligation to intervene. However, some members of the Board with experience of making third party interventions had found that it had involved a large amount of work. They were also concerned about the potential liability for costs. It was therefore agreed that they should intervene by way of a witness statement in support of the applications.

The organisation contacted the solicitor of one of the claimants, sending information about its campaign. Despite further attempts to contact the solicitor involved, several weeks elapsed before such contact was made. A witness statement was then prepared and submitted as further evidence. The applications were heard together in August 2000, but were adjourned until modifications to the system have been agreed by the Prison Service.

The Double Punishment Case

An application challenged the deportation of a Guyanese citizen upon his release from prison as a violation of his rights under Articles 7 (no punishment without law) 8 (right to respect for family life), 12 (the right marry and found a family) and 14 (prohibition of discrimination) ECHR. The

claimant was married to a British Citizen with whom he had a young child, and the case thus highlighted the impact of double punishment not only upon non-British citizens serving custodial sentences but also their families. The case was sent to a small group campaigning against double punishment.

This group expressed an interest in making an intervention both because it was an issue about which they felt strongly and as an opportunity to raise public awareness of it. However, it was unsure to what extent it could assist the court given the seriousness of the claimant's offence and the court's tendency to decide such cases in favour of public security. As an extremely small organisation with few resources, they also expressed concern about costs.

Having discussed the case with legal professionals and groups with some experience in similar cases, the group decided to become involved through either method of intervention. They proceeded to contact the claimant's solicitor, although some weeks elapsed before such contact was made and the solicitor was able to send copies of other case documents.

The group then discussed the case with an immigration advice body, who also contacted PLP with a view to making a joint intervention and requested more information about the issue of costs.

After much discussion between the two organisations, it was eventually decided not to make an intervention for two reasons. Firstly, the case was considered not to go to the heart of their primary concern that deportation in addition to a prison sentence is fundamentally unjust, but instead focussed upon the deportation as in breach of the right to family life. Secondly, the risk of being pursued for costs, although low, would have had a substantial impact upon them as small organisations. Both groups however remained interested in the principle of third party interventions and planned further joint discussions to identify attributes of cases that might merit their intervention in the future.

Kidney Patient Cases

Two cases were brought by patients undergoing dialysis which, although factually very different, raised similar public interest issues. In one of these the claimant challenged the refusal of entry clearance to an Indian citizen about to undergo tests in the UK to ascertain whether he was a suitable kidney donor. As a member of an ethnic minority, the claimant had experienced great difficulty in finding a suitable donor within the UK and challenged the refusal as unreasonable and in breach of Article 2 ECHR (the right to life).

The other case challenged the refusal of a health authority to provide further dialysis treatment to an overseas citizen unless payment in advance was given. This claimant had arrived in the UK to undergo a kidney transplant at his own expense, but the surgery was delayed for medical reasons. He had paid for most of his dialysis himself, but had fallen into debt with the health authority providing the necessary treatment. The refusal was challenged as unlawful and in breach of Articles 2 (right to life) and 3 ECHR (prohibition of inhuman treatment). Although not specifically pleaded, both cases also raised possible violations of Article 14 ECHR in that they had suffered discrimination on the grounds of nationality or race in enjoyment of convention rights.

A pressure group representing the interests of patients with kidney disease was contacted, but they did not consider that either case accorded with its objectives. Although the group was also deterred by potential liability for the other parties' costs – which it described as "frightening" – it also indicated that it would have to think very carefully before rejecting an intervention in a more appropriate case.

The first case was then sent to an organisation whose objectives were to assist Asian families in their use of health services and to bring the needs of Asian communities to the attention of health professionals and statutory bodies. It was considered that this organisation might have access to background information about the difficulties faced by Asian patients in finding suitable donors in the UK. Unfortunately, they were unable to respond until the case was about to settle, but expressed an interest in this particular case and in interventions more generally. The organisation had some awareness of judicial review, but not of the potential to intervene in proceedings. If able to assist with the case, they would probably have done so by providing a witness statement because, as a small organisation, they could not commit themselves to the costs of third party intervention unless the case would sufficiently raise their profile. It was clear from the discussion that they did not seek to gain publicity for its own sake, but to raise public awareness of the problems commonly faced by the patients they represent.

Other organisations were then contacted by telephone as both cases had by this time been listed for hearing. One did not consider that either case came within their scope. Another group representing the interests of black and Asian people living in Britain expressed an interest in both cases but did not have the resources to conduct the research necessary to make an intervention. By this point, there was insufficient time before the hearing date to make intervention practical for the dialysis refusal case, but the entry clearance case was referred to a large national organisation whose aim is to uphold fundamental liberties. However, although interested in the case, they did not think it practical to attempt an intervention within the few weeks remaining before the hearing date.

The case eventually settled.

Mental Health Cases

In all but two of the Mental Health cases sent to potential interveners, one particular national charity appeared to be the most appropriate group to intervene. This organisation did not wish to intervene in one of the cases sent, which challenged an MHRT's decision to remove a psychiatric patient to Belgium in the absence of any information about arrangements for his removal and subsequent care. This was because, in the light of a recent Court of Appeal decision, they though it would be difficult to establish that the MHRT had a duty to satisfy itself as to a care plan when removing a patient to another country. Additionally, they had no specialist information about psychiatric care in Belgium.

Three of the cases sent to this organisation were found to have settled when they contacted solicitors to discuss the potential for providing further information. Two of these concerned the continued detention of patients due to failure to provide aftercare services. However, the same issue was raised in another case in the study that had been expedited at first instance but which was sent to the same organisation when granted leave to appeal. They contacted the claimant's solicitors, but did not intervene because there was nothing that could be added to the claimant's own submissions.

Two independent cases challenged decisions by the same secure hospital to seclude the respective claimants. In each case, the claimant had been considered a management problem by the hospital and had been secluded for long periods in inadequate conditions in breach of the Home Secretary's Code of Practice issued under the Mental Health Act 1983. The organisation contacted expressed an interest in the cases since the misuse of seclusion was of great concern to psychiatric patients. Although they were interested in third party interventions, having considered making one in the past, they stressed the need to consider whether the time and trouble involved was well spent as well as the need to minimise legal costs. They were also unsure that they had access to sufficient information to justify an intervention, but were willing to explore the provision of further evidence in a witness statement. One of the cases however settled, and although the organisation discussed the possibility of intervening with the other claimant's solicitor, it appeared that there was nothing they could add to the case.

A further case referred to this organisation challenged the lawfulness of an ex parte order made by a county court substituting a social worker for a patient's nearest relative where the relative would not agree to an application for the patient's detention for hospital treatment. They were particularly interested in this case, but by the time they contacted the claimant's solicitor the main issue had been resolved and it had turned into a rather different application. Because of difficulties in keeping contact with the solicitor involved, they were unable to pursue the prospect of intervention any further.

Although this particular organisation was very positive about third party interventions, they stressed the need to target their limited resources towards cases with a significant impact for users of mental health services. Thus they were most likely to consider providing evidence by way of witness statements in order to minimise their own legal costs as well as to save the time and trouble involved in making third party interventions.

Visits by Child Relatives to Special Hospital Patients

Two Mental Health cases both challenged a Department of Health Circular prohibiting visits by certain categories of child relative to patients convicted of serious offences. These were both sent to a legal advice and information service representing the interests of children since these interests were unrepresented by the parties involved. The organisation was interested in principle in making an intervention, but wished to consider the cases carefully to ensure that they would be acting in the best interests of children. They also expressed concerns about the cost implications of making a third party intervention. Unfortunately, it then proved difficult to keep contact with this organisation, although they did contact PLP some months later to check progress on the cases. By this point one case had settled and the other had been dismissed at the substantive hearing.

Immigration cases

Of the seven immigration cases sent to potential interveners, five were asylum cases and two non-asylum. Two cases – one of each category – have already been discussed above, i.e. the kidney donor case and the double punishment case. The second non-asylum case concerned the refusal of entry clearance to the UK to a Sri Lankan national in the interests of national security. The claimant had already been issued with a deportation order from Canada on the grounds that he was a member of a terrorist organisation, but had appealed to the Canadian Court of Appeal following dismissal of a judicial review in that jurisdiction. The current application challenged the refusal of entry as a breach of Article 8 ECHR, given that he wished to join family in the UK, and of Article 3 ECHR (prohibition of torture or inhuman or degrading treatment) in view of his possible deportation from Canada. This case was sent to an organisation with expertise in Convention law, but had been stood out pending a decision from the Canadian Court of Appeal and was not pursued further.

