Judicial Review Reform: The Government Response to the Independent Review of Administrative Law

Consultation Call for Evidence - Response

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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 particular, JUSTICE has throughout its existence been concerned with 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 to the consultation contained in the Government Response to the Independent Review of Administrative Law (the "Consultation").[1] The group is largely the same as the advisory group convened to inform JUSTICE's previous response to the Independent Review of Administrative Law ("the IRAL"), ("JUSTICE's IRAL submission"). The group comprises the following members:

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

3. The group comprises lawyers who are experts in public law and have a wide range of experience across England and Wales, Scotland and Northern Ireland. In particular, the six 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.

[1] The work for JUSTICE and the drafting of this response was undertaken by Florence Powell (Sir Henry Brooke Fellow) and Stephanie Needleman (Senior Lawyer).

4. The report of the IRAL (the "IRAL Report") is a detailed and considered analysis of some of the key elements of judicial review within the UK. Crucially, the IRAL Report reiterates the vital importance of judicial review to the UK's constitutional arrangement,[2] the rule of law, access to justice,[3] and in promoting good governance. As the IRAL Report recognises, all of society, including public bodies, "have an interest in legality as an element of good administration".[4]

5. Whilst we do not agree with all the findings of the IRAL Report, we welcome its overall conclusion that there is no significant need for reform of judicial review. The IRAL Report recognises that the existence of one or two "difficult" cases that "attract different views" should not be taken to be indicative of structural malaise in the judicial review system and is "rarely justification for radical reform".[5] Further, disagreement as to the "appropriate place" of judicial review within the UK constitution should not be frowned upon. Rather, as the IRAL Report states, it is "inevitable", and in fact "shows that the checks and balances in our constitution are working well."[6] We do not agree that the Consultation's proposals "complement"[7] the IRAL Report's findings or its limited proposals in relation to specific areas of judicial review. Rather, the Consultation appears to discount many of the IRAL Report's findings that reform of judicial review is neither required nor justified. The proposals suggested in the Consultation go far beyond the scope and findings of the IRAL Report; they go to fundamental issues concerning the role of judicial review and could have significant constitutional implications. Their implementation should not be taken lightly – as the IRAL Report concludes, the Government should "think long and hard before seeking to curtail [the judiciary's] powers".[8] We fully agree.[9]

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[2] IRAL Report, Conclusion, para. 2.

[3] For instance, IRAL Report, para. 1.43, "Judicial review is considered an essential ingredient of the rule of law in the care of an independent judiciary. Judicial review is an essential element of access to justice, which is a constitutional right and also a right protected by the European Convention."

[4] IRAL Report, Introduction, para.34.

[5] IRAL Report, Conclusion, para. 6.

[6] IRAL Report, Conclusion, para. 11.

[7] Consultation, Introduction, para. 7.

[8] IRAL Report, Conclusion, para. 10.

[9] In addition, the Consultation poses 19 complex and technical questions across a broad range of topics. Many of the questions go to the heart of the operation of administrative law, raise difficult issues of principle, and go far beyond the scope of the IRAL. As expressed in a joint letter to the Lord Chancellor, in our view the six-week consultation period is insufficient to allow for the detailed scrutiny and meaningful engagement necessitated by these proposals.

Executive summary

6. As the Consultation states, "the rule of law matters"[10]. This principle requires, amongst other principles, that: executive action must be within its legal bounds; no person should be subject to unlawful action; there be an independent judiciary to enforce the rule of law; and there be access to such a judiciary. Judicial review plays a crucial constitutional role in upholding the rule of law; any proposed changes to it need to be carefully considered in light of this role.

7. In respect of question 2, we oppose the proposal to legislate to remove *Cart* judicial reviews. First, we have considerable concerns with the underlying empirical evidence used in the IRAL Report and in the Consultation to justify the proposal. Second, *Cart* judicial reviews help prevent serious injustices in an area that often involves fundamental human rights. Any proposal must be based on empirically sound evidence and address the constitutional importance of *Cart* judicial reviews.

8. In respect of question 3 (devolution), many of the proposed amendments to judicial review are likely to have implications for the devolved nations and raise considerable issues of bifurcation of the judicial review jurisdictions within the UK. Although there are already points of distinction amongst those jurisdictions, further bifurcation of jurisdictions within the UK should be avoided. It is inherently undesirable and would create significant uncertainty.

9. In respect of questions 1 and 4 to 7 (remedies and nullity),[11] we are opposed to the proposals, other than in relation to introducing suspended quashing orders on a discretionary basis.

   a. The concept of nullity reflects the importance of government under law and legal certainty, two key elements of the rule of law. Fundamentally, unlawful decisions should not be upheld. Legislating to re-introduce the concept of reviewable non-jurisdictional errors of law would create considerable uncertainty, as the distinction is difficult to make in practice, and would result in continued unlawful infringements

[10] Consultation, para. 18.

[11] The response addresses questions 1 to 16 of the Consultation, however we have not addressed these in numerical order below given the overlap between some of the questions and the need to address certain overarching issues before answering other questions.

on individuals' rights.

b. Prospective only remedies ("PO Remedies") risk substantial injustices to persons impacted by the unlawful decision or delegated legislation and are generally contrary to the rule of law, including certainty. There are occasionally exceptional circumstances where there are significant administrative or practical implications to a quashing order, or where a quashing order would have considerable consequences on third parties. In these rare cases, the courts are already able to exercise their remedial discretion to craft the appropriate remedy given the competing considerations.

c. We can see some benefit in the courts, in exceptional circumstances, suspending the effect of a quashing order to allow for potential gaps in legislation or policies resulting from the quashing order to be addressed (for example in the circumstances that arose in *Ahmed*[12]) and are of the view that an explicit discretion to do this should be provided for in statute. However, this is different from the type of suspended quashing order ("SQO") proposed in the Consultation which would result in the quashing order never taking effect if certain conditions are met.

d. Further, the courts' remedial discretion is crucial for the fair and effective administration of justice. We are strongly opposed to any legislation that specifies the criteria the courts should consider when exercising their remedial discretion, still less legislation that entails a presumption in favour of, or mandates the use of, prospective remedies. Such legislation would be fundamentally inconsistent with the rule of law.

10. In respect of question 8, we are opposed to the proposals to strengthen the effect of ouster clauses. Independent court review of administrative decision-making is of vital importance to the rule of law and the checks and balances in the UK's constitution. The courts' scrutiny ensures that there is a means to address abuses of power, as well as promoting effective administration. It should not be legislated away lightly.

11. In respect of questions 9 to 15 (procedural reform):

a. We can see the benefit in removing the promptitude requirement from the time

[12] *Ahmed v HM Treasury (No 2)* [2010] 2 AC 534.

limit for judicial review claims (question 9) as this could help provide clarity to all parties. However, we would caution against any extension to the three-month time limit (question 10) or to allowing parties to extend the time limit by agreement (question 11). There is a public interest in judicial review, and we are concerned by the impact the proposals would have on third parties.

b. A track system (question 12) would create unnecessary procedural complexity to judicial review claims. It would be difficult to effectively allocate claims to the different tracks, which would potentially be to the detriment of urgent claims.

c. We are opposed to the suggestion of introducing a requirement on parties to identify organisations or wider groups that might assist litigation (question 13). It would be difficult to identify all potential interveners in every case and where applicable, interveners are already identified to the court as early as possible. The proposal entails an unnecessary procedural burden and risks further stifling interventions.

d. We agree with the proposal that there should be a formal provision in the Civil Procedure Rules ("CPRs") which allows a claimant to file a 'Reply' (question 14). However, we consider that the time limit should be 14 days, rather than seven days, following receipt of the Acknowledgement of Service.

e. It is unclear to us what the purpose is of the proposals in relation to Summary Grounds of Resistance and Detailed Grounds of Resistance (question 15). The Grounds of Resistance benefit defendants as well as the court and claimants, and it is a fundamental principle that a party must respond to a claim to defend it. A response to a pre-action protocol letter is no substitute.

f. We do not agree that the time limit at CPR 54.14 for serving Detailed Grounds of Resistance should be extended; the swift resolution of claims is important for certainty and for ensuring relief is provided quickly when needed.

The rule of law and judicial review

12. The critical importance of the rule of law in the UK's constitution is both uncontroversial and key, having been recognised extensively by the courts, section 1 of the Constitutional

Reform Act 2005, the IRAL Report and the Consultation. However, we consider that the approach to the rule of law adopted in the Consultation is unduly restrictive. In our view many of the proposals in the Consultation would, if implemented, undermine core tenets of the rule of law (see paragraphs 30 - 35, 51 - 60, 70 - 72, 84 - 87 below) that we consider worth reiterating in this response.

13. The principle that all are governed by the law, including the Government is the core element of the rule of law.[13] As has been expounded countless times by the courts, "[t]he rule of law requires that those exercising public power should do so lawfully".[14] This is initially recognised in the Consultation which states that the laws made by Parliament should govern all, including the Government and "should be enforced by the courts (or another body) according to Parliament's intent".[15]

14. Throughout much of the rest of the Consultation the rule of law is equated with certainty.[16] We do not disagree that certainty and predictability are important elements of the rule of law; laws should be able to guide conduct so as to enable individuals to be able to plan their lives in accordance with the law.[17] However, first, as explained further below, many of the Consultation's proposals would in fact undermine certainty, rather than enhance it. Second, the rule of law requires more than certainty and predictability. Even under a formal conception, the rule of law also requires (amongst other principles) laws to be accessible,[18]

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[13] As the Supreme Court said in *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [68] "[a]t the heart of the concept of the rule of law is the idea that society is governed by law" (Lord Reed).

[14] *Bobb v Manning* [2006] UKPC 22 at [14] (Lord Bingham).

[15] Consultation, para. 26.

[16] In relation to prospective only remedies (para. 68), suspended quashing orders (para. 69) and in the criticism of the concept of the nullity (para. 76).

[17] Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195. As one Government department made in its submissions to the IRAL Report: "[t]he rule of law requires predictable rules around which citizens, businesses and government can plan their activities and lives" (IRAL Report, para. 2.62). P. Craig, 'The Rule of Law', paper included as Appendix 5 to House of Lords Select Committee on the Constitution, 6th Report of Session 2006-2007, 'Relations between the Executive, the Judiciary and Parliament', (2007) HL 151, p.151. See also *R. (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [34] (Lord Dyson); *R v Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2000] UKHL 61 (Lord Nicholls).

[18] As Lord Neuberger observed "the laws must be freely accessible: that means as available and as understandable as possible", Lord Neuberger, 'Justice in an Age of Austerity', JUSTICE – Tom Sargant Memorial Lecture (2013), para. 2, available at: https://www.supremecourt.uk/docs/speech-131015.pdf. For instance, the Home Secretary could not follow unpublished guidelines on detention of asylum seekers, which interfered with the liberty of the subject. Publication of the policy was necessary to afford it legality, *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768.

legislation to not be retrospective without a strong justification,[19] there to not be punishment when there is no law, [20] and consistency and equal treatment of all in the application of the law. [21]

15. Crucially, the rule of law also requires an effectively functioning independent judiciary[22] who "ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced". [23] If laws are not enforceable, they lose their value and "might as well not exist",[24] undermining the sovereignty of Parliament and the legislation it enacts. As Lord Dyson has said, the courts have a "constitutional role as guardian[s] of the rule of law*"* [25] and as the IRAL Report recognised, "judicial review is considered an essential ingredient of the rule of law in the care of an independent judiciary." [26] This constitutional role of the courts is essential to the maintenance of the separation of powers.[27] The courts act as a crucial check on the abuse of power, ensuring Government action is in accordance with the law and holding the executive accountable.[28]

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[19] *R. (on the application of Reilly (No.2) and Hewstone) v Secretary of State for Work and Pensions* [2014] EWHC 2182 at [82] (Lang J).

