The Independent Review of Administrative Law

Call for Evidence – Response

October 2020

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Introduction

1. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK branch of the International Commission of Jurists. JUSTICE's vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law. In 2015, JUSTICE launched a dedicated programme of work on administrative justice, focusing on good decision-making, complaints, and redress, including through access to judicial review.

2. JUSTICE has convened an advisory group of experts to inform its response ("**the Response**") to the Independent Review of Administrative Law's ("**the Review'**") Terms of Reference ("**ToR**") and Call for Evidence. The group comprises the following members:

    - Rt Hon. Lord Dyson (Chair);
    - Zahra Al-Rikabi, Brick Court Chambers;
    - Gordon Anthony, Professor of Public Law, Queen's University Belfast;
    - Catherine Callaghan QC, Blackstone Chambers;
    - Adam Chapman, Head of Public Law, Kingsley Napley LLP;
    - Andrew Lidbetter, Head of Public Law, Herbert Smith Freehills LLP;
    - Jennifer MacLeod, Brick Court Chambers;
    - Morag Ross QC, Axiom Advocates; and
    - Alison Young, Sir David Williams Professor of Public Law, University of Cambridge.

3. The group comprises lawyers who are experts in public law and have a wide range of experience. In particular, the five practitioner members have acted many times for both claimants and respondents in judicial review cases and one of them worked as a Government lawyer for many years.

4. We were assisted in drafting the Appendix by Graeme Johnson (Partner) and Mark Smyth (Senior Associate) at Herbert Smith Freehills LLP. Both are Australian qualified and practice public law in Australia.

Executive Summary

5. Judicial review plays a crucial constitutional role in upholding the rule of law in the UK's unwritten constitution; any proposed changes to it need to be carefully considered in light of this role.

6. In respect of the substantive questions identified in ToR 1 and 2:

    a. We oppose the codification of judicial review grounds on the basis that it would not achieve the stated aims of clarity and accessibility but would be likely to undermine them. We are also concerned that codification may result in a restriction of the grounds of judicial review which, in light of its constitutional importance, would be of significant concern.

    b. Similarly, excluding certain categories of powers from the scope of judicial review would, in our view, undermine the key constitutional role of the courts in ensuring that the government respects the fundamental principle of the rule of law. It would be practically difficult to define a list of what powers would be non-justiciable particularly in the context of the UK's unwritten constitution, which does not clearly delineate the powers of the executive.

7. In respect of the potential procedural issues highlighted in ToR 3:

    a. We note that there have been a number of recent procedural reforms which appear to be having the intended effect of reducing the number of overall judicial review claims and the proportion of those that are unmeritorious. We have not seen any evidence that suggests there is a need for further wide ranging procedural reforms and, in our view, there is limited scope for reform of the fundamental procedural requirements of judicial review without severely impacting access to justice and preventing courts hearing meritorious claims.

    b. We do however believe that there is some scope for clarification on the point at which the duty of candour arises and can also see some benefit in the Court being able, in exceptional circumstances, to suspend the effect of a quashing order to allow for defective decisions to be rectified.

    c. We also note that there are fundamental issues in relation to the costs of bringing a judicial claim and the negative impact that these have on access to

justice. We would like to see Sir Rupert Jackson's proposals for qualified one-way costs shifting, or the extension of the Aarhus costs rules piloted and evaluated.

d. In respect of alternative dispute resolution (ADR), and what more can be done to minimise the need to proceed with judicial review, we do not think judicial review claims are necessarily suitable for formal ADR. However, we highlight the benefits of early engagement and communication between the parties and the fact that this would be adversely affected by any reduction in the time limit for bringing claims.

8. The Call for Evidence states that the Review will be considering "all UK Wide and England and Wales powers only", and that it is interested in "judicial review in its application to reserved, and not devolved, matters". However, in our view, reforms of the kind contemplated by the ToR will have serious implications for the devolved nations.

The role of judicial review

9. Judicial review is a crucial check on the abuse of power, ensuring that the Government and other public authorities act in accordance with the law. Access to judicial review is a key element of our unwritten constitutional arrangements for the protection of the rule of law.[1]

10. This was previously recognised by then Lord Chancellor the Rt. Hon. Michael Gove MP in the most recent consultation on judicial review:

> Without the rule of law power can be abused. Judicial review is an essential foundation of the rule of law, ensuring that what may be unlawful administration can be challenged, potentially found wanting and where necessary be remedied by the courts.[2]

[1] 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' (JUSTICE, October 2015), available at: https://justice.org.uk/wp-content/uploads/2015/11/Judicial-Review-and-the-Rule-of-Law-NGO-Summary-FINAL.pdf.

[2] Ministry of Justice, *Reform of Judicial Review: Proposals for the provision and use of financial information* (Cm 9117, July 2015) 3 Ministerial Foreword, available at: https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf.

More recently, the current Lord Chancellor, the Rt. Hon. Robert Buckland MP described judicial review as “an essential part of our democratic constitution – protecting citizens from an overbearing state”.

11. The ToR and Call for Evidence recognise the legitimate interest in citizens being able to challenge the lawfulness of executive action, but state that this needs to be properly balanced with effective government. However, judicial review and effective government are not mutually exclusive but mutually reinforcing. “The rule of law requires that those exercising public power should do so lawfully”,[3] effective government must therefore be lawful government, and judicial review is the mechanism by which this is ensured.

Implications for the devolved nations

12. The Call for Evidence states that the Review will be considering “all UK Wide and England and Wales powers only” and that it is interested in “judicial review in its application to reserved, and not devolved, matters”. However, in our view, reforms of the kind apparently contemplated will have serious implications for the devolved nations. The distinction between devolved policy on the one hand and “UK-wide policy and England and Wales policy” on the other, and the explanation that the Review will only consider the latter, are simplistic. The Review appears to focus on policy and powers, although it is not quite clear which powers are to be subject to scrutiny. There is an important distinction between policy and jurisdiction. That courts in the devolved nations have jurisdiction in respect of reserved matters is recognised only faintly in the suggestion that “certain minor and technical changes to court procedure in the Devolved Administrations […] may be needed”. We consider that the potential consequences for Scotland and Northern Ireland will go well beyond “minor and technical”.

13. In relation to Scotland, one obvious issue is the extent to which reforms, whether covering codification or process and procedure, affect the jurisdiction of the Court of Session. The authority and privileges of the Court of Session, which include its supervisory jurisdiction, are protected by Article XIX of the Acts of Union. The “continued existence of the Court of Session as a civil court of first instance and of appeal” is itself a reserved matter,[4] but that serves to maintain in the devolution setting the guarantee for which provision was originally made in the Acts of Union; it does not serve to enable the UK Government to

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[3] *R (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23 [2003] 2 AC 295 at [73] (Lord Hoffmann).

[4] Scotland Act 1988, Schedule 5, paragraph 1(1)(e).

reshape the jurisdiction of that Court. These are not technical or procedural points. In any event, the administration of the courts and the justice system in Scotland clearly falls within devolved competence. Even if it were possible to restrict any proposed reforms to procedural matters, there would still be important constitutional implications. [5]

14. In relation to Northern Ireland, reform of the grounds for review could have implications for the control of public authorities in that jurisdiction. Judicial review has played a fundamentally important role since the time of the Belfast/Good Friday Agreement, where public authorities – including Ministers of the Crown – have often been held to account by the courts. A narrowing of the grounds for review would be a matter of concern in Northern Ireland, notably if narrower grounds for review would apply to Ministers of the Crown. This could lead to bifurcation of the grounds for review as are applied to different authorities – something that would plainly be undesirable.

15. There would also be constitutional questions about *how* to reform the judicial review procedure in Scotland and Northern Ireland.[6] The workings of the justice system are for the most part a transferred matter in Northern Ireland, and in Scotland they are devolved, so proposed changes to the judicial review procedure would require legislative intervention in those jurisdictions. The alternative would be for legislation to be enacted by the Westminster Parliament – but that might raise questions about the workings of the Sewel convention and legislative consent motions.

Judicial review landscape

16. Before considering the ToR in detail, it is helpful to provide an overview of the current judicial review landscape. The number of judicial reviews in the Administrative Court has been declining over the past five years, from a peak of 4,681 in 2015 to 3,383 in 2019.[7] The number and proportion of cases that end up in a final hearing is very small. In 2019,

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[5] The potential impact of changes to judicial review on the devolved nations is acknowledged to a certain extent in Note A of the Terms of Reference (the Review will consider any “unintended consequences from any changes suggested”) and the Call for Evidence (“[a]ny wider implications for the devolved administrations will be carefully thought through”).

[6] See further, R. Cormacain, ‘Legislative Competence in Northern Ireland and the Independent Review of Administrative Law’ *U.K Constitutional Law Blog* (15 October 2020), available at https://ukconstitutionallaw.org/2020/10/15/ronan-cormacain-legislative-competence-in-northern-ireland-and-the-independent-review-of-administrative-law/.

[7] Ministry of Justice, ‘Civil justice statistics quarterly: April to June 2020 Tables’ (2020) Table 2.1, available at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2020.

only 212 cases reached a final hearing; the vast majority of cases are either refused permission or withdrawn, often because settlement is reached between the parties.[8]

17. Of the judicial reviews that reached a substantive judgment 2019, 54 per cent were decided in favour of the defendant.[9] This demonstrates that, whilst there is a strong case for ensuring claimants are able to access judicial review as a mechanism for enforcing their rights, the court upholds the Government's position more often than it rules against it.

Experience in other common law jurisdictions outside the UK

18. Note B of the ToR states that the Review will consider the experience of other common law jurisdictions outside the UK, in particular Australia. We have therefore included an Appendix to this Response which contains a summary of the main features of the Australian system of administrative law. In summary, Australia has codified the jurisdiction, grounds, remedies and procedure for judicial review in the Administrative Decisions (Judicial Review) Act 1977 (the **"ADJR Act**"). However, this has resulted in considerable litigation on the meaning of key statutory terms, the judicial review grounds and alignment with common law principles of judicial review. There are also two other means by which administrative decisions may be reviewed: (i) constitutionally entrenched judicial review under s.75(v) of the Australian Constitution, and a similar Federal Court jurisdiction under s.39B of the Judiciary Act 1903; and (ii) full merits review of certain administrative decisions under the Administrative Appeals Tribunal Act 1975. The latter subjects administrative decision-making to a much more comprehensive assessment than judicial review, as the tribunal can step into the shoes of the decision maker.

Codification

19. Paragraph 1 of the ToR asks "[w]hether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute." Note C of the ToR asks the further question of "whether such legislation would promote clarity and accessibility in the law and increase public trust and confidence in JR".

[8] This figure includes 23 cases where the case was withdrawn at the substantive hearing, adjourned, no order given or a European reference made (ibid, Table 2.2).

[9] This percentage is calculated by reference to the 189 cases in which a judgment was made. Although 212 cases reached a final hearing, in 23 of those the case was withdrawn at the substantive hearing, adjourned, no order given or a European reference made (ibid, Table 2.2).

Paragraphs 3 to 5 of the Call for Evidence similarly question whether codification would "add certainty and clarity to judicial reviews". For the reasons that follow, we do not consider that codification would serve any useful purpose and would not achieve any of the suggested objectives.

20. Codification of judicial review could take a variety of forms. In its simplest form it would entail setting out the high-level principles of judicial review – legality, procedural fairness and irrationality – in statute. However, it is difficult to conceive of any benefit from adopting such an approach. It would merely replicate in statutory form the existing headline grounds of judicial review.

21. A second approach would be to seek to set out in statute the current grounds of judicial review in a meaningful amount of detail. In our view this would be both difficult to do and counterproductive for the purposes of clarity and certainty for the following reasons.