One of the asylum cases challenged the refusal to waive

entry clearance fees in a family reunion case. The claimant, and sponsor for entry clearance, was a Somali national granted exceptional leave to remain in the UK whose seven children were currently in a refugee camp. The policy of the Foreign and Commonwealth Office was that fees could only be waived if the sponsor was destitute and, since the claimant was receiving income support, she was not automatically deemed destitute. It was submitted that the refusal was irrational in failing to consider the financial status of applicants for entry clearance or to take account of the total cost of the fees to the sponsor. The claimant also challenged the refusal as a violation of Article 8 ECHR. The case was discussed with a national group that campaigns and advises on immigration and nationality issues, who expressed an interest in this case. A case summary was then sent, but nothing further was heard from this group as they were in the process of internal reorganisation. An international agency representing the welfare of children was then contacted, but they considered that the information required to assist in the case was too specialised. In any event, they would only be interested in children under 18 years, and at least one of those in this case was over that age. No further organisations were contacted as the case had settled by this stage.

Another case was also sent to the immigration group mentioned above following a telephone discussion. This challenged the lawfulness of a blanket ban on the attendance of legal representatives and interpreters at an initial Dublin Convention interview. Again, this group was unable to assist for the reasons outlined above. Two other organisations representing the interests of refugees were contacted, but were also unable to assist. The substantive hearing date was by this point too close to make intervention practical.

Two asylum cases involved claims of persecution against identifiable social groups. One concerned a homosexual Romanian citizen who challenged a Special Adjudicator's dismissal of his appeal against refusal of political asylum. The case aimed to establish that the treatment to which homosexuals are subjected in Romania, particularly prosecution and imprisonment for consensual homosexual relations in private, amounted to persecution under to Refugee Convention. The case was referred to a small group which advises homosexual groups on immigration issues, who it was thought might be able to provide information about the incidence of prosecution and imprisonment of homosexuals in Romania. This organisation however said that it aimed to give general advice but not to get involved in individual cases. They did however pass on the names of solicitors who assisted them on occasions and who might be able to provide further information. Because the case was listed for hearing within the next two weeks, it was decided to contact one of the solicitors only if the case went on appeal.

The second persecution case concerned a Nigerian woman who had been refused asylum. She was over 40 years and childless, and claimed that the severe discrimination suffered in Nigeria by childless older women amounted to persecution. A group providing legal advice specifically to Nigerian women was identified as the most appropriate intervener in that they might best be able to provide further information about the treatment of women sharing the claimant's characteristics. No response was received from this group and it proved very difficult to contact them by telephone. It also appeared that the case might be settling (although it did not settle), so no other potential interveners were contacted.

Prisons Cases

In addition to the four cases challenging the introduction of the prison telephone system described in detail above, four prisons cases were sent to a charity providing legal advice to prisoners. Two were linked cases against the same defendant prison, raising issues about procedures adopted in discipline adjudications and the right to legal representation. The organisation already knew about these cases, having spoken to the solicitors involved, but did not think they had the necessary statistics or other information to assist.

The same organisation also did not think they had anything to add in a case brought by a Category A prisoner aiming to clarify the factors to be taken into account in categorisation decisions. The main reason for this was the difficulty in challenging cases involving Category A prisoners.

The claimant in the final prisons case was a disabled prisoner who was unable to use most of the prison facilities due to his disability. He challenged the refusal of the Home Office to identify and move him to a more suitable prison as a breach of the Disability Discrimination Act, the Prison Rules and Article 14 ECHR in that he had suffered discrimination in enjoyment of the right to education under Art. 2 of Protocol 1 ECHR. The failure to move him also meant that the claimant could not have his categorisation downgraded. The organisation was interested in this case as they had recently dealt with another raising similar issues, but had nothing further to add to the claimant's submissions.

Housing, Housing Benefit and Homelessness Cases

Cases in these categories are often expedited where the claimant is in urgent need of accommodation or rehousing. For this reason, four homelessness cases and one housing case were not sent to potential interveners at first instance because intervention would have been impractical. However, these cases were all granted leave to appeal and were referred to a national homelessness charity at this

stage of proceedings. The homelessness cases had been joined with three others, lodged before this project began, challenging the policy of the same London borough. The local authority had adopted a policy of placing homeless people in bed and breakfast accommodation outside the borough. It appeared that the court might be assisted in these cases by the provision of background information giving examples of similar cases causing particular hardship for those affected. The organisation to which these cases were sent appeared to be an appropriate intervener because they might have access to such information via their local networks. They were however already aware of these cases through discussions with counsel representing the claimants, and did not have anything to add to submissions already advanced.

Similarly, this organisation did not think they could add anything to assist in the housing case going to the Court of Appeal. This challenged the application of a housing transfer policy whereby exceptional circumstances, e.g. medical conditions, could not be considered within the local authority's "points" system. Again, this case might have been suitable for background information on others similarly affected.

They were interested in considering two other cases in more detail. One aimed to clarify whether local authorities have a duty to house homeless parents of young children under the Children Act 1989. This was a problem that this organisation said they encounter frequently. However, the main issue became settled between the parties and only costs were in dispute when the case went to a full hearing. The second case challenged a local authority's policy of automatically refusing a payment on account of housing benefit where applicants are under investigation without taking other circumstances into consideration. This case subsequently settled before intervention could be considered further.

People with Learning Difficulties

One of the Community Care cases identified as suitable for intervention concerned direct payments to users of community care services. It raised two issues: firstly, whether payments could be made to carers or other agencies on behalf of those unable to secure services for themselves, and secondly what responsibilities may be delegated by local authorities. An organisation working for the rights of learning disabled people to participate in decision making was known to have campaigned in favour of direct payments to service users, and therefore appeared to be an appropriate body to intervene. In fact they already knew about the case (but not that it had gone to judicial review) and were keen to consider an intervention. They also suggested that it should be sent to another individual who had worked closely with them in their work on direct payments. He also expressed an interest in the case but, like the organisation first contacted, decided that there was insufficient time to make an intervention when the case was then listed for hearing at short notice. He was interested however in making an intervention if the case went on appeal as he was looking for a test case on the direct payments issue. The case appeared to have been listed at short notice due to the Crown Office "blitz" but settled just prior to the hearing date.

A second case was also sent to the same organisation representing learning disabled people. The claimant was a woman with learning difficulties who had been detained under the Mental Health Act 1983 but who wished to live independently following her discharge. Staff responsible for her care supported her wish, but the local authority insisted that she be placed into residential care. Although the organisation thought that they would have some useful comments to add to this case, they did not have the capacity to intervene at this time. They again suggested it be sent to someone at another organisation with experience in independent living issues, but by this point the case had settled.

Radioactive Waste

The one pollution case obtained in the study challenged a decision by the Environment Agency to authorise the disposal of radioactive wastes arising from Trident production and decommissioning. In addition to raising issues about the legal requirement to provide justification in granting authorisation, this case also submitted that the deployment of Trident missiles is a breach of provisions of international law relating to armed conflict since Trident does not discriminate between civilian and military targets. The issue raised in respect of this contention was whether this was a relevant matter within the scope of the defendant's consideration when reaching their decision.

Although this application was brought by a public interest group, it was considered that other such groups might have something further to add. It was therefore discussed by telephone with a large environmental pressure group. It appeared that this group had in fact been contacted by the solicitor acting for the claimant and had already discussed the case. As a result, they had nothing further to add to the submissions. In addition, they were no longer concentrating resources on this sort of issue and would not have wished to formally intervene in any event.

Death in Custody

An application brought by the Chief Constable of a police force challenged an inquest applying a rider of neglect to a verdict of accidental death where the deceased had died in police custody. The deceased had been too drunk to be interviewed following his arrest and was detained at the police station overnight. His sister had telephone the

custody sergeant soon after the deceased's arrest, expressing concern that he might "get the shakes" and was told that a doctor would be called if necessary. On being interviewed the next day, the deceased's hands were shaking badly, but the custody sergeant did not consider him to be ill and therefore did not call a doctor. Within the next two hours the deceased suffered a fit in the exercise yard, following which he was taken to hospital by ambulance. He subsequently lost consciousness and died the following day.

Because the case aimed to clarify the appropriateness of apply a rider of neglect to an accidental death verdict, it would have an impact upon others dying in custody and their families. It was therefore sent to a group whose aims include the improvement of the coroners' inquest system and who actively campaign against deaths in custody. This group was familiar with this case and knew that the deceased's mother had been unsuccessful in obtaining legal aid in order to intervene in the proceedings. She was reapplying for legal aid on alternative grounds and the group intended to assist her if successful or, if not, to intervene on their behalf. The group was, however, concerned about the costs issue and wished to seek the view of the coroner (who had consented to an intervention) on the likelihood of the police pursuing them for costs.

