INDEPENDENT REVIEW OF ADMINISTRATIVE LAW
CALL FOR EVIDENCE

Doughty Street Chambers
Administrative & Public Law Team Response

26 October 2020

Background

1. The Government announced the Independent Review of Administrative Law ("the Review") and published the Terms of Reference for the Review on 31 July 2020. The Review will be conducted by a Panel appointed by the Lord Chancellor ("the Panel") and chaired by Lord Faulks, a former Government Minister at the Ministry of Justice. The Review published a Call for Evidence on 7 September 2020. Responses were requested by 19 October 2020 (i.e. within 6 weeks). On 16 October 2020, a short extension was announced. No responses received after 26 October 2020 will be considered by the Review.

2. This Response is prepared on behalf of the Administrative & Public Law Team at Doughty Street Chambers. The Team is led by Martin Westgate QC and comprises members practising in a diverse range of administrative and public law matters, from housing and community care to mental health, immigration and actions against the police, terrorism and prison law.

3. Doughty Street Chambers is a set of internationally renowned barristers with a reputation for excellence. All members of Doughty Street Chambers have a commitment to human rights and civil liberties which they bring to their cases. Doughty Street Chambers is at the forefront of human rights related public law cases. Administrative and public law is at the heart of Doughty Street Chambers**.** Although the primary focus of Doughty Street Chambers is acting for claimants, members also work for local authorities, central government and regulatory bodies. It has long been recognised as a leading set in administrative and public law by both Chambers and Partners and Legal 500. The set is shortlisted for Human Rights and Public Law Set of the Year in the 2020 Chambers Bar Awards.

4. For further information on this Response, please contact Doughty Street Chambers on civilclerks@doughtystreet.co.uk.

Overview and Summary

1. Administrative law and access to judicial review play a crucial function. In our constitution the boundaries of state power, the rights of individuals and the capacity for individuals and communities to hold the state to account are all set by law. The courts' vital function is to provide an independent and authoritative means of interpreting and enforcing the law, including laws passed by Parliament or under Parliamentary authority. Only the courts can fulfil this role and it is as vital a feature of our constitution as Parliamentary sovereignty. When the executive complains about judicial review it is really complaining about the law, and specifically that it may be found to have breached it.

2. The need for caution by the Review in light of the importance of administrative law and judicial review for the rule of law is clear. We are concerned that this Review is not a suitable way to examine and make recommendations on issues of such importance.

3. The members of the Panel are each respected legal scholars but they are necessarily limited in their experience and in the time and resources made available by Government for a Review on the scale envisaged by the Terms of Reference.

4. The climate in which the Panel are asked to complete their task is one where the rule of law is politically precarious and the Government is increasingly hostile to legal oversight and accountability. In the last few months, public lawyers have been exposed to public criticism from the Home Secretary and the Prime Minister simply for doing their jobs. The Lord Chancellor has confirmed that this Review is only a first step in revisiting our constitutional landscape: the rights guaranteed by the Human Rights Act 1998 will be next.

5. Against this background, and while we welcome the intention to make this Review evidence-based, the asymmetry in the Terms of Reference and the Call for Evidence issued creates a justifiable cause for concern.

6. This Response draws on the experience of the Doughty Street Chambers Public Law Team to highlight the reality of judicial review for claimants; the significant procedural controls which already exist to limit access to the courts and the important role which judicial review plays in protecting the rights of vulnerable people and marginalised communities. The Panel is invited to meet with claimants and their representatives before reaching any conclusions in this Review.

Introduction

1. This Response expresses significant concerns about the scope and process of the Review in light of the constitutional importance of administrative law.

Judicial review, administrative law and the rule of law

2. Public authorities, the government and other bodies may only act within the law. The sources of this law include statute, the prerogative and common law. In practice nearly all governmental action is subject to legislative control, whether by primary statute or subordinate legislation. Parliament acts on the understanding that public bodies will act in accordance with the principles of administrative law recognised in statute and in the common law. Where a body acts outwith these powers, it is to the courts people and communities may turn. Judicial review ensures that public authorities are accountable and act lawfully; it guards against abuses of power and protects the parameters of the duties imposed and powers bestowed by Parliament.

3. Given the fundamental role judicial review plays in upholding the rule of law and Parliamentary sovereignty, any review, reform or amendment to the scope, basis and process of judicial review must proceed with enormous care.

4. The title of the Questionnaire within the Call for Evidence proceeds on a false assumption: that the "*business of government*" is a paramount constitutional goal.

5. It is fundamental to the English legal system, as it has developed over centuries, that the executive is both subject to scrutiny by the courts for the legality of its actions and accountable to Parliament in the political sphere. Without such accountability there is nothing to stop the executive from behaving arbitrarily. The Terms of Reference and the questions posed in the Call for Evidence appear to suggest that the executive should be sheltered from legal challenge or from any consequence of having acted unlawfully. This would be a grossly illiberal step. As explained by Sir Stephen Sedley, it is only in these two forms of scrutiny working together that our constitution respects the rule of law:

> "*Holt, trying the great electoral corruption case of Ashby v. White, is said to have been confronted by the Speaker of the House of Commons and his retinue threatening the judges with imprisonment for contempt of Parliament, and to have ordered the Speaker out on pain of committal for contempt of Court—"had you all the House of Commons in your belly". It is to this symbolic stand-off, of which the deference of the Courts to Parliament's enactments is a central but by no means the only element, that we owe the bi-polar sovereignty of the legislature and the Courts upon which the rule of law within a democratic polity continues to depend.*
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> *The civil war which made the settlement possible was fought upon a political agenda which postulated not simply the entitlement of individuals to be free of unnecessary legal restraint, but the impossibility of such individual freedom in a society which was itself unfree—unfree in the sense that the ultimate power in it was autocratic and therefore arbitrary. To the reformers of the civil war period, discretion and prerogative were the antitheses of liberty."* [1]

[1] *Freedom Law and Justice*, Hamlyn Lectures 1999, pp6-7.

6. Parliament, public authorities and the courts each play an important constitutional role in ensuring respect for administrative law. Recent criticism of lawyers and members of the judiciary by government creates an uncomfortable climate in which to propose a core constitutional safeguard must be subject to review. The intention of the Panel to base its work on an evidence-based Review is welcome but we have significant concerns about the way in which evidence is being sought and gathered. The evidence canvassed by the Review should not be tainted by recent political antipathy to scrutiny and accountability. As Lord Kerr of Tonaghmore has recently acknowledged: although governments may be "*irritated by legal challenges which may appear to them to be frivolous or misconceived*"; "*The last thing we want is for government to have access to unbridled power.*"[2]

The Review

7. In this section we record some concerns about the Review and its methodology.

8. Firstly, the scope is exceptionally broad. It covers the types of decision that can be the subject of judicial review, the grounds on which decisions can be challenged and the remedies that can be granted. Further, the Terms of Reference (in footnotes) suggest that the Review will consider non-justiciability and the doctrine of nullity (and so, will address the conceptual foundations of judicial review). The Review may make recommendations on procedural reforms extending to standing, time limits, disclosure and costs.

9. The Review proposed is not appropriate for a task on this scale. Each member of the Panel is a distinguished legal professional. However, they form a small group with very limited time and resources. Their experience is necessarily limited.[3] A serious review would be a long term exercise with a Panel properly resourced to conduct its own investigations and research. It would, among other things, conduct an independent assessment by appropriate sampling of cases brought against public bodies. It would openly engage persons with a range of perspectives on administrative law, including public decision-makers, judges, claimants and their lawyers. It would arrange seminars and public meetings, publish interim findings and invite further consultation, discussion and dialogue.

10. A 6-or-7-week "Call for Evidence" necessarily falls short. It is far from clear that the Review will be free to publish its findings. Instead, it will report to the Lord Chancellor "*who will work with interested departments to determine the publication timelines as well as the Government response.*"

11. It is simply not possible to reach meaningful or robust conclusions in this way. A plea for a more considered approach may be condemned as special pleading. However, this Review appears to have in its sights some fundamental features of our constitution and its form demands careful scrutiny.

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2 Guardian Online, *UK needs judges to limit government power, says Lord Kerr*, 19 October 2020.

3 Recruitment for the Review Panel was not by open appointment. The selection, make-up and independence of the Panel have been criticised by others, including in the legal and mainstream press. It is of notable concern that at least two members of the panel have published material that is openly hostile to what is sometime characterized (inaccurately) as "*judicial activism*". See, for example, BBC Online, *Judicial review: Labour query independence of government probe*, 31 July 2020. For the purpose of this Response, it is noted that there is no representation on the Panel to reflect the experience of judicial review claimants.