[20] *Wheeler v Leicester City Council* [1985] A.C. 1054. Dicey's first principle of the rule of law was that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint". Dicey, 'The Law of the Constitution', 10th Edition, (Macmillan & Co Ltd: 1959).

[21] K. Steyn, 'Consistency—A Principle of Public Law?' [1997] J.R. 22; *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 at [122] (Lord Brown of Eaton-under-Heywood). The concept of equality before the law was expressly recognised by the then Lord Chancellor, Michael Gove, in his speech to the Legatum Institute, 'What Does a One Nation Justice System Look Like?' (2015), available at: https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like, "The belief in the rule of law, and the commitment to its traditions, which enables this country to succeed so handsomely in providing legal services is rooted in a fundamental commitment to equality for all before the law."

[22] IRAL Report, para. 1.43; *R (Cart) v The Upper Tribunal* [2011] UKSC 28, at [30] "The rule of law requires that statute law be interpreted by an authoritative and independent judicial source" (Lady Hale).

[23] *Unison*, no.13, at [68]. See, for instance, *A v Secretary of State for the Home Department* [2004] UKHL 56 at [42], where Lord Bingham stated that the "function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law".

[24] Lord Neuberger (2013), no.18.

[25] *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 at [42] - [44] (Lord Dyson MR).

[26] IRAL Report, para. 1.43.

[27] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 at [142] (Lord Reed).

[28] The 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' (2015), available at: https://justice.org.uk/wp-content/uploads/2015/11/Judicial-Review-and-the-Rule-of-Law-NGO-Summary-FINAL.pdf. As Lady Hale, quoted by the IRAL Report at para. 1.4, stated the object of judicial

16. Further, for laws to be enforceable and for courts to fulfil their essential constitutional role in a meaningful way, there must be access to the courts, including access to judicial review. [29] As the Supreme Court set out in *UNISON* without, in principle, unimpeded access to courts "laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade."[30] Likewise, the rule of law requires there to be an effective judicial remedy and a means of holding the executive accountable.[31]

17. We are concerned that many of the proposals in the Consultation would undermine these fundamental principles of the rule of law.

Implication for the devolved nations

Question 3: *Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?*

18. We do not support the implementation of the majority of the Consultation's proposals, as explained below, but nevertheless we consider it worth highlighting issues that may arise as regards the devolved nations if the proposals were introduced. The Consultation states that the "proposals will only apply to one reserved matter (the proposal on *Cart* Judicial Reviews), and the jurisdiction of England and Wales."[32] We therefore understand that, other than in relation to *Cart* judicial reviews, the Government is not currently intending to seek to implement any of its proposed changes to judicial review principles, remedies and procedure in the devolved nations. However, many of the proposed amendments to judicial review in the Consultation are likely to have implications for the devolved nations and raise considerable issues of bifurcation of the judicial review jurisdictions within the

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review is to maintain the rule of law and ensure that, "within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise" (*Cart,* no.22, at [37]).

[29] This right has been long recognised in the common law: *Raymond v Honey* [1983] 1 AC 1; *R v Lord Chancellor, ex p. Witham* [1998] QB 575; *Ex p. Leech (No.2)* [1994] Q.B. 198. More recently cases such *as R. (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710 and *Unison* (no.13), have reiterated the fundamental nature of access to justice as a requirement of the rule of law.

[30] *Unison,* no.13, at [68],

[31] *Ahmed v HM Treasury* [2010] 2 AC 534; *R v Commissioner of the Metropolis, ex p Blackburn* [1968] 2 QB 118, at p. 148E-G, explaining that policy duty was enforceable by mandatory order, since otherwise "however brazen the failure of the police to enforce the law, the public would be without a remedy…The very idea is as repugnant as it is starting" (Edmund-Davies LJ).

[32] Consultation, para. 59.

UK. Although there are already points of distinction amongst those jurisdictions, such a further bifurcation is inherently undesirable and would create significant uncertainty.

19. The courts in the devolved nations have jurisdiction in respect of reserved matters and the same judicial review application could often be brought in any of the jurisdictions across the UK.[33] The proposals suggested by the Consultation represent fundamental changes to the mechanisms, availability of and remedies from judicial review. There would be considerable confusion were the results of similar judicial reviews on the same matters to reach different conclusions because of a bifurcation of jurisdictions across the UK. In relation to the proposals on remedies, a position where a statutory instrument (or a decision) on a reserved matter was found to be unlawful by a court in England and Wales, but only a prospective remedy was available would raise considerable uncertainty as to the position of the same statutory instrument in the devolved nations. Likewise, there would be a risk of different laws, practices and procedures applying to different respondents in the same case, creating a "form of two-tier justice that would be difficult to justify and complex to operate in practice".[34]

20. The greater the changes made to the process of judicial review in England and Wales, the greater the problem of bifurcation will be and the more likely such anomalous situations could arise.[35] The IRAL Report recognised the importance of keeping administrative order broadly the same across the UK, recognising that "[t]o be avoided is a system which is more complex and uncertain than the existing system, which has all the advantages of familiarity and relative freedom from technicality."[36] These concerns still apply, despite the shift in the Consultation to the availability of judicial review, remedies and procedure.

21. Further, as discussed in our submission to the IRAL, there are significant constitutional and practical questions as to how any proposed reforms would be implemented in the devolved nations. Proposed changes to judicial review, even if purely restricted to procedure, would require legislative intervention in Northern Ireland and Scotland, or for

[33] JUSTICE's IRAL submission, para. 45. There are several areas where this happens, for instance in immigration. Further, the supervisory jurisdiction of the Court of Session in Scotland 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 (*Tehrani v Secretary of State for the Home Department* [2007] 1 AC 521 (HL)). JUSICE's IRAL submission, para. 33.

[34] Bar Council of Northern Ireland IRAL submission, para. 14.

[35] The submissions to the IRAL and the IRAL Report clearly set out the difficulties and uncertainties that could arise from a bifurcation of jurisdictions (IRAL Report, para. 5.38 – 5.48).

[36] IRAL Report, para. 5.48.

the devolved institutions to have passed a legislative consent motion.[37] As the IRAL Report concluded "the potential for statutory intervention to become a matter of serious dispute between the UK government and the devolved administrations should not be underestimated."[38]

Cart judicial reviews

Question 2: *Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?*

22. The Consultation accepts the recommendation from the IRAL Report to legislate to remove the possibility of judicial reviews of Upper Tribunal ("UT") refusals of permission to appeal a decision of the First-tier Tribunal (the "FTT") ("*Cart* JRs"). The reasons set out in the Consultation for accepting this recommendation are twofold. First, the Consultation, relying on empirical analysis conducted by the IRAL, concludes that because so few errors of law have been identified through *Cart* JRs, compared to the large number of *Cart* JR applications, the cost of *Cart* JRs is too high. The "concept of diverting large amounts of public resources towards these cases" is considered by the Consultation to be "disproportionate" to the potential injustices that *Cart* JRs were designed to address.[39] Second, the Consultation suggests that the outcome of *Cart* was "contrary to the intention of Parliament" as "the Upper Tribunal was originally intended to be broadly equal to the High Court" and "[i]n declaring Upper Tribunal decisions amenable to Judicial Review, the Supreme Court effectively downgraded the intended status of the Upper Tribunal."[40] This second argument is in direct contrast to the position argued by the Government in *Cart.* At the time, the Government did not seek to argue in the Supreme Court that all UT decisions were not amenable to judicial review, but rather the case was about the extent of judicial review (see paragraph 30 below). We also note that the IRAL Report did not dispute whether *Cart* was correctly decided by the Supreme Court.

23. We have concerns with the reasoning of the IRAL Report and the Consultation in relation to *Cart* JRs. First, the statistical analysis used by the IRAL Report and relied on in the Consultation seriously misrepresents the statistical findings, has methodological flaws and does not represent the range of different "positive results" for claimants. Second, *Cart* JRs

[37] JUSTICE's IRAL submission, paras. 15, 44 – 49.

[38] IRAL Report, para. 5.50.

[39] Consultation, para. 52.

[40] Consultation, para. 51.

address the risk of injustices concerning some of the most fundamental rights and have an important constitutional function. Third, *Cart* JRs address a very narrow category of cases in relation to the UT's statutory appeal jurisdiction and therefore do not entail a downgrading of the intended status of the UT.

Flaws with the statistics

24. The headline success rate of 0.22% calculated by the IRAL Report and relied upon by the Government in the Consultation[41] and in Government communications[42] is misleading and misrepresents the results of the IRAL's research. The 0.22% figure relates to the 12 recorded cases with "positive" results, defined as cases where the courts were "able to detect and correct an error of law that a FTT had fallen into and that the UT had failed to correct because it refused permission to appeal the FTT's decision",[43] out of 5,502 *Cart* JR applications. However, the IRAL was only able to look at reported cases / transcripts that are available on the legal databases of WestLaw and Bailii – of which the IRAL was only able to identify 45.[44] There are therefore 5,457 *Cart* JR cases for which we understand that IRAL had no data and they therefore should not have been used in the calculation of the statistics.[45] A more accurate figure, based on the IRAL's findings, would be 12 out of 45 cases, representing a much higher success rate of 26.7%.[46]

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[41] Consultation, para. 51.

[42] The figure of 0.22% was referred to by the Lord Chancellor in his statement on the Consultation in the House of Commons debate on the IRAL, 'Independent Review of Administrative Law', Commons Chamber (18 March 2021) available at: https://hansard.parliament.uk/commons/2021-03-18/debates/8629246C-68B7-48DE-B601-FB80866A4CEA/IndependentReviewOfAdministrativeLaw.

[43] IRAL Report, para. 3.41. Specifically, the IRAL Report explains that a positive result would be recorded if: a court granted permission to make an application for a *Cart* JR and in doing so made it clear that the FTT had misapplied the law; pursuant to an application for a *Cart* JR, a court quashed the UT's decision not to permit an appeal against a decision of a FTT on the basis that the decision of the FTT (and by extension the UT) was affected by an error of law; or a court granted permission to make an application for a *Cart* JR on the basis that the claimant had an arguable case for being granted judicial review of the UT's refusal to grant permission to appeal the decision of a FTT, the UT's refusal was subsequently quashed under the Civil Procedure Rules, 54.7A(9), and when the UT subsequently considered the claimant's appeal, it found in favour of the claimant on the basis that the FTT had indeed misapplied the law in the claimant's case. IRAL Report, para. 3.42.

[44] IRAL Report, para. 3.45.

[45] Electronic immigration network, 'Independent Review of Administrative Law recommends that *Cart* JR applications be discontinued due to low success levels' (March 2021), available at: https://www.ein.org.uk/news/independent-review-administrative-law-recommends-cart-jr-applications-be-discontinued-due-low.

[46] J. Tomlinson and A. Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews', U.K. Const. L. Blog (March 2021), available at: https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/%20.