The deceased's mother was again unsuccessful in getting legal aid, but obtained pro bono representation having been granted leave to intervene. Following his judgment at full hearing, Tomlinson J concluded that, despite some helpful submissions by the intervener, it might have been more appropriate for the intervener to have written a letter to the court or invited the defendant to draw the court's attention to her position[40]. As a result, the intervener's application for costs against the claimant was refused.

Compliance of Civil Procedure Rules with the ECHR

One interesting application submitted that certain of the Civil Procedure Rules and Practice Directions were not compliant with the right to a fair trial under Article 6 ECHR in that they allowed some court proceedings to take place in private. The claimant challenged the failure of a county court to make such proceedings open to the public. This raised an issue of general public interest concerning openness in the administration of justice.

The case was sent to an organisation with expertise in Convention law as it was considered that they would be able to balance the right to a fair and public hearing with the right to confidentiality of proceedings in the civil courts. The organisation was initially very interested in the issues raised but, after further research on Convention law, decided that the Rules and Practice Directions under challenge were effectively compliant with the ECHR, so that there was little point in making an intervention.

Investigation of Police Complaints

One case was sent to an organisation at their own request and concerned the failure of the Police Complaints Authority to properly investigate a complaint about alleged abuse of police "stop and search" powers under the Police and Criminal Evidence Act 1984. The complainant was a member of an ethnic minority and his judicial review application raised an issue about potential racial bias, either in the investigation of police complaints more generally, or where the complaint concerned allegations of racial bias in the use of police powers. This case was not however taken any further as the parties were involved in negotiations for some time before the case eventually settled.

Sex Discrimination Against Transsexuals

A transsexual claimant challenged the Sex Discrimination (Gender Reassignment) Regulations as both ultra vires the Sex Discrimination Act and contrary to the Equal Treatment Directive. She applied for an appointment as a police constable but was later informed that her application would not be pursued as, because of her transsexual status, she was prohibited by the Regulations from performing intimate physical searches on persons in custody. An Employment Tribunal had previously ruled that the claimant had been subjected to unlawful discrimination, but the police force had since appealed to the Employment Appeals Tribunal. The judicial review application was sent to an organisation that had made submissions on a similar issue in the European Court of Human Rights. However, the application was then stayed pending a substantive EAT hearing in May 2001 and was not pursued further at this point.

Refusal of Planning Permission to Gypsy Families

This case challenged the failure to determine a planning application for the development of land occupied by four Gypsy families. The claimant Gypsies alleged that this failure was in breach of their right to family life under Article 8 ECHR given that the plots of land concerned were their homes. The claimants had already addressed issues about the desirability of the applicants' having a settled base for the purpose of their children's schooling and registration with health services. However, it was considered that a group with expertise in travellers' law might have other relevant points to add in support of the application. The case was sent to this group who responded by e-mail to the effect that they did not have sufficient time to become involved since staff were already taking on work in their own time.

(e) Informal "Interventions"

In addition to the methods of intervening already identified, a third method of providing specialist information or

expertise emerged during the course of the study. This tended to be carried out by organisations with legal expertise with which solicitors often discuss cases. The use of this method became apparent when contacting these organisations with cases suitable for intervention. One such group were familiar with some cases that were going on appeal to the Court of Appeal, having discussed them with the solicitors concerned prior to the first instance application. Another had encouraged a network of solicitors handling relevant cases to keep them informed of those where they might be able to add something. In some such cases, this organisation has provided statements or further information to assist an application. As a result of being contacted by the solicitor handling the case, one pressure group contacted in this study was also able to add information to be included in an application for judicial review. Another representing the interests of a vulnerable group said that they sometimes prepared the pleadings for cases referred to them by solicitors. Such cases would then be handed back to the solicitor to make an application for legal aid. Thus some organisations might be "intervening" in a much more informal way by providing information that the claimant can make use of, rather than through the more formal methods of submitting a witness statement or intervening as an independent third party.

(f) Cases Granted Leave to Appeal

Forty-nine of the 63 cases considered suitable for intervention and which did not settle had been determined by the end of April 2001, of which 18 (37%) were granted leave to appeal either by the High Court or the Court of Appeal. In one of these cases, the appellant applied for, but was refused, an extension of time in which to lodge the appeal. Thus in 32 (65%) of this sub-sample of cases in which judgment had been given by 30 April 2001, the only potential for intervention was at first instance. Two cases also received expedited appeal hearings, making them impractical for intervention at this level unless a potential intervener had already prepared submissions in anticipation of an appeal.

Six of the cases going on appeal were sent to potential interveners at this stage. These comprised four Homelessness, one Housing and one Mental Health case, all of which are described earlier in this chapter. A seventh case was later joined with the Mental Health case at the appeal stage. For three further cases granted permission to appeal, no suitable intervener had been identified at first instance.

One of the organisations contacted in the study had earlier expressed an interest in intervening in one particular case should it go on appeal. Unfortunately this case did not do so.

The view has commonly been expressed both by members of the judiciary and some more experienced interveners that interventions are best made when the cases go on appeal, since by then the issues have crystallised. The results of this study suggest otherwise, as most cases are unlikely to go as far as the appeal courts. Unless interventions are made at first instance, the opportunity to assist the court on issues of public interest is likely to be lost.

4. Realising the potential for third party interventions

(a) "Floodgates" Fears

The results of this project indicate that, far from the prospect of the courts being flooded by applications to intervene in judicial review proceedings, there are likely to be few such applications. Table 9 summarises the number and proportion of cases identified at various stages of assessment throughout the research project and shows the very small percentage of cases in which interventions were potentially possible on public interest grounds.

Although one third of the cases included in the study were identified as raising issues of public interest, little more than half this sub-sample were considered to be suitable for intervention. Settlement or withdrawal proved to be a significant barrier to intervention within these cases, although it should be noted that the incidence of settlement or withdrawal within the sub-sample of public interest cases suitable for intervention was lower than that for non-public interest cases (57% compared to 66%)[41]. Expedition also made intervention impractical in a small proportion of cases where the substantive hearing took place within a few weeks of permission being granted. Of the 147 public interest cases identified as suitable for intervention at first instance, 99 (67%) were either expedited or had settled by the end of April 2001, while another four were not known about within sufficient time to identify and contact interveners. This left only 43 (29% of cases identified as suitable for intervention on public interest grounds and just 5% of all judicial review cases granted permission) where intervention was practical. Nine of these were either stayed or stood out pending other proceedings, so that only 34 of cases identified as suitable for intervention had been heard or were listed for full hearing by the end of January.

Among those cases identified as suitable for intervention, the majority affected other groups of individuals with a similar, if not the same, interest in the outcome as the claimant or, more rarely, the defendant. The most effective method of intervening in such cases is probably by the provision of a witness statement in support of the party whose interests are shared by the intervener, rather than by intervention as an independent third party. Witness statements are frequently submitted in support of parties to judicial review proceedings and do not add significantly to the time and cost of proceedings.

Even in those cases where a third party intervention was more appropriate because the case affected others with a different interest to either of the parties, many potential interveners approached by this study preferred to submit witness statements where possible. Potential liability for costs appeared to be the main factor militating against intervening as an independent party, even for some of the comparatively well-resourced groups. The time involved in preparing an intervention was also a deterrent, especially for smaller groups with few staff.

The provision of a witness statement might be an appropriate alternative to third party intervention in certain types of case where the interests of the affected group might overlap with those of the claimant, for example, as in the cases affecting families of prisoners. The problem even in these cases is that the third party might also have other interests which are not shared by claimants, and which cannot be canvassed through a witness statement supporting those claimants. In other types of case, a witness statement cannot substitute for third party intervention because the case has an impact on others whose interests are opposed to those of the claimants. Prisoners' rights cases might have a significant impact upon victims of crime, whose interests can only be represented by third party intervention. In such cases, potential interveners' fear of an adverse costs order might prevent these interests from being represented.

Table 9
Number and percentage of cases identified at different stages of assessment

	No. cases	% cases
Granted permission 01/10/99 – 31/05/00 inclusive	831	100
Identified as raising issues of public interest	277	33
Suitable for third party intervention	147	18
Third party intervention practical	43	5

In some of the cases identified as suitable for intervention, potential interveners did not always think that they had anything to add that might assist the court. The extent to which the court requires further information might depend upon other factors outside the individual case. Multiple linked cases might dispose of the need for further information where the decision affects others with the same interests as the claimants. In the four homelessness cases challenging the same local authority's policy, the fact that they were heard together meant that the court no longer needed the sort of background information that might have been provided by a public interest intervener. This is because the number of cases in itself provided evidence of the widespread impact of the policy. In addition, the court was able to see the range of adverse consequences suffered by those affected since each case provided an example. The Crown Office practice of linking a number of cases raising the same issues may make intervention unnecessary where this would merely provide background information in support of an application. Multiple cases do not however assist where others are affected whose interests differ from those of the parties to the litigation.