12. Secondly, there have been a number of recent consultations on judicial review. Each of them presented proposals and invited a response. The Call for Evidence does little more than list aspects of administrative law and practice. Yet, it also suggests, in a general sense, the Review is designed to consider whether the executive (and other public authorities) could and should be better insulated from legal challenge. It is difficult to respond constructively on these terms.

13. Thirdly, the Call for Evidence is explicitly designed to canvass evidence from Government Departments. A Questionnaire is directed to them alone.[4] This asymmetry undermines public confidence in the independence and legitimacy of the Review.

14. Government Departments will have, or ought to have, access to a database of all cases that have been brought against them and to the outcomes in each. This will include cases where they have changed an unlawful decision or practice when confronted with a proposed challenge. Yet, despite this exceptional access to information, Departments are not asked to give an objective account but instead to cherry pick examples illustrating whether aspects of judicial review "*seriously impede the proper or effective discharge of central or local governmental functions.*"

15. The questions in the Call for Evidence are designed to invite responses hostile to judicial review. The language adopted frequently implies that change is necessary to reduce access to judicial review; to limit the grounds on which a claim can be made and to restrict the remedies available. This is bound to affect the reliability of any evidence base.

16. Fourthly, the Call for Evidence neglects the reality of judicial review. The procedure is a remedy of "*last resort*". Administrative law governs public action in all its forms. Parliament legislates in the understanding that public bodies will act in accordance with administrative law, subject to the jurisdiction of the Administrative Court. Administrative law is implemented by public bodies, by tribunals and by the courts in judicial review. Judicial review already places Defendants in a preferential position relative to other litigants. It incorporates significant procedural limits. A number of these restrictions are the result of recent legislation or rule changes the effect of which has not yet been fully understood or analysed.

17. In any judicial review, the claimant has the burden of establishing that the public body has acted unlawfully.[5] Where there is any conflict on the facts the public authority is given the benefit of doubt by the courts.[6] The primary onus on a body being challenged is to be able to explain themselves and to be candid, including in the disclosure of documents.[7]

18. Public bodies and Government Departments have resources, access to high quality legal advice and they control the information needed to establish a claim. As Sir John

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4 The Call for Evidence does not make clear where the government Questionnaire ends. It seems probable that the section in italics is intended for government alone and the remainder of sections 1-4 seek a wider view. This is, however, far from clear. Further, it is also worthy of note that the Call for Evidence and covering letter were sent to selected recipients only. The distribution list has not been made publicly available; but it appears to have excluded chambers such as DSC and others whose members routinely act for claimants.

5 *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409, [38].

6 *R v Oxfordshire Local Valuation Panel ex p Oxford City Council* (1981) 79 LGR 432, 440. See also Michael Fordham QC, *Judicial Review Handbook*, Sixth Edition, 2012, Hart Publishing, [42.1.2].

7 Ibid, [42.2]. See also, for example, *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin).

Donaldson MR observed in *R v Lancashire CC ex p Huddleston* [1986] 2 All ER 941: *"the vast majority of the cards will start in the authorities hands."*

19. Any claim about the burden or increased burden of addressing judicial reviews has to recognize that the number of such claims has continued to reduce, year on year, since 2015.[8] Against this background, there is no case to swing the balance further against the right of the citizen to access judicial review.

20. Finally, time and again the Call for Evidence implies that judicial review must be the subject of new controls upon the judiciary because of the unique power of administrative law to regulate the activities of the State.

21. This wrongly characterizes judicial review as an alien or unwarranted judicial imposition instead of a procedure which interprets the law in the same way that other courts do throughout the English legal system. Indeed, many of the cases that we think of as establishing the foundations of our public law were decided in ordinary civil actions. For example, the right of an individual to be heard before they lose their property through the exercise of governmental power was set out over 150 years ago in a trespass claim: *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180. When the executive complains about judicial review it is really complaining about the law, and specifically that it may be found to have breached it.

22. This Response is necessarily limited by the short time available and by the scope and nature of the Review. If this limited Response fails to comment on any aspect of the Terms of Reference for the Review or the Call for Evidence, silence should not be read as support for reform. It (like many other contributions) will highlight the significant barriers which face claimants in judicial review claims and the significant constitutional and practical importance administrative law remedies hold for individuals and communities adversely affected by the unlawful actions of public authorities.

[8] Civil Justice Statistics April-June 2020, Table 2.1, 4,681 claims lodged in 2015 to 3,383 cases in 2019. The quarterly statistics for April-June published are accompanied by the following commentary: *"There were 1,400 judicial review applications received so far in 2020, down 17% on the same period in 2019. In 2019, there were 3,400 applications received in total, down 6% on 2018 (from 3,600)".*

1. General Call for Evidence (Section 1)

> *Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?*
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> *In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?*

1.1. First, the opening question in the Call for Evidence proceeds on the false assumption that the identified grounds of judicial review *"seriously impede the proper or effective discharge of central or local governmental functions."* We raise a principled concern about this above but also note here that it is a surprising proposition. We are not aware of quantitative or qualitative evidence to support it (and none is cited in the Call for Evidence).[9] Moreover, as Government guidance provides:

> "*Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked.*"[10]

1.2. There is a body of vocal commentary to the effect that some judicial review decisions have over-reached their legitimate bounds to the detriment of good administration and democratic decision-making. The criticism made of judicial decision-making in some high-profile cases is not qualitative or quantitative evidence of any need for reform; it is far from warranted criticism nor is it generally supported.[11]

1.3. Second, the list of grounds identified in the Call for Evidence as possibly impeding the discharge of government functions all derive from the principle that public authorities must act lawfully. That public authorities are required to act lawfully in the discharge of their functions is fundamental to the rule of law.

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9 On the contrary, academic research suggests this proposition is unsupported. *"There are a number of widely held and influential assumptions about the costs and misuse of JR. First, that the past growth in the use of JR has been largely driven by claimants abusing the system, either deliberately or otherwise. Second, that the effect of JR on public administration is largely negative because JR makes it more difficult for public bodies to deliver public services efficiently. Third, that JR litigation tends to be an expensive and time consuming detour concerned with technical matters of procedure that rarely alters decisions of public bodies. These claims have been challenged for their lack of empirical basis and this study provides additional evidence which shows them to be at best misleading and at worst false."* Varda Bondy, Lucinda Platt, Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences,* Public Law Project, University of Essex, London School of Economics, London, October 2015.

10 Government Legal Department, *The judge over your shoulder — a guide to good decision making*, Fifth Edition, October 2018 ("JOYS").

11 See, by way of example only, Paul Craig, Judicial Power, the Judicial Power Project and the UK, (2017) 36 University of Queensland Law Journal 355; Mark Elliott, *Judicial Power in Normative, Institutional and Doctrinal Perspective – A Response to Professor Finnis*, 3 November 2015, Judicial Power Project Blog; Mark Elliot, Judicial Power's 50 "problematic" cases and the limits of the judicial role, 9 May 2016 Public Law for Everyone Blog; TT Arvind and L Stirton, *Why the Judicial Power Project Is Wrong about Anisminic*, U.K. Const. L. Blog, 20 May 2016.

1.4. Third, there is a danger that the Call for Evidence s unbalanced in that it focuses on ways in which government action is said to be adversely impacted without recognising the benefit of legal scrutiny and the need to ensure that mechanism is accessible. Judicial review plays a vital role in protecting the rights and legal entitlements of vulnerable individuals and communities, enabling them to access services (and enforce public duties) where they have no alternative remedy.

1.5. The Review is invited to consider:

1.5.1. The significant limits built into the judicial review process which filter out vexatious or fanciful challenges;

1.5.2. The discretionary nature of remedies available in judicial review, and the limits which ensure respect for constitutional separation of powers and the rule of law;

1.5.3. That judicial review plays an important role in supporting good administration and effecting positive outcomes for individuals and communities.

1.6. The examples we can provide are limited in the scope of this short Response. The Panel is urged to meet with judicial review claimants and their representatives and to consider the wider impact these individual claims may have on good administration.

Controls on Judicial Review

1.7. A wide array of procedural mechanisms already work to filter out and deter weak claims including : (i) the pre-action Protocol; (ii) time limits; (iii) the permission filter; (iv) the inherent power of the administrative court to control its jurisdiction; and (v) the discretionary nature of judicial review remedies. We deal separately with costs and funding in Section 3.

1.8. There is no evidence-based research to suggest that these limits do not function effectively to achieve their purpose.