25. The IRAL Report reached its 0.22% figure as it assumed that all cases which were not reported were failed *Cart* JRs, however, there is no basis for this assumption.[47] As highlighted by Joe Tomlinson and Alison Pickup[48], the specific streamlined procedure used for *Cart* JRs means that (a) *Cart* JRs are not generally reported; and (b) reported cases will not be reflective of the number of "successful" *Cart* JRs. First, the court will decide the permission application on the papers and there is no right to a renewed oral hearing if permission is refused on the paper (albeit appeal rights do then apply).[49] This means that the majority of permission hearings will not be reported. Second, CPR 54.7A provides that if permission for the *Cart* JR is granted by the High Court, unless the UT (or other interested party) requests a substantive hearing, the court will quash the UT's refusal of permission.[50] Normally there is no request for a hearing and the decision goes back to the UT to reconsider whether to grant permission, which it normally does.[51] Hearings and therefore reported judgments are extremely rare – especially since the majority of judicial review permission decisions are unreported.[52] We also understand from practitioners that they have experienced and represented individuals at many more than 12 "successful" *Cart* JRs.[53] The figure also does not include any consideration of *Eba* judicial reviews in Scotland,[54] which we understand the Government is also proposing to remove. The statistical information is therefore an insufficient basis for closing this potentially important route to preventing serious injustice.

26. The IRAL Report's figures also do not reflect the number of *Cart* JRs where "success" is in the form of an out of court settlement, which is "achieved only under the threat of judicial

[47] CJ Mckinney, '*Cart* cases scrapped as government launches judicial review consultation', Free Movement, (March 2021), available at: https://www.freemovement.org.uk/abolition-of-cart-cases-confirmed-as-government-launches-judicial-review-consultation/?utm_source=rss&utm_medium=rss&utm_campaign=abolition-of-cart-cases-confirmed-as-government-launches-judicial-review-consultation&mc_cid=272c87e581&mc_eid=56309c82e4.

[48] Tomlinson and Pickup (March 2021), no.46.

[49] The Administrative Court Judicial Review Guide 2020 (July 2020), para. 8.7.3.3; CPR 54.7A(8).

[50] CPR 54.7A(9) and 5A.7A(10).

[51] Tomlinson and Pickup (March 2021), no.46.

[52] S. Nason, 'Reconstructing Judicial Review' (Bloomsbury: 2017), p. 106. We note that in a different context, the IRAL Report expressly recognises the difficulties in understanding judicial review success rates, for example, IRAL Report, para. 4.69.

[53] See for instance, CJ Mckinney (March 2021), no.47, combined Colin Yeo, Garden Court Chambers, and Alasdair Mackenzie, Doughty Street Chambers, recall five cases that have succeeded, "which would leave just seven for the rest of the nation's immigration lawyers."

[54] The UK Supreme Court held in *Eba* v *Attorney General for Scotland* [2012] 1 AC 710 that the same position as in *Cart* should apply in Scotland under the Scottish law of judicial review.

review”.[55] In immigration law, the subject matter of the vast majority of *Cart* JRs, a Law Society survey has suggested that judicial review cases are settled before court about 90% of the time.[56] This flaw in data on judicial review is recognised multiple times by the IRAL Report,[57] including that it is likely that settlements are frequently reached following the granting of permission by the High Court.[58] The possibility of success at the permission stage, which then encourages out-of-court settlements, should not be excluded from the analysis used to form the basis for reform proposals.

27. The number of successful *Cart* JRs must therefore be considerably higher than the few reported successful cases identified by the IRAL Report. We note that statistics published by the Ministry of Justice for judicial review claims in England and Wales suggest that 6.26% of *Cart* JRs between 2012 and 2019 were successful, being cases where the UT decision would have been quashed, (assuming cases labelled as “other” were withdrawn).[59] We recognise that this figure is not necessarily high, however, it needs to be considered in light of the specific *Cart* JR procedure which requires fewer resources than ordinary judicial reviews; the injustices *Cart* JRs address; and the purposely high threshold set for permission to be granted. These points are addressed below.

The streamlined procedure for *Cart* JRs

28. The streamlined process set out at CPR 54.7A is designed to reduce the extent of judicial

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[55] David Greene Law Society President, ‘Judicial review must remain an essential check on state power’, The Law Society (March 2021), available at: https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/judicial-review-must-remain-an-essential-check-on-state-power.

[56] ibid.

[57] IRAL Report, paras. 4.47, 4.48, 4.74, C.22.

[58] IRAL Report, para. 4.74.

[59] According to these statistics between 2012 and 2019, there were in fact 330 *Cart* JR cases which were granted permission without a substantive hearing, the effect of which would be to quash the UT decision, and nine cases were granted permission and then allowed following a substantive hearing. 26 cases were refused permission by the High Court but then granted permission on appeal to the Court of Appeal, and one case was refused permission but the appeal was then “allowed” by the Court of Appeal. This figure of 66 cases is out of a total of 6,293 *Cart* JRs (5,870 which are labelled as “immigration” and 423 labelled “other”). This leads to a success rate of 5.34% or a higher rate of 6.26% if the 446 cases labelled as “other” in the permission column are removed from the total number of *Cart* JRs (on the basis that they are likely cases that were withdrawn and therefore did not require judicial resources). See the recent analysis done of these statistics by J. Bell, ‘Digging for Information about *Cart* JRs’, U.K. Const. L. Blog (April 2021), available at: https://ukconstitutionallaw.org/2021/04/01/joanna-bell-digging-for-information-about-cart-jrs/?blogsub=confirming%22%20\l%20%22blog_subscription-3.

resources required to deal with *Cart* JRs.[60] These rules include the following:

a. There is a short deadline of 16 days, compared to 3 months for most other judicial reviews, to file the claim form and supporting documents.[61]
b. The claim form for a *Cart* JR cannot include any other claim, whether against the UT or not, which has to be brought separately.[62]
c. There is no right to a renewed oral hearing, if permission is refused on the papers.[63]
d. A number of discrete documents, as well as any other documents essential to the claim, must be filed with the claim, including the FTT decision and the grounds of appeal to the UT.[64] This ensures that the High Court has all the necessary information before it to make a decision on the papers.[65]
e. As set out above (paragraph 25) there is rarely a substantive hearing on *Cart* JRs. The UT's decision is normally quashed automatically by the High Court following permission having been granted.[66]

29. Given this bespoke procedure, it is highly likely that a *Cart* JR will require significantly less judicial resource than other "normal" judicial review applications; the two cannot be compared like-for-like. The Consultation states that *Cart* JRs are a "significant cost"[67], however there is no evidence provided that large amounts of public resources are being diverted towards *Cart* JRs. We recognise that the Consultation states the Government "will work to calculate the net impact on MoJ/HMCTS finances"[68] of removing *Cart* JRs. However, this analysis, considering the streamlined procedure for *Cart* JRs, has to be done prior to reaching a conclusion on whether their existence is "proportionate" to the judicial resources required.

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[60] Tomlinson and Pickup (March 2021), no.46.

[61] CPR 54.7A(3).

[62] CPR 54.7A(2).

[63] CPR 54.7A(8).

[64] CPR 54.7A(4).

[65] The Administrative Court Judicial Review Guide 2020 also notes that "[i]f the documents required by CPR 54.7A(4) are not provided with the Claim Form the Court is unlikely to allow additional time for them to be submitted and may refuse permission to apply for judicial review on the grounds that it does not have sufficient information to properly consider the claim", para. 8.7.4.

[66] CPR 54.7A(9).

[67] Consultation, para. 51.

[68] Consultation, para. 110(a).

The importance of *Cart* JRs

30. At its core, the *Cart* decision rests on basic principles of constitutional law and the need to limit the extent of the potential injustices that could result from a fully self-contained tribunal system, in turn protecting access to justice.[69] The Supreme Court's reasoning in *Cart* rested on the basic component of the rule of law that there should be some scrutiny of decision-making by an independent judicial body to ensure compliance with the law.[70] The Supreme Court further understood that the preservation and protection of this value was an inherent policy goal underlying the TCEA.[71] The Supreme Court in *Cart* was concerned with the exact extent of judicial review required by the rule of law.[72] To dispense with it entirely, however, would result in a significant gap in protection - a position that was in fact accepted by the Government in its arguments in *Cart*.

31. External judicial scrutiny has a crucial purpose of putting "right any legal error which results in an injustice", both for the claimant and the wider public. Onwards judicial challenges play a vital role in "allowing the higher courts to clarify and develop the law, practice, and procedure; and maintaining the standards of first-instance courts and tribunals". This in turn prevents the adoption of "erroneous" approaches to wider points of law or practice that "will adversely affect many other similar cases".[73] To not have any judicial review of errors of law of the Upper Tribunal, would, as Lord Dyson explained in *Cart* insulate from review serious errors of law raising important points of principle.[74] *Cart* JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within the

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[69] For instance, see T. Buley, '*R (Cart) v Upper Tribunal; R (MR (Pakistan)) v Upper Tribunal*' (2012) 26(1) JIANL 68.

[70] For instance, *Cart,* no.22, at [64], "The rule of law requires that the laws enacted by Parliament, together with the principles of common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive" (Lord Phillips).

J. Bell, 'Rethinking the story of *Cart* v Upper Tribunal and its implications for administrative law', O.J.L.S. 2019, 39(1), 74-99. Joseph Raz, 'The Rule of Law and Its Virtue' in The Authority of Law (2nd edn, OUP 2009); Tom Bingham, The Rule of Law (Penguin 2011); John Laws, 'The Rule of Law and the Presumption of Liberty and Justice' (2017) 22(4) JR 365.

[71] Bell (2019), no.70. For instance, the central role that would be played by sitting High Court and Court of Appeal judges (see *Cart* at [29]) and the overarching functions of the Court of Appeal (see *Cart,* no.22 at [48] and TCEA, ss.13-14).

[72] *Cart,* no.22, at [51] (Lady Hale), "The real question, as all agree, is what level of independent scrutiny outside the tribunal structure is required by the rule of law."

[73] M. Elliott and R. Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71(2) CLJ 297.

[74] *Cart,* no.22, at [110] (Lord Dyson). There is a real risk that "the exclusion of judicial review will lead to the fossilisation of bad law" within the tribunal system, *Cart,* no.22, at [112] (Lord Dyson).

tribunals system,[75] with the Upper Tribunal continuing to follow erroneous precedent that itself or the Court of Appeal / Supreme Court has set.[76] As the Consultation recognised the "creation of 'local laws' in a way which is not intended by Parliament is undesirable".[77] The decision in *Cart* is aimed at preventing exactly this;[78] *Cart* JRs "guard against the risk that errors of law of real significance slip through the system".[79]

32. A significant portion of *Cart* JRs relate to immigration claims.[80] Almost all the cases in the Immigration and Asylum Chamber of the FTT relate to asylum and human rights appeals, engaging the most fundamental rights.[81] The potential injustices that *Cart* JRs are designed to address will, in some cases, be the difference between life and death.[82] If *Cart* JRs were to be removed this limited but crucial additional level of review would be lost, and with it the potential for fundamental injustices to be prevented.[83]

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[75] In *Cart* Lord Dyson at [112] referred to *Woodling v Secretary of State for Social Services* [1984] 1 WLR 348 as an example of where such a problem could arise. Lady Hale noted that an approach of restricting from judicial review entirely certain errors, would risk the development of "local law" in the sense that erroneous or outmoded constructions might be perpetuated if the regular courts were effectively locked out of the tribunals system (*Cart,* no.22, at [43]). Elliott and Thomas (2012), no.73, note that: "[t]his view is built partly upon institutional competence—the implication being that High Court and Court of Appeal judges may be better situated to furnish corrections—and partly upon precedent, the risk being that the tribunals system might continue to apply precedent set by the courts thinking (perhaps wrongly) that those courts would be unwilling to disturb it."