22. It would be *difficult* first, because the existing grounds of judicial review overlap with one another and therefore do not readily admit of characterisation in detail.[10] Second, the content of the grounds depends on, and cannot be isolated from, the contexts in which they operate. As Professor Elliott highlights, the grounds acquire shape and meaning only in relation to the statutory framework that defines the powers whose exercise is under review in any given case. [11]

23. Assuming such an approach would be possible, in our view it would undermine *clarity* in three ways. First, in order to provide a meaningful amount of detail the codifying legislation would be lengthy, detailed and complex, which would thwart the goal of clarity and accessibility. Second, new and untested legislation would be less certain than the current reasonably settled principles of judicial review, which have been clarified by the courts over many years. Untested legislation would serve as a springboard for an increase in litigation to test the parameters of the new statute. Third, codification would result in a bifurcation in the sources for judicial review and for this further reason a reduction in

[10] *Boddington* [1999] 2 AC 143, 152 (Lord Irvine LC).

[11] Professor Mark Elliott, 'The Judicial Review Review II: Codifying Judicial Review — Clarification or Evisceration?' (*Public Law for Everyone*, 10 August 2020), available at: https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/. For example, the power of the police to issue enhanced criminal record certificates (ECRCs) is provided under section 113B of the Police Act 1997. This power is also subject to substantive and procedural requirements taken from article 8 of the ECHR, as set out by the Supreme Court in *R (L) v Commisioner of Police of the Metropolis [2010]* 1 AC 410. The ground of illegality in the context of ECRCs is therefore not dependent solely on the wording of the 1997 Act, it also depends on the requirements of article 8.

clarity. The grounds of judicial review would be contained in the text of the new statute, as well as case law. This would include case law predating the statute (unless specifically excluded) as well as subsequent cases concerning the meaning of the statute, in which it is possible that judges would have reasonable disagreements on its correct interpretation in different contexts.

24. As stated in the Appendix, the experience in Australia demonstrates that codification will not necessarily simplify judicial review or provide additional clarity. In the decades since the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**) was introduced, there has been considerable litigation on the meaning of key statutory terms, the judicial review grounds and alignment with common law principles of judicial review. Indeed, there have been criticisms of approaches adopted under the ADJR Act with Australian commentators referring favourably to UK common law tests.

25. In addition, judicial review principles have, like other areas of the common law, necessarily developed incrementally over time in response to a variety of factors, including the Human Rights Act 1998 ("HRA") and the growth in administrative power. Codification of the current grounds of judicial review risks stultifying their development and precluding valuable flexibility.[12]

26. A third approach to codification would be to codify the law and (at the same time) amend it by legislating to restrict the grounds of judicial review, for example, by narrowing the meaning of existing grounds, omitting some grounds of review or including a meta-ouster clause.

27. Restricting the grounds of judicial review through codification would have significant constitutional implications. As Professor Elliott highlights, codifying the grounds of judicial review is not the same as codifying other areas of common law because the grounds are themselves an "expression of fundamental constitutional principles, including the rule of law and the separation of powers".[13] If the grounds of judicial review were to derive from

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[12] For example, the courts have developed a sliding scale of scrutiny for the judicial review ground of irrationality, depending on the context in which it arises in: see *Kennedy v Information Commissioner* [2015] AC 455, [51]. Before the enactment of the Human Rights Act 1998, there was a growing realisation in the courts that the traditional *Wednesbury* standard was inappropriate where a decision interfered with a fundamental right or important interest: for a full list of cases, see Lord Woolf et al, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2018) 11-094. Thus, in *R. v Ministry of Defence Ex p. Smith* [1996] QB 517, 554, Sir Thomas Bingham MR accepted that "the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable".

[13] Professor Mark Elliott, 'The Judicial Review Review II: Codifying Judicial Review — Clarification or Evisceration?' (*Public Law for Everyone*, 10 August 2020), available at: https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/.

statute rather than from the court's own jurisdiction, this would limit the extent to which the judiciary represents an independent check on the executive.[14] This is particularly troubling in the context of the UK's constitutional arrangements, where the executive's majority in Parliament means that it directs the legislative agenda. Even if such a statute could be drafted, it ought to be resisted because it would amount to the Government setting down the rules by which its actions are to be judged.[15]

28. A restrictive model of codification assumes that judges necessarily use their discretion to expand, rather than to constrain, grounds for judicial review. However, on many occasions the courts have sought to prevent a proliferation of terminology and grounds. For example, in *Gallaher*[16] Lord Carnwath expressed scepticism about the value of terms such as "substantive unfairness", "conspicuous unfairness" and "abuse of power".[17] In this case, the Supreme Court apparently jettisoned equality as a free-standing common law ground for review – the better view was said to be that consistency in treatment is a facet of *Wednesbury* unreasonableness.[18]

29. We are also concerned about the impact a restrictive codification of judicial review grounds would have on human rights law. The ToR and Call for Evidence do not mention the Human Rights Act 1998 ("HRA") and proportionality is not listed in its indicative grounds for review. However, judicial review and human rights are intertwined and cannot be considered in isolation from each other. Section 6 of the HRA creates an express statutory obligation on public authorities not to infringe the European Convention on Human Rights ("Convention") rights listed in Schedule 1 and section 7 of the HRA provides for victims of a breach of those rights to bring legal proceedings against a public authority, including by way of judicial review. Section 2 of the HRA requires that courts take into account European Court of Human Rights (ECtHR) jurisprudence when determining a question that has arisen in connection with a Convention right.

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[14] David Allen Green writes "some would say that the supervisory jurisdiction of the High Court is logically prior to, and distinct from, the legislative supremacy of parliament." David Allen Green, 'The government is looking at judicial review', (*The Law and Policy Blog*, 10 August 2020), available at: https://davidallengreen.com/2020/08/the-government-is-looking-at-judicial-review/.

[15] Professor Mark Elliott, 'The Judicial Review Review II: Codifying Judicial Review — Clarification or Evisceration?' (*Public Law for Everyone*, 10 August 2020), available at: https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/.

[16] *R (Gallagher) v The Competition and Markets Authority* [2019] AC 96.

[17] ibid at [41]. See too Lord Sumption in the same case at [50]: "In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories".

[18] ibid at [24], [26].

30. Restrictive codification of the grounds of judicial review could limit the ability of the courts to determine HRA claims in a manner consistent with ECtHR jurisprudence. For example, if the statute excluded proportionality as a ground of review or specified the content of procedural fairness in a way that did not correspond to the requirements of the Convention. Consideration must be given to the impact that any codification would have on the ability of individuals to enforce their Convention rights under the HRA, and the UK to fulfil its international obligations under the Convention.

31. We are also concerned that a restrictive approach to codification of judicial review grounds would restrict the development of common law rights. This in and of itself is problematic,[19] and would be even more concerning if the HRA were to be repealed or amended. Further, if HRA claims were excluded from the scope of the codifying statute, this would create a bifurcation between the content, as well as the method of enforcement, of Convention and common law rights, decreasing certainty and clarity.

Implications for devolved nations

32. It is hard to see how codification of the grounds of judicial review, whether or not restricted in its application to reserved matters, could be achieved without interfering with the jurisdiction of the Court of Session. As noted above, that jurisdiction encompasses the determination of disputes relating to reserved matters. Separately, even if reforms were restricted in their application such that they were limited to reserved matters, the effect would be a change to the administration of civil justice in Scotland and that is a devolved matter.

33. One possible consequence is that codification might result in significant changes to the grounds for review in England and Wales, but not in either or both of Scotland and Northern Ireland. Were that to happen, it would complicate the areas that the jurisdictions have in common and the cross-fertilisation of case law between them. There are benefits in courts in one UK jurisdiction having regard to judicial review case law from another UK jurisdiction. A 'restrictive' model would out these at risk and might cause a conflict between a more restrictive approach to judicial review in England and Wales and a more expansive approach in Scotland and/or Northern Ireland. It would also mean that the UK

[19] See *Kennedy (n 12)* which suggests that, at least in some respects, the common law may go further than corresponding provisions of the Convention.

Supreme Court would potentially have to hear appeals from jurisdictions with different approaches to the grounds for review.

34. Furthermore, a specific issue of relevance to Northern Ireland concerns the relationship between the grounds for the review and the Human Rights Act 1998. The UK government is bound in international law by the Belfast/Good Friday Agreement, which includes a UK government commitment to "complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention."[20] The Human Rights Act 1998 currently fulfils this requirement, where section 2 of the Act has enabled the European principles of proportionality and legality to develop alongside the domestic grounds for judicial review. Proposals for reform which cut-across section 2 would complicate that development of the law and may even place the UK government in breach of its international obligations.

Justiciability

35. Paragraphs 2 and 3 of the ToR question whether justiciability is in need of clarification or reform. The Call for Evidence asks whether "it [is] 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?"

36. Before responding to these questions in detail it is important to situate them in the current context in which they arise; that is a concern in the Government, as well as some academics and commentators, of the "judicialisation of politics".[21] This debate has come to the fore in light of a small number of recent high profile cases, in particular *Miller I*[22]

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[20] The Good Friday Agreement, Rights Safeguards and Equality of Opportunity, para 2.

[21] See for example comments to that effect by the then Attorney General Geoffrey Cox, H. Yorke and A Bennet, 'Attorney General says 'judicialisation of politics' may have gone too far' *The Telegraph* (12 February 2020) available at: https://www.telegraph.co.uk/politics/2020/02/12/attorney-general-says-judicialisation-politics-may-have-gone/. The Government's manifesto pledged to "ensure that judicial review…is not abused to conduct politics by another means". John Finnis: 'The unconstitutionality of the Supreme Court prorogation judgment' (*Judicial Power Project*, 28 September 2019) 10-11, available at: https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf; 'Judicial Power: Past, Present and Future' (*Judicial Power Project*, 20 October 2015) available at: https://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/. Richard Ekins, 'Protecting the Constitution: How and why Parliament should limit judicial power' (*Judicial Power Project*, 28 December 2018) 12, available at: https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf.

[22] *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

and *Miller II*[23] as well as *Evans*,[24] *UNISON*[25] and *Adams,*[26] in which the Government has been unsuccessful. It is worth noting that such high-profile cases involving contentious issues of justiciability constitute a very small proportion of judicial review claims. The vast majority of judicial reviews are much more 'routine' and most of them do not involve issues of justiciability at all, but questions of statutory interpretation to determine whether an administrative body has acted beyond the scope of its legal powers.

37. In response to *Miller II*, which did raise issues of justiciability, some academics and commentators have called for legislation to be passed which "sets out a (non-exhaustive) list of prerogative powers that are non-justiciable and cannot be questioned or quashed in any court".[27] It is unclear whether such a list would exclude review of the scope of the powers as well as their exercise. While judicial reviews challenging the exercise of prerogative power are more recent (since the *GCHQ*[28] case), consideration of the existence and scope of a power have always been considered quintessentially judicial matters. Indeed, in *Miller II* the Government acknowledged that the issue of the existence and scope of the power to prorogue Parliament was a justiciable question for the court.[29] However, given that the Supreme Court decided in *Miller II* that the prorogation of Parliament without reason was outside the scope of the prerogative power, in order to reverse the effects of that decision, a statute would have to exclude review of the scope as well as the exercise of the prerogative power. We strongly oppose any attempt to do this. It would undermine the fundamental principle of the rule of law that the government must have some basis in law for its actions and the key constitutional role of the courts in ensuring that is the case. It would also undermine a fundamental element of parliamentary sovereignty if there were certain decisions, such as the prorogation of parliament, that the executive were able to take without the courts being able to consider whether the power to take such decisions existed and its extent.

38. We are also of the view that it would be constitutionally improper and practically difficult to define a list of prerogative powers whose exercise would be non-justiciable. As Elliott points out, the question of whether an issue is justiciable is a context-specific enquiry

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[23] *R (Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2020] AC 373.

[24] *R (Evans) v Attorney General (Campaign for Freedom of Information intervening)* [2015] AC 1787.

[25] *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409.