The Pre-Action Protocol

1.9. The pre-action Protocol ("PAP" or "the Protocol") requires that any claimant wishing to bring a judicial review put to the relevant public authority the decision under challenge and the legal grounds for any challenge. The process allows 14 days for a response; there is a clear expectation that any abridgement of this opportunity for consideration by a public authority must be justified with cogent reasons. The Protocol is designed to ensure that parties seriously consider whether judicial review can be avoided. It allows some time for alternative dispute resolution and for the early disclosure of information which may narrow the issues in dispute

1.10. The timescale in the Protocol is not fixed and parties frequently engage in correspondence over a longer period of time. Extensions for providing a response to

pre-action correspondence can enable willing and cooperative parties to explore a resolution without recourse to the courts.

1.11. There are many examples which illustrate the efficacy of PAP correspondence. A small selection of very recent examples illustrates the significance of pre-action engagement for the rule of law:

1.11.1. A local authority failed to provide suitable full-time education for a child with autism and sensory needs. The child's mother had repeatedly requested a new placement be named but the local authority took no action. Following a PAP letter, the local authority agreed a new placement must be found and took the necessary steps to arrange this.

1.11.2. The Home Secretary failed to consider whether to grant indefinite leave to remain to a 16-year-old suspected victim of trafficking with schizophrenia, autism and severe learning difficulties. Following a PAP letter, the client was issued with a grant of indefinite leave to remain.

1.11.3. A hospital trust refused to allow a detained patient, who was preparing for a Mental Health Tribunal, to have telephone contact with his solicitors. A PAP letter was sent and arrangements were made to enable the client to speak to his solicitors via telephone.

1.11.4. The Home Secretary determined that accommodation provided to a victim of trafficking was not suitable but took no action to remedy this for nine months. Suitable accommodation was provided after a PAP letter was sent.

1.12. Even when pre-action correspondence is unable to resolve the legal dispute, it serves an important purpose in enabling the parties to understand the issues in dispute in advance of litigation so that they turn to the court with their eyes open and the case properly defined.

Time limits

1.13. Civil Procedure Rules ("CPR") Rule 54.5(1) provides that a claim for judicial review must be made *"promptly and … in any event not later than 3 months after the grounds to make the claim first arose*". Authority makes clear that a claim will not necessarily be promptly made simply because it is brought within three months. Although the courts have the power to grant an extension of time (if there is good reason to do so (CPR Rule 3.1(2)(a)), public law claims are unlike ordinary civil litigation and require strict adherence to time limits. The test goes to the heart of the requirement of good administration so that *"public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than absolutely necessary in fairness to the person affected by the decision"*: *O'Reilly v Mackman* [1983] 2 AC 237 at 280H-281A.

1.14. The Senior Courts Act 1981 ("SCA") s. 31(6) further provides that, where there has been "*undue delay*" in making an application for judicial review, the court may refuse to grant permission or relief "*if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*" If an application is not made promptly or within three months, there is undue delay for the purposes of the SCA 1981 s. 31(6). Even in cases where there is good reason to extend time, s. 31(6) empowers the court to refuse to grant any remedy if doing so would "*be likely to cause hardship*" (*R v Dairy Produce Quota ex p Caswell* [1990] 2 AC 738 at 747B-C) or where it would "*cause immense practical difficulties*" *(R v Hammersmith and Fulham LBC ex p Burkett* [2002] UKHL 23).

Acknowledgment of Service

1.15. Prior to the court considering permission, the defendant has an opportunity to respond to the claim. This provides a further opportunity for early resolution.

1.16. Where it has not proved possible to resolve a claim pre-action, many claims resolve prior to consideration of permission by the court. This is almost as common as settlement at the pre-action stage. For example:

1.16.1. Where a housing authority is in breach of duty, for example in not providing urgent housing, then it is often necessary to apply for judicial review to secure interim relief as there is no other remedy. The vast majority of such cases settle pre-permission, often because the grounds have caused the authority to reconsider its legal position.

1.16.2. Similarly, in the context of children's social care, where the disputes generally relate to the complex history of children who were formally in care not having their care leaver rights acknowledged and implemented, an oft entrenched unwillingness to concede these claims pre-permission softens after the claim is issued, or after permission is granted for the claim to proceed.

1.16.3. The Home Secretary adopted a policy of making significantly lower payments to support victims of trafficking who were pregnant or had children if they had not claimed asylum; this cohort received half the support offered to victims who had claimed asylum. A claim was issued challenging the policy on a number of grounds. The Home Secretary then agreed to increase the support to this cohort to allow parity with those who claimed asylum. In the announcement to stakeholders she explained: "*This change is the first step in delivering a need-based financial support policy. Over the coming months, the Home Office will engage with Victim Care Contract Providers and key stakeholders and make further improvements to the current system to ensure the financial support is focused on individual victims' needs, including helping victims to transition to other more suitable services to help aid recovery*".

Permission

1.17. Unlike most other civil claims, any would-be claimant must obtain permission to apply for judicial review. Permission is a significant obstacle and it has become increasingly difficult to overcome in recent years.[12]

1.18. The permission filter is perhaps the most important of the procedural limits in judicial review. Permission is granted only where the court is satisfied that there is an arguable case which merits investigation at a full hearing. The court must be satisfied that there is a realistic prospect of success and that there is no discretionary bar to a remedy such as delay or an alternative remedy. The court may limit permission if a view is taken that some grounds are unarguable.

1.19. As outlined above, the Protocol and the Acknowledgment of Service provides a Defendant public authority with an early opportunity to influence the decision of the court on permission. The right to renew an application for permission to an oral hearing, where permission has been refused on the papers, has been limited so that it does not apply where the claim has been judged to be totally without merit on the papers. This is a strict test but it is used in a large proportion of cases (13% of cases reaching the permission stage).

1.20. Fact-finding generally is considered to be best left to public bodies, and therefore the Court will exercise greater caution in granting permission for a claim to proceed on the grounds of a mistake of fact (see *E v Secretary of State* [2004] QB 1044).

1.21. Courts are reluctant to intervene in decisions which involve the weighing of information and concerns by decision makers who have more expertise than the courts to do so: for example, decisions of the Parole Board as to the release or license conditions of offenders. In *DSD v Parole Board* [2019] QB 285, the Divisional Court held that the judiciary should be slow to intervene and interfere with decisions of the Parole Board, even if on the facts of the case, the decision of the Parole Board was "*surprising and concerning*" (at [130]) and not one that the reviewing court would have arrived at:

> *"A risk assessment in a complex case such as this is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself. This panel's reasons were detailed and comprehensive. We are not operating in an appellate jurisdiction and the decision is not ours to make. We are compelled to conclude that the decision of the panel must be respected. It follows that the irrationality challenge… cannot be upheld*" (at [133]).

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[12] In 2000, 1,381 cases (33% of all judicial review claims) were granted permission and proceeded to trial; in 2019, this had reduced to 663 cases (20% of all claims). The statistics on cases granted or refused permission should be handled with care by the Review. The figures published do not provide a full and accurate picture of cases settled either before or after permission stage with a result in the Claimant's favour. See Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) which suggests up to 60% of cases are settled pre-issue and the majority of these are to the claimant's benefit. We address settlement, below in Section 3.

1.22. The courts have also been reluctant to interfere with decisions not to prosecute, especially when there is an available remedy via the Victim's Right of Review scheme and furthermore given the constitutional position of the CPS as an independent decision maker: *L v DPP* [2013] EWHC 1752 (Admin).

1.23. What is of note in these cases is the recognition of the significance of public authority decision-making and the limits of the courts' constitutional competence.

1.24. The Criminal Justice and Courts Act 2015 (s. 84) introduced a requirement into s. 31 SCA 1981 that the Court refuse permission or any remedy (if the case had proceeded to a hearing) *"if it appears to the Court to be highly likely that the outcome for the applicant would not be substantially different if the conduct complained of had not occurred"*. This provision is frequently relied upon by Defendant public authorities; we are unaware of any qualitative or quantitative research on its impact on permission decisions.

1.25. The permission filter, if crossed, presents "*golden opportunities*" (*TH v East Sussex CC* [2013] EWCA Civ 1027) for the parties to focus their minds on exploring alternative resolution and settlement (see Section 3, below at [3.23] – [3.36]). For example, in *Ward v Poole Borough Council*, Ms Ward challenged the decision by Poole to criminalize rough sleeping by the use of Public Spaces Protection Order. Although the claim was fiercely defended in pre-action correspondence, after proceedings were issued the Council removed the offending parts of the PSPO and increased its investment in homelessness prevention. The failure to engage in settlement efforts may result in the penalty of costs, which may be against the applicant (see *TH* above and Section 3, below).