[76] Sarah Craig notes that some level of judicial review "is still required because the chances of tribunals themselves giving leave to approach the higher courts are remote", S. Craig, 'Judicial Review: How Much is Too Much? A View of Eba, *Cart* and MR (Pakistan) from the Asylum and Immigration Perspective' (2012) 16 Edin LR 223.

[77] Consultation, para. 94.

[78] For example, *Cart,* no.22, at [37] (Lady Hale).

[79] *Cart,* no.22, at [92] (Lord Phillips); IRAL Report, para. 3.40; Consultation, para. 50.

[80] 5,870 judicial review applications since 2012 are labelled "Cart – immigration" in the Ministry of Justice data on civil justice and judicial review for 2020. 423 judicial review applications are labelled "Cart – other". Civil justice statistics quarterly: October to December 2020, Civil Justice and Judicial Review data file, available at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020.

[81] As Lord Dyson recognised in *Cart,* no.22, at [112], "In asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture."

[82] Tomlinson and Pickup, (March 2021), no.46. Joanna Bell has noted that a "significant portion of decisions" in which an Upper Tribunal decision is successful involve "a claim on the applicant's behalf that she will face persecution if removed to her nation state. This may well indicate that the Cart JR process has played an important role in preventing wrongful removals in these types of cases." Bell (April 2021), at no.59; *Cart* at [112] (Lord Dyson). For instance, in one of the first reported *Cart* JR cases, the First Tier Tribunal had failed to consider a significant witness statement which could have vitiated its decision upholding findings of misconduct against a mental health nurse and which resulted in the nurse's inclusion on the Protection of Children Act list and the Protection of Vulnerable Adults, *R. (on the application of Kuteh) v Upper Tribunal* [2012] EWHC 2196 (Admin).

[83] David Greene, Law Society President, no.55, has stated: "Removing the option of recourse to judicial review in any area, let alone one as complex as immigration, risks injustice – as the government itself

33. It is important to remember that the threshold for permission to be granted for *Cart* JRs is set deliberately high.[84] As well as requiring an "arguable case, which has a reasonable prospect of success"[85], there are additional criteria, normally only applied to determine whether permission should be granted for an appeal to the Court of Appeal (the "second-tier appeals criteria"). As set out by the Supreme Court in *Cart* and now in CPR 54.7A(7) permission will only be granted if "either (i) the claim raises an important point of principle or practice; or (ii) there is some other compelling reason to hear it."[86]

34. The fact that few cases have identified errors of law does not make the injustices identified any less unjust or suggest that the judicial review mechanism is not required. In fact, the second-tier appeals criteria introduced by the Supreme Court in *Cart* were by definition designed to ensure that *Cart* JRs were reserved to the most important points of principle or practice, which would not otherwise be considered, or some other compelling reasons, such as a "wholesale collapse of fair procedure"[87].[88] The intention of the Supreme Court in *Cart* was to seek to meet the demands of the rule of law and address the most significant injustices in a way that makes efficient use of judicial resources.[89] It is circular that the relatively low numbers of "successful" *Cart* JRs, which result from the fact that the Supreme Court purposely limited *Cart* JRs to the most egregious cases and thus reduced the number of potentially successful *Cart* JRs[90], should then be used to argue that the injustices that *Cart* JRs seek to remedy are not worth the judicial resources required to protect them.

35. The Consultation recognises the potential for "some injustice" to a "few cases".[91] However,

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acknowledges – not only for those people whom the court would have found in favour of, but also for the much larger number of cases where settlement is achieved only under the threat of judicial review, which are not reflected in the panel's figures."

[84] *R (PA (Iran)) v Upper Tribunal (Immigration and Asylum Chamber) v Secretary of State for the Home Department* [2018] EWCA Civ 2495 at [7], "The test for permission to bring judicial proceedings in the current circumstances under CPR 54.7A is a high one".

[85] CPR 54.7A(7)(a).

[86] CPR 54.7A(7)(b).

[87] *Cart,* no.22, at [131] (Lord Dyson).

[88] Tomlinson and Pickup (March 2021), no.46.

[89] Elliott and Thomas (2012), no.73; Bell (2019), no.70; *Cart,* no.22, at [89] (Lord Phillips).

[90] As Lady Hale said in *Cart,* no.22, at [56], the Supreme Court's preferred approach "would lead to a further check [upon the UT], outside the tribunals system, but not one which could expect to succeed in the great majority of cases".

[91] Consultation, para. 52.

it is vital that the full extent of the potential injustices and the weight of the interests involved, including the significantly wider impact of *Cart* JRs beyond the individual cases identified by the IRAL Report, are fully assessed and taken into account in the assessment of the proportionality of *Cart* JRs.[92] Further, if *Cart* JRs are removed, there must be some other means of safeguarding against errors.[93]

<u>The Supreme Court in *Cart* did not "downgrade" the UT</u>

36. The argument that by designating the UT as a "superior court of record" Parliament excluded any possibility of judicial review was described as a "constitutional solecism"[94] by Lady Hale in *Cart*. This argument was, as Lady Hale remarked, "comprehensively demolished"[95] by Laws L.J. at first instance and was not made again in the Court of Appeal or the Supreme Court by the Government.[96] It is well established that Parliament cannot exclude judicial review without the most clear and explicit words,[97] which are not present in the TCEA. The decision in *Cart* did not therefore involve the interpretation of any statutory provision that could be described as an ouster clause. The TCEA did not include any provision ousting judicial review and statutorily designating a body as a superior court of record, as Laws L.J. pointed out, "says nothing on its face about judicial review".[98]

37. There is also a long history of judicial review being available on conventional public law grounds of permission decisions of the Social Security Commissioner, the predecessor of

[92] Tomlinson and Pickup (March 2021), no.46.

[93] Bell (April 2021), no.59.

[94] *Cart,* no.22, at [30] (Lady Hale).

[95] *Cart,* no.22, at [30] (Lady Hale), see also [37] where Lady Hale noted that this argument "was killed stone dead by Laws LJ and has not been resurrected".

[96] *Cart,* no.22, at [31] (Lady Hale).

[97] *R v Medical Appeal Tribunal, ex parte Gilmore*. [1957] 1 Q.B. 574 at [583] (Denning L.J.).

[98] *R (Cart & Ors) v The Upper Tribunal* [2009] EWHC 3052 (Admin) at [29]. It is also worth noting that the Parliamentary Election Court is amenable to judicial review, despite being designated as a superior court of record (see *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin)). Likewise, the Crown Court in England and Wales, which shares similar characteristics as the UT, including being designated as a superior court of record, is subject to full judicial review, save were expressly excluded by statute. See further, Case for the Intervener JUSTICE, in *R (Cart) v Upper Tribunal* UKSC 2010/0176 and *Eba v Advocate General* UKSC 2010/0206 (2011), available at: https://justice.org.uk/cart-v-upper-tribunal-eba-v-advocate-general/.

the UT,[99] and in the field of immigration and asylum law,[100] prior to the creation of the Asylum and Immigration Tribunal which had the possibility of statutory review.[101] It is too simplistic to say that Parliament intended, when legislating for the new tribunal structure, that there be no judicial review of permission decisions from the UT.

38. Further, it is important to reiterate that the reasoning of the Supreme Court in *Cart* was clear that the High Court should not just be redoing the function of the UT.[102] The second appeals criteria were designed to ensure that there was no risk of "usurpation" of the UT by the High Court. Further, the procedure at CPR 54.7A(9) ensures that, generally, once a judge decides that the second appeals criteria are met and permission is granted, the case will go back to the UT for a reassessment of arguability. This also helps guard against any risk of the High Court "usurping" the statutory functions of the UT.[103]

39. Finally, we also note that in a recent consultation regarding appeals from the UT to the Court of Appeal, the Ministry of Justice suggested that, in the context of the UT certifying an application for permission to bring a judicial review as being totally without merit, there should be a second review by a different UT judge.[104] This acknowledges the importance of review and suggests that the Ministry of Justice does consider that there is merit to a review by a same level court, albeit not an independent one, as the High Court provides.

40. We do however recognise that a significant number of applications are made for *Cart* JRs every year. As set out above, *Cart* JRs are meant to be used in exceptional circumstances and should not be the norm. There are a large number of highly dedicated legal practitioners and immigration advisers providing expert advice on immigration and asylum matters, often under difficult circumstances. However, we also recognise that a proportion of the *Cart* JR applications could result from a lack of understanding from legal

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[99] Buley (2012), no.69; see, for instance, *R v SSSS, ex parte Connolly* [1986] 1 WLR 421; *R (Wiles) v SS Commissioner* [2010] EWCA Civ 258.

[100] *R v IAT, ex parte Singh (Bakhtaur)* [1986] 1 WLR 910; *R v IAT, ex parte Shah (sub nom Islam)* [1992] 2 AC 629.

[101] Buley (2012), no.69.

[102] J. Bell, 'The Relationship between Judicial Review & The Upper Tribunal: What Have the Courts Made of *Cart*?', P.L. 2018, Jul, 394-412.

[103] Bell (2018), no.102.

[104] Ministry of Justice, Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal, (November 2020), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939835/reforms-arrangements-obtaining-permission-appeal.pdf.

practitioners and immigration advisers as to the exceptional nature of *Cart* JRs. Therefore, rather than removing *Cart* JRs on the basis that they take up too much judicial resources, we would suggest that the Government seek to find ways to reduce the number of *Cart* JR applications which are highly unlikely to succeed. This should be achieved through training and guidance for practitioners as well as strengthening the qualification and disciplinary process for legal representatives.

Nullity

Question 7*: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?*

41. The proposals in relation to both remedies and ouster clauses are underpinned by a conception of what the Government considers should constitute jurisdictional errors in decision-making and thus what errors should result in a decision being null and void.[105] The theory of nullity can be summarised as the principle that if a decision is taken that is beyond the scope of the jurisdiction of the body making that decision, it is regarded as if it never occurred (a "nullity"). *Anisminic*[106] established that all errors of law, including the grounds of judicial review, are jurisdictional errors and therefore render a decision or statutory instrument ("SI") ultra vires and a nullity.[107] The Consultation considers that nullity has "two chief disadvantages". First, it is "contrary to legal certainty" and the rule of law as "it leads to a situation whereby an apparently valid legal act is actually null and void from the outset. This is a particular issue for third parties which might have to rely on it." Second, "a court has no remedial discretion when an act is a nullity" which is "inappropriate".[108] We do not consider that either of these criticisms are borne out in practice.

42. To address the perceived issues with nullity, the Consultation advocates for a dismantling

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[105] M. Elliott, 'Judicial review reform II: ouster clauses and the rule of law", Public Law for Everyone (April 2021), available at: https://publiclawforeveryone.com/2021/04/11/judicial-review-reform-ii-ouster-clauses-and-the-rule-of-law/. The Consultation recognises this, for example, stating that "[r]eining in the court's propensity to declare the exercise of power null and void is required for suspended quashing orders to operate successfully", Consultation, para. 72.

[106] *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6.