There is also evidence that the organisations contacted in the study made very careful assessments of whether they could add anything of assistance in the cases sent to them. It appeared that they would only consider making an intervention where the issues at stake accorded with a core organisational objective. These same organisations expressed an interest in making interventions should a case come up that did accord with their aims due to a sense of "moral obligation". However, the study suggests that most organisations would be unaware of the existence of such cases.

Given the practical barriers that exist to making third party interventions in terms of expedition and settlement, some consideration might be given to removing some of the controllable barriers to making such interventions, most notably:

- not knowing about cases at an early enough stage in proceedings;
- being unable to track the progress of cases;
- lack of information or advice about how to make an intervention;
- risk of an adverse costs order if the intervention is unsuccessful.

(b) Access to Information

Of the twenty potential interveners contacted in this research, only five (25%) had any prior knowledge of any of the cases discussed with them. One knew about five of the cases sent to them, having previously discussed them with instructing solicitors, and another organisation had also discussed a case with the claimants' solicitors. Both were relatively large organisations with legal expertise. Another group, again a large organisation with legal expertise, knew of a case from reading a newspaper report. The other two groups were smaller organisations. One knew of the case from its own affiliated lawyers' group, while the other was aware of a case through another unspecified source but did not know that proceedings had been issued.

Most potential interveners contacted therefore had no knowledge of judicial review cases that might have been of interest to them. This was particularly striking in the cases concerning the prison telephone system where the group contacted had been campaigning against its introduction for some time, unaware that this had been challenged in judicial review proceedings. A better known group, by contrast, was aware of these applications. This tends to support the hypothesis that such information is mainly obtained through informal networks that favour larger and better-resourced groups.

However, even those organisations with informal networks do not always know of cases where they could provide further expertise. One in particular, a group with its own in-house legal expertise, mentioned that they sometimes only know of a case in which they could have provided assistance after judgment has been reported. This is despite having contacts with a number of solicitors who actively seek their advice and further information about issues affecting the vulnerable group that they represent. They found this particularly frustrating when nothing was known about a case until after it had gone to the Court of Appeal.

If the potential for third party interventions is to be fully realised, public interest groups firstly require better access to information about pending judicial review cases at a relatively early stage in the proceedings. There are two potential sources of information about judicial review applications: claimants own solicitors, and the courts themselves.

Claimants' Solicitors

Some of the larger organisations with in-house expertise have contacts among solicitors handling cases of interest to them. This appears to benefit both the public interest groups and the solicitors, in that the former have an opportunity to address issues having an impact upon their constituents and the latter are able to address policy issues that benefit their clients' cases.

Recent reforms to legal aid as a result of the Access to Justice Act 1999 and the Funding Code might encourage networks between public interest groups and solicitors. The Legal Services Commission has recognised the need to provide public funding for cases, such as judicial review applications, that might otherwise fail to attract legal aid on the merits and cost-benefit tests where they have 'signifi-

cant wider public interest'. This goes beyond the more general public interest element that is inherent in all judicial review cases and has been defined as:

> *"the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question)"*[42]

Thus it might be in the interests of their clients for solicitors to contact public interest groups able to provide evidence of significant wider public interest before applications for legal aid are submitted.

The Legal Services Commission established a Public Interest Advisory Panel in May 2000 in order to assist in deciding whether cases have 'significant wider public interest'. However, relatively few judicial review cases have so far been referred to the Panel. One explanation is that the Commission decided to grant funding in any event on the standard tests[43]. However, an alternative explanation might be that claimants' solicitors are failing to recognise or record the public interest aspects of the case.

The development of better networks between solicitors and public interest groups might also continue to favour those groups with a high profile and in-house legal expertise. One of the main barriers for smaller groups is likely to be that solicitors do not know of their existence or of the nature of their expertise on relevant issues. However, this does not fully explain the lack of involvement of public interest groups at the initiative of legal practitioners, as was illustrated by one of the examples in this study. Here, the public interest group concerned was known to solicitors handling a number of cases in which they could (and eventually did) assist on the issues raised. Despite the group's ability to support the claimants by the provision of further evidence, the solicitors had not sought their expertise. In other cases, even where potential interveners made contact through the project with claimants' solicitors, they were unsuccessful in obtaining a response regarding possible interventions or information about cases.

Clearly, this suggests that a culture change amongst legal practitioners is also required if interventions in the public interest are to be encouraged. While it is relatively common for solicitors to include supportive witness statements from persons with an obvious involvement in a particular case, it requires a more lateral approach to seek specialist information beyond the client's own personal interests in support of an application. Such a culture change can best be achieved by increasing solicitors' awareness of the value of information and expertise provided by public interest bodies, either for inclusion in the form of witness statements or through "informal interventions" as described above. The Interveners' Information Pack produced for this study could be refined as a briefing pack for solicitors, assisting them in identifying public interest cases which might benefit from further expertise, and encouraging them to form networks with groups able to provide it. The briefing pack might also be used as a basis for training.

The Courts

This study has highlighted the difficulty of accessing information through the courts themselves. No public register of pending cases exists in the Administrative Court, and the list of pending cases to which the public has access in the Civil Appeals Office is not very informative and sometimes inaccurate. Only the House of Lords has an effective public register of pending cases in the form of its Cause List produced each term. This would enable potential interveners to identify the issues raised by an individual case, assuming that they are aware of its existence.

However, it might be relatively easy to develop a public register of first instance applications based upon information already entered on the Administrative Court Office's computer system, COINS. To be of value to public interest groups, the register should include a brief summary of the issues raised by each application, similar to that included on the House of Lords Cause List. This would enable potential interveners to identify cases that may have an impact upon their constituents and in which they can provide information to assist the court.

Potential interveners are very unlikely to require information about a case at the pre-permission stage. The new rules[44], whereby claims must be served on the defendant immediately on issue of the permission application, are aimed at encouraging earlier settlement. It would not generally be worthwhile for public interest groups to become involved in cases that might settle at a very early stage or fail to be granted permission. If, however, the reforms succeed in achieving earlier settlement in a significant number of cases[45], fewer are likely to reach the permission stage and a proportion of these will not be granted permission[46]. This would make the task of entering information about cases easier and less time consuming. Much of the information required already appears on the Administrative Court Office's own "staging reports" produced on the COINS system, such as the case number, case category and names of the parties.

The Administrative Court lawyers currently produce a summary of each case for the judge prior to the permission stage. For those cases granted permission, this might be used to add brief details of the issues raised in the case for inclusion on the register. Alternatively, claimants could be required to provide a brief outline of the issues on the claim form for this purpose. In a few of the claim forms obtained in this research project, the main issues had been clearly summarised in the grounds of the application. As well as

being good practice, this might provide a basis for the case information to be entered on the public register. If this were to be provided by the claimant's counsel in the form of a header to the application, it would also be of assistance to the Administrative Court Office, the defendant and the judge in addition to providing information for the public register.

The public register might also include information about the stage that a case has reached in proceedings, so that potential interveners could find out when a case has been warned or listed for hearing. This register could also be used to enable the public to track any cases going on appeal by continuing to include those granted permission to do so either by the High Court or the Court of Appeal.

In keeping with the aims to modernise the civil justice system through greater use of information technology, this information could be made available on the internet, to which most public interest groups now appear to have access.

Having identified any cases in which they are interested, potential interveners may contact the parties to the judicial review for copies of the claim form and any other documents. Since the claim form is a public document after having been served on the other parties, a copy may also be obtained from the Administrative Court Office on payment of any prescribed fee[47]. Other documents may also be inspected or copied with the permission of the court.

(c) Clear Procedures for Making Third Party Interventions

Although some of the public interest organisations contacted in the study had experience of making interventions, either as independent third parties or through the provision of supporting evidence, others were unaware of the potential for interventions in judicial review cases.

Despite the rule change permitting anyone to apply to intervene in judicial review proceedings, no rules or guidelines currently exist in England and Wales for those wishing to do so. This is particularly likely to be a barrier for groups who are new to the concept of third party interventions, but has also been problematic to more knowledgeable organisations. One of the more experienced organisations contacted in this research had made an intervention, independently of the study, in the Court of Appeal and had initially received conflicting information on how to go about applying for permission. Another organisation, not otherwise involved in the study, was willing to discuss their experiences of intervening in the Court of Appeal, and had also been unsure about how to apply for permission in the absence of any formal rules or guidelines.