[26] *R v Adams* [2020] 1 WLR 2077.

[27] Ekins (n 21) 14.

[28] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[29] *Miller II* (n 23) [35].

which cannot be reduced to a list of predetermined categories.[30] Whether something is justiciable is about whether a matter raises a legal question which the courts are capable of determining through the application of legal standards. Where such standards do not exist the courts have declined to adjudicate on the issue.[31] This flexible conception of justiciability, which has been carefully developed by our courts over many years, is particularly necessary in the context of the UK's unwritten constitution which does not clearly delineate the powers of the executive.[32] Attempting to specify which powers are, and are not, justiciable would require a fundamental change to the UK's constitution.

39. Whilst courts are wary of adjudicating on questions of high policy,[33] they are able, and indeed obliged, to require that executive actions, even those with a political hue, are exercised lawfully. That is because "[e]xecutive government exercises public powers which are created or recognised by law and have legal limits that it is the courts' constitutional task to patrol."[34] If the executive (through Parliament) were to limit the circumstances in which the courts could perform this proper constitutional function, this would undermine the separation of powers by the executive, rather than the courts, determining the legal limits of their own powers.

40. Finally, any attempts to clarify / reform justiciability must consider the potential consequences of any such reform outside of domestic public law. Questions of justiciability also arise in other contexts, in particular public international law, via Crown act of state and state immunity doctrines. Reforming justiciability in respect of judicial review may have unintended consequences in these other areas of law.

41. To summarise, we are strongly opposed to any statutory intervention in the area of justiciability. In addition to the constitutional issues that we have raised, there is a further

[30] Mark Elliott, 'The Judicial Review III: Limiting judicial review by 'clarifying' non-justiciability – or putting lipstick on the proverbial pig', (20 August 2020, *Public Law for Everyone*).

[31] See for example *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin).

[32] By comparison Section of Article II of the US Constitution explicitly sets out the powers of the President.

[33] For example: in *Elgizouli v Secretary of State for the Home Department* [2020] 2 WLR 857, the Supreme Court held that the common law had not evolved to recognise a prohibition on the exercise of prerogative powers to provide mutual legal assistance that will facilitate the death penalty and the common law should be developed "incrementally rather than making the more dramatic changes which are the prerogative of the legislature" [170] (the court did however find the mutual assistance unlawful on other grounds, namely because it did not meet the requirements of the Data Protection Act 2018, s 73); in *A v Secretary of State for the Home Department* (Belmarsh detainees case) [2005] 2 AC 68, the majority in the House of Lords held at [29] that the question of whether there was a "public emergency threatening the life of the nation" involved a "a pre-eminently political judgment" and therefore great weight should be given to the government and Parliament.

[34] S. Sedley, 'Judicial politics' (2012) 34(4) *London Review of Books*, available at: https://www.lrb.co.uk/the-paper/v34/n04/stephen-sedley/judicial-politics.

concern about the difficulty of *defining* the principle of justiciability/non-justiciability. A high-level definition would inevitably give rise to uncertainty and the risk of litigation. It would merely replicate a list of factors for the courts to apply and would therefore make no difference in practice in terms of clarity of the factors or how they would apply in specific cases. It would achieve nothing. Even a more granular definition could not accommodate the full range of circumstances that arise. Far better to leave things as they are and to continue to rely on the courts to determine whether a claim is justiciable or not. This has rarely been a problem. In the few high-profile cases where the Government's justiciability challenge is rejected by the courts, it is open to the Government to seek to introduce amending legislation to change the effect of the underlying decision. [35]

Procedural reforms

42. ToR 4 asks whether "procedural reforms to judicial review are necessary, in general to 'streamline the process'". It then identifies particular areas that may require reform. Each area of procedural reform listed in ToR 4 is discussed below. We note that many of the areas identified in ToR 4 have been the subject of consultations on judicial review in recent years. In particular, the Ministry of Justice's 2012 and 2013 consultations resulted in a number of procedural reforms to judicial review by amendments to the Civil Procedure Rules (CPR) 52 and 54, and the Criminal Justice and Courts Act 2015 ("CJCA").[36]

43. As noted in paragraph 16 above, since the implementation of these reforms the number of judicial review cases lodged in the Administrative Court has fallen significantly. The proportion of cases certified as totally without merit has also declined significantly from 16 per cent in 2015 to 10 per cent in 2019,[37] whilst the proportion of cases granted permission to apply for judicial review has risen from 17 to 20 per cent in the same period.[38] The mean number of days from case lodged until a final hearing has fallen from a peak of 316

[35] For example, in *Ahmed v HM Treasury* [2010] 2 AC 534, the court quashed two Orders on the basis that they went beyond the scope of the United Nations Act 1946 which empowered the Government to implement resolutions of the UN Security Council. The Government sought permission to suspend the quashing order, which the court refused. The Government subsequently enacted specific legislation to retrospectively provide temporary effect to the orders that had been quashed by the court, pending their enactment in primary legislation.

[36] Ministry of Justice, *Judicial Review: proposals for reform* (Consultation, December 2012; Government's Response), available at: https://consult.justice.gov.uk/digital-communications/judicial-review-reform/; Ministry of Justice, *Judicial Review: proposals for further reform* (Consultation, September 2013, Government's Response, February 2014), available at: https://consult.justice.gov.uk/digital-communications/judicial-review/.

[37] Ministry of Justice, *Civil Justice Quarterly* (n 7), Table 2.4.

[38] ibid, Table 2.2.

in 2016 to 213 in 2019.[39] It therefore appears to us that the procedural reforms introduced following the Government's 2012 and 2013 consultations have broadly had the intended effect of reducing the number of judicial reviews, discouraging unmeritorious claims and reducing delays. It is unclear to us why it is thought that the time is ripe to revisit many of the procedural questions identified in the ToR.

Impact of procedural reforms on the devolved nations

44. The Call for Evidence states that *"[i]n addition to recommending changes to UK-wide powers, the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations".* It is unclear at present what these "certain minor and technical changes" to procedure may be, and it is therefore difficult to comment on the potential implications that they may have for procedure in Scotland and Northern Ireland. Nevertheless, it is evident that procedural reforms could have significant consequences for the devolved nations. We set out some of the issues below.

<u>Scotland</u>

45. As already noted, court procedure is a devolved policy matter, and the Call for Evidence states that it "will not consider devolved policy", limiting its scope to "UK-wide policy". What that means for cases in which the exercise of a reserved power is scrutinised by the Scottish courts is unclear. There are several areas where that happens, with immigration being an obvious example. Moreover, the supervisory jurisdiction of the Court of Session can be exercised where there is sufficient connection with Scotland, even though there is a concurrent jurisdiction which may be exercised in England and Wales.[40] The Court of Session is well accustomed to exercising this jurisdiction in relation to the UK Government, which is regularly a respondent in judicial proceedings in the Court, and where Scottish procedural rules obviously apply. Currently, although the procedural rules are quite separate, in several aspects there are now similarities between Scotland and England and Wales, for example, in relation to time limits, standing and permission.

46. If procedural changes were to be enacted in England and Wales but not in Scotland, this could lead to cases where the same decision is subject to review in one jurisdiction but

[39] ibid, Table 2.3.

[40] *Tehrani v Secretary of State for the Home Department* [2007] 1 AC 521 (HL).

not the other. For example, if the permission threshold was only raised in England and Wales then the same decision of the Secretary of State for the Home Department might be subject to review in Scotland but not in England and Wales. We recognise that this was the position until relatively recently[41] and that it may still be possible for this to happen at present, depending on the facts of the case. It may not be a serious obstacle but it is a consequence that should be considered.

47. Furthermore, if procedural reforms were introduced in Scotland but only in relation to reserved matters, other issues would arise. The Lord Advocate (or the Scottish Ministers) and the Advocate General for Scotland (or a UK Government Department) often appear as respondents in the same judicial review proceedings.[42] It could be possible for proceedings to be time-barred against the UK Government, but not against the Scottish Government, or permission might be granted to proceed against one but not the other.

Northern Ireland

48. It is unclear what "minor and technical changes" would mean for Northern Ireland, but it raises questions as to how any reforms would be introduced. As noted above, reform of the judicial review procedure would normally be a matter for local legislative intervention. Depending on the nature of the reforms to be made, this is something that could be effected by the Rules Committee under the Judicature (Northern Ireland) Act 1978 or, alternatively, by primary legislation enacted by the Northern Ireland Assembly. The other option, again, would be for the Westminster Parliament to legislate directly, subject to possible questions about the Sewel convention and legislative consent motions.

49. If significant procedural reforms were introduced in England and Wales, but not in Northern Ireland, this would cause difficulties for the exchange of case law between the jurisdictions. The procedural rules in Northern Ireland are broadly comparable to those in England and Wales, and the Northern Ireland courts often cite English authorities on, among other things, standing and delay (though Northern Ireland no longer has a "promptly" requirement). It is also of note that one of the leading UK-wide authorities on disclosure (below) is *Tweed*, which was a Northern Ireland case on discovery and proportionality challenges under the Human Rights Act 1998.[43] This provides one

[41] Until the coming into force of the Courts Reform (Scotland) Act 2014

[42] In cases often involving Convention rights, cross-border issues, or the application or interpretation of EU law.

[43] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53.

example of how case law in Northern Ireland can have a wider relevance to principle and practice in the UK. It is to be queried whether that influence would survive a narrowing of the grounds and related procedural rules in England and Wales.

(a) Disclosure

50. ToR 4(a) asks whether reforms are necessary in respect of the "burden and effect of disclosure in particular in relation to "policy decisions" in Government".

51. Unlike in civil or criminal proceedings, there is no formal disclosure duty imposed on parties in judicial review proceedings, unless the Court orders otherwise (CPR Part 54, Practice Direction 54A, Paragraph 12). The rationale is that the kind of standard disclosure required in civil proceedings under CPR Part 31 is unnecessary because the parties will usually have discharged their duty of candour (see further below).[44]

52. Claimants can make an application for specific disclosure. Such applications are dealt with on a case by case basis by the courts. Whilst complying with an order for specific disclosure may place an additional 'burden' in terms of time and costs on public authorities, such orders are rare[45] and will only be made where necessary for fairly and justly disposing of a specific issue.[46] Courts will not countenance "fishing expeditions" where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge.[47] It is therefore more likely that any "burden" on defendants or effect on policy decisions in relation to the provision of information in judicial review claims will result from compliance with the duty of candour rather than disclosure, which we discuss below.

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[44] Iain Steele, 'The duty of candour: Where are we now?', (1 December 2017, Public Law Project), para 8.

[45] Admin Court Guide, para 6.5.3; Cranston J and Lewis J, 'Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: a Discussion Paper' (28 April 2016) para 24. There are many cases where applications for disclosure are refused on the basis that they are not necessary, for example see *R (Actis SA) v Secretary of State for Communities & Local Government* [2007] EWHC 344 (Admin); *R (AA, CK) v SSFCO* [2008] EWHC 2292 (Admin); R (BMA) v GMC [2008] EWHC 2601 (Admin); *R (Friends of the Earth) v SSBERR* [2008] EWHC 2983 (Admin); *Save Guana Cay Reef Association v R* [2009] UKPC 44; *R (Terra Services Ltd) v National Crime Agency* [2020] EWHC 1640 (Admin).

[46] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386 at 396-397; *Tweed* (n 43).

[47] *Tweed* (n 43) at [31].

53. We note that disclosure and the duty of candour were the subject of a recent review conducted in 2016 by Mr Justice Cranston and Mr Justice Lewis at the request of the Lord Chief Justice.[48] They recommended that it would be sensible to set out a procedure for specific directions in in Practice Direction 54A in order to "ensure that applications for disclosure are not used routinely, inappropriately or excessively."[49] In their view such a procedure would ensure effective case management of the small minority of cases where disclosure was necessary and that applications for disclosure are not used routinely, inappropriately or excessively. We agree with this proposal for the reasons given by Cranston J and Lewis J.