[107] For example, Lord Diplock's discussion in *In re Racal Communications Ltd* [1980] UKHL 5 at [14]. See also in *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 at p.702, "in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law" (Lord Browne-Wilkinson).

[108] Consultation, para. 76.

of the modern view that all judicially reviewable errors amount to jurisdictional errors.[109] Under the proposals there would be a return of reviewable-but-non-jurisdictional errors, which, when they occur, would result in the decision or SI being unlawful but remaining intact as only "voidable", leaving the court with the "discretion on how to deal with it".[110] This allows the concept of a prospective remedy, whereby the unlawful decision/SI continues to have effect, to make theoretical sense.[111] Likewise, the proposals in relation to increasing the effectiveness of ouster clauses seem to depend on there being non-jurisdictional errors which do not result in nullity, so that any *Anisminic* reasoning that ouster clauses cannot apply to decisions which are a nullity would no longer apply to those errors.[112]

Nullity provides certainty

43. The Consultation argues that removing nullity would increase legal certainty. However, nullity, at least as a default position, favours legal certainty.[113] This is because there is no need to distinguish between different kinds of errors, actors, individuals impacted or the point in time relative to a court judgment that an individual was impacted by a decision.

44. The concepts of "void", "voidable ab initio", "voidable" or "nullity" are concepts from contract law and their excessive use "leads to confusion" when applied in a public law concept.[114] The distinction between a decision which is void and one which is voidable is very hard to draw. Case law from before *Anisminic* demonstrates that the distinction between jurisdictional and non-jurisdictional error is almost impossible to apply in practice.[115] The

[109] Elliott (April 2021), no.105.

[110] Consultation, para. 80.

[111] Consultation, para. 72.

[112] Elliott (April 2021), no.105.

[113] See for instance, C. Forsyth, '"The Metaphysics of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds), The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC (OUP 1998).

[114] *Hoffmann-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at p.366.

[115] For instance, the dissent of Lord Denning in *DPP v Head* [1959] AC 83 in which he distinguished between acts which were ultra vires and thus nullities and void, and errors of law on the face of the relevant record which rendered the relevant instrument voidable rather than void; and *R v Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380 where Lord Denning distinguished between two kinds of invalidity that could result from legal flaws in preparing a Rating Valuation List to assess liability for local tax on houses. The first was one that was "so grave" that the list was "a nullity altogether", while the other form of invalidity would "not make the list void altogether, but only voidable." However, in *Peachey* Lord Denning also recognised that there was no error on the

distinction was removed by the House of Lords in *Anisminic* and subsequent decisions[116] because the distinction had led to incoherence and inconsistency.[117] The proposals in the Consultation will also likely lead to repeated litigation as to how delineating terms, such as what counts as "lack of competence, power or jurisdiction",[118] should be interpreted and applied in practice. It is possible to give clear examples of "simple ultra-vires" acts, such as the example given in the Consultation[119] of a tribunal established to hear tax cases determining murder convictions, however these examples are extremely rare in practice. Instead, courts are normally required to examine legislation to determine which errors are jurisdictional and which are not – a task which often proves incredibly difficult to determine with any degree of certainty.

Remedial flexibility

45. The theory of nullity is just that; a theory and not a legal doctrine.[120] As the Consultation and the IRAL report both recognise, in practice there is case law both in support of[121] and that rejects[122] the nullity theory. However, differing case law and academic theory does not in itself necessitate legislative intervention. Disagreement as to exactly how the decisions of the courts can be conceptualised and the extent to which different cases fit the theory is inevitable and a function of the continuous development of the common law through the courts.[123] What matters is that in practice the courts already exercise discretion in respect of remedies.

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face of the record despite him treating the list as merely voidable, something which Wade described as amounting to "asking for the best of both worlds", H.W.R. Wade, 'Unlawful Administrative Action – Void or Voidable?' (1967) 83 LQR 499 (Part I) and (1968) 84 LQR 95 (Part II).

[116] For instance, as confirmed in *Page,* no.107.

[117] For example, Lord Diplock in *O'Reilly v. Mackman* [1983] 2 A.C. 237 at p.278 described the decision in *Anisminic* as having "liberated English public law from the fetters that the courts had theretofore imposed upon themselves…by drawing esoteric distinctions".

[118] Consultation, para. 81(a).

[119] Consultation, para. 77.

[120] D. Feldman, 'Error of law and flawed administrative decision-making' [2014] CLJ 275.

[121] For example, *Ahmed v HM Treasury* [2010] 2 AC 534.

[122] For example, *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890. IRAL Report, para. 3.60.

[123] The common law is pragmatic and flexible, rooted in experience rather than logic. Carol Harlow. 'Changing the Mindset: The Place of Theory in English Administrative Law', Oxford Journal of Legal Studies, Volume 14, Issue 3 (Autumn 1994), Pages 419–434.

46. Both the courts[124] and academics[125] have recognised the reality that quashing orders which render decisions null and void can cause practical problems, including for public authorities and third parties who have reasonably relied upon the decision being lawful. However, it is a "first principle of judicial review that remedies are discretionary"[126] if an action is shown to be unlawful.[127] The courts have always retained the flexibility[128] to decide for each case, taking into account the factual and institutional context, whether a remedy is issued and the type of remedy.[129]

47. In exercising their remedial discretion, the courts will consider a range of factors[130] including: the applicant's interests,[131] the nature of the matter and the significance of the issues, the "nature and importance of the flaw in the challenged decision",[132] the impact of the error on individual rights and society, the nature and effect of the particular remedy sought, the practical benefit that the claimant would derive from the remedy,[133] and the interests of third parties.[134] Importantly, the court will take into account the impact of quashing on certainty and "the needs of good public administration".[135] This also includes

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[124] For instance, *Ahmed*, no.121.

[125] For instance, see C. Forsyth (1998), no.113 and Feldman (2014), no.120.

[126] M. Fordham, 'Judicial Review Handbook', 7th edition, (Hart 2020), para 24.3; *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 p.656

[127] See, for instance, Bingham, 'Should public law remedies be discretionary?' [1991] Public Law 64; *R (Bibi) v Newnham LBC* [2001] UKSC Civ 607 at [40], "The Court has two functions – assessing the legality of actions by administrators, and, if it funds unlawfulness on the administrators' part, deciding what [remedy] it should give".

[128] T. Endicott, 'Administrative Law', 2nd edition, (Oxford University Press: 2011) p.384, "The court's powers in judicial review proceedings are extremely flexible".

[129] As Lord Roskill put it in *National Federation of Self-Employed and Small Businesses Ltd,* no.126, at p.656, "the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary". See also, *R v Islington LBC ex p Degnan* (1998) 30 HLR 723 at [730], the court is required to engage in a balancing exercise between "the individual right and the public interest in decisions being taken lawfully" and "the practical effect-or lack of it -of the illegality found".

[130] *R (Save our Surgery Ltd) v Joint Committee of Primary Care Trusts* [2013] EWHC 1011 (Admin) at [4] (Nichola Davies J).

[131] *Walton v Scottish Ministers* [2012] UKSC 44 at [95].

[132] *Nochol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 at [460].

[133] The court may refuse relief if the legal error was not material to the decision or if relief would serve no practical purpose (*Baker v Police Appeals Tribuna*l [2013] EWHC 718 (Admin) at [31] and [32]). See also *Berkeley v Secretary of State for the Environment* [2000] UKHL 36 for an exercise of remedial discretion at common law.

[134] *Save our Surgery Ltd*, no.130, at [4].

[135] *Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union* [2011] UKPC 4 at [40] (Lord Walker).

consideration of the courts' duty to protect the rule of law.[136] Further, section 31(2A) of the Senior Courts Act 1981 requires the court to refuse 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". Section 31(6) Senior Courts Act 1981 also provides that the court may refuse relief where there has been "undue delay" in the making of an application and the granting of relief "would be likely to cause substantial hardship to, or substantially prejudice the right of, any person or would be detrimental to good administration".

48. Generally, consistent with the rule of law, the starting point is that a decision which is unlawful will be quashed as a nullity; the alternative, to deny a legal right, impose a sanction or subject someone to legal liability that is legally flawed, would be unjust.[137] However, the courts' discretion is a "wide one"[138] and has been exercised to limit the application of a remedy, partially to uphold and partially to quash the decision or act,[139] or to refuse any remedy other than a declaration.[140] This discretion to craft the appropriate remedy has been applied cautiously but where needed by the courts given the exceptional circumstances of the facts before them, for example, to avoid "administrative chaos" or where third parties have relied on the decision to their detriment.[141] This can be seen by the variety of circumstances in which the courts have refused to grant a quashing order but have instead granted declaratory relief.[142] In fact, in the vast majority of cases in recent

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[136] For instance, the introduction of the second appeals criteria for *Cart* JRs entailed a recognition by the Supreme Court that while all errors of law the Upper Tribunal in relation to permission may be jurisdictional errors that could in principle be judicially reviewed, it was also necessary to limit the amount of judicial resources that would be expended were there to be no restraints on the availability of judicial review, see *Cart,* no.22, at [59] (Lady Hale). See also Elliott and Thomas (2012), no.73.

[137] *R (Edwards and Others) v Environment Agency and Others* [2008] UKHL 22 at [63], "in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it" (Lord Hoffman).

[138] *Credit Suisse v Allerdale Borough Council* [1997] QB 306, p. 355; *Save our Surgery Ltd*, no.130, at [4].

[139] ibid, p. 355; see, for instance, *Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd.* [1972] 1 W.L.R. 190.

[140] P. Craig, 'Administrative Law' (London 1998), pp. 774-775, remedial discretion has been used to "refuse a remedy, or limit its application, so that it only operates prospectively"; See Lord Slynn (obiter) in *R v Governor of Brockhill Prison Ex p. Evans (No.2)* [2001] 2 A.C. 19 at pp. 26-27, "I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants." This would be to avoid "unscrambling transactions perhaps long since over and doing injustice to defendants".

[141] *R (Corbett) v Restormel Borough Council* [2001] EWCA Civ 330.

[142] See for example, in *R (Hurley and Moore) v. Secretary of State for Innovation, Business and Skills* [2012] EWHC 201; *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1; *R (South West Care Homes Ltd) v Devon County Council* [2012] EWHC

years, where a SI has been found to be unlawful, the courts have granted a declaratory order rather than quashing it.[143]

49. For instance, in *R. (Hurley and Moore) v. Secretary of State for Innovation, Business and Skills*[144] the Government's failure to pay due regard to its public sector equality duty ("PSED"), which constituted an error of law, in making regulations on university fees did not lead to a quashing of the regulations. In the circumstances, where the Government, universities and students had all been planning on the assumption that higher fees would come into effect, it would have been disproportionate to quash the regulations, which "would cause administrative chaos, and would inevitably have significant economic implications", and there had been "very substantial compliance in fact" with the Secretary of State's statutory duties.[145] Instead, the court simply made a declaration that the Secretary of State had failed to comply with his PSEDs.[146]

50. In addition, we have found one instance in which the court has made a quashing order but limited its temporal effect. In *BASCA v The Secretary of State for Business, Innovation and Skills*[147] the High Court quashed an SI, but ruled that the quashing had prospective effect and declined to rule as to whether the SI was void from the outset. [148] The SI provided an exception to copyright infringements for copying for personal use and had been found to be unlawful.[149] Quashing it retrospectively would have meant that people who had copied content after the law passed had done so illegally. This would have been an "unattractive proposition", including because the general market view was that personal copying in fact

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1867 (Admin); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin); *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438; *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778.