Inherent jurisdiction and the power of the court

1.26. The court has inherent and long established powers to control its own procedure including in the law on abuse of process and its "*Hamid*" jurisdiction (i.e. the power to summon any lawyer whose professional conduct falls below the high standards expected of them (see the *R (Madan) v Secretary of State for the Home Department (Practice Note)* [2007] EWCA Civ 770; [2007] 1 WLR 2981, *R (Hamid) v Secretary of State for the Home Department* [2013] EWHC 3070). There is no evidence that the limited use of these draconian powers is indicative of any need for reform.

1.27. However, the most considerable limit on the pursuit of unnecessary, inappropriate or unjustifiable judicial review claims is practical not procedural. Judicial review is not cheap. Financial risk represents a barrier to access to justice in judicial review as in other civil litigation. In a successful judicial review, it is unlikely the benefit to the claimant will accrue in damages or any financially measurable recovery. We address the significant chilling effect of the substantial costs risk which any claimant must face, below, in Section 3 (Costs, from [3.3]). Access to legal aid in judicial review claims has been considerably constrained since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). For many clients,

legal aid is simply not an option. Judicial review is not risk free; even when a client can secure *pro bono* legal advice and representation.

Remedies

1.28. It is a first principle of judicial review that remedies are discretionary (s. 31 SCA 1981) and *"the principles on which the court's discretion must be exercised take account of the needs of good public administration"*: *Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers* [2011] UKPC 4. This may include consideration of the nature and importance of the flaw in the challenged decision, the conduct of the claimant, the effect on the administration of granting the remedy.

1.29. There is no evidence that the discretion is not exercised with care by the courts having regard to the context and circumstances of the individual case.

1.30. Thus regulations related to the restraint of children were quashed in *R (C) v Secretary of State for Justice* [2008] EWCA Civ 883 where it would be the *"wrong message to public authorities"* if race equality impact assessment breach were seen to be *"cured"* by conducting an assessment to validate the impugned decision, but in *R (English Speaking Board (International) Ltd) v Secretary of State for the Home Department* [2011] EWHC 1788 (Admin), a quashing order was refused despite a finding that there was an unlawful failure to consult given the limited damaging impact, the desirable purpose and the procedural nature of the flaw.

1.31. See also the ample examples of the courts refusing to grant a remedy, or granting a limited remedy, in recognition of the limits of their institutional competence, such as:

1.31.1. In an unsuccessful challenge to the blanket ban on assisting suicide the Supreme Court recognised it did have the power to make a declaration of incompatibility with the European Convention on Human Rights, but that it would not be institutionally appropriate for the Court to do so at that time. As per Lord Neuberger at [113]-[118], Parliament should be given the opportunity to consider amending the law in light of the provisional views of the Court. This recognised how controversial and sensitive the issue was and that Parliament had already considered it on a number of occasions and was due to debate the issue in the near future: *R (Nicklinson) v MOJ* [2014] UKSC 38.

1.31.2. A heterosexual couple successfully challenged the prohibition on different-sex couples entering into a civil partnership. A declaration of incompatibility with the European Convention on Human Rights was made. However, as the Supreme Court noted at para 60, '*it is salutary to recall that a declaration of incompatibility does not oblige the government or Parliament to do anything': R (Steinfeld v Keidan) v SSID* [2018] UKSC 32.

1.32. A remedy can be refused in the court's discretion, where a claimant has unduly delayed and granting a remedy would cause relevant prejudice or detriment.

1.33. The discretion is further limited with the introduction of SCA s. 31(2A) whereby relief must be refused *"if it appears to the Court to be highly likely that the outcome for the applicant would not be substantially different if the conduct complained of had not occurred".* For example, the Administrative Court refused relief arising from the Secretary for Justice's refusal to move the prisoner to a facility closer to his wife's home on the basis that "*even if the Secretary of State for Justice or his staff or officials had fully and duly discharged their duties under that section, the outcome would have been, and will still be, the same*." *R (on the application of H) v Secretary of State for Justice* [2015] EWHC 4093 (Admin).

Judicial review ensuring the rule of law

Ensuring transparency

1.34. Implicit in any legislative framework set out by Parliament is the principle that any decisions taken by a public authority will be made fairly and lawfully. Further, any discretion afforded to a public authority or government must be exercised in a way which is transparent and ensures the fair treatment and dignity of individuals as members of a community. Such a principle is fundamental in liberal democratic society: each person counts as an individual with interests and concerns.

1.35. Ensuring transparency in decision-making works to the advantage both of the individuals and of the government as it is vital that the decision made, whether affecting an individual or a class of persons, is transparent, worthy of respect and seen to be so. This is important even where the decision is a disappointment to affected individuals. In *Bracking v Secretary of state for Work and Pensions* [2013] EWCA Civ 1345*,* a group of disabled adults brought a challenge to the Secretary of State's decision to end the provision of an Independent Living Fund on the basis that it failed to address the equality objectives under the public sector equality duty under s. 149 Equality Act 2010. The Court found in favour of the Claimants and held that it had been Parliament's intention that "*considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude*" (at [59]). Following this decision, the Minister carried out a consultation, involved interest groups, and still decided to close the Independent Living Fund. That decision, when subsequently challenged, was unsuccessful because the Secretary of State was able to demonstrate, by having conducted a transparent consultation process, that he had sufficient information to enable him to assess the decision and its equality implications for disabled people with the requisite thoroughness, conscientiousness and care. The Court commented that it should, in the circumstances resist any attempt to "*micro-manage*" the assessment process informing the decision: *R (Aspinall and Ors) v Secretary of State for Work and Pensions and Anr* [2014] EWHC 4134.

Making positive impact on local practice

1.36. In many cases, where a judicial review identifies that a public authority is acting unlawfully, changes in practice often benefit the wider community and not only the claimant in the case.

1.37. A successful challenge was brought against a coroner's refusal to prioritise burials on the basis of religion of the deceased or their families. The coroner's policy was found to discriminate against those with certain religious beliefs: *R (Adath Yisroel Burial Society) v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin).

1.38. A local authority adopted a policy which diverted 16/17 year-old homeless children away from accommodation and support. The case settled three days before trial with the local authority withdrawing the policy and agreeing to train social workers on the duties to accommodate 16/17 year-old homeless children. The local authority also agreed to set up inter-authority monitoring of provision for 16/17 year-old homeless children with the cooperation of other local housing authorities and the local MP: *ED v Essex County Council* (CO/4790/2018).[13]

1.39. A local authority amended its housing allocation policy after the Court found the policy discriminatory against recognised refugees in the provision of social housing. The case likely lead to other authorities amending their schemes to take account of the needs of refugees and thereby prevented further litigation: *R (Gullu) v. Hillingdon* [2019] EWCA Civ 692.

Securing the rights of vulnerable people

1.40. In community care and social welfare, where there are few statutory rights of appeal against decisions made by a local authority and where local government ombudsman complaints frequently take more than a year access to judicial review is critical. The courts are frequently unwilling to interfere in resource decisions (see *R v Gloucestershire County Council ex p Barry* [1997] AC 584). However, the courts will look at whether local authorities are complying with their legal duties, including their duties to assess and to provide services. Where a court does intervene, the decision to overturn a refusal to assess or a refusal to provide services may have obvious benefits to disabled clients in terms of allowing or enabling access to services.

1.41. Other examples include:

1.41.1. A successful challenge against a local authority's refusal to fund a five-day a week college course for a group of disabled young people. The Court quashed the refusal to fund the course and ordered the local authority to arrange funding for the course from 2020 – 2025. This decision affected about 240 disabled children and young adults who will, as a result, have access to the specialist and consistent educational provision they require: *R*

[13] https://www.childrenslegalcentre.com/essex-homeless-children/

(ML and Ors) v Cornwall Council, Truro Penwith College and Secretary of State for Education (CO/2180/2019).

1.41.2. A successful challenge was brought by asylum seekers who were potential victims of human trafficking to the decision of the Secretary of State for the Home Department to reduce their weekly cash subsistence payments from £65 to £37.75, denying them the financial support they needed for their recovery. Victims of trafficking who were not asylum seekers continued to receive £65. The Home Office set up a back-payment scheme to repay victims the money that had been cut: *R (K) v SSHD* [2018] EWHC 2951 (Admin).[14]

1.41.3. A successful challenge was brought by an 8-year-old child against the Secretary of State for the Home Department's regime whereby an applicant for leave to remain had a condition imposed that they would have no recourse to public funds. The effect of this regime was that the child's family was denied access to the social security safety net due to the immigration status of his mother. This was found to be unlawful as the regime imposed the condition in cases where a family would imminently suffer inhuman or degrading treatment without recourse to public funds: *R (W) v SSHD* [2020] EWHC 1299 (Admin).