In *A Matter of Public Interest*, the JUSTICE / PLP Working Party provided draft rules for applications for public interest interventions[49]. More recently, rules for making interventions in the public interest have been issued in Scotland[50]. The Scottish rules with regard to the application for permission to intervene are broadly similar to those drafted by the Working Party and provide that:

- An application to intervene must be lodged in the court and served on the parties to the proceedings;
- The application should state briefly the name and a description of the intervener, the issue(s) which raise a matter of public interest, the issue(s) to be addressed by the intervener, and the propositions to be advanced with reasons for believing that they will assist the court;
- The court may grant leave only if it is satisfied that the proceedings raise a matter of public interest, the intervention is likely to assist the court and the intervention will not unduly delay or prejudice the rights of the parties, including their potential liability for costs.

Both the Scottish rules and those suggested by the Working Party also make reference to the form and length of an intervention, i.e. that it should be a written submission no longer than 5000 words, including appendices (Scottish Rules), or 20 pages (Working Party) unless the Court allows otherwise.

It is too early to monitor the effect of the Scottish rules on third party interventions in judicial review (which had not previously been allowed in Scotland). It was also difficult to assess the effect of the absence of rules in this study as the potential interveners contacted were sent a copy of the interveners' information pack. This included a suggested procedure for making an intervention based upon both the draft rules in *A Matter of Public Interest*[51] and the experiences of previous interveners. However, the absence of any rules or other information about how to intervene is likely to involve potential interveners in spending extra time on seeking advice. This may well be a deterrent to those with fewer resources.

The main problem with rules is that they are often unduly restrictive. The Scottish rules, for example, limit submissions to no more than 5000 words other than in "exceptional circumstances", providing little scope for discretion in most individual cases. Similarly, very few interveners would be allowed to make oral submissions under these rules. If public interest interventions are to be permitted for the assistance of the court, then it should be for the court to determine, on a case-by-case basis, the manner in which it can best be assisted and the volume of information required to assist on the issues raised.

The use of Directions hearings to decide the length of submissions and whether they should be written or oral might be one means of avoiding the need for rigid rules.

The Directions hearing could also deal with costs issues such as applications by the intervener for pre-emptive costs. However, this would make further demands on court time, thus increasing the parties' costs. Because the Directions hearing would be held only after permission to intervene has been granted, it would not dispense with the need for guidelines on applications for permission to intervene. As discussed below, costs would also be dealt with at too late a stage in the proceedings to be of benefit to public interest interveners.

A Practice Direction would appear to be a more effective means of setting out principles and guidelines for the practice of making third party interventions. This could include stricter procedural guidelines for making applications for permission (which are unlikely to be controversial) whilst allowing greater flexibility in the form and length of submissions where permission is granted. The Practice Direction might also deal with costs against interveners, thus providing greater certainty (see below). The provision of a Practice Direction need not preclude the court from holding Directions hearings in more complex cases, but would probably make this unnecessary in the majority of cases.

(d) Advice and Assistance in Making Interventions

Although guidelines for making interventions, whether in the form of a Practice Direction or otherwise, will go some way to assisting public interest groups wishing to make third party interventions, further advice and assistance may also be necessary, especially for those without in-house legal expertise. For the purpose of this research, the Public Law Project has produced an information pack for potential interveners which is now available on its website[52]. In addition to guidelines on how to apply for permission to intervene, the information pack gives examples of previous interventions, as well as some of the practical issues that public interest groups may need to consider when deciding upon a method of intervening. Also included are some of the issues to consider when deciding whether or not to intervene, based upon what has been learned from previous interventions. Those groups contacted in the study and who commented on the information pack appeared to have found this section particularly useful.

However, it is likely that public interest groups, particularly those with no in-house legal expertise, will require more individual guidance on making interventions or about judicial review procedures more generally. Some of the groups with whom cases were discussed as part of the project had no previous experience of judicial review, and others had not previously been aware that third parties can intervene in proceedings. A limited number of organisations exist which may be able to provide advice and assistance to such groups[53]. Alternatively, those organisations that have made successful public interest interventions might be willing to advise others wishing to do so, perhaps acting as a "mentor". A list of such organisations could be compiled for circulation to other potential public interest interveners, possibly via the Public Law Project's own website.

(e) Reducing Uncertainty About Costs

Interveners' own costs

Public interest interveners usually have to bear their own costs involved in making an intervention. It was notable in this study that none of the organisations contacted raised the possibility of being awarded their own costs in the event of a successful intervention. This may have been because the issue was eclipsed by that of their potential liability for other parties' costs if unsuccessful, but could equally have reflected a willingness to bear these costs in the interests of those they represent. The prospect of raising the public profile of their constituents and campaign objectives appeared to be a more valued consequence of a successful intervention for those groups giving serious consideration to intervening.

Although potential liability for the other parties' costs was a particular deterrent to making interventions as an independent party, it is likely that the costs of representation if oral submissions are made could be equally problematic for many groups, especially those without in-house legal expertise. It might be possible for a Panel to be established of counsel able to offer free representation to public interest groups, perhaps as part of the Bar Pro Bono Unit.

Other parties' costs

The risk of an adverse costs order should an intervention be unsuccessful was mentioned by most organisations included in this study as a significant barrier to making third party interventions. This is demonstrated by the fact that even though other barriers were removed in this study by providing groups with information, guidelines for making interventions and further assistance, many decided not to intervene independently due to the risk of having to bear the other parties' increased costs. Smaller organisations tended to describe this as "frightening" or "devastating" and, for this reason, those who did consider intervening said they would be more likely to submit evidence in support of a party to the proceedings. While this is an efficient and cost effective alternative in cases where the intervener's perspective largely accords with that of one of the parties, it is not appropriate where the case affects others whose interests differ from those of the litigants. Consequently, the interests of some vulnerable or disadvantaged groups are likely to be unrepresented in judicial review proceedings while the current position on costs remains.

Costs were not just an issue for the less well-resourced

groups: all public interest groups have limited financial resources and must therefore justify their expenditure. One of the larger organisations made particular mention of the need to minimise legal costs by targeting their efforts towards more significant cases.

In some cases, both parties might welcome a third party intervention and therefore agree in advance not to pursue the intervener for costs. However, this is not always so. One of the organisations contacted in this study was interested in intervening in a Coroners' case, but was worried about the prospect of being pursued for costs by the applicant who was unlikely to welcome their intervention. (In fact this organisation did not intervene because the mother of the deceased was granted permission to do so.)

There are precedents for making no order for costs against unsuccessful applicants where issues of public importance have been raised, some of which date back many years[54]. More recently, in *Coughlan*, a partially successful applicant was not required to pay any of the respondent's costs on the ground that she had raised an issue of wider public significance[55]. The problem with making no order for costs against an intervener is that the successful party would be unable to recover any increased costs due to the intervention. This may be viewed as unjust, and the courts are mindful of the fact that public authorities themselves do not have unlimited funds. Their was general consensus within the JUSTICE/PLP Working Party that the court should have the discretion to award costs to the successful party out of central funds[56] – a suggestion previously made by the Law Commission in relation to public interest litigation[57]. However, some members of the Working Party did not think that this would go far enough towards reducing the uncertainty over costs which currently deters many public interest groups from making interventions. Whether other parties' costs are paid from central funds or borne by those parties themselves, decisions to this effect are made only after the case itself has been decided. As a result, only the very best resourced groups are able to take the risk of intervening in the public interest.

Pre-emptive costs orders in favour of a public interest intervener are one means of reducing this uncertainty. Pre-emptive costs orders in favour of claimants are relatively common in Chancery cases where applications, if successful, would benefit a much wider group such as beneficiaries of a trust fund[58]. Claimants bringing judicial review proceedings in the public interest have, however, been unsuccessful in obtaining pre-emptive costs orders, and it is doubtful that many interveners would have much greater chance of success given the very strict conditions laid down in *ex p. CPAG*[59]. Markus and Westgate have suggested that the courts should provide clearer guidance as to the circumstances in which an unsuccessful applicant will not be held liable for the other parties' costs to improve the position of those not granted pre-emptive costs orders[60]. Similar guidance would equally benefit public interest interveners.

One means of dealing with costs before the substantive hearing might be to hold a Directions hearing. This would allow agreement to be reached between the parties, subject to the length and format of submissions by the intervener, or for the court to set out other conditions under which the intervener would be exempted from costs liability. However, Directions hearings in themselves increase costs and resulting decisions on costs would be made at too late a stage in proceedings to be of benefit to many smaller public bodies. Additionally, in the absence of any general guidelines for the courts on costs, this method may lead to a lack of consistency between different cases.