(b) The duty of candour

54. ToR 4(b) asks if reforms are necessary "*in relation to the duty of candour, particularly as it affects Government*".

55. The duty of candour applies to all parties to judicial review proceedings. However, in practice, the duty is more demanding on the defendant, primarily because in judicial review proceedings it is the defendant that has the material and documentation available regarding the decision and its context. The duty requires public authorities to make candid disclosure of the decision-making process, identifying the relevant facts and setting out the reasoning behind the decision challenged.[50] This includes those which may give rise to further grounds of challenge. A cards on the table approach is expected, and "the vast majority of the cards will start in the authority's hands."[51] Although ordinary disclosure rules are not applicable unless the court orders, public authorities may disclose documents voluntarily to discharge their duty of candour and courts have encouraged disclosure of relevant and significant documents as good practice, absent a good reason not to.[52]

56. We strongly oppose any reform to remove or limit the duty of candour for the following reasons.

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[48] Cranston (n 45).

[49] ibid, paras 26-27.

[50] *Tweed* (n 43) at [31] and [54]; *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, [50].

[51] *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at [945].

[52] *Tweed* (n 43) at [4].

57. First, restricting the duty of candour would undermine the key principle which underlies it. The rationale of judicial review is to ensure lawful, fair and just public administration. A public authority's objective should not therefore be to win the case at all costs, but to assist the court with ensuring the lawfulness of the decision under challenge, with a view to upholding the rule of law and improving standards in public administration.[53] There is inherent and important value in public authorities acting transparently in their decision making and conducting themselves transparently in litigation. Any other approach undermines the role of public authorities in upholding the rule of law.

58. Second, judicial review only works in its current form (with limited, if any, fact-finding; limited requirements for disclosure; declaratory remedies) because the parties, and in particular defendants, are subject to a duty of candour. Without such a duty, it would be difficult to resist extensive changes that would result in a procedure much closer to that of a civil trial. As it was put by Girvan J in *Downes*, *"The judicial restraint on matters such as discovery and cross-examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications".*[54] A move to costly, lengthy, adversarial proceedings is unlikely to be welcomed by either defendants or claimants.

59. Third, the experience of the Advisory Group members is that the duty of candour helps to resolve matters efficiently and effectively. It allows for a proper assessment of the merits of a case and can lead to early settlement, withdrawal of the challenge or at least the narrowing of the issues in dispute, thereby avoiding unnecessary costs. We note that Question 10 of the IRAL Call for Evidence, asks *"[w]hat more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review"?* In our view, the duty of candour can minimise the need to proceed with judicial review and therefore any limitation of this duty would be contrary to the aims of streamlining the judicial review process and minimising the need for proceedings.

60. In respect of the possible impact of the duty of candour and disclosure on policy decisions, we note that a judicial review claim is only one of a number of means by which internal information and documentation may become public. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 capture a much wider set of information as there is no relevance test and the burden is on the public authority to justify

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[53] See *Downes* [2006] NIQB 77 at [31]; *Abraha v SSHD* [2014] EWHC 1980 (Admin) at [114]; *R (Hoareau) v SS FCA* [2018] EWHC 1508 (Admin) at [20].

[54] *Downes* [2006] NIQB 77 at [31].

non-disclosure. Public inquiries, Parliamentary select committees and leaks are additional ways in which information about public authority decision making can enter the public domain. In our view it is therefore unlikely that policy decisions or civil servants' advice is affected specifically by the possibility of disclosure in the course of future judicial review proceedings. To the extent that policy decisions and advice are impacted more generally by the possibility of information being made public, we are of the view that this is generally a good thing; it is in the interests of good public administration that decisions and policy choices should be made in a transparent way that withstands public scrutiny. Further, many of the difficulties faced by government in complying with the duty of candour (as well as other obligations in respect of the provision of information) relate to issues of recording keeping rather than issues with the principle of providing the information. Better record keeping systems and the use of technological solutions to search and identify relevant information would make it significantly easier for Government to comply with its duty of candour.

61. However, one particular area which in our view would benefit from some additional clarification is the point at which the duty of candour arises. It is clear that the duty applies after permission is granted.[55] However it is less clear whether it applies at any earlier stage. The Treasury Solicitor's Guidance states that it applies *"as soon as the department is aware that someone is likely to test a decision or action affecting them"* and that it applies at every stage of the proceedings, including the pre-action stage.[56] However, the authorities are less clear on whether, and to what extent, the duty arises prior to permission being granted.[57]

62. The point at which the duty arises has significant implications for judicial review in practice. If the duty only arises after permission is granted, this may require a claimant to take a serious cost risk without understanding the full context of the decision. We are also aware anecdotally of cases where (due to whistleblowing or other means) the claimant

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[55] *R (I) v SSHD* [2010] EWHC Civ 727 (Admin) at [50].

[56] Treasury Solicitor's Department, 'Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings' (2010) 3, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf.

[57] In *R (Terra Services Ltd) v NCA*, 2019] EWHC 1933 (Admin) at [41] it was said to be common ground that the duty "is *not confined exclusively to cases in which permission has been granted and may well be applicable, depending on the context, at or even before the permission stage*"; R (*Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at [13] the court stated that the duty of candour was imposed on public authorities "particularly after permission to bring a claim for judicial review has been granted"; in *R (on the application of Bilal Mahmood) v Secretary of State for the Home Department IJR [2014] UKUT 439 (IAC)* at [15] the duty of candour was said to apply throughout the proceedings but be of particular importance at permission stage.

has had knowledge of matters that would have to be disclosed under the duty of candour, but without permission, those cases were not able to proceed and the relevant issues never came to light.

63. In our view, the duty of candour should arise as early as possible, because transparency in decision-making is positive for public administration, the duty assists in narrowing and resolving disputes, and because meritorious claims may be excluded if the duty only arises after claims cannot proceed. However, we acknowledge the difficulties of compliance at an earlier stage of the proceedings due to the time and resources compliance requires. We are therefore of the view that the intensity of the duty should vary according to the stage of proceedings. We suggest:

    a. At the pre-action stage, in accordance with the pre-action protocol, the public authority should be required to provide information and documents which are proportionate and properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues, unless there is good reason for it not do so. [58]

    b. At permission stage, we agree with Cranston J and Lewis J's suggestion that: *"If a defendant chooses to file an acknowledgement of service, the summary grounds of resistance referred to in CPR 54.8(4)(a) should identify succinctly any relevant facts, and provide a brief summary of the reasoning, underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information*".[59]

    c. Once permission has been granted, the duty should remain in its current form for the reasons specified above.

(c) Standing

64. ToR 4(c) refers to "possible amendments to the law of standing", whilst Question 13 of the Call for Evidence asks if respondents "*think the rules of public interest standing are treated too leniently by the courts*".

[58] Pre-Action Protocol for Judicial Review, para 13.

[59] Cranston (n 45) [35].

65. In order to bring a claim in judicial review, a person must have a "sufficient interest in the matter to which the application relates". This test was placed on a statutory footing by section 31(3) of the Senior Courts Act 1981. Parliament chose not to require a direct interest and left the test of sufficiency to the courts. This test has been given a broad, interpretation by the courts over the years, allowing claims not just from individuals directly affected by the decision in question, but also groups or organisations with an interest in the case.[60] Whether a person, group or organisation has standing will depend on the circumstances and context of the claim.[61]

66. The ability to challenge the legality of actions of public authorities is fundamental to upholding the rule of law. Changes to the rules regulating who is able to bring such challenges therefore have the potential to undermine the maintenance of the rule law. In our view, the current test for standing works well and we would strongly oppose any reform that would restrict the rule.

67. First, we agree with Fordham et al that the current test provides "the necessary flexibility to enable the courts to vindicate the rule of law while enabling them to guard against mere 'busybodies' or individuals or groups abusing the process of judicial review".[62] This is demonstrated clearly by the reasoning of the Divisional Court in *R (McCourt) v Parole Board* (2020) EWHC 2320 when dealing with the novel question of whether a murder victim's mother had standing to challenge the Parole Board's decision to recommend the release of the offender in question:

> 43. What counts as a "sufficient interest" for the purposes of s. 31(3) of the Senior Courts Act 1981 will vary depending on what the rule of law requires in

[60] *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617; *R v HM Inspectorate of Pollution, ex parte Greenpeace (No 2)* [1994] 4 All ER 329; *ex parte World Development Movement Ltd* (n 46).

[61] *AXA General Insurance Ltd v HM Advocate [*2012] 1 AC 868, at [170]. For example, see ibid *ex parte Greenpeace (No 2*), Greenpeace had standing. The relevant factors to considered were the nature of Greenpeace and the extent of its interest in the issues raised, the remedy Greenpeace seeks to achieve and the nature of the relief sought; *ex parte World Development Movement Ltd* (n 46), the claimant had standing because of the importance of vindicating the rule of law; the absence of any other challenger; the nature of the breach of duty; and the expertise of the claimant in the issue in question. However, in *R (DSD, NBV and others) v the Parole Board* [2018] EWHC 694 (Admin) the Mayor of London was refused standing to judicial review the decision of the Parole Board to release John Worboys, on the basis that the functions of the Mayor of London were general in scope and did not relate to the decisions of the Parole Board in a particular case. He was in no different position from any other politician or member of the public.

[62] Michael Fordham et al , 'Streamlining Judicial Review in a Manner Consistent with the Rule of Law' (*Bingham Centre for the Rule of Law*, February 2014), para 2.5, available at: https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistant_with_the_rule_of_law.pdf.

> the particular context of the decision under challenge. For some decisions (such as those in the *Smedley*, *Rees-Mogg* and *World Development Movement* cases), it may not be possible to identify any class of persons, or any class of persons within the jurisdiction, who are more affected than the public at large. In other cases, the direct impact of the challenged measure falls on a class whose members are likely to lack the financial and organisational resources required to litigate. This is one reason why organisations like the Child Poverty Action Group, the Joint Council for the Welfare of Immigrants and the Howard League for Penal Reform (to name a few) have sought to challenge measures of general application in areas falling within their purview, for the most part without dispute as to their standing. Another reason is that a suitably expert organisation may be better placed to present arguments about the impact of policy on the affected class as a whole, rather than one individual in particular.
>
> 44. Decisions taken by the Parole Board in individual cases, however, are different from measures of general application. In one sense, they affect the population as a whole, because the task of the Parole Board is to assess risk; and any member of the public could in principle be exposed to risk by the release of an offender. But the rule of law does not require that Parole Board decisions in individual cases should be challengeable by any member of the public. In most cases, there is likely to be a small class of persons who are much more directly affected than the public at large. If no-one in this class is prepared to bring a challenge, it can be properly assumed, without offending the rule of law, that there is no need for the court to entertain one.
>
> 45. The members of this class obviously include the offender himself and the Secretary of State, both of whom are parties to the Parole Board proceedings. *DSD* establishes that they do not include the Mayor of London or elected local politicians in a comparable position. Do they include the victim or, in a case where the victim is deceased, the victim's close relative?
>
> 46. Looking at the matter from first principles, we would answer that question in the affirmative…

68. Second, a test requiring that a person have a direct interest in the action or decision in question misunderstands that judicial review is not solely concerned with individual rights, but public wrongs. It exists to ensure accountability, with consequential benefits for society

as a whole.[63] A restrictive standing test would mean that cases would be immune from scrutiny where there was no directly affected party willing or able to challenge the unlawful decision, or where everyone was equally affected but no one directly.[64] For example decisions impacting on the environment and/or animals rather than humans, would be excluded from judicial review by a more restrictive standing test.[65]

69. Third, the issue of standing has previously been reviewed on a number of occasions.[66] In particular, in 2013, the then Lord Chancellor Chris Grayling MP attempted to introduce a modified test of standing, limiting it to those with a "more direct and tangible interest in the matter", excluding persons with only "a political or theoretical interest, such as campaigning groups".[67] The Government was concerned that judicial review was being used as a campaign tactic, impeding "proper decision-making" of the elected government who were "best placed to determine what is in the public interest".[68] The proposal was strongly opposed by the judiciary, practitioners and NGOs due to the deleterious effect that a direct interest test would have on the rule of law. Respondents to the 2013 consultation also pointed out that there were relatively few claims brought by groups or organisations without a direct interest (as a percentage of total applications) and that

[63] See Mark Elliott, 'Standing, judicial review and the rule of law: why we all have a "direct interest in government according to law", (*Public Law for Everyone*, 29 July 2013).