1.42. Other responses may have identified a list of administrative law reforms to improve access to justice for putative claimants in judicial review, including to improve the quality of public decision making and to better embed the duty of candour in good public administration.[15] These changes could ensure that more public decisions are right first time, could ensure that public authorities accept when things go wrong and could save public money and personal grief by avoiding the need for a critical judicial review. Doughty Street barristers have spoken up time and again on the importance of administrative law for good governance. The rule of law should not depend on how deep your pockets are. It is regrettable that the lack of symmetry in this Review suggests that constructive proposals for reform to better support judicial review claimants are unlikely to be welcomed by Government.

[14] See back-payment scheme: https://www.gov.uk/guidance/claim-a-subsistence-rates-back-payment-victims-of-modern-slavery.

[15] See, for example, PLP, IRAL Response, 19 October 2020, pp 12 – 16.

2. Codification and Clarity (Section 2)

Codification and clarity

Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

2.1. Statute already regulates the judicial review process in the form of the SCA 1981, which governs the Court's powers to issue remedies, venue, standing and related matters (s. 31-31A). Certain aspects of costs in judicial review are dealt with in the Criminal Justice and Courts Act 2015 (ss. 87-89, re interveners costs and cost capping orders in public interest cases).

2.2. There is no case for further statutory intervention in the substantive law of judicial review. The British constitution is founded on the rule of law (Dicey, *The Law of the Constitution*); and the rule of law is given effect by the substantive principles of judicial review (*R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 at [41]). Those principles have evolved over many centuries. Statute affirms the rule of law but has not attempted to define it (Constitutional Reform Act 2005, s. 1).[16]

2.3. Parliament should not attempt to do so now by defining the rule of law or by circumscribing the process or principles of judicial review. While the aims of improving certainty, clarity and accessibility to the process of judicial review are laudable, it is unlikely to be possible to make substantive public law clearer by codifying it in statute. This is because:

2.3.1. Judicial review is fundamentally concerned with statutory interpretation. Statutes are interpreted in the light of fundamental principles of law, and of construction; and this would also apply to any codifying legislation. Therefore, a code will not stand on its own and its meaning will have to be interpreted by the courts, with reference to principles which include (but are not limited to) the principle of Parliamentary sovereignty. We do not think that the judicial process of statutory interpretation itself is amenable to codification.

2.3.2. Any straightforward attempt to codify the grounds on which discretionary power are reviewed, e.g. by way of an expanded version of "illegality, irrationality, procedural impropriety and proportionality" would not improve certainty and clarity. That is because what these principles require depends on the facts and circumstances of the individual case.

2.3.3. Any attempt to codify the grounds for judicial review is likely to result in greater complexity and uncertainty in their application. There is the further

[16] The Act 'does not adversely affect (the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle').

complication that even a very detailed code cannot cater for all possible cases, since what justice demands in the individual case may require more than what is in the code. It will always exist alongside other sources of law; however this fact undermines its very purpose.

2.4. One illustration of the difficulties that are likely to be encountered in attempting to codify substantive public law is the protracted litigation arising from the enactment of sections 117A-D (Part 5A) of the Nationality Immigration and Asylum Act 2002, inserted by the Immigration Act 2014, s.19. Part 5A of the 2002 Act specified certain mandatory relevant factors to be considered by a Court or tribunal when deciding whether a person's removal or deportation would violate their right to private and family life under Article 8(2) ECHR. The House of Lords Constitution Committee described s.19 as a "*constitutional innovation*".[17] That was because the Government had intended to remove the proportionality judgement from judges and to pre-determine the outcome of that issue by way of statutory criteria. It appears that the Government are proposing to introduce a similar set of provisions with respect to Article 3 ECHR, again in the deportation context.[18]

2.5. These four additional subsections inserted into the 2002 Act, together with related provisions within the Immigration Rules, resulted in a tide of conflicting case law and litigation. This was inimical to legal certainty. In *KO (Nigeria) v Home Secretary* [2018] UKSC 53 Lord Carnwath said of the difficulty faced by the courts in grappling with these statutory provisions, at [14]:

> *"It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges."*

2.6. Furthermore, these provisions applied to a very specific situation: foreign nationals resisting removal on Article 8 grounds. It is likely to be impossible – certainly not consistently with the aim of furthering clarity and transparency – to codify substantive public law, entirely in the abstract, and shorn of context. It is difficult to see any advantage of specifying what the grounds of review are, when it is clear what they are. It is in the application of those grounds to the facts that justice is done in any claim. Also, for every criterion set out in statute, there will be numerous borderline cases; and for every principle that is set out there will be a swathe of dispute about its scope and effect. These necessary effects of codification threaten clarity and certainty.

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17 House of Lords Constitution Committee report on the Immigration Bill 2014, at [9] which was then Clause 14.

18 The Telegraph, *Judges reined in on using human rights laws to block deportations*, 17 October 2020.

Clarity and the scope of judicial review

Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

2.7. Concerns about judicial 'over-reach' into areas that are thought to be the domain of elected politicians overlook the fundamental importance of judicial review in improving decision making. Unless public authorities are held to account when they get it wrong, bad practices will not be held in check.

2.8. Judicial review applies to the exercise of public functions by a public body carrying out a public activity (*R v Panel on Takeovers and mergers, ex p Datafin* [1987] QB 815, 838). The law governing which decisions or powers are amenable to judicial review is clear, and well settled. Indeed, the courts have been careful not to extend the reach of judicial review to decisions which do not have a sufficient public law element (e.g. *R (Holmcroft Properties) v KPMG* [2018] EWCA Civ 2093).[19]

2.9. Judicial restraint is inherent in the rule of law and the separation of powers which underpin our constitution. Restraint is shown in a number of ways, for example:

2.9.1. The courts will only intervene in a case of (non-jurisdictional) factual error in limited circumstances, such as where there is irrationality, or on the narrow ground that there was unfair disregard of an established and relevant fact;

2.9.2. The courts attach appropriate weight to the judgment of elected decision makers and officials who possess the necessary institutional competence (*R (GC) v Metropolitan Police Commissioner* [2011] UKSC 21, [2011] 1 WLR 1230 at [43]).

2.9.3. Where a decision maker possesses specialised knowledge, experience and judgment, the courts are likely to be slower to impugn their decisions (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 230).

2.9.4. Conversely, the identity of a decision maker and the nature of their decision can lead to a lighter touch form of review (e.g. *R (AM Kenya) v SSHD* [2009] EWCA Civ 1009 at [32] ("*the court should avoid an over legalistic approach to the words of a lay officer*").

2.10. Whether adjudication of any given subject matter is more suited to the courts than to the legislature or the executive is a matter of law based on the correct constitutional 'division of labour'. In *R (Pro Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 Lord Hoffmann said at [76]):

[19] In which KPMG were held not to be subject to judicial review in their role as reviewer of the appropriateness of a compensation offer for mis-selling financial products.

"The Courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the Courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles… when a Court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."

2.11. Applying the correct constitutional 'division of labour' the following is unsurprising:

2.11.1. It was appropriate for the courts to determine whether tribunal fees infringed the right of access to the Court (*R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409).

2.11.2. The Minister's decision as to whether local authorities budgets were excessive involved political judgement which could only be impugned on the grounds of bad faith or 'manifest absurdity' (i.e. a high level of restraint was shown) (*R v Secretary of state for the Environment, ex p Hammersmith & Fulham LBC* [1991]1 AC 521, 593F).

2.11.3. It was for the executive and not the courts to decide whether the requirements of national security outweighed those of fairness (*Council of the Civil Service Unions v Minister for the Civil Service* (the *GCHQ* case) [1985] AC 374).

2.12. The Terms of Reference specifically invite the Review to consider the principle of non-justiciability. For the reasons outlined above, we consider that the codification of that principle would not be simple and could be counterproductive. Further, taking steps to carve out powers, including prerogative powers, from the scrutiny of the courts and the bounds of administrative law were addressed simply by Sedley LJ in the Chagos Islands litigation:

"[W]e would be creating an area of ministerial action free both of parliamentary control and of judicial oversight, defined moreover not by subject matter but simply by the mode of enactment. The implications of such a situation for both democracy and the rule of law do not need to be spelt out."[20]

Procedural clarity

Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

[20] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365, [36].