If, as discussed earlier in this chapter, guidelines on the length and form of submissions are provided by means of a Practice Direction, the issue of costs could be more efficiently dealt with in the same way. The provision of a general principle on costs would improve certainty for potential interveners by making clear the criteria to be satisfied if costs are to be limited or waived. However, providing greater certainty with regard to costs will not in itself be sufficient to encourage interventions from organisations with lesser resources. Such guidelines must significantly broaden the circumstances under which public interest interveners will not be liable for costs.

Interventions are only permitted where they would be of assistance to the court. If the intervention addresses issues of public interest on which the intervener can assist, there is a strong argument for a presumption against liability for other parties' costs, rebuttable on grounds of abuse or misconduct by the intervener. Where the court has taken the view that the intervention would be of assistance, the question of whether that intervention is successful or unsuccessful no longer arises – whatever the court's decision, it has been informed by the intervener's submissions. Thus the intervener is in a similar position to *amicus curiae*, who themselves are not liable for other parties' costs. Another point in favour of a "no costs" presumption is that public interest interveners are rarely, if ever, entitled to their own costs[61]. This approach would therefore redress an inequality while making interventions accessible to smaller public interest bodies with relevant expertise. As a result, the court will benefit from being better informed about the issues to be decided.

5. Conclusions and recommendations

1 At present, public interest groups are often unaware of pending judicial review cases in which they might provide further information or expertise for the benefit of the court. Although some larger groups have informal networks with solicitors handling cases of interest to them, this does not guarantee that they are aware of all relevant cases.

Recommendation:

■ Pending civil judicial review cases granted permission to proceed should be published via a website. Information on each case should include the name and reference number, stage it has reached in proceedings and a brief summary of the issues raised, thus enabling public interest bodies to identify cases of interest to them and where intervention is practical.

2 There are currently no rules or guidelines regarding third party interventions. Although specific rules are likely to be too restrictive, some form of general guidelines and principles to be applied when granting permission to intervene would assist both potential interveners themselves and the courts.

Recommendation:

■ A Practice Direction on third party interventions should be made. This should set out general guidelines in how to go about applying for permission to intervene, together with principles to be applied by the court when granting permission. Ideally, the Practice Direction should also provide guidelines as to the length of submissions, whether these should be written or oral, and orders for costs (see below). This would obviate the need for costly Directions hearings except in the most complex cases.

3 The current position on costs, whereby unsuccessful interveners are potentially liable for the other parties' increased costs, means that only the very best resourced groups can take the risk of making public interest interventions. Although the courts have sometimes made no order for costs against interveners, the fact that these orders are granted only after the trial leaves interveners in a state of uncertainty.

Recommendations:

■ General principles on costs should be included in the Practice Direction on third party interventions, such as the conditions under which interveners will or will not be liable for costs. This would create greater certainty for potential interveners as well as for other the parties involved.

■ A presumption should be created that interveners assisting the court in the public interest should not be liable for other parties' costs, rebuttable on grounds of abuse or misconduct by the intervener. As well as encouraging interventions for the benefit of the court from less well resourced public interest bodies, this presumption would counterbalance the unjust situation whereby interveners are rarely, if ever, awarded their own costs.

Notes

1 Changes to the rules and procedures of the Administrative Court Office have been implemented following the *Review of the Crown Office List*, Lord Chancellor's Dept., London 2000 (The Bowman Report).
2 *R v The Lord Chancellor ex p. CPAG* [1999] 1 WLR 347.
3 Ibid. These are: (a) the issues raised are truly of general public importance; (b) it is in the public interest to make the order; (c) the intervener is less able than the other parties to bear the costs, is unlikely to continue with the intervention if the order is not granted, and would be acting reasonably in so doing.
4 R v London Borough of Hammersmith & Fulham ex p. CPRE (Judgment No.2) 26 October 1999 (unreported).
5 For example, R v Central Criminal Court ex p. Francis and Francis [1989] 1 AC 346, in which the Law Society intervened.
6 R v North and East Devon Health Authority ex p. Coughlan [2000] 2 WLR 622, in which the Royal College of Nursing intervened.
7 R v Minister of Agriculture, Fisheries and Food ex p. S P Anastasiou (Pissouri) [1994] COD 329.
8 Rule 54.17
9 This is in contrast to Scotland, where procedural rules now exist for making third party interventions as part of that jurisdiction's reforms in response to the Human Rights Act 1998. However, there had been no previous provision for making interventions in Scotland.
10 A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases (1996) JUSTICE / Public Law Project.
11 This view was expressed by some potential interveners contacted in this study.
12 For example, the Court of Appeal invited the Equal Opportunities Commission to intervene to assist in relation to European discrimination law in Shields v E. Coomes (Holdings) Ltd. [1978] 1 WLR 1408.
13 Practice Direction - Admiralty 2A 6.8
14 CPR 1998 Schedule 2, cc24.4.
15 For example, the Commission for Racial Equality intervened in Anyanwu & Anr v South Bank Students Union & Anr [2001] 2 All ER 353, a case that originated from an Employment Tribunal, and the Refugee Legal Centre made written submissions in Horvath v Secretary of State for the Home Office [2000] 3 All ER 577, originally from an Immigration Appeals Tribunal.
16 'Claimants' and 'defendants' were known respectively as 'applicants' and 'respondents' during the period of this research, and this was reflected in materials produced for the purpose of this research. However, the new nomenclature is used throughout this report for the sake of consistency.
17 *Public Interest Law* (1986) Oxford: Blackwell.
18 *Pressure Through Law* (1992) London: Routledge.
19 *Access to Justice with Conditional Fees, March 1998 at para 3.32*
20 *A Matter of Public Interest, op cit,* pp4-5.
21 *R v The Lord Chancellor ex p. CPAG, op cit,* p 353.
22 e.g. *ex parte Witham* [1997] 2 All ER 779, concerning the raising of court fees.
23 e.g. *R v Bournewood NHS Trust* ex p.L [1999] 1 AC 458, a case in which the Mental Health Act Commission intervened in the House of Lords.
24 e.g. *R v Gloucestershire County Council ex p. Barry* [1997] AC 584, concerning the extent to which resources affect local authority duties to make community care provision.
25 e.g. *R v SSHD ex p. Brind* [1991] 2 AC 696 (validity of a broadcasting ban), R v Cambridge District Health Authority ex p. B [1995] 1 WLR 898 (public funding of expensive and uncertain medical treatment) and *R v Secretary of State for Foreign and Commonwealth Affairs ex p. The World Development Movement Ltd.* [1995] 1 WLR 386 (proper use of overseas aid).
26 *A Matter of Public Interest, op cit,* p.18
27 *R v Dept. of Health ex p. Source Informatics* [2000] COD 114
28 Op cit.
29 The Crown Office has since been renamed as the "Administrative Court Office" following recommendations in the *Review of the Crown Office List* (LCD, London, 2000). See *Practice Direction (Administrative Court: Establishment), The Times*, 27 July 2000. However, the earlier name is used where this applied during the period of the research.
30 The claimant for judicial review must now serve the claim form on the defendant and any other interested parties within seven days of it being issued, and to serve notice of service on the Administrative

Court Office within seven days of service. Thus the claim form now becomes a public document prior to the permission hearing (CPR Part 54 and PD 54). The impact of this upon potential interveners is discussed later in this report.

31 See *Practice Direction: Crown Office List*, 23 March 2000.

32 www.parliament.uk

33 This is a website set up by court reporters Smith Bernal, providing full-text judgments (and sometimes post-judgment proceedings) of cases heard in the Administrative Court, High Court and Court of Appeal. Judgments of the House of Lords, Privy Council and the Scottish Courts can also be accessed through links to other websites.

34 One of these cases was later discovered to be the application by the convicted murderer Ian Brady challenging his force-feeding while on hunger strike in Ashworth Hospital. This would therefore have been identified as a public interest case had the Form 86A been in the public domain. However, because by court order there was no public access to the claim form, the case has been excluded from further analysis in this study.

35 *R v SSHD ex p.Adan and others* [2001] 1 AC 293.

36 Now that the Human Rights Act 1998 has come into force, it is likely that many cases turning upon statutory construction might be suitable for intervention as the courts will be required to interpret legislation, so far as is possible, so that it is compatible with Convention rights. To do this, they will need to determine whether a particular construction breaches any of these rights. Interveners may therefore be able to provide specialist information to assist in matters of statutory construction.

37 NCVO Publications, 1996

38 Community Legal Service, 2000

39 *Op cit.*

40 *R v H.M. Coroner for Coventry ex p. Chief Constable for Staffordshire Police.* 5 July 2000 (unreported).

41 The settlement/withdrawal rate for public interest cases *not* suitable for intervention was 55%, i.e. comparable to the sub-sample that were suitable for intervention.