[64] See for example *ex parte World Development Movement Ltd* (n 46) in which Rose LJ observed that in the absence of a challenge by the pressure group, it was hard to see who else would question the decision, and cited the "importance of vindicating the rule of law" as a key argument in favour of acknowledging standing in such circumstances (395-396); *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710 in which a policy to deport individuals with less than 72 hours' notice amounted to an unlawful restriction of the common law right of access to the courts as it did not allow sufficient time to access legal advice. Those directly affected could not bring a challenge as they were detained in immigration removal centres.

[65] This is recognised by Article 9(2)(b) of the Aarhus Convention which requires that NGOs have standing for this reason.

[66] For example, in Law Commission, *Report on Remedies in Administrative Law* (Law Com No 73, 1976), available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/08/LC.-073-REPORT-ON-REMEDIES-IN-ADMINISTRATIVE-LAW-ADVICE-TO-THE-LORD-CHANCELLOR-UNDER-SECTION-31e-OF-THE-LAW-COMMISSIONS-ACT-1965.pdf; Patrick Neill, *Administrative Justice- Some Necessary Reforms: Report of the Committee of the JUSTICE- All Souls Review of Administrative Law in the United Kingdom* (OUP 1988); Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226, 1994), available at: http://www.lawcom.gov.uk/app/uploads/2016/02/LC.-226-ADMINISTRATIVE-LAW-JUDICIAL-REVIEW-AND-STATUTORY-APPEALS.pdf; Lord Woolf, 'Access to Justice report' (1996) available at: https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm; Sir Jeffrey Bowman,Review of the Crown Office List (LCD, 2000); and Ministry of Justice, *Judicial Review: Proposals for further reform* (Cm 8703, October 2013) available at: https://consult.justice.gov.uk/digital-communications/judicial-review/supporting_documents/Judicialreviewproposalsforfurtherreform.pdf. See Fordham et al (n 62) para 2.3.

[67] Ministry of Justice, *Judicial Review: Proposals for further reform* (n 66) para 80.

[68] ibid, para 79.

Government figures indicated those cases tend to be more successful than on average.[69] In the end, the proposal was dropped; the Government concluded that amending standing was not the best way to tackle unmeritorious claims.[70] It is difficult to see why any different conclusion would be justified now; we are not aware of any evidence that the position has substantially changed since the 2013 consultation.[71] We also note that in most of the more controversial judicial review challenges in recent years, standing has not been an issue, and in many of these cases, the claimants had a direct interest in the matter in question.

(d) Time limits for bringing claims

70. Time limits for bringing claims are addressed by ToR 4(d). Question 6 of the Call for Evidence also asks whether *"the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?"*

71. Time limits for judicial reviews are intended to ensure that claims are brought promptly and resolved efficiently.[72] In general, a claimant must commence a judicial review promptly and in any event within three months of the action or act in question.[73] The court may exercise its discretion to extend the time limit,[74] but the court will require a good reason for any extension of time.[75] It is worth noting that this is much shorter than the six-year limitation period for most civil claims[76] or one year for human rights claims, not brought by way of judicial review.[77]

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[69] Ministry of Justice, *Judicial Review – proposals for further reform: the Government response* (Cm 8811, February 2014), available at: https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf, para 33.

[70] ibid, paras 14 and 35.

[71] The latest statistics on claimant type we are aware of show that only three percent of all judicial reviews that went to a final hearing between July 2010 and February 2012 were brought by interest groups (V. Bondy, L Platt and M. Sunkin, 'The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences' (*Public Law Project,* October 2015) available at https://www.nuffieldfoundation.org/sites/default/files/files/Value-and-Effects-of-Judicial-Review.pdf, p.18).

[72] Fordham et al (n 62).

[73] CPR 54.5(1)

[74] CPR 3.1(2)(a)

[75] For example, the courts have accepted that there was good reason for the delay if the applicant was unaware of the decision, provided that they applied expeditiously once they became aware of it: *R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 WLR 1482; *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 WLR 386 at p.402. The fact that the claim raises issues of general public importance may also be a reason for extending the time-limit: *R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 WLR 1482; *Re S (Application for Judicial Review)* [1998] 1 FLR 790.

[76] Limitation Act 1980, ss. 2 and 5.

[77] Human Rights Act 1998, s. 7(5).

72. Time limits were recently reformed as part of the package of reforms introduced by the Government in 2013. The time limits for filing claims for planning matters and procurement cases were shortened to six weeks and 30 days respectively.[78] There is also a 16-day time limit for Cart judicial reviews, which involve a challenge to the refusal by the Upper Tribunal (Immigration and Asylum Chamber) of permission to appeal a decision of the First-tier Tribunal.

73. The Terms of Reference do not specify whether the general three-month time limit is under review, or if the aim is to look at shortening it for specific areas as the 2013 reforms did. For the reasons that follow, we consider that shortening time limits would be highly undesirable.

74. First, it would have a negative impact on access to justice. In its 2012 consultation the Government recognised that parties need a reasonable amount of time to consider their position and to take legal advice.[79] They acknowledged that the shortening of time limits could have a particularly adverse impact on those with disabilities, mental health issues and learning difficulties.[80] Claimants who rely on legal aid already encounter difficulties in securing funding within the current three month limit. Shortening it further would make this even more difficult, further restricting access to the courts for those without significant financial means.

75. Second, reducing time limits could in fact hinder effective government. Research by Bondy and Sunkin found that practitioners who acted for both the Government and claimants felt that the three-month limit often cut short negotiations which would have resulted in an out-if court settlement.[81] Shorter time limits would potentially increase the number of weak and premature claims as claimants are more likely to file claims on a protective or precautionary basis without having had time to properly assess, and get

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[78] CPR 54.7 (A)(3).

[79] Ministry of Justice, *Judicial Review: proposals for reform* (Cm 8515, December 2012) para 42, available at: https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf

[80] Ministry of Justice, *Reform of judicial review: the Government response* (Cm 8611, April 2013) para 32, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228535/8611.pdf.

[81] Bondy and Sunkin, 'Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse', (*UK Constitutional Law Association Blog*, 10 January 2013,), available at: https://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/.

advice on, the merits of the case or negotiate an out of court settlement in accordance with the Pre-Action Protocol. This would increase the burden on public authorities who would have to respond to greater numbers of premature claims. This risk was recognised by the Government in its 2012 consultation, which is why it did not propose a general reduction in judicial review time limits.[82] When the Government decided to reduce time limits for procurement and planning decisions, it agreed that the shorter time limits meant that there would not be sufficient time to comply with the Pre-Action Protocol.[83] Constraining the ability of parties to comply with the Pre-Action Protocol is counterproductive from an efficiency perspective. Even where the Pre-Action Protocol does not lead to settlement, it plays a valuable role in clarifying the issues, enabling robust advice on the merits to be given and preventing the need for applications to be amended at a later date - all of which helps to ensure that the claim is dealt with more efficiently.

(e) Relief

76. ToR 4(e) asks whether reforms are necessary in respect of the *"the principles on which relief is granted in claims for judicial review"*. Related to this, ToR 3(iii) states that the Review should consider *"the remedies available in respect of the various grounds on which a decision may be declared unlawful".* The Call for Evidence asks whether "*remedies granted as a result of a successful judicial review are too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial*?"

77. The rules for granting relief have also been subject to recent reforms, which were introduced by section 84 of the CJCA.[84] This section introduced section 31(2A) into the Senior Courts Act 1981 which requires the court to refuse to grant relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." This altered the common law test in three ways. Before the CJCA, the courts had discretion to decide whether to refuse to grant relief. This was replaced with a duty to refuse relief when certain conditions are met. If asked to consider the question by the defendant at the permission stage, the court must also do so. Second, under the common law the courts'

[82] Ministry of Justice, *Judicial Review: proposals for reform* (n 79) para 45.

[83] Ministry of Justice, *Reform of Judicial Review: the Government Response*, (n 80) para 41.

[84] Which introduced section 31(2A) into the Senior Courts Act 1981.

discretion was triggered if it was "inevitable" that the same result would be reached if taken lawfully.[85] Section 84(2)(3D) of the CJCA lowered this threshold to when it is "highly likely". Third, previously relief would be refused if the outcome would have been the "same" had the decision been taken lawfully, whereas under the current test relief will be refused as long as the outcome would not have been "substantially different". Lord Chancellor Chris Grayling explained that the new test was intended to prevent judicial reviews being heard in respect of 'minor procedural defects."[86]

78. The provisions of section 84 have not featured prominently in case law since their enactment.[87] However, four general principles have emerged:

    a. The courts have been reluctant to speculate as to whether it is highly likely that the outcome would have been substantially different for the applicant had the decision been taken lawfully, because the court has been concerned to ensure that they do not intrude on the proper function of the administration, by assessing the merits of a decision to determine whether the administration would have reached a similar conclusion had it acted lawfully.[88] However, the court will refuse to grant a remedy where there is clear evidence that it is highly likely the outcome would not have been substantially different had the decision been made lawfully.[89]

    b. The court has, in our view, correctly placed the burden of proof on the defendant. Once the claimant has identified an error in the decision-making processes, it must be for the defendant to show that the error did not make a substantial difference; the court and claimant are ill-equipped to second-guess the mind of the decision-maker.

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[85] *R v Chief Constable of Thames Valley, ex p Cotton* [1990] IRLR 344.

[86] HC Deb 13 January 2015, vol 590, col 812, available at: https://publications.parliament.uk/pa/cm201415/cmhansrd/cm150113/debtext/150113-0003.htm

[87] There is only authority on the interpretation of these principles at the level of the Court of Appeal, the most recent application being found in the challenge to the decision the grant planning permission for a third runway at Heathrow Airport (*R (Plan B Earth Ltd) v Secretary of State for Transport* [2020] EWCA Civ 214).

[88] See for example, See *Logan v Havering* [2015] EWHC 741 (Admin), [2016] PTSR 603, *Bokrosova v Lambeth* [2015] EWHC 3386 (Admin), [2016] HLR 10, *Williams v Powys County Council* [2016] EWHC 480 (Admin); [2017] EWCA Civ 427, *R (BM) v Hackney LBC* [2016] EWHC 3338 (Admin) and *Goring on Thames Parish Council v South Oxfordshire District Council* [2016] EWHC 2898 (Admin).

[89] For example, in *Logan v Havering* (n 88) the London Borough of Havering decided to reduce council tax relief from 100% to 85% in order to meet cuts in general funding from central government. However, when taking the decision, the public sector equality duty was not fulfilled as an equality impact assessment had not been circulated to all members of the council. The court concluded that it was highly likely that the decision would not have been substantially different if all members of the council had received the equality impact statement.

c. In line with Chris Grayling's explanation of the provision, it is more likely that a remedy will be refused when a decision is unlawful because of a procedural as opposed to a substantive error. [90]

d. The court gives weight to the significance of the error made by the public authority when determining whether to refuse to grant a remedy. For example, in *R (Plan B Earth Ltd) v Secretary of State for Transport*,[91] the Court of Appeal noted the seriousness of the failure of a Minister to take account of the Paris Agreement on climate change, which the Court concluded was part of the national policies that the Minister had a statutory obligation to consider.