2.13. The judicial review process is not set out in one place but this is not unique to administrative law. The processes themselves are clear and transparent and are set out within the CPR, the SCA 1981 and the Supreme Court Rules and Practice Directions. The Protocol is contained within the Practice Direction on Pre-Action Conduct and is referred to in Part 3 CPR. Part 54 CPR, and its five practice Directions 54A-54E, govern procedure in judicial reviews. The CPR reflects the requirements of the SCA 1981, s. 31-31A. Judicial review appeals are dealt with clearly within Part 52 CPR, and Practice Directions 52A and 52C (Court of Appeal) and in the Supreme Court Rules and Practice Directions.

2.14. The Administrative Court Guide provides a helpful and accessible tool for Court users (if anything it may be too detailed to be user friendly for litigants in person). The guidance offered by the Government Legal Department in "*Judge over your Shoulder*" ("JOYS") similarly provides a useful guide for civil servants unfamiliar with the process of responding to any judicial review claim.

2.15. For an individual or a litigant in person seeking to bring a judicial review claim, the sources of law and practice governing judicial review may be inaccessible without help. Again, this is not a criticism unique to administrative law; and this is not a sufficient reason for administrative law itself to be remade or restricted. However, where access to judicial review may be the only remedy open to a vulnerable individual in the event of unlawful decision making by a state body, knowledge of the process may be the only way to ensure a decision maker acts lawfully.

2.16. Often whether a claimant, including a claimant who is a vulnerable person eligible for legal aid, is able to access advice and representation in good time to pursue a well-founded judicial review challenge is a matter of chance or dependent upon guidance from a supportive charity. While charities and others may help simplify the process, the limitations on funding for legal advice and the constitutional significance of judicial review is such that Government Departments and public authorities may bear a responsibility to provide clearer signposting and guidance for individuals on how to access legal aid, judicial review and other administrative law remedies (where they are available).

3. Process and Procedure (Section 3)

Limitation: The right balance?

3.1. There is no evidence to suggest that judicial review does not strike the right balance between enabling time for a claimant to lodge a claim and ensuring effective government and good administration without too many delays.

3.2. This Response identifies above the various limits embedded in the judicial review process and provides some examples of how they work to the benefit of both parties and for the benefit of good public administration. The Administrative Court has case management powers to deal with cases which are out of the ordinary, either to expedite the court timetable or to extend time to allow the parties time to explore alternative dispute resolution. Allowing the parties to agree to extend time for issue to allow for continuing negotiations could encourage effective settlement while reducing the administrative burdens of the court. It is our understanding from the Administrative Court's own data that, as at May 2020, 73% of paper applications were dealt with within 3 months, beating the target of processing 60% in 3 months. The Administrative Court has, for the past three years, adopted a practice of listing oral permission renewal hearings without reference to counsel's availability for either party, thus enabling hearings to be listed more quickly and without delay, particularly at the crucial stage of permission where early clarity over the legal position is important for good administration and legal certainty of decision-making.

Costs

3.3. The general position is that the ordinary costs rules found in the CPR apply to judicial reviews. The courts have a discretion whether or not to order costs. The unsuccessful party will normally be required to pay the costs of the successful party but a judge may make a different order (CPR Rule 44.2). There are some variations to this rule which we address below.

3.4. The biggest disincentive to bringing an otherwise good claim for judicial review is in the risk the claimant will face an adverse costs order. For potential litigants who do not have legal aid or some other source of funding this puts any claim out of reach. That the depth of a person's pockets should limit their access to an important constitutional remedy should be a matter of great concern to the Review. In his Report on Fixed Recoverable Costs, Sir Rupert Jackson recommended a model based on the Aarhus rules to address this concern.[21] No convincing reason has been given by the Government for not adopting that model.[22]

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21 Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report* (London: Judicial Office, July 2017), Ch. 10.

22 Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals* (London: HMSO, 28 March 2019).

3.5. This Response considers separately the position in costs where the defendant or claimant is the unsuccessful party.

Defendant unsuccessful

3.6. The ability of administrative law claimants to obtain access to competent legal advice is crucially linked to the ability of advisers to recover *inter partes* costs. Few privately paying individual claimants can afford to embark on litigation. Claimants may therefore seek to instruct on a Conditional Fee Arrangement ("CFA") or discounted CFA basis. Where the work is done with the benefit of legal aid then the rates payable are not sustainable and so advisers can only continue to offer a service if they are able to recover costs in cases where they win. This has been recognised in a number of cases. As explained by Lord Hope in *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] 1 WLR 2353 at [24]-[25]:

> *"It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work."*

3.7. Similar statements have been made in other cases for example *AL (Albania) v Secretary of State for the Home Department* [2012] 1 W.L.R. 2898 at [14]; and *ZN v Secretary of State for the Home Department* [2018] 3 Costs LO 357 at [87]-[90], [101] and [106].

3.8. Where a defendant concedes after a PAP letter then they will not be liable to pay the costs because proceedings have not yet started. This operates unfairly for claimants because of the work they will have to do at the PAP stage. In other contexts (e.g. the housing disrepair protocol) the defendant does have to pay the claimant's costs and there is no reason for the same principle not to apply here.[23]

3.9. Where a defendant concedes after issue but before the final hearing then the claimant will be entitled to their costs only if they can be described as the successful party *M v London Borough of Croydon* [2012] 1 WLR 2607 at [44]. In that case Lord Neuberger set out 3 classes of case: (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement; (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement; and (iii) a case where there has been some compromise which does not actually reflect the claim. Costs will normally follow the first of these cases but in the others, the position is less clear cut. The court may be able to decide if the claimant was substantially successful as a result of having started the proceedings

[23] Pre-Action Protocol for Housing Conditions Claims (formerly the Pre-Action Protocol for Housing Disrepair Cases).

or whether they would have won but unless this is "*tolerably clear*" the appropriate order will often be no order for costs.

3.10. Since *M v London Borough of Croydon*, there have been frequent disputes as to whether a defendant should pay the costs of a settled claim. It is in the defendant's interests to seek to give an impression of complexity to avoid liability and in *R (Parveen) v London Borough of Redbridge* [2020] EWCA Civ 194 the Court of Appeal upheld a decision for no order because it was not possible proportionately to decide whether the outcome (an offer of accommodation) settlement was caused or contributed to by the proceedings.

3.11. The current rules operate to make it difficult to secure costs from a defendant even where the claimant has obtained substantially the object of their claim. This is despite the considerable cost risk posed to claimants who start a judicial review, the considerable work required in the pre-permission stage of a claim and the multiple opportunities for defendants to resolve a claim through settlement prior to the issue of proceedings. There should be a presumption that where the claimant has received a benefit from the claim then a costs order should be made in their favour.

3.12. Where the defendant is a judicial body then there will not normally be a costs order against them if they lose unless they play an active role in the proceedings or have been guilty of some other improper behaviour (e.g. *R (Gourlay) v Parole Board* [2017] EWCA Civ 1003; [2017] 1 W.L.R. 4107; [2017] 4 Costs L.O. 489, CA; *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 1 WLR 2739). This is unfair because the claimant will have been forced to bring the claim to vindicate their rights in law. The rule should be changed.

Claimant unsuccessful

3.13. Where permission to apply for judicial review is refused on the papers then the ordinary order is that the claimant must pay the defendant's costs of preparing the acknowledgement of service. Defendants often do not make a properly substantiated claim for these costs in their acknowledgment but where they do the court normally makes an order for those costs. There is no need for any change in the existing rules.

3.14. Where permission is refused on the papers and at an oral hearing then the claimant remains liable for the costs of the acknowledgment of service but they will not normally have to pay the costs of attendance by a defendant or interested party. We do not consider that this rule requires any alteration. It is based on the fact that attendance at the hearing is optional and the same approach is adopted in the Court of Appeal. If the court requires attendance at the hearing then the position is different. Any perceived unfairness to defendants is avoided by the fact that there are also exceptions where the claimant may be ordered to pay costs and that may include (i) the hopelessness of the claim; (ii) the persistence by the claimant in the claim after having been alerted to facts or the law demonstrating its hopelessness; (iii) the extent to which the court considers that the claimant has sought to abuse the process of judicial review for collateral purposes; (iv) whether, as a result of full argument and the deployment of documentary evidence, the claimant has, in effect, had the

advantage of an early substantive hearing of the claim (*R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P. & C. R. 405).

3.15. Where a claimant is granted permission to apply for judicial review but loses at the final hearing then they are liable to pay the defendant's costs. The court still has a discretion and may decide to make some other order. However, there is nothing to suggest that the courts routinely or unfairly deprive successful defendants of their costs on discretionary grounds.