[143] The Public Law Project have reviewed the reported final decisions handed down by the High Court and Court of Appeal of England and Wales, as well as the UK Supreme Court, between 2014 and 2020 in which the lawfulness of delegated legislation was challenged. Their research has found that of the 37 successful challenges to SIs, in only 10 instances did the courts quash a statutory instrument as a remedy. However, of those 10 decisions: four related to the same two SIs and one quashed the SI only prospectively. Meaning that only seven SIs have been retrospectively quashed over a period of 6 years. Public Law Project, 'Consultation response Judicial Review: Proposals for Reform' (April 2021).

[144] [2012] EWHC 201 (Admin).

[145] ibid, at [97] (Elias L.J.).

[146] ibid, at [99] - [100] (Elias L.J.) and [102] (King J).

[147] [2015] EWHC 2041 (Admin).

[148] ibid*,* at [20].

[149] *BASCA v The Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin).

benefitted the market and was a "practical and reasonable reality".[150] Declaring the SI void raised "potentially complex and far-reaching issues" which were more appropriate to be addressed in private law litigation between the right holder and alleged infringer.[151]

Distinguishing between "void" and "voidable" unlawful decisions would undermine rule of law

51. In our view, legislating to distinguish between "void" and "voidable" unlawful decisions would have a negative impact on the rule of law. As the Consultation points out, certainty is one aspect of the rule of law and, as explained above the proposals would have a detrimental effect in this regard.

52. The rule of law also requires that individuals have access to a remedy. Distinguishing between different types of unlawful decisions could leave those who have been affected by an unlawful but merely voidable decision without any remedy. The Consultation recognises that this is an unjust outcome.[152] We appreciate that there are rare occasions where the other compelling factors will exist so that it will not always be appropriate to quash a decision or SI (as set out above), however this should not be the default position. The default must be to prevent injustices to those impacted by unlawful decisions, including, but not limited to, an individual who has brought the challenge.

53. Further, the fundamental principle of the rule of law – Government under the law – requires that unlawful decisions should not result in continued coercion, penalty or liability on individuals. The Consultation gives no consideration to the impact of the proposals on collateral challenge - the ability to mount challenges under the civil and criminal law to the lawfulness of administrative action. The collateral challenge would, in principle, be that a person should not be subject to criminal or civil coercion, liability or penalties based on a rule which is null and void.[153] The proposals in the Consultation would fundamentally undermine this important protection. They raise the prospect of, for example, people being convicted of criminal offences under unlawfully made delegated legislation,[154] which would

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[150] *BASCA,* no.147, at [14].

[151] ibid*,* at [19].

[152] Consultation, para. 61.

[153] *Boddington v British Transport Police* [1998] UKHL 13. For a recent example of a collateral challenge with the planning inspector, see *Dill v Secretary of State for Housing* [2020] UKSC 20.

[154] Elliott (April 2021), no.105.

leave the law in a "radically defective state".[155] We recognise, as the IRAL Report did,[156] that collateral challenges could still be entertained if the Government legislated for it or if the courts took the approach that it should still be available for certain, or all, errors of law. However, not only would there be, at a minimum, a reduction in its availability it would also create significant uncertainty as to exactly what the impact of unlawful acts are. The implications for collateral challenge should be expressly considered and clearly set out by the Government.

54. The return to the concept of voidability may also undermine the principle of consistency and equal treatment in the application of the law[157] as it risks situations where a decision which is unlawful may exist for some purposes, for example for certain decisions which flow from it, or for some who have relied upon it, but will not exist for others. This is a highly unsatisfactory position and leads to the question of how it would be determined when a voidable act would be effective and when it would not.[158]

55. It will also undermine the accessibility of the law.[159] Individuals and entities who had been impacted by an unlawful act would have difficulty understanding the impact the unlawfulness has had on them. They would be faced with the complex task of first determining whether the error of law was of the kind that only made the act voidable, and then determining what that means to them. This task proved incredibly difficult for the courts in the past – it is misconceived to consider that it will become any easier for the courts or the public through legislation.

56. Further, there is no normative or practical justification for why certain errors of law should be regarded as any less serious than other errors of law, so that the decision maker has

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[155] IRAL Report, para. 3.66. See also, D. Feldman, 'Collateral challenge and judicial review: the boundary dispute continues' [1993] Public Law 37, 42; and Feldman (2014), no.120, "It is unacceptable in principle for a person to suffer coercion or penalty without a lawful justification. If the coercive action is in respect of breach of a rule which is itself unlawful, coercive action will usually be unjustified."

[156] IRAL Report, para. 3.67.

[157] *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 at [122] (Lord Brown of Eaton-under-Heywood). The concept of equality before the law was expressly recognised by the then Lord Chancellor, Michael Gove, in his speech to the Legatum Institute, 'What Does a One Nation Justice System Look Like?' (2015), available at: https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like, "The belief in the rule of law, and the commitment to its traditions, which enables this country to succeed so handsomely in providing legal services is rooted in a fundamental commitment to equality for all before the law."

[158] C. Forsyth (1998), no.113.

[159] Lord Neuberger (2013), no. 18; *R. (on the application of Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768.

not "acted outside their competence"[160] and individuals should continue to be impacted by decisions marred by such errors. This lack of explanation will cause uncertainty, repeated debates and incoherence in the application of the law.

57. The Consultation lists the errors the Government considers only go to the "wrongful exercise of…legitimately held power", "rather than lack of power".[161] However, the grounds of judicial review have developed precisely because significant, detrimental effects and injustices could arise where the grounds are breached by an administrative decision or SI. Unreasonableness, irrationality, breach of legitimate expectations, procedural unfairness, bias, abuse of and fettering of discretion, amongst other public law grounds, are all of vital importance in ensuring that decision-making is fair, consistent and within its legal bounds.[162] For instance, 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. Further, they may be used as a means of achieving equality by facilitating decision-making that takes account of its implications for minority interests.[163] To the extent that the effect of the errors is not sufficiently detrimental to justify the quashing of the act / decision, the courts already consider this[164] and exercise their remedial discretion accordingly.

58. As Lord Carnwath recognised in *Privacy International*[165], and as quoted in the IRAL Report[166], judicial review for errors of law is not necessarily based on unyielding doctrine or on "such elusive concepts as jurisdiction (wide or narrow), ultra vires or nullity"[167] but on

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[160] Consultation, para. 81(b).

[161] Consultation, para. 81(c).

[162] As Lady Hale, quoted by the IRAL Report at para. 1.4, stated "the scope of judicial review is an artefact of the common law." Its object is to maintain the rule of law and ensure that, "within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise" (*Cart,* no.22, at [37]).

[163] 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 (Equality Act 2010, s.149.)

[164] *Nochol,* no.132, at [460].

[165] *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491.

[166] IRAL Report, para. 3.60.

[167] *Privacy International,* no.165, at [132] (Lord Carnwarth).

a “pragmatic and principled”[168] approach to upholding the rule of law.[169] However, this should not entail a rejection of the concept of nullity. In fact, the rule of law requires that nullity is the default position that is applied in the vast majority of cases. This is both principled – the principle of Government under law requires that unlawful decisions should not stand or result in continued coercion, penalty or liability on individuals – and pragmatic – nullity brings certainty in the vast majority of cases. However, in exceptional circumstances on a case-by-case basis, the court will modify or limit the implications of the concept of nullity through their remedial discretion to reach a just result which is consistent with the rule of law and parliamentary sovereignty. Further legislation in this area, which would inevitably limit the flexibility and nuance of this approach, should therefore be avoided.

Remedies

Question 1: *Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?*

Question 4*: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?*

Question 5: *Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?*

Question 6*: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?*

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[168] ibid, at [131] (Lord Carnwarth).

[169] As Paul Craig has said “[t]he bottom line is that the courts have always had remedial discretion, and this has been exercised on the assumption that there has been an error that would justify invalidation of the contested measure.” P. Craig, ‘The Panel Report and the Government’s Response’, U.K. Const. L. Blog (March 2021), available at: https://ukconstitutionallaw.org/.

Discretionary remedies

Prospective-only remedies

59. In general, the use of PO Remedies has serious implications for the rule of law. It involves the rejection of the ordinary position that unlawful decision should be quashed retrospectively. This will significantly weaken the protection of citizens against abuse of power and result in considerable unjust outcomes for those impacted by unlawful decisions by depriving individuals of access to a remedy (see paragraphs 51 to 58 above). The Consultation acknowledges this, recognising that PO Remedies "could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy."[170]

60. The use of PO Remedies leads to the undesirable situation whereby the impact of a SI / decision on a person will depend on at what point of time they were impacted – whether it is before or after a court judgment. This distinction is incredibly arbitrary and undermines certainty[171] and the rule of law.[172] The fact that the lawfulness of an SI / decision has not previously been contested does not make the unlawfulness any less unjust. Individuals who have not litigated, but are impacted by an unlawful SI / decision, have just as much a need for the law's protection, as the potential individuals who would be impacted in the future. If other competing considerations prevent this, there needs to be a clear justification as to why.

61. We do recognise that quashing orders can create administrative difficulties and there may be some circumstances, where despite these concerns, it would not be appropriate to quash an unlawful decision. However, as explained above (paragraphs 45 to 50), the courts' current remedial discretion ensures that difficulties with quashing orders can be dealt with in a "pragmatic and principled"[173] manner, allowing the courts to consider the

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[170] Consultation, para. 61.

[171] It would create, as Wade in 1968 described, "[a] large area of grey, where no one could be sure of his rights" which "would be a dangerous innovation indeed", Wade, 'Unlawful Administrative Action: Void or Voidable? (Part II)' (1968) 84 LQR 95.

[172] *R v Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2000] UKHL 61, "legal certainty… is one of the fundamental elements of the rule of law" (Lord Nicholl's).

[173] *Privacy International,* no.165 at [131] (Lord Carnwath), no.165.

various, sometimes competing, factors. Where significant administrative disruption or chaos could result from a judicial review decision, the courts have the power to issue a declaration rather than a quashing order. The courts have also found that in wholly exceptional cases it may be appropriate for a quashing order to have prospective only effect.[174]

62. Given the courts' remedial discretion, we therefore do not consider the proposal to amend the Senior Courts Act 1981 to provide for a legislative power to grant PO Remedies is necessary to address the rare cases where concerns highlighted in the Consultation such as economic implications and administrative chaos, are significant enough to depart from the ordinary position that unlawful decisions will be retrospectively quashed.

63. If such an amendment to the Senior Courts Act 1981 was to be made, we oppose the inclusion of a list of factors that the courts should be required to consider when deciding whether to grant a prospective only remedy. The factors proposed by the Consultation[175] are already taken into account by the courts, in addition to others (see paragraphs 45 to 50 above). We are concerned that the list proposed by the Consultation puts administrative burden and economic implications on equal or greater footing than the "injustice caused by a prospective-only remedy". We would also not want to limit the discretion of the court to take into account other factors not included in any list. Further, a statutory list could lead to additional disputes as to whether an issue fell within one of the statutory factors to be considered.

Suspended quashing orders

64. In our response to the IRAL we stated that "it may be desirable for legislation to be enacted to empower courts, in exceptional circumstances, to suspend the effect of a quashing order to allow the defects to be rectified." As explained in our response we had in mind the very exceptional circumstances, such as those that arose in *Ahmed,* where issuing a quashing order would itself involve a breach of the rule of law. In *Ahmed* two asset freezing orders were found to be unlawful, however a quashing order, rendering them void, would put the United Kingdom in breach of its international law obligations under the Charter of the

[174] *Re: Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41 per Lord Nicholls at [40] and Lord Hope at [71-74]. See also *BASCA,* no.147.