79. The court is permitted to disregard the 'highly likely' test if it considers that it is appropriate to do so for reasons of "exceptional public interest".[92] However, the court has rarely exercised this discretion; we are only aware of one case in which it has done so and this was in truly exceptional circumstances. In *R (Plan B Earth Ltd)*[93] the court noted the huge public interest in the development of Heathrow, as well as the fact that the planned development of a third runway was one of the largest infrastructure projects in the UK and that it was a matter of profound national and international concern.

80. In light of the above, we are of the view that the CJCA reforms are working well to achieve their purpose of ensuring that minor procedural defects do not prevent effective government, whilst ensuring that judicial review continues to provide an effective means of protecting rights and upholding the rule of law. In our view, any reforms that raised the threshold so as to exclude relief for more categories of procedural defect, would risk undermining the aim of judicial review of ensuring that public authorities do not abuse their powers. This is because procedural requirements are important in their own right; they are not designed solely to assist public authorities to reach better decisions. They ensure that decisions are taken in a manner that respects the interests of individuals, which in turn ensures public confidence in the administration. Second, procedural

[90] For example, section 31 (2A) did not apply when a public body failed to have regard to statutory purposes, thereby applying the wrong criteria when determining whether land could be classified as a village green (*R (NHS Property Services) v Surrey County Council* [2016] EWHC 1715 (Admin), [2016] 4 WLR 130). See, also, *R (Irving) v Mid Sussex District Council* [2016] EWHC 1529 (Admin), [2016] PTSR 1365, and *R (BM) v Hackney* [2016]**Error! Bookmark not defined.**, *R (Noye) v Secretary of State for Justice* [2017] EWHC 267 (Admin) and *R (Lucas) v Oldham Metropolitan Borough Council* [2017] EWHC 349 (Admin).

[91] [2020] EWCA Civ 214, [276].

[92] Senior Courts Act 1981, s. 31(2B).

[93] (n 91) [277].

requirements can also facilitate effective participation in decision-making.[94] Third, they may be used as a means of achieving equality by facilitating decision-making that takes account of its implications for minority interests. For example, procedural mechanisms have been used to ensure that public bodies pay due regard to the need to eliminate discrimination, harassment and victimisation via the public sector equality duty.[95]

81. It is also important to note that remedies in judicial review are discretionary. This means that courts will often grant a declaratory order to resolve or help to mitigate the effect of issues that could arise were a quashing order to be implemented. In *Plan B Earth Ltd*, for example, the Court of Appeal issued a declaratory order, rather than quashing the decision.

82. However, we recognise that there are some circumstances where there is perhaps a lack of remedial flexibility. The normal remedy for any measure enacted by the executive that was beyond the scope of its powers (ultra vires) is a quashing order. Quashing orders render decisions null and void; it is as if the decision had never been made. We recognise that this can have difficult consequences for public authorities. For example, in *Ahmed v Her Majesty's Treasury*[96] the court quashed The Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 as they went beyond the scope of the United Nations Act 1946 which empowered the Government to implement resolutions of the UN Security Council. The Treasury sought permission to suspend the quashing order as regards the Al-Qaida and Taliban (United Nations Measures) Order 2006 for one month, in order for the UK to uphold its international law obligations and to continue counter-terrorism measures. The Supreme Court refused to suspend the implementation of the order on the basis that it would have given the impression that unlawful orders could continue to have force when they are null and void. This led to the enactment of specific legislation to retrospectively provide temporary effect to the orders, pending their enactment in primary legislation.[97]

83. The lack of remedial flexibility in these situations is understandable given the nature of judicial review and the understanding of the common law that, to maintain the rule of law, any measure enacted by the executive that was beyond the scope of its powers never was lawful. However, we consider that it may be desirable for legislation to be enacted

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[94] *R (CPRE Kent) v Dover District Council* [2017] UKSC 79.

[95] Equality Act 2010, s.149.

[96] Ahmed (n 35).

[97] Terrorist Asset-Freezing (Temporary Provisions) Act 2010.

to empower courts, in exceptional circumstances, to suspend the effect of a quashing order to allow the defects to be rectified. We believe that this is preferrable to enacting retrospective legislation to achieve the same effect. Similar provisions already exist in the Northern Ireland Act 1998 and the Scotland Act 1998. Where a court decides that a provision of an Act is not within the legislative competence of the Northern Irish Assembly or Scottish Parliament or a Minister or department did not have the power to make secondary legislation, the court may make an order removing or limiting any retrospective effect of such a decision or suspend the effect of the decision to allow the defect to be corrected.[98] The court must have regard to the extent to which persons who are not parties to the proceedings would be adversely affected.[99] We also note that in Australia, the Administrative Decisions (Judicial Review) Act 1977 allows the Federal Court to specify the date from which a quashing order takes effect.[100]

(f) Rights of appeal and permission

84. ToR 4(f) asks whether "*rights of appeal, including on the issue of permission to bring judicial review proceedings*", are in need of procedural reform. Paragraph 10 of the Call for Evidence questions what more can be done by the decision-maker or the claimant to "*minimise the need to proceed with judicial review*".

Permission

85. The current position on permission is as follows. The Court's permission is required to bring a claim for judicial review.[101] Applications for permission are determined, in the first instance, by a Judge on the papers. Where permission is refused, the claimant has a right to request reconsideration at an oral hearing.[102] Any request for reconsideration must be filed within 7 days after service of the refusal decision.[103] Where the claimant is granted permission, the costs will generally be costs in the case. Where permission is refused, the defendant will generally recover its costs of the acknowledgement of service/summary grounds. However, the successful defendant does not generally recover its costs of

[98] Scotland Act 1998, s.102(2); Northern Ireland Act 1998, s.81(2).

[99] Scotland Act 1998, s.102(3); Northern Ireland Act 1998, s.81(3).

[100] Administrative Decisions (Judicial Review) Act 1997, s.16.

[101] CPR 54.4.

[102] CPR 54.12(3).

[103] CPR 54.12(4).

attending the oral renewal hearing.[104] The ordinary threshold for the grant of permission is arguability: in essence, the Court will grant permission where it is satisfied there is an arguable ground for judicial review having a reasonable prospect of success and not subject to any discretionary bar (such as delay or alternative remedy).[105]

86. Two recent reforms were made in respect of permission. First, in 2013 the Civil Procedure Rules were amended to provide that where a claim is refused permission on the papers and is certified as totally without merit, the claimant may not request that decision to be reconsidered at an oral hearing.[106] Second, as a result of changes made by the CJCA to the Senior Courts Act, the court may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and it must consider this question if it is raised by the defendant. Where the court considers this question and finds it is highly likely the outcome would not have been substantially different it must refuse permission.[107]

87. In our view the permission stage performs its purpose well. It allows courts to filter out weak or vexatious claims,[108] or, following the CJCA reforms, those involving minor procedural defects, whilst retaining sufficient flexibility to ensure that meritorious claims can proceed. The statistics demonstrate that the permission stage is currently operating as an effective filter. In 2019 of the 2,435 cases that reached permission stage only 648 were granted permission (27%).[109] We would not support raising the threshold at which permission is granted as this would risk excluding good claims, undermining the purpose of judicial review of ensuring that the Government acts lawfully.

88. We would also oppose the removal of the right to oral renewal. First, a significant number of cases are granted permission to bring judicial review claims after oral renewal. Over the last five years, 3-4% of judicial review cases lodged were granted permission at the oral renewal stage. However, around 20% of the cases that receive permission do so at

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[104] See *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 at [76].

[105] See *Sharma v Brown-Antoine* [2007] 1 WLR 780 (PC) at [14(4)].

[106] CPR 54.12(7).

[107] Senior Courts Act 1981, ss.31(3C) and (3D).

[108] As Lord Diplock said in *R v Inland Revenue Commissioners ex p National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 at 643, it is also designed: "to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

[109] Ministry of Justice, Civil justice statistics quarterly' (n 7), Table 2.2

the oral renewal stage.[110] Thus, the oral renewal stage serves as an important safety net that maintains the integrity of the system. Second, the introduction of the totally without merit rule appears to be having its intended effect of deterring weak and unmeritorious claims. The number of cases in the Administrative Court classed as totally without merit has fallen to below half its 2014 levels (706 cases were classed as totally without merit in 2014, 17 per cent of cases lodged, whereas in 2019 324 cases were classed as totally without merit, just 10 per cent of cases lodged).[111] The same is true of immigration judicial reviews in the Upper Tribunal (Immigration and Asylum Chamber) UTIAC, where the number of cases deemed totally without merit has fallen from a peak of 6,318 or 33 per cent of claims disposed of in 2015/16 to 10 per cent of claims disposed of in 2019/20.[112]

Rights of appeal

(i) Appeals of a refusal of permission to apply for judicial review

89. It is possible to appeal to the Court of Appeal a decision of the High Court or Upper Tribunal to refuse permission to apply for judicial review where permission has either been refused: (i) at a hearing; or (ii) on the papers and recorded as totally without merit.[113] The test for permission to appeal is that "the court considers that the appeal would have a real prospect of success; or there is some other compelling reason for the appeal to be heard".[114] We recognise the additional pressure that dealing with permission to appeal applications from permission refusals places on the court's limited resources and potential to cause delays. That is why in October 2016 the CPR was amended to remove the right to oral renewal of permission to appeal if permission is refused on the papers which has significantly lessened the Court of Appeal's workload and reduced delays.[115] There is no further right of appeal from a decision by the Court of Appeal to refuse permission to appeal a decision to not to grant permission for judicial review.

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[110] ibid.

[111] Ibid, Table 2.4.

[112] Ministry of Justice, 'Tribunal statistics quarterly: January to March 2020, Main Tables' (2020), Table UIA_3, available at: www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2020.

[113] Where appealing a decision of the Upper Tribunal to refuse permission, permission to appeal must also have been refused by the Upper Tribunal.

[114] CPR 52.6

[115] The average number of weeks for between PTA granted and the hearing start has fallen between 2017 and 2019 for all appeals and for judicial review cases. Ministry of Justice, 'Royal Courts of Justice Annual Tables – 2019 (2020), Table 3.10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890424/civil-Justice-stats-main-tables-Jan-Mar.xlsx.

90. In 2018 a JUSTICE working party looking at ways to improve the immigration and asylum appeals process considered whether the right of appeal against refusals of permission should be curtailed. Proposals considered included only allowing appeals to the Court of Appeal in cases where the UTIAC had certified that it raised a point of law of public importance. As a safeguard, any refusal to certify would be reviewed on the papers by a more senior judge, possibly the President of the Upper Tribunal (Immigration and Asylum Chamber), a vice-presidential member or a visiting High Court judge. It would also be possible to judicially review the certification.[116]

91. The rationale behind this suggestion was to "prevent misuse of the system by those who see an advantage in the delay caused by bringing unmeritorious challenges, and make better use of judicial resources".[117] However, the majority of the Working Party rejected the proposal. They felt the right of appeal was an essential safeguard in the, albeit, small number of cases, including those recorded as totally without merit, which have succeeded on appeal. They pointed to recent important cases in the Court of Appeal and the Supreme Court in which it is unlikely that permission to appeal would have been granted if the proposed restrictions had been in place, thereby leaving unlawful executive action unchallenged.[118]

92. Such arguments would apply equally to judicial review claims outside the immigration and asylum context. We would therefore resist the removal of the right to appeal against permission decisions in all judicial reviews.

(ii) Appeals of a substantive judicial review decision

93. Parties may also appeal a substantive judicial review decision to the Court of Appeal and the Supreme Court. Such decisions are subject to the same rules for obtaining permission to appeal as any other type of decision. We can see no justification for removing or modifying this appeal right. There is no basis for singling out an exceptional standard for

[116] JUSTICE, Immigration and Asylum Appeals: A Fresh Look (2018), para 6.38, available at https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf.

[117] ibid, para 6.37.