3.16. Where a costs order is made against a claimant it will not normally include the costs of the permission stage because they are deemed to be costs in case. This is a principled approach that does not require adjustment. By obtaining permission where the grant was opposed by the defendant the claimant has succeeded on an interim issue crucial to the claim.

3.17. Any costs Order made against a claimant may be limited where there is a costs capping order ("CCO") made by the court. The making of CCOs in judicial review claims is now regulated by the Criminal Justice and Courts Act 2015. The significance of CCOs and their limitations have been recently canvassed during the course of consultation on that Act and again during the recent consultation on fixed costs by Sir Rupert Jackson.[24] These are not repeated again here. Significantly, CCOs are not available before permission is granted. Although the provisions in the 2015 Act were unnecessary and unduly restrictive; it is not anticipated the Review will contemplate the undoing of a recent act of Parliament. Few such orders are made and there is no reason further to interfere with them.

3.18. Where there are two or more defendants or where there is an interested party then the usual practice is only to award one set of costs. It is necessary to change this practice. Where those parties have a common interest then they ought to be encouraged to act proportionately by using the same legal team. If they chose not to do so then they ought not to recover the additional costs so incurred.

Costs and proportionality

Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved?

3.19. Defendants in judicial review already benefit from very substantial protections that do not apply to ordinary litigants. The vast majority of judicial review claims are about decisions made by the defendant public authority in the very recent past. In order to defend a claim a defendant will need to explain the decision (if they have not already done so) and deal, as far as necessary, with the process adopted and the material before them when they made the decision. This material ought to be readily to hand if the decision has been lawfully made. The duty of candour placed upon a defendant

[24] See, e.g. Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report* (London: Judicial Office, July 2017).

ought not to be onerous or disproportionate in circumstances where a decision has been made lawfully.[25]

3.20. There is no evidence which suggests the cost of judicial review claims are not proportionate. The Review is invited to acknowledge that although the proportionality of costs in a judicial review claim cannot be calculated in the same commercial sense as in a money claim, the costs of judicial review are comparatively low. No doubt some claims are pursued or defended in a disproportionate way but there is no basis for asserting that the costs are, in general, "*disproportionate*" (in these cases, the court may address disproportionality on assessment). This is unsurprising because judicial review claims are normally heard without live evidence and the vast majority last for no more than one day.

3.21. Given that costs are generally likely to be low; the Review should be cautious that any measures designed to reduce costs may be counter-productive. For example:

Paper determinations

3.21.1. There is provision for cases to be determined on paper where both parties agree. However, it will often be at least as time consuming and costly to prepare detailed written submissions. Judicial review claims are likely to be unsuited to this type of determination in most cases. Where issues turn on contested points of law then the court will benefit from oral argument.

Costs budgeting

3.21.2. Costs budgeting cannot usefully be extended to judicial review. This is already a streamlined process and costs are front loaded in judicial review cases with both parties having to set out their evidence at the same time as their pleadings. The result is that a high proportion of the costs would already be incurred before any costs budget could be agreed. This would require a separate preliminary hearing; increasing delay, placing additional pressure on the court and the parties and incurring additional costs.

Alternative Dispute Resolution (ADR)

3.21.3. The Response addresses settlement and ADR below. Informal or formal ADR is a means of arriving at a just and durable solution but should not be approached primarily as a method of saving costs. For the reasons outlined below, some formal methods of ADR may increase costs. No form of ADR should be approached as a means to undermine the jurisdiction of the court. We address the unfair application of the rules in *M v Croydon,* above. Since the object of mediation (and other forms of formal ADR) is often to find a solution that goes beyond the confines of any remedy open to the court it makes little sense for costs recovery in ADR to be tied to whether the claimant achieved the remedy sought in the claim.

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[25] *R* (*Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508; *R (Citizens UK) v SSHD* [2018] EWCA Civ 1812, [2018] 4 WLR 123; Treasury Solicitors, *Guidance on the Duty of Candour*, (2010).

Remedies

3.22. Remedies are discretionary and so are flexible. For the reasons outlined above in Section 1, this gives the courts considerable power to tailor any remedy to the circumstances of a claim. The most important additional remedy that ought to be available is damages for breach of a public law duty where that can be shown to have caused loss. At the moment, damages are only available where some other private cause of action arises. The arguments in favour of monetary redress for administrative law wrongs were canvassed in the Law Commission Consultation Paper No 187 and in the Law Commission Report, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 332). Any further progress was impossible because of the failure of public bodies to provide data about the current compensation position so that the proposals could be evaluated.[26]

Avoiding litigation

What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

3.23. Essentially, there are three steps which can be taken by public authorities to minimise the need to proceed with judicial review: (i) ensuring high-quality decision-making in the first place; (ii) the provision of effective alternative means of resolving disputes, and (iii) effective engagement with the PAP.

3.24. The first, and perhaps most obvious, way in which public authorities can minimise the need for judicial review is by ensuring high-quality decision-making. The Civil Service has long recognised that judicial review plays an important part in securing good administration (not least in the JOYS guidance),[27] and the availability of judicial review is a vital check on the unlawful exercise of power. Improving decision-making, so that it reflects relevant law and guidance, is fair and complies with basic principles of good administration, is therefore a key part of minimising the need for judicial review. Ensuring high-quality decision-making involves a combination of effective training for decision-making staff (so that they are aware of the relevant legal framework and guidance), robust quality assurance of decisions taken, and a cultural willingness to examine decisions and procedures which are challenged. It also involves learning from previous judicial review litigation and changing policies or procedures as a consequence. A failure to learn from previous litigation is likely to result in more identical claims.

3.25. The second route by which judicial review can be minimised is the provision of alternative means for resolving disputes. Judicial review is a "*remedy of last resort*", which means that it is not available as a route to resolve disputes with public authorities until all other alternative means of resolution have been exhausted. These

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26 See *Home Office v Mohammed* [2011] 1 WLR 2862 for what is there described as a "*debacle*".

27 Government Legal Department, *The judge over your shoulder — a guide to good decision making*, Fifth Edition, October 2018.

can include formal mechanisms such as statutory appeal procedures, internal review or complaints procedures, or ADR, but also include any other step which the parties can take to obviate the need for judicial review litigation. Where an alternative remedy is as effective and appropriate as judicial review would be in the particular context, taking into account factors such as the possible outcome, cost, speed, the need for fact finding, and the desirability of an authoritative judgment or ruling, a failure to exhaust the alternative remedy will normally lead to a claim for judicial review being refused at the permission stage. Claimants are therefore normally required to demonstrate that alternative remedies have been exhausted, or that the alternative remedy proposed by the decision-maker would not be an effective means of resolving the dispute, before a judicial review claim can proceed.

3.26. The third route by which both claimants and defendants can minimise the need for judicial review is effective engagement with the PAP before proceedings are initiated. The Protocol is a vital part of the judicial review procedure, and is intended to ensure that parties try to settle a dispute without the need for judicial review proceedings by identifying the issues and resolving them where possible at the earliest possible opportunity[28]. Failure to follow the PAP may be reflected in an order for costs against the relevant party. The Protocol does not affect the tight time limit applicable to judicial review proceedings and therefore does not normally lead to additional delay.

3.27. The PAP, if it leads to a proper and effective consideration of the decision challenged, may therefore result in the decision being withdrawn and re-taken at an early stage, without the time and cost of judicial review proceedings. Although there are no overall statistics available for the proportion of potential claims which settle at the pre-action stage, Home Office statistics which are available through the ICIBI review of its litigation operations[29] show that between 2015 and 2017, 37-39% of potential claims at the pre-action stage did not proceed to judicial review. Even where it is not possible to resolve the claim at the pre-action stage, effective engagement with the pre-action protocol by both parties is also likely to reduce the time and cost of proceedings by (i) identifying and narrowing the issues in dispute at an early stage, and (ii) ensuring that the parties have all relevant documents and evidence at the earliest possible stage.

3.28. It is therefore essential that the Protocol functions properly, and in particular that public authorities engage with the PAP as a cost-effective mechanism for resolving a potential claim through a genuine review of the decision, rather than simply an opportunity to "rubber stamp" the original decision.

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28 PAP, at [3]. (See https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv)

29 '*An inspection of the Home Office's mechanisms for learning from litigation*', January 2018, at [3.25].