[175] Consultation, para. 64.

United Nations and the relevant United Nations Security Council Resolutions.[176] The request to suspend the effect of the quashing order was refused by the Supreme Court. The Government therefore enacted the orders in primary legislation and included a retrospective provision to maintain the validity of the asset freezing regime during the period between the Supreme Court's decision and the coming into force of the Act.[177]

65. The majority in *Ahmed* decided not to suspend the effect of the quashing orders. Having found that the orders were unlawful, and therefore null and void, they reasoned it would be contradictory if they then provided for the decision to continue to be treated as if it had legal effect. We are in favour of Parliament legislating to explicitly give courts the discretion, in appropriate cases, of making SQOs of the type refused in *Ahmed* (by way of amending the Senior Courts Act 1981). This would provide a clear statutory basis for the courts to exceptionally enable an unlawful act to remain temporarily valid, resolving any lack of clarity that currently exists as to whether the courts already have this power,[178] rather than waiting for a clear precedent from the Supreme Court.

66. The IRAL report suggests amending section 31 of the Senior Courts Act 1981 to provide that "on an application for Judicial Review the High Court may suspend any quashing order that it makes and provide that the order will not take effect if certain conditions specified by the High Court are satisfied within a certain time period."[179] However, we note that this is not what was requested in *Ahmed.* The Treasury requested that the quashing orders take effect after a period of time for the purpose of enabling steps to be taken to ensure that the United Kingdom remained in compliance with its international obligations under the Charter of the United Nations. Counsel for the Secretary of State "made it clear that the Treasury accepted that suspension would do no more than delay the taking effect of the Court's orders, which would then operate retrospectively as from the specified date. It would have no effect whatever on remedies for what had happened in the past or during the period of the suspension."[180] This is somewhat different from what is proposed in the IRAL Report which is that the quashing order will not take effect at all if certain conditions

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176 Under Article 25 of the Charter of the United Nations, Security Council Resolutions create legal obligations binding on all contracted states.

177 Terrorist Asset-Freezing (Temporary Provisions) Bill 2009-10.

178 In particular, Lord Hope in his dissent in *Ahmed* considered that the court did have the power to make the suspended quashing order that the Government requested and instead considered that the difference in view between the majority and the minority in *Ahmed* was whether the court should exercise this power. *Ahmed,* no.121, at [18] (Lord Hope).

179 IRAL Report, para. 3.68.

180 *Ahmed,* no.121, at [19] (Lord Hope).

are met by a specified date.

67. We do see some advantages to the types of SQOs envisaged by the IRAL Report and Consultation in the *Hurley and Moore* type scenario where the court would have otherwise issued a declaration, and a SQO can be used to ensure that the public authority complies with its duties by a certain date. It would allow the courts to issue a remedy with "more teeth"[181] than a declaration where they are concerned about the substantial uncertainty and detriment to third parties that would result from quashing the general measures.

68. However, there are a number of difficulties that arise when thinking about how such SQOs would operate in practice and we are therefore opposed to their introduction. Considerable uncertainty will likely still exist with SQOs in determining what needs to be done, how it should be done and exactly when it has been done by the Government to meet the terms of an SQO. It is also not always possible for an error of law to be rectified and errors may be integral to a decision or SI, especially for substantive errors. There is a significant difference between requiring the Government to consult certain individuals, or take a particular factor into account, compared to needing to "be more reasonable". For many errors of law, even those which on the face of them could be rectified retrospectively, rectifying them may result in the decision or SI needing to be changed. This uncertainty could result in further satellite litigation to the detriment of finality. Further, the courts are currently reluctant to impose any strict obligations on Parliament or the Government to bring forward primary or secondary legislation or to address unlawfulness in a decision.[182] It is unlikely that this situation will change through SQOs.

69. As with prospective only remedies, we do not agree with the proposal to specify in legislation the factors or criteria the court should take into account when considering whether an SQO is appropriate. We agree with the IRAL Report that, if SQOs are placed on a statutory footing, it should be left up to the courts to develop principles to guide them in determining what circumstances a SQO would be granted, for the same reasons as specified at paragraph 63 above.

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[181] IRAL Report, para. 3.54. For example, in a situation such as in *Hurley and Moore,* no.144 (see paragraph 49 above), which was used as an example by the IRAL Report at para. 3.53.

[182] The courts prefer to provide deference to Government and Parliament and to not unduly restrict the parliamentary and executive decision-making processes.

Mandatory / presumptive remedies

70. We strongly oppose the proposals to mandate (absent an "exceptional public interest") the use of PO Remedies and/or SQOs or for there to be a presumption in favour of a PO Remedy and/or SQO. The proposed limits on the courts' discretion would be entirely contrary to the rule of law, as well as contradicting the Government's stated aim of increasing remedial discretion.[183]

71. As set out above (see paragraphs 51-58, 59, 60 and 68), there are strong reasons to maintain the default position that an unlawful decision should be quashed. Whether there should be a departure from this position is a question for the courts on a case-by-case basis: practical and administrative considerations are a reality that is grappled with by courts.[184] They do not automatically justify a complete rejection of the need to remedy the impact of unlawful decisions on individual rights[185] - "[a]dministrative convenience cannot justify unfairness".[186] Remedial discretion provides flexibility and allows the courts to balance the various aspects of the rule of law (including, but not limited to, certainty), the impact of the error on both the decision and individuals, and the need for effective administration.[187] These arguments will inevitably sometimes conflict,[188] however, it is the courts that are best placed to weigh them up, considering the factual and legal context of each case.

72. Further, a lack of flexibility would create incoherence and uncertainty in judicial review, contrary to the aim of the Consultation.[189] The courts could be required to issue a SQO or PO Remedy even if a quashing order would be much more suited to the circumstances of the case. As Lord Bingham recognised, "in the long run the administration of justice rests on public acceptance, and judicial review is more likely to command public acceptance if

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[183] Consultation, para. 76.

[184] For example, recently in *R (Plan B Earth Ltd) v Secretary of State for Transport* [2020] EWCA Civ 214 the Court of Appeal issued a declaratory order, rather than quashing the decision.

[185] In *Hurley and Moore*, no.144, at [99] the court was clear that the practical difficulties in itself would not "begin to justify a refusal to quash the orders if the breach was sufficiently significant."

[186] *R v SSHD ex p Fayed* [1998] 1 WLR 763 at p. 777B (Lord Woolf MR). Wade (1968), no.171, "[a]dministrative inconvenience should not be allowed to distort the law".

[187] Feldman (2014), no.120.

[188] M. Elliott, 'Judicial review reform I: Nullity, remedies and constitutional gaslighting', Public Law for Everyone (April 2021), available at: https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/.

[189] Consultation, para. 70.

it is seen as a precision instrument and not a juggernaut."[190] The proposals in the Consultation risk turning judicial reviews into a "juggernaut" that is not adaptable to the facts and context of each case. We would also expect there to be further uncertainty and litigation as to exactly when the presumption applies and can be rebutted, or when there is an "exceptional public interest" such that a quashing order can be granted.

73. The Consultation states that the unjust outcomes for individuals would be "remedied in the long-term"[191] through "conciliatory political mechanisms" and "a compensation scheme".[192] However, there would be no requirement on the Government to implement any such remedies or scrutiny as to their effectiveness. Fundamentally, the Government would be under absolutely no legal duty to address the injustices caused by the improperly made SI or decision.[193] We do not consider that to be an appropriate or principled solution.

74. Crucially, the proposals for mandatory/ presumptive prospective remedies and SQOs will undermine Governmental accountability. As Mark Elliott argues, the suggestions in the Government Proposal would: "enable the Government to legislate at will, confident in the knowledge that anything done under the colour of such secondary legislation — however blatantly unlawful it might be — would be functionally lawful up to the point of the issuing of any relief, thanks to the courts' inability retrospectively to invalidate it."[194] The same reasoning applies equally in respect of mandatory / presumptive SQOs of the type proposed by the Consultation because as long as the Government / administrative body takes the steps required by the court, the original decision will not be quashed. The threat of judicial review quashing SIs or decisions and the possibility of being held to account, are of vital importance in ensuring that public bodies' decision-making is lawful, fair and not an abuse of power,[195] in turn improving the quality and effectiveness of decision-

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[190] Bingham (1991), no.127.

[191] Consultation, para. 61.

[192] Consultation, para. 60.

[193] M. Elliott, (April 2021), no.188.

[194] ibid.

[195] This is the very purpose of the Government's guidance on judicial review for civil servants (JOYS). For example, in the forward to the current guidance Jonathan Jones explains that "JOYS will help you to understand the potential legal risks of your actions…and the factors you and your minister should be aware of and take into account before acting", Government Legal Department, 'The judge over your shoulder – a guide to good decision making' (2016), p. 4, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf.

making.[196]

75. We are also concerned that the introduction of mandatory / presumptive PO Remedies and/or SQOs would have a significant chilling effect on judicial review. The purpose for many applicants of judicial reviews is for the impact of the SI / decision on them to be remedied. However, the result of both SQOs, of the type suggested by the IRAL Report and Consultation, and PO Remedies is that the impact of the unlawful decision on the applicant (and others affected) is not remedied by the court and there is no guarantee that it will be amended through "political" means. Bringing a judicial review already has many disadvantages to applicants, not least the costs implications, the uncertainty as to the outcome and the length of the process. These proposals to introduce mandatory / presumptive PO Remedies and/or SQOs therefore remove a key motivation. Judicial review is fundamental to the rule of law, good administration, and citizens' rights. It is beneficial to society and public bodies alike - such a significant stifling must therefore be avoided.

76. Further, the courts are opposed to considering judicial review applications which are purely academic or hypothetical, unless there is a good reason for doing so.[197] There must be a utility to a judicial review claim,[198] not least because of the need to make efficient use of court resources.[199] However, the proposals in the Consultation will remove, or substantially reduce, the utility of many judicial reviews. There is a risk that for many judicial reviews there "will no longer be a case to be decided which will directly affect the rights and obligations of the parties to the claim" and therefore it could be argued that such claims are no longer appropriate for judicial review.[200] Indeed, it is hard to conceive of a case for which there would be a direct impact for an applicant if there is no actual remedy for them. This would drastically limit access to judicial review and undermine the constitutional role

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[196] See research by L. Platt, M. Sunkin and K. Calvo, which considers the various benefits to local authorities and their public service provided by judicial review. L. Platt, M. Sunkin and K. Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales', Journal of Public Administration Research and Theory 243 (2010), available at: https://academic.oup.com/jpart/article/20/suppl_2/i243/932292?login=true.

[197] See for instance, *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213 at [208]; *R (Howard League for Penal Reform) v SSHD* [2002] EWHC 2497 (Admin) at [140].

[198] See, for instance, *R (Anti-Waste Ltd) v Environment Agency* [2007] EWCA Civ 1377.

[199] *R (Raw) v Lambeth LBC* [2010] EWHC 507 at [53].

[200] The Administrative Court Judicial Review Guide currently states "Where a claim is purely academic, that is to say that there is no longer a case to be decided which will directly affect the rights and obligations of the parties to the claim, it will generally not be appropriate to bring judicial review proceedings." The Administrative Court Judicial Review Guide 2020 (July 2020), para. 5.3.4.1.

of the courts in enforcing the law.