[118] *Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167 where fraud was alleged by the Home Office in English language tests; *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 concerning foreign national offenders challenging their deportation on human rights grounds which, since they were certified, would have only had an out of country hearing; *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755 involving the appeal rights of extended family members of EU nationals.

appeals from judicial reviews. In fact, given the constitutional significance of judicial review and the impact of cases beyond the individual parties, it is important that the highest courts in the country have the opportunity to adjudicate on judicial review cases where necessary. Furthermore, between 2015 and 2019 there has been a consistent decline in the total number of (non-immigration and asylum) judicial review appeals filed in the Court of Appeal. Likewise, between 2015 and 2019, the total number of UKSC applications for permission to appeal from judicial review decisions has decreased year-on-year, from 37 in 2015 to 10 in 2019.[119] In these circumstances, we see no justification for further limiting the right of appeal in judicial review cases.

(g) Interveners

94. ToR 4(g) asks whether reforms are required in relation to interveners.

95. Since the mid-80s, JUSTICE has used third-party interventions with the aim of promoting a fairer, more effective, justice system, capable of protecting individual rights. We strongly believe that interventions can play an important role in assisting the courts, in particular in our adversarial system in which the courts rely on the parties to bring to light the essential issues, relevant evidence and legal arguments. Whilst this system works well for the most part, there are cases where the parties do not or cannot provide the court with all the information it needs to determine the issues fairly. This is particularly the case when the court is called upon to decide questions of public importance, where the outcome of the case will be felt much more widely than just affect the parties to the dispute, which given the nature of judicial review is often the case.

96. The value of interventions has often been recognised by the judiciary. The Senior Judiciary's response to the Government's 2013 consultation recognised this,[120] and there

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[119] "Immigration" is a separate category of appeals so it is likely that the judicial review figures exclude immigration judicial reviews.

[120] "The court is already empowered to impose cost orders against third parties. The fact that such orders are rarely made reflects the experience of the court that, not uncommonly, it benefits from hearing from third parties. Caution should be adopted in relation to any change which may discourage interventions which are of benefit to the court". Judiciary of England and Wales, 'Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'', (2013) para 37, available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf.

are many examples at Supreme Court,[121] Court of Appeal,[122] and High Court[123] level where the court has expressly relied on, and thanked, the submissions of third-party interveners in its judgment. Lady Hale has also noted that interventions can bring judges' attention to international and comparative jurisprudence. This is particularly helpful in an adversarial system where judges must decide the case on the arguments and authorities put before them, rather than on the research undertaken by themselves and their clerks as in civil law inquisitorial systems.[124]

97. We recognise that there have been concerns in the past that the expansion of interventions in the UK could lead to the development of a US-style approach to litigation, where the rules on interventions are looser and have arguably contributed to the politicisation of the courts.[125] However, these concerns have not materialised. The courts are able to regulate access to their time and resources, and only grant permission to intervene where they feel it will be of genuine assistance to the court. Where they do grant permission to intervene, they may do so on conditions and may give case management directions and often do so.[126]

98. The rules relating to interveners is another area that has recently been the subject of reform. Section 87 of the CJCA 2015 introduced a new statutory framework for the treatment of costs and third-party interventions. The changes codified the existing presumption that interveners are responsible for their own costs. It also introduced a duty to award costs against the intervener if any of the following four conditions are satisfied:[127]

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[121] *The Christian Institute and others v The Lord Advocate* [2016] UKSC 51 at [69]. The Supreme Court commented that, as a result of the submissions of the intervener, Community Law Advice Network, "there was more focus on article 8 of the ECHR […] than there had been in the debates both in the Inner House and before the Lord Ordinary".

[122] *R (on the application of S) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275 at [72] where Sedley LJ referred to Liberty's submission being of "great assistance".

[123] *HC v Secretary of State for the Home Department and Metropolitan Police* [2013] EWHC 982 (Admin), in Annex B to the judgment, the High Court referred to much of the substantial material before the court and many of the important arguments being contained in the submissions of Coram Children's League Centre and the Howard League.

[124] Lady Hale, 'Who Guards the Guardians?', (Public Law Project Conference, October 2013), 12, available at: https://www.supremecourt.uk/docs/speech-131014.pdf.

[125] Carol Harlow, 'Public Law and Popular Justice', (2002) 65 MLR 1.

[126] CPR 54A para 13.2

[127] Historically, there has been a strong presumption that all parties bear their own costs in relation to an intervention and that no order would be made against a public interest intervener. This broad approach is grounded in the public benefit offered to the court by a public interest intervention, and is reflected in the Supreme Court Rules. JUSTICE, *To Assist the Court: Third party interventions in the public interest* (2016), para 8.3, available at: https://justice.org.uk/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf.

a. the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
b. the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
c. a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or
d. the intervener has behaved unreasonably.[128]

However the court will not be required to make an order as to costs "if it considers that there are exceptional circumstances which make it inappropriate to do so".[129]

99. The costs risk facing interveners is further underscored by the fact that section 88(4) of the CJCA provides that *"the Court may make a costs capping order only on an application for such an order made by the applicant for judicial review in accordance with rules of court".* An intervener cannot therefore seek a costs capping order in order to try and limit the amount of costs that may be awarded against them.

100. When the new measures were introduced JUSTICE, PLP and the Bingham Centre for the Rule of Law noted that the measures could have a negative effect on the number and nature of interventions.[130] We have received anecdotal evidence from public law practitioners that there has been a chilling effect on the willingness of smaller organisations to intervene. In particular, this seems to be the case in respect of smaller organisations where an undefined costs risk is more likely to endanger their financial stability. Some organisations have tried to mitigate this risk by seeking undertakings from parties that they will not pursue costs against the intervener and asking the court to only grant permission if it agrees that the intervention as proposed in the application will be of significant assistance to it and will relate to matters which are necessary for the court to consider.

101. We do not consider that the rules relating to third party interventions need to be reformed in any way that would make it more difficult to intervene or increase costs or

[128] CJCA, s.87(5).

[129] CJCA, s.87(7).

[130] JUSTICE, PLP and the Bingham Centre for the Rule of Law, 'Judicial Review and the Rule of Law' (n 1) para 3.43.

other risks to interveners. However, we are of the view that greater guidance on interventions would be of assistance generally and would help reduce the chilling effect of the CJCA reforms. We suggest this takes the form of a Practice Direction dedicated to the conduct of an intervention, which could outline the information to be provided by a prospective intervener at the application for permission stage and the process which an intervener might follow after permission is granted. It could deal with the treatment of costs in more detail and create a framework against which reasonable and responsible behaviour could be assessed.[131]

Costs

102. Question 7 of the Call for Evidence asks if "*the rules regarding costs in judicial reviews [are] too lenient on unsuccessful parties or applied too leniently in the Courts?",* whilst Question 8 asks *"[a]re the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?*"

103. The costs of bringing a judicial review claim are prohibitively high for the average citizen or small business. A simple two-hour judicial review can cost upwards of £8,000, with a substantial two-day hearing costing around £200,000.[132] By comparison, one study recently found the average savings of a person in the UK to be £9,633.30.[133] One reason for the high costs is that all claims have to be brought in the High Court (or Upper Tribunal), even where there is no monetary value in dispute. This stands in contrast with civil litigation involving sums of under £10,000, where claims are brought on the small claims track and parties cannot recover legal costs.[134]

104. Although legal aid is available, which also protects the claimant from an adverse costs order, the scope is limited, and the means test is very strict. Legal aid is not available for those with savings or capital over £8,000 (£3,000 in immigration cases) or with a monthly

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[131] JUSTICE, *To Assist the Court* (n 127), paras 16.1-16.6.

[132] Tom Hickman, 'Public Law's Disgrace', (*UK Constitutional Law Association*, 9 February 2017,), available at: https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/.

[133] The same study found that 6.5% have no savings, 25.95% have less than £1,000 in savings. The average savings among all the 2,000 people surveyed was £35,361.09. Once the highest and lowest savers were removed, the middle 66% of people surveyed had an average savings balance of £9,633.30. Raisin UK, 'Who's better at saving money?', (24 March 2020), available at: https://www.raisin.co.uk/newsroom/articles/better-saving-money/.

[134] Hickman, 'Public Law's Disgrace' (n 132).

disposable income over £733.[135] Disposable income refers to income after tax, rent and national insurance but does not account for council tax or any bills and expenses.

105. Costs is another area that has been subject to recent reforms. In 2014, the CJCA replaced the judge-developed protective costs order regime established in *Cornerhouse*[136] with cost capping orders ("CCOs"). CCOs limit or remove the liability of a party to judicial review proceedings to pay another party's costs in connection with any part of the proceedings. We have been told by practitioners that placing the protective costs order regime on a statutory footing has made it more straightforward to obtain an order and in many cases CCOs are agreed between the parties. However, we are also told that there are a number of features of the regime that deter claimants and/or practitioners from bringing cases. In particular the provision for a reciprocal cap on the defendant's liability for costs has a negative impact on the economic viability for practitioners of taking on cases as does the fact that an application for a CCO can only be made once permission is granted, which leaves claimants and/or practitioners 'at risk' financially until this point. In addition, CCOs cannot be granted unless the issue in question is of wider public importance. If it is not, then the claimant must bear the full financial risk.

106. In light of the above we have grave concerns about the current costs regime and its impact on access to justice. Given the constitutional importance of judicial review in holding to account public authorities, it is in our view imperative that individuals with potentially meritorious judicial review claims are not prevented or unduly deterred or discouraged from bringing judicial reviews due to the financial cost and risks involved.

107. As the Panel is aware, Sir Rupert Jackson has made two proposals in respect of judicial review costs. The first, in his 2009 Review of Civil Litigation Costs, was the implementation of qualified one-way costs shifting ("QOCS") for judicial review claims. The costs shifting was qualified in so far as costs could be ordered against a claimant but could not exceed a reasonable amount having regard to all the circumstances, including the financial resources of the parties and their conduct in the dispute. His reasons included the public interest in enabling claimants with arguable claims to bring them and that two-way costs shifting was not necessary to deter frivolous claims as the permission

[135] The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, regulations 8(2) and (3).

[136] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

requirement was an effective filter. He noted that one-way costs shifting in judicial review cases had proved satisfactory in Canada.[137]

108. When QOCS was not taken forward by the Government, Sir Rupert made a recommendation to extend the Aarhus rules to all judicial reviews so that costs recoverable by a successful defendant are capped at £5,000 in respect of claimants who are individuals (or £10,000 for companies), with a reciprocal cap of no costs being recoverable by a claimant in excess of £35,000.[138] Sir Rupert recommended that these rules be extended to all judicial reviews, and that the caps should be fixed at the permission stage. He proposed that, if the claimant's costs liability exceeded the default sum, then they should have 21 days to opt out without further liability. He did however recognise that even these lower caps would still be prohibitive for many claimants.[139]

109. In its 2019 consultation on the implementation of Jackson's costs proposals, the Government rejected extending the Aarhus rules, stating it believed that "[e]xtending cost capping increases the risk of less meritorious [judicial reviews] coming forward with increased costs to the government and other public-sector defendants."[140] The rejection was prefaced by the statement that Sir Rupert's recommendation was "intended primarily to enable access to justice, rather than to control costs". However, the Government did not perceive there to be an "access to justice issue in respect of non-Aarhus JRs", given the availability of CCOs and legal aid.[141]

110. No evidence was given in support of the assertion that there is no access to justice issue in respect of non-Aarhus JRs. In our view the factors outlined above strongly indicate that there is one. However, further data is needed on the actual costs of judicial review claims and the impact of those costs on the behaviour of claimants and putative claimants. We

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[137] The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), pp.310-311, available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[138] Article 9 of the Aarhus Convention obliges signatories to establish procedures which are "not prohibitively expensive" in environmental disputes. The cap is optional and can be raised in some circumstances.

[139] The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (July 2017), para 3.4 p.130, available at: https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf.