42 Funding Code s2.4

43 J Gould *Advising on public interest cases.* Legal Action, December 2000.

44 CPR Part 54

45 Doubts have, however, been expressed that the new procedures will achieve this aim. See, for example, Cornford and Sunkin [2001] *The Bowman Report, access and the recent reforms of the judicial review procedure.* Public Law 11-20.

46 The Crown Office Review found that, during the year ending June 1999, 53% of all applications were granted permission (p.F-1).

47 CPR 1998 Part 5.4

48 Rule 54.17.

49 *Op cit*, pp 38-39.

50 Scottish Statutory Instrument 2000 No. 317.

51 Op cit.

52 www.publiclawproject.org.uk

53 The Public Law Project is one such organisation.

54 e.g. *Hanks v Minister of Housing* [1963] 1 QB 999, which concerned a challenge to a compulsory purchase order under the Housing Acts.

55 *R v North and East Devon Health Authority ex p. Coughlan (Judgment on costs)* 16 July 1999 (unreported).

56 *A Matter of Public Interest*, op cit, pp 13-14.

57 Law Commission Consultation Paper No. 126 *Administrative Law: Judicial Review and Statutory Appeals* (1993) HMSO para. 11.9

58 e.g. *Laws v National Grid PLC (Costs)* [1998] Pensions Law Reports 295. See also Carnwath, R. (1999) *Environmental litigation - a way through the maze?* J Environmental Law Vol. 11, 3 for examples and discussion of both pre-emptive and "no costs" orders.

59 *Op cit*, p

60 K. Markus and M. Westgate *Pre-emptive costs orders* (1998) JR 76.

61 This is in contrast to the position of "own interest" interveners, most notably in planning cases, who may be entitled to costs under certain conditions specified in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176. It should however be noted that in such cases the intervener is treated as a second defendant to the application. Thus the intervener's costs are payable not by a public body but by the claimant, which is often a large commercial organisation. It remains to be seen what the position of a public interest intervener might be if it were to intervene in opposition to a relatively well-resourced claimant for judicial review.

Appendix 1

CONFIDENTIAL

Please return to:

Deana Smith
Legal Research Officer
The Public Law Project
Room E608
Birkbeck College
Malet Street
London WC1E 7HX

Telephone: 020 7467 9815

Third Party Intervention Project

Case name: **Ref.**

We would like your help in deciding whether this is a public interest case. Our working definition of "public interest" in judicial review proceedings is as follows:

Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern; and/or concerning systematic default or abuse by a public body.

Below are some operational indicators which, jointly or separately, may be used to identify public interest cases for the purposes of this project. In recording details of public interest cases on our database we wish to note which indicators were considered applicable in each individual case and why.

Please would you tick the indicators that apply in this particular case, giving brief notes as to why you consider them to be applicable.

❑ This case affects others who may have the same or a similar interest in the case (such as they might themselves be the applicant for judicial review).

❑ This case will have a significant impact on a wider group of vulnerable or disadvantaged persons whose interests may be unrepresented in the proceedings. (Please say who these groups might be.)
NB –Please consider groups who may be outside your normal sphere of interest: for example, a prisoners' rights case may also be of interest to victims' groups.

❑ This case aims to clarify an important aspect of the law, or seeks to alter existing legal doctrine, or will otherwise set an important precedent.

❑ This case raises a serious or controversial issue of general public significance.

❑ This case involves systematic default or abuse by a public body.

If none of the above indicators apply to this case, please give reasons why you consider that either:

❑ This case appears to be a public interest case even though none of the indicators apply; or
❑ This case does not appear to be a public interest case; or
❑ It is impossible to decide whether this is a public interest case without more information.

Please provide as much detail as possible below.

If you consider that this is a public interest case, is it suitable for intervention? Please give reasons why it is/is not suitable.

If the case is suitable for intervention, do you think the intervention could best/most conveniently be done by way of:

❑ Affidavit in support of the applicant/respondent (please delete as appropriate).
❑ Intervention as an expert third party.

Please give reasons for your response.

Please suggest potential interveners:

Thank you for completing this checklist.

Name: **Date:**

Appendix 2

Third party interventions in judicial review *information pack*

Introduction

Judicial review applications often raise wider issues of public interest that go beyond the interests of the parties involved. Many of these cases affect disadvantaged or vulnerable groups whose interests are represented by voluntary sector organisations. Because of their specialist knowledge about how particular decisions impact upon the group they represent, these organisations have the ability to make informed submissions that could assist the court, while also raising their own public profile and thus helping to achieve campaign objectives.

Third party interventions are a method by which an organisation not otherwise involved in the litigation may submit specialist information or expertise to the court. However, there are two main barriers preventing the use of third party interventions: firstly, organisations may be unaware of pending judicial review applications raising issues of interest to them; secondly, because the practice is not well developed, they may not know how to make an intervention.

In order to address these barriers, the Public Law Project is conducting 'action research' on the potential for third party interventions in civil judicial review cases raising issues of public interest. Our aim is to research and develop the practice and procedures for making future public interest interventions. This research has arisen from previous work by the Public Law Project on public interest interventions[1].

Third party interventions will become increasingly important once the Human Rights Act 1998 comes into force later this year. Because applicants for judicial review under the Act must satisfy the "victim test", this may limit the issues of public interest that may be raised unless there are third parties that can intervene to do so.

Previous interventions

Although few interventions have so far been made in this country, they are relatively common in many others. In Canada, for example, the women's group LEAF successfully intervened in the Canadian Supreme Court, citing articles from a variety of sources in its submission that pornography poses a serious risk to women[2].

In this country, interventions are becoming more widely used to represent the alternative interests of others affected by a decision. For example:

- The Royal College of Nursing intervened on appeal in *ex parte Coughlan*[3], to address issues of concern to both the nursing profession itself and patients receiving nursing care.

- In *ex parte Source Informatics*[4], four interveners with separate interests made submissions on the duty of confidentiality owed by health professionals to patients.

- Both the Attorney General and the Law Society intervened in *ex parte Bramley*[5], a case concerning police seizure of legally privileged documents.

All the above cases used one particular

method of bringing information before the court, i.e. by presenting an argument that was independent of the parties involved in the case. An example of how this was done in the case of *Coughlan* is given below.

In this example, the Royal College of Nursing intervened as an independent third party to the proceedings.

Another means of bringing specialist information to the court's attention is by providing evidence in support of one of the parties involved. This is done by witness statement, and has been used by the Public Law Project in the case of *ex parte Witham*[6]. This can only be done with the consent of the relevant party. The party's own solicitors will assist you with what is a fairly straightforward procedure.

In contrast to the Royal College of Nursing in *Coughlan*, the Public Law Project was not a party to the proceedings in *Witham*, but instead acted as a kind of expert witness for one of the parties.

In some cases either method may prove equally effective and the decision may depend upon the following factors:

- **Costs** – submission of evidence in support is likely to be less costly for the intervener both in terms of their own costs and those sought by the other parties.

- **Time** – preparing a witness statement may be quicker and therefore the more suitable method if a case has been expedited.

- **Rules of evidence** – these place restrictions on what may be included in witness statements.

- **Status** – third party interventions have the advantage of enabling more objective information and neutral argument to be presented. The third party intervener's status might be that of an expert to assist the court rather than necessarily assisting one of the other parties.

Our project is interested in both methods of "intervening". For the purposes of clarity however, the remainder of this document will use the term "third party intervention" to mean the type used in *Coughlan*. Due to their relative novelty, standard procedures have yet to be laid down. The information that follows represents our knowledge of the practice and procedure based upon third party interventions that have been made so far.

Practical Issues

Who can intervene?

There is no specific requirement that those wishing to intervene in judicial review cases must meet. However, the court is more likely to allow an intervention if an organisation can claim a special remit (e.g. to represent the interests of particular groups who may be affected by a case) or access to information or expertise that will assist the court's understanding of the wider impact that the case might have.

When can an intervention take place?

In both the High Court and the Court of Appeal, the current rules allow any person to be heard in *opposition* to an application provided the court

Case example 1: *ex parte Coughlan*

This case raised a question of whether a chronically disabled patient should receive nursing care as a service from her local authority, for which she would be means tested for payment, or whether the care should be provided free by the NHS.

The Royal College of Nursing made an intervention to make two points that were relevant to this case:

(i) that nursing care should be provided free of charge by the NHS to patients in nursing homes as it is to those in hospitals or their own homes; and

(ii) that the respondent health authority was wrong in law to distinguish two types of nursing care, one of which was the responsibility of local authorities rather than the NHS.

In addition, the RCN was able to answer questions raised by the courts during the hearing and which the other parties did not have sufficient expertise to answer.