PO remedies for SIs

77. We are concerned that the Consultation seeks to put subordinate legislation on a par with primary legislation. The justification for doing so is that "acts of a legislative nature (including secondary legislation) are inherently different from other exercises of power. Such legislation is intended, and considered to be, valid and relied on by others. Therefore: "Retrospective invalidation of legislation will, in almost all cases, impose injustice and unfairness on those who have reasonably relied on its validity in the past […].""[201]

78. In our view it is wrong to equate subordinate and primary legislation in this way. First, decisions, policies and guidance made by public authorities are also intended to be valid and relied on by others. Second, it is acknowledged by the courts that retrospective invalidation may impose injustice and unfairness, however, this may occur in respect of decisions, policies and guidance as well as SIs. The extent of any injustice should be considered on a case-by-case basis - there is no reason why retrospective invalidation of SIs will always be more unjust than the retrospective invalidation of other public authority decisions or acts.

79. Third, subordinate legislation is a fundamentally different part of the legislative hierarchy to primary legislation. It is made by the executive, not Parliament. Often judicial review is the first substantial scrutiny of a delegated legislation, which is subject to very limited public[202] and parliamentary scrutiny prior to enactment.[203] For instance, the majority of SIs are laid in Parliament under the negative procedure, which means that they will automatically become law unless objected to and can come into force before the 40-day period has expired; it is the Government that determines whether debates on negative procedure SIs occur and the composition of Delegated Legislation Committees for affirmative procedure SIs;[204] there is regularly insufficient time to debate the SIs to afford

[201] Consultation, para. 67, quoting from Sir Stephen Laws' submission to the IRAL.

[202] There is often no prior statutory consultation and at best informal consultation.

[203] Hansard Society, 'The Devil in the Detail: Parliament and Delegated Legislation' (2014).

[204] The Public Law Project and The SIFT Project, 'Plus ça change? Brexit and the flaws of the delegated legislation system' (October 2020), available at: https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf.

The affirmative procedure is also being increasingly used, which gives SIs legal effect immediately, before they have been debated. It is incredibly rare for an affirmative SI not to receive Commons

them proper scrutiny; and the vast majority of SIs are never debated.[205] The scrutiny system can be described as "more like procedural window dressing than effective Parliament control".[206] The courts apply deference to Parliament SI scrutiny[207] but judicial scrutiny is an important safeguard.[208] This is particularly so in the context of the increasing number[209] and length[210] of SIs.

Interaction with judicial reviews under the Human Rights Act 1998

80. The Consultation is not clear to what extent its proposals will apply to judicial reviews in which claims under the Human Rights Act 1998 (the "HRA") are made. However, judicial review and human rights claims are intertwined and cannot be considered in isolation from each other. The interaction of the proposals with the HRA must be considered along with the ongoing Independent Human Rights Act Review ("IHRAR").[211]

81. The scope of the Consultation's proposals is unclear; however, we are concerned that they may impinge on the remedies available under the HRA and could result in a significant

approval. The last affirmative SI that failed to receive the approval of the House of Commons was in 1978. UK Parliament, 'Statutory instruments procedure in the House of Commons', https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-commons/.

[205] During the 2015-2016 parliamentary session, 80% of made negative SIs came into force before their 40-day scrutiny period expired, Hansard Society, 'Can the government get all its Brexit Statutory Instruments through Parliament by exit day on 29 March?' (2019), available at: https://www.hansardsociety.org.uk/blog/can-the-government-get-all-its-brexit-statutory-instruments-through.

[206] The Public Law Project and The SIFT Project (October 2020), no.204, p. 16.

[207] *Hurley v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin) [55] (Collins J); *Bank Mellat v. HM Treasury (No2)* [2013] UKSC 38 at [44], "when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the court will hold it to be unlawful on some ground" (Lord Sumption).

[208] For instance, see *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at [32] (Lady Hale) where it was recognised that the level of parliamentary involvement is often only very slight.

[209] The number of SIs made each year has increased significantly in recent decades – with an average of 3,000 UK statutory instruments being issued annually from 2010 to 2019, C. Watson, 'Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019', House of Commons Library CBP 7438 (2019), available at: https://commonslibrary.parliament.uk/research-briefings/cbp-7438/.

[210] Analysis of the SIs made by the Treasury and HMRC during the 2017-2019 session shows that the average word count of these SIs increased nearly 300% between the 2009–10 and 2017–19 sessions. There was also a significantly increased average number of articles per SI for the 2017-2019 session compared to the previous sessions from 2009, Institute for Government, 'Secondary legislation', available at: https://www.instituteforgovernment.org.uk/publication/parliamentary-monitor-2020/secondary-legislation.

[211] This was expressly recognised by the IRAL Report, which stated that "[t]here is clearly a degree of overlap between [the IHRAR] and ours", Conclusion, para. 5(a).

reduction in the protection of human rights in the UK.[212] Access to effective judicial remedies is vital for individuals to enforce their ECHR rights[213]; and, in relation to Northern Ireland, for the UK Government to comply with the Belfast / Good Friday Agreement, which requires "direct access to the courts, and remedies for breach of the Convention.[214] The proposals on mandatory / presumed PO Remedies and SQOs directly undermine this: remedies that do not address the breach of the applicant's (and other's) human rights cannot be effective.

82. In addition, the HRA is not limited to judicial review and can be raised in any legal proceedings, including as a defence. The proposed limits to the remedies available in judicial review proceedings, could therefore risk the bifurcation of remedies available to the different methods of bringing an HRA claim.

83. We note that one of the questions in the IHRAR call for evidence asks specifically about the treatment of SIs under the HRA, and whether there is any need for change. There is no acknowledgement of this in the Consultation document. There are significant human rights implications of the proposals in the Consultation that must be clearly set out, considered, and consulted upon by the Government. Further the human rights implications of the proposals must be considered as a whole with any proposals that arise from the IHRAR.

Ouster clauses

Question 8*: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?*

84. We oppose the proposals in the Consultation to legislate to strengthen the effect of ouster clauses. These proposals would significantly reduce access to justice, the effectiveness of administrative law and the quality of decision-making.[215]

85. There is little benefit of going into whether it is constitutionally possible for Parliament to

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[212] As it has been long recognised in the common law, fundamental rights ought to attract enhanced judicial scrutiny, see, for example, *R v Ministry of Defence ex parte Smith* [1996] QB 517.

[213] The right to an effective remedy before a national authority for a violation of ECHR rights is directly recognised by Article 13, ECHR and which the HRA was intended to meet. The UK Government has indicated its wish to remain party to the ECHR and therefore continues to be subject to Article 13.

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

[215] Elliott (April 2021), no.105.

exclude judicial review, as the IRAL Report concluded, "no conclusive answer can be given".[216] However, the proposals in respect of ouster clauses risk significantly undermining the concept of Government under law.[217] As the IRAL Report recognised there must be "highly cogent reasons for" Parliament taking the "exceptional course"[218] of ousting or limiting the jurisdiction of the courts in particular circumstances. In our view, given the fundamental importance of judicial review, such reasons will rarely, if ever, exist.

86. Judicial review is generally only available where there is no other recourse to an alternative remedy.[219] The effect of a provision which purports to exclude judicial review of a tribunal or administrative body is therefore to create a situation where all routes of challenge are shut down, even if the decision has misinterpreted the law. The Consultation states: "[o]uster clauses are not a way of avoiding scrutiny. Rather, the Government considers that there are some instances where accountability through collaborative and conciliatory political means are more appropriate, as opposed to the zero-sum, adversarial means of the courts."[220] This misrepresents the value of independent court review of decision-making. Judicial review is part of the checks and balances of the UK constitution based on parliamentary sovereignty, alongside, rather than instead of, the executive's accountability to Parliament. The courts' scrutiny ensures that there is a means to address injustices and abuses of power, as well as promoting effective administration. It has its own distinct purpose, separate from political scrutiny.

87. Judicial review is an essential constitutional protection.[221] As set out above, the rule of law and parliamentary sovereignty mandate an independent judiciary. Court review of administrative decision making has an irreplaceable role in controlling administrative

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[216] IRAL Report, para. 1.39. The complexities of the arguments can be seen by the range of reasoning amongst the majority and minority of Justices in the Supreme Court in *Privacy International,* no.165.

[217] For example, *Privacy International,* no.165, at [210], "Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not therefore consistent with the courts lacking the capacity to enforce the limits" (Lord Sumption).

[218] IRAL Report, para. 2.89.

[219] *R (Archer) v Commissioners for Her Majesty's Revenue and Customs* [2019] EWCA Civ 1021 at [87] – [95]; Administrative Court Judicial Review Guide (2020), para. 5.3.3.1.

[220] Consultation, para. 86.

[221] *Cart*, no.22, at [122], "there is no principle more basic to our system of law than … the constitutional protection afforded by judicial review" (Lord Dyson). It is the "cornerstone of the rule of law", *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731 at [13].

action.[222] This is both in the public interest[223] and in the interest of the executive: effective governance is lawful governance.[224] Judicial review of public authorities and tribunals "protects citizens against inappropriate use of the executive's power"[225]; it is a "major protection for the rights and liberty of citizens".[226] No matter how unpopular the cause or the claimant, the rule of law still applies and the executive should not be able to go beyond its legal limits without the potential for accountability in the courts. In fact, it is precisely for such claimants that judicial review is crucial.[227] As has been recognised time and again in the case law "[t]he courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law."[228] Attempts to reduce this role risks undermining the UK's constitutional framework and the protection of all against the abuse of power.

88. Judicial review is also crucial to effective administrative action and good governance, which was expressly recognised in the IRAL Report.[229] First, it clarifies the law and helps ensure its effectiveness. Regardless of the outcome of the case, the courts will "interpret the statute to attain" its "specified objectives, and often fill gaps to render the legislation more efficacious".[230] This benefits both those impacted by the legislation and the public bodies applying it.[231]

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[222] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 p.408E (Lord Diplock*);* *R (Beeson) v Dorset County Council* [2002] EWCA Civ 1812 at [17].

[223] *Land Securities Plc v Fladgate Fielder* [2009] EWCA Civ 1402 at [70] (Etherton L.J.).

[224] This is recognised by the Government in its judicial review guidance to civil servants which states that "Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked", Government Legal Department (2016), no.195, p. 31.

[225] *R (Carlile) v SSHD* [2014] UKSC 60 at [56] (Lord Neuberger).

[226] *Re McGuinness* [2020] UKSC 6 at [64] (Lord Sales).

[227] *R v SSHD, ex p Moon* (1996) 8 Admin LR 477 at p. 485C, "it is precisely the unpopular [claimant] for whom the safeguards of due process are most relevant in a society which acknowledges the rule of law" (Sedley J).

[228] *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6 at [61] (Lord Neuberger).

[229] IRAL Report, para. 34, "judicial review serves many other functions, in many of which government and public authorities have a significant interest".

[230] P. Craig, 'Judicial Power, the Judicial Power Project and the UK', University of Queensland Law Journal 355 (2017), 367.

[231] Empirical research has found that usually judicial review cases were considered to have contributed to clarifying the law and creating helpful precedents. These benefits were both from the claimants' perspectives but also public bodies, for whom judicial review can help clarify the law and assist them to meet their legal obligations. 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, University of Essex and