[140] Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals*, (March 2019) para 2.4 p.37, available at: https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixedrecoverablecostsconsultationpaper.pdf.

[141] ibid.

acknowledge the potential issues with Jackson's proposals but, in light of the issues identified above, we think they are worth further consideration and piloting and evaluation.

111. At a minimum we urge the panel not to make any recommendations that would further increase the costs risks to claimants.

Alternative Dispute Resolution

112. Question 12 of the Call for Evidence asks whether *"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?"* Questions 10 and 11 are of a similar nature, asking *"[w]hat more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?"* and whether respondents to the consultation *"have any experience of settlement prior to trial".*

113. The judicial review Pre-Action Protocol already provides that parties should consider whether some form of ADR would be more suitable than litigation and may be required to provide evidence to the court that alternative means of resolving their dispute were considered. It states that if the protocol is not followed there may be costs implications, particularly where a party has ignored an invitation to, or refused to, participate in ADR.[142] Paragraph 10 lists possible methods of resolving disputes without resorting to litigation. It makes clear that it is not the purpose of the protocol to stipulate what method parties should adopt, acknowledging that the most appropriate method will depend on the particular dispute at hand.

114. It is important to note that informal methods of ADR are frequently adopted, and the majority of judicial review claims are settled between the parties early in the process, many as a result of following the Pre-Action Protocol.[143]

115. However, there are also a number of features of judicial review which may make ADR unsuitable:

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[142] Pre-Action Protocol for Judicial Review, paras 9-12.

[143] Approximately 80 to 85% of pre-action protocol letters written as part of the Pre-Action Protocol Project between 2016 and 2019 were successful in that they were acted upon by the public body in question and resulted in the client receiving the relevant service. The project was run by Deighton Pierce Glynn and involved lawyers assisting frontline migrant advisors prepare pre- action protocol letters in relation to a number of areas of law, including social care, asylum support and housing (Richard Malfait and Nick Scott-Flynn, *Evaluation of the Pre-Action Protocol Project* (August 2019), pp.4, 17-18 and 29, available at https://d195fe63-5d46-4c4f-9e7c-909b1d5c5ab4.filesusr.com/ugd/52ee2f_f16d8cfad90348288aa0d168ca24dfda.pdf.

a. Judicial reviews often involve 'crisis situations' where there is little time for discussion and negotiation.

b. Even where there is not a 'crisis situation', the tight time limits may limit opportunity for dialogue.

c. There may be little or nothing to negotiate. For example, whether a public authority owes a duty to a claimant or has abused its powers are not generally matters that can be negotiated.

d. There is often a power imbalance between the parties in judicial review proceedings.[144]

e. The importance of judicial review, both in terms of its constitutional function and value to the wider public, militates against a greater role for ADR on some occasions, as a settled case does not set a precedent and only provides a remedy for the individual claimant, as opposed to resulting in change that is in the wider public interest.

f. Formal methods of ADR are often no cheaper than judicial review.[145]

More generally, as with all disputes, the perspectives and interests of both parties can also affect the opportunity for discussion and negotiation. The parties may have different views regarding the urgency of the proceedings the motives of the other party; and the other party's available resources.[146]

116. In our view the introduction of formal and/or compulsory ADR would be unlikely to avoid the need to proceed with judicial review and may be positively inappropriate in certain circumstances as well as costly. Informal negotiation and discussion already take place and should continue to be encouraged from the earliest stage possible. We were told by advice sector organisations that it is difficult to get public authorities to engage before

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[144] Bondy and Sunkin, 'The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing' (*Public Law Project,* 2010), pp. 18-19, available at: https://publiclawproject.org.uk/wp-content/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf.

[145] Bondy and Doyle, 'Mediation in Judicial Review: A practical handbook for lawyers' (*Public Law Project,* 2011) p.19, available at: https://www.nuffieldfoundation.org/sites/default/files/files/MJRhandbookFINAL.pdf.

[146] Bondy and Sunkin, (n 144) pp. 20-24.

sending a formal pre-action protocol letter. We recognise that this is likely to be due to the resource constraints under which they are operating, particularly at local level. However, earlier engagement would help the resolution of disputes and result in improved overall efficiency. For example, the independent evaluation of Deighton Pierce Glynn's Pre-Action Protocol project whereby lawyers assist frontline advice organisations writing pre-action letters, found that "the project seems to be helping government department conduct their work more efficiently and just focus on complex cases".[147] We have highlighted in this paper the benefits of early communication between parties and repeat that the ability of parties to engage in discussion and negotiation or mediation, is affected by the length of the time limits. In our view (i) improving administrative decision making so as to militate against the need for individuals to use remedies such as judicial review to correct errors;[148] and (ii) ensuring effective and accessible appeal processes and complaints procedures[149] would have the greatest impact on avoiding judicial reviews.

Future consultation

117. Finally, we would like to note that given the potential far reaching impact that reforms of judicial review may have on access to justice, the rule of law and our constitution, we would expect the Government to engage in a full public consultation on any specific proposals for reform that they intend to take forward following the Review.

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[147] Malfair and Scott-Flynn (n 143), p.34.

[148] For example, in respect of immigration and asylum judicial reviews, which account for the majority of judicial review claims each year, JUSTICE found in its 2018 report on the immigration and asylum appeals process that better Home Office decision making was key to delivering a better appellate and judicial review system and made recommendations for how it can be improved (JUSTICE (n 116). See also Professor Robert Thomas and Dr Joe Tomlinson, *Immigration Judicial Reviews: an Empirical Study* (2019), available at https://drive.google.com/file/d/1IsTGQJgs4W8ERvmtWBFYrdexPQd9cXqr/view.

[149] The Bowman Committee Report concluded in 2001 that the quantity of judicial review litigation largely depends on factors other than procedure, in particular the existence and quality of appeal routes. Bondy and Sunkin, (n 144) p.4.

Appendix - Australian system of administrative law

Overview of the Australian system of administrative law

Australia has a unique system of administrative law, comprising of the following elements:

1. **Administrative Decisions (Judicial Review) Act 1977 (Cth)** (**ADJR Act**) **–** this sets out in statute jurisdiction for judicial review of administrative decisions made under Commonwealth legislation, the grounds for judicial review, available remedies and the procedure for bringing a judicial review claim.

2. **Administrative Appeals Tribunal Act 1975 (Cth)** (**AAT Act**) – this created an independent administrative appeals tribunal which is conferred with jurisdiction to conduct full merits reviews of administrative decisions. The AAT only has jurisdiction to review a specific decision where legislation expressly confers it. This is by no means universal but occurs for decisions in over 450 Commonwealth enactments, in a diverse range of areas including migration, corporations and financial services regulation, civil aviation, child support, bankruptcy and taxation.[150]

   The scope of AAT review can also encompass decisions which have been expressly excluded from ADJR Act judicial review, provided that such jurisdiction has been conferred by statute or subordinate legislation.[151]

3. **Section 75(v) of the Australian Constitution** which confers original jurisdiction on the High Court to granted remedies of mandamus, prohibition and injunction against an officer of the Commonwealth. This has been interpreted as providing constitutional protection to "an entrenched minimum provision of judicial review".[152]

Comparison to the UK

The strict legality / merits distinction, arising from Australia's constitutional separation of powers, has limited the ability of Australian courts to consider substantive judicial review

[150] For a full list of decisions, see <https://www.aat.gov.au/AAT/media/AAT/Files/Lists/List-of-Reviewable-Decisions.pdf>.

[151] For example, the AAT can review "objection decisions" under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (conferred by Division 165 of that Act) despite the exclusion of ADJR Act judicial review of such decisions.

[152] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513.

concepts such as substantive fairness and legitimate expectations. Whilst this delineation has meant that judicial review may be more limited in Australia than in the UK, the existence of the AAT means that governmental decision making, at least where it is susceptible to AAT review (noting that many decisions are not reviewable by the AAT), is overall subject to a more comprehensive review by the courts and tribunals, as the AAT is able to assess the merits of administrative decisions in a way that the courts in the UK deciding a judicial review claim cannot. It is worth noting, however, that while a decision may be susceptible to both forms of review, an applicant is ordinarily required to pursue merits review first – generally, all other appeal rights must be exhausted before a court will entertain an application for judicial review.[153]

The constitutionally entrenched s 75(v) judicial review, and a similar Federal Court jurisdiction under s 39B of the *Judiciary Act 1903* (Cth), mean that judicial review of a decision may still be available even where ADJR Act judicial review of those decisions has been excluded, although there will be some decisions for which neither avenue of review is available.[154]

Issues with codification of judicial review under the ADJR Act

Satellite disputes over preconditions to ADJR Act review: The ADJR Act limits its scope to decisions which are "final and operative", "administrative" and made "under an enactment" which, in turn, has led to a large number of "satellite disputes" concerning their meaning. The extensive body of case law that has emerged illustrates the extent of such disputes, which lengthen and increase the cost of judicial review applications. Moreover, inherent uncertainties in the language of the ADJR Act suggests that such 'threshold disputes' will continue. For example, determining whether a decision is "administrative" requires a distinction between decisions of an "administrative", "legislative", and "judicial" character, which the High Court has described as unstable.[155] Similarly, the meaning of "under an enactment" in the ADJR Act has focused attention on the source of the legal power, which has resulted in fine, and sometimes controversial, distinctions on the availability of judicial review, leading to suggestions that a functional approach akin to the UK's *Datafin* test should be preferred.[156]

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[153] See, for example, *Attorney-General (SA) v Marmanidis* (2019) 132 SASR 320, [218].

[154] For example, where no 'officer of the Commonwealth' is involved.

[155] *Griffith University v Tang* (2005) 221 CLR 99 at [63] (***Tang***).

[156] See Michael Taggart, "'Australian Exceptionalism' in Judicial Review" (2008) 36 *Federal Law Review* 1, referring to *Tang* and other decisions and concluding that "*It beggars belief how a reform like the ADJR Act (and its State equivalents) which was intended 'to simplify and clarify the grounds and remedies for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests' can be interpreted to frustrate that intention in Tang"* and *"there is certainly a sense in which*

Litigation over the meaning of judicial review grounds: The enactment of the ADJR Act also led to some initial disputes concerning the meaning of the codified judicial review grounds (which have since been clarified over time), particularly in respect of grounds which departed from the common law position.[157]

The ADJR Act has been criticised as hampering the development of Australian administrative law by codifying the grounds of review based upon assumptions as to the proper scope of administrative law at a particular point in time.[158] For example, Kirby J (a judge of the High Court of Australia) has observed that "[t]o some extent the development of the common law of judicial review in Australia was retarded by the enactment of the AD(JR) Act in 1977".[159] Legal scholar Professor Aronson has also noted that the ADJR Act lacks reference to fundamental concepts such as the rule of law, separation of powers and accountability, as well as broader ideals such as liberal democratic principles and human rights.[160]

Fragmentation of judicial review: The existence of two different routes for judicial review under the ADJR Act and common law judicial review can lead to satellite litigation over the availability of each route, increased case load as cases are brought via both routes and the potential for differential outcomes for claimants due to a divergence in remedies.

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the High Court did not see through the institutional form to the reality of the situation" in applying the "under an enactment" test.

[157] For example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, which concerned the "no evidence" ground of review which the ADJR Act had narrowed from the common law position.

[158] Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) *12 Australian Journal of Administrative Law* 79. Despite the inclusion of two open-ended grounds of review under the ADJR Act ("otherwise contrary to law" or which is an "exercise of power in a way that constitutes abuse of the power), which were intended to allow for further flexibility and "innovation in judicial review", these concerns have not been alleviated. As one prominent Australian academic has noted, in the more than 30 years since those grounds were first enacted they have been "so underused and under-theorised that they may fairly be described as 'dead letters, (Matthew Groves, 'Should we follow the Gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (2010) 34 *Melbourne University Law Review* 736, 757).

[159] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, [157] (Kirby J).

[160] Ibid 94.