Although the intervention was in support of the applicant, the issues raised by the RCN also affected the interests of the Nursing profession which would otherwise have been unrepresented.

The Court of Appeal held that while it is not unlawful for health authorities to transfer some nursing care responsibilities to local authorities, the mere fact that this care is received in a nursing home does not necessarily mean that the NHS is relieved of responsibility for the nursing care.

As well as assisting the court in reaching this decision, the intervention raised the profile of the RCN which proved valuable in terms of lobbying and achieving campaign objectives.

considers them "a proper person to be heard"[7]. There is no equivalent rule allowing third parties to be heard in *support* of an application, but the court does have the power to ensure that anyone affected by a decision has an opportunity to present their case[8].

In the House of Lords[9] third parties may apply for permission to intervene by petition. Various human rights organisations have been granted permission, both individually and collectively, in recent years,[10] as have statutory agencies such as the Equal Opportunities Commission and the Commission for Racial Equality[11].

How will I know about relevant cases?

The Public Law Project will be aware of all judicial review cases that have been granted permission to proceed and where a claim form has been lodged in the Crown Office, as well as cases going on appeal to the Court of Appeal and the House of Lords. We will let public interest organisations know of suitable cases in which they may wish to intervene.

How much information will I receive about a relevant case?

■ For first instance cases, we will send you a copy of the applicant's claim form the Form 86A. This is a public document which sets out the basic details of the case. We are unable to send other documents relating to the case as they are not in the public domain, although the parties themselves may be willing to send them to you.

■ For cases going to appeal, the judgment of the lower court will be publicly available, either in law reports or on Casetrack[12]. The latter transcript usually contains any post-judgment discussion including requests for leave to appeal on public interest grounds. PLP can send you a copy of this transcript. Other documents such as the Notice of Appeal (which sets out the appellant's grounds) can be obtained from the parties.

What should I do if I want to intervene?

Because third party interventions are relatively rare, there are no procedural rules for making them at present.

If you do not have your own in-house legal expertise, PLP will provide information and assistance. In some cases we *may* be able to act for you, but this cannot be guaranteed. Organisations who do employ legal advisers are also welcome to make use of PLP's own solicitors for information on the mechanics of what may be an unfamiliar procedure. In all cases, PLP would like to be informed about any attempted interventions as we aim to track the progress of public interest interventions, including any difficulties and obstacles encountered.

The information and suggestions that follow are based upon what has been learned from previous third party interventions by PLP and other public interest groups.

Issues to consider

■ **Is the case likely to settle?** Many judicial reviews are settled out-of-court, often because the public body concedes the case. This can prevent issues of more general public interest being raised and undermine the efforts of third party interveners. Some cases will also settle because judgment has been given in another case involving the same issues. You are advised to contact the parties to find out whether a settlement is likely.

■ **What are your aims and objectives?** Be clear about what you wish to achieve by an intervention. Think carefully about what you want to say about an issue that has not already been said by another party.

■ **What relevant expertise do you have?** The court is more likely to permit an intervention if you can demonstrate a special remit or access to information that cannot be provided by the other parties.

■ **Are you able to apply promptly?** An application to intervene should be made as early as is practical since permission may be refused on the grounds of delay[13].

■ **What status do you seek in the pro-**

Case example 2: *ex parte Witham*

This case concerned the removal of exemption or remission of court fees. It was challenged on the ground that persons on low incomes were effectively denied access to the courts in proceedings where legal aid is unavailable.

The Public Law Project, whose aim is to improve access to public law remedies for disadvantaged groups, provided evidence by way of an affidavit (witness statement) in support of the applicant. This gave examples of various categories of case where individuals on low incomes had been prevented from going to court, often with potentially serious consequences.

The Divisional Court held that the removal of the exemption or remission infringed the constitutional right of access to the courts by barring poorer people from them. In giving judgment, Laws J referred to PLP's evidence of the wide-ranging impact of the increased fees, by bringing this issue before the court, PLP had therefore assisted and influenced its decision.

ceedings? You may wish to provide evidence in support of one party: if so, this might best be achieved by witness statement, or you may wish to take a more independent role in the proceedings.

■ **Do you wish to make written or oral submissions?** If you wish to intervene as an independent third party, you may do so by making either written or oral submissions. Sometimes the court may permit you to make written submissions only, although the court may ask you to respond orally at the hearing if you are best able to answer any questions arising.

Procedure for making a third party intervention

Before applying to the court for permission to intervene, it is advisable to contact the parties to ascertain whether they would approve or oppose the application, and whether they are likely to seek costs against you.

There is currently no standard procedure for applying to intervene in support of a judicial review application in either the Crown Office (for hearing judicial review applications at first instance) or the Court of Appeal. Both courts have however permitted applications by motion or summons to a Master (a judicial official), with a supporting affidavit. The affidavit should ideally contain:

■ a description your organisation, including its public policy aims, activities, membership and/or people it represents;

■ an outline of your specialist knowledge or expertise relevant to the issues raised, and your merits as a potential intervener;

■ a statement of the public interest issues raised, their impact upon the public generally or sectors of it, and the arguments you wish to address;

■ a request for orders from the court allowing the intervention.

There is usually a fee of £100 for lodging the application to intervene.

Applications for permission to intervene in the House of Lords are made by petition and referred to an Appeals Committee.

What are the cost implications?

The position on costs is not entirely clear at present. However, it seems that interveners will have to bear their own costs of making an intervention. As a public interest group you may already have contacts willing to provide legal advice and/or representation without charge.

The question of whether you might be ordered to pay the other parties' extra costs caused by the intervention cannot be answered with any absolute certainty. Permission to intervene has sometimes been made conditional upon paying the other parties' costs, although in such cases the interveners also appeared to have a private interest in the decision[14], and the situation is likely to be different where the intervention is solely in the public interest. There have however been too few public interest interventions to identify general principles.

In order to reduce uncertainty about the issue of costs, it may be possible to:

■ reach an agreement where none of the parties will seek their costs. The parties may be more prepared to do this if you agree to restrict yourself to making written rather than oral submissions;

■ consider making an application for a protective costs order (see below).

Protective costs orders

In a recent case, a public interest applicant applied for protective costs order exempting them from liability for the other parties' costs[15]. The court refused to grant the order in that particular case but accepted that it had power to do so. It is arguable that the same principle applies to a public interest intervener, in which case the court would consider whether:

(a) the issues raised are truly of general public importance;
(b) it is in the public interests to make the order; and
(c) the intervener is less able than the other parties to bear the costs, and is therefore unlikely to continue with the intervention if the order is not granted.

The Third Party Intervention Project: Aims and Objectives

The aim of this project is to research and develop legal practice and procedures for making public interest interventions in civil judicial review cases. Its objectives are:

■ to research, over a 10-month period, the volume and type of civil judicial review cases having public interest implications and where a third party intervention could be of assistance;

■ to investigate and test the scope and potential for third party intervention in such cases, as well as the barriers and difficulties encountered;

■ to draw up practical recommendations to develop the practice of third party interventions, including a more permanent registration system;

■ to raise awareness among voluntary sector groups of the scope for third party interventions, disseminate information about potential cases, and educate and advise groups in the use of legal procedures.

Notes for Appendix 2

1 A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases. JUSTICE/Public Law Project 1996.
2 *R v Butler* [1992] 1 SCR 452.
3 *R v North & East Devon Health Authority ex p. Coughlan* (1999) 2 CCLR 285.
4 *R v Department of Health ex p. Source Informatics*
5 *R v Chesterfield Justices ex p. Bramley*
6 *R v The Lord Chancellor ex p. Witham* [1997] 2 All ER 779.
7 Ord.53 r.9 of CPR Schedule 1.
8 *R v MAFF ex p. Anastasiou (Pissouri)* [1994] COD 329
9 Direction 34, Practice Directions and Standing Orders: Applicable to Civil Appeals (January 1996).
10 For example, JUSTICE was allowed to intervene in *R v Home Secretary ex p. V and T* [1997} 3 WLR 23, while a coalition including Amnesty International, The Redress Trust, The Medical Foundation for Victims of Torture and affected individuals was grated permission to intervene in *ex p. Pinochet* [1998] 3 WLR 1456.
11 *Science Research Council v Nasse* and *Leyland Cars v Vyas* [1979] 3 WLR 762.
12 This is the website of court reporters Smith Bernal.
13 *R v Secretary of State for Social Services ex p. Association of Pharmaceutical Importers* (1987) Unreported.
14 For example, *R v Central Criminal Court ex p. Francis and Francis* [1989] 1 AC 346.
15 *R v The Lord Chancellor ex p. CPAG* [1999] 1 WLR 347.

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