Settlement and ADR

Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

3.29. A significant proportion of judicial review claims do settle. As outlined above, the most likely points at which a claim is likely to settle are either during the pre-action stage (before a claim is brought), where a defendant concedes that the decision challenged was taken in error, or at the permission stage, where a defendant who has originally contested the claim decides not to contest it at a substantive hearing following the grant of permission. Sometimes the latter occurs where a Government Department has had legal advice that the prospects of defending the claim are under 50% but nonetheless instructs GLD and counsel to defend at the permission stage (an issue highlighted by Treasury counsel in the response to the Government's LASPO consultation).[30]

3.30. Settlement "at the door of the court" (that is, immediately before the substantive trial) is relatively rare in judicial review proceedings. That is for good reasons: the PAP and the duty of candour are intended to ensure that, as much as possible, the issues in the claim and the merits of each party's case become apparent at an early stage, so that litigation is not prolonged unnecessarily. Where settlement immediately before or during a substantive trial does occur, it is usually where a change of circumstances alter the prospects of success. This could be for example because a change in solicitor or counsel has led one party to review the prospects of success, or where there has been a recent judgment of a superior court which has changed the law, or where a public authority decides to settle the claim to avoid an adverse authoritative judgment on a particular issue.

Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

3.31. Parties in judicial review proceedings, as with other civil proceedings, are required to consider ADR at all stages. The pre-action protocol and relevant practice direction emphasise that judicial review is a remedy of last resort and identifies ADR as an alternative to litigation.

3.32. In 2001, the Government made an ADR pledge that "*Alternative Dispute Resolution will be considered and used in all suitable cases wherever the other party accepts it*." (*Halsey v Milton Keynes General NHS Trust & Ors* [2004] 3 All ER 920). That was replaced in 2011 by the Dispute Resolution Commitment.[31] Current guidance

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30 Open letter from Treasury Counsel to Dominic Grieve QC MP, 4 June 2013. (See https://legalaidchanges.wordpress.com/2013/06/06/46/)

31 *Ministry of Justice and Attorney General's Department: Dispute Resolution Commitment* and associated guidance.

recommends the use of ADR in specific types of private law claims and in some public law contexts (e.g. claims against HMRC) but does not contain any commitment for public authorities to consider ADR in judicial review proceedings.

3.33. The courts have emphasised the need to consider ADR in judicial review (cf: *R(Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, emphasising the importance of mediation as an alternative to costly litigation). The failure to consider ADR in an appropriate case may also carry a costs risk for the offending party. However, as Fordham's *Judicial Review* notes, the nature of public authority functions and responsibilities mean that in many cases there may be little alternative to the court ruling on a contested issue of public law.[32]

3.34. Informal ADR is already incorporated into the fabric of judicial review, because judicial review is a remedy of last resort (as set out above). The parties are therefore required to have engaged with alternative means of dispute resolution and to have exhausted alternative remedies prior to bringing a claim. Any professional involved in litigation knows the benefits of reaching agreement and representatives frequently negotiate outcomes without the need for formal ADR. This is common where the reviewing Court has given judgment on liability but left it to the parties to agree the amount of damages payable (where appropriate). It is also used to agree the form of a particular remedy (e.g. the wording of a declaration or form of order) and is normally the means by which disputes about costs are resolved.

3.35. On the other hand, formal ADR (including processes such as formal arbitration or mediation) may be of limited use in judicial review proceedings. That is because the pre-action protocol and duty of candour are intended to ensure that judicial review claims are resolved at the earliest possible stage. Where the claim turns on a contested issue of legal principle then mediation will not be appropriate. ADR may be of particular use where:

3.35.1. Parties are unrepresented.

3.35.2. Where there are multiple stakeholders or issues crossing different jurisdictions - for example a complex care package where there are associated court of protection proceedings.

3.36. Some forms of ADR (such as formal arbitration or judicial mediation) are unlikely to reduce substantially the costs to the parties of bringing a claim, at least to permission stage, and may increase the demands on judicial time and resources. This point needs to be emphasised. ADR may have a place in judicial review. It allows the parties to reach a lasting agreement unconstrained by the formal orders that a court might make. But it cannot be seen as a means of cutting costs and it is crucial that where representatives are involved in such processes they are properly remunerated through legal aid where available and appropriate costs shifting rules.

[32] Michael Fordham QC, *Judicial Review Handbook*, Sixth Edition, 2012, Hart Publishing, [10.2].

Standing and Interveners

Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

3.37. In order to pursue a claim for judicial review, a claimant must have a *"sufficient interest in the matter to which the application relates"* (s. 31, SCA 1981). This test for standing recognises the broad public interest in judicial review claims and the role which judicial review plays in protecting the rule of law.

3.38. The Government last consulted on proposals for the reform of standing in 2013. In February 2014, the Government concluded that such reform was not necessary or appropriate. Instead, a series of changes were introduced in Part 4 of the Criminal Justice and Courts Act 2015 to govern costs and financial disclosure by those participating in a judicial review, whether as a claimant or a third party supporter. There is no new evidence that any need for reform has emerged since 2014.

3.39. Significantly, the last Government consultation on standing heard evidence that public interest challenges were few in number and when pursued, more likely to succeed than other judicial reviews. This suggests that, in these cases, the cost of identifying (and rectifying) a significant legal error in administration is well spent, as the cases are appropriately targeted and well-run.

3.40. The recognition of the public interest in standing cases is not new or innovative (see *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1995] 1 WLR 386).[33] As Lord Reed has observed:

> *"[A] public authority can violate the rule of law without infringing the rights of any individual"*[34]

3.41. For that reason, it may be appropriate for an individual to seek to pursue a judicial review "*simply as a citizen*".[35]

3.42. The courts have been circumspect about the rules of standing and do not consider the Administrative Court to be an open forum for campaigning by other means by persons or bodies with no genuine place in a judicial review:

> *"Successful campaigners do not, by virtue of their success as campaigners, acquire standing to challenge public decisions with which they disagree;*

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33 *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed Small Businesses Ltd* [1982] AC 617, 644E: *"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."*

34 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, [169]-[170].

35 *Walton v Scottish Ministers* [2012] UKSC 44, [95]. See also: *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552 at 562.

conversely, popularity or a high profile in the media or in Parliament is not, and must not be allowed to become, a precondition of access to the court."[36]

3.43. The Terms of Reference for the Review invite comment on interveners and costs. Extensive commentary exists on the changes introduced by s. 87 of the Criminal Justice and Courts Act 2015 in respect of costs orders and interveners.[37] This Response does not repeat the contemporaneous concern expressed that the introduction of those changes would unnecessarily restrict the capacity for interveners to act to assist the court in judicial review claims of constitutional significance.

3.44. There is no qualitative or quantitative research yet published on the impact of these changes. Anecdotally, the changes inform each decision by any would-be intervener on whether to pursue an intervention with the attendant costs risk which might arise as a result; where an intervention is pursued, the new costs rules inform the conduct, form and substance of any intervention made.

3.45. In considering the role of interveners in administrative law, the Review is invited to consider that no intervener has permission to participate in any proceedings as of right. The propriety and scope of any intervention is determined entirely at the discretion of the judge in any claim. There must be some evidence that an intervention will add some value to the court's consideration of the issues before permission will be granted. Permission will be refused where an intervener simply echoes the position of one or other of the parties (*R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin); *E (A Child) v Chief Constable of Ulster* [2008] UKHL 66; [2009] AC 536, [1] – [3] (Lord Hoffmann)). The court is entitled to limit the scope of any intervention in any such manner as it may see fit.

3.46. There is no evidence that the role played by interveners is disruptive or disproportionate. On the contrary, there is considerable judicial comment on the value of interventions in cases of significant constitutional interest. Interventions have proved valuable to senior judges: *"[It is] the experience of the court that, not uncommonly, it benefits from hearing from third parties*".[38] Speaking extra-judicially, Baroness Hale has said:

"Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer… [F]rom our - or at least my - point of view, provided they stick to the rules, interventions are enormously helpful."[39]

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36 *R (McCourt) v Parole Board for England and Wales* [2020] EWHC 2320 at [50].

37 See, for example, Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4*, London, October 2015.

38 Response of the senior judiciary to the Ministry of Justice's consultation paper, *Judicial Review: Proposals for Further Reform*, November 2013, [37].

39 Baroness Hale, *Who Guards the Guardians?,*Public Law Project Conference: Judicial Review Trends and Forecasts (October 2013). See also Sir Henry Brooke, *Interventions in the Court of Appeal*, [2007] PL 402.

3.47. There is no case for further restrictions to be placed on the "*sufficient interest*" test or on the role of interveners. An overly restrictive approach should not be permitted to leave a "*grave lacuna*" in our constitution which would allow the unlawful conduct of a public authority or Government Department to go unchallenged.[40]

[40] *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed Small Businesses Ltd* [1982] AC 617, 644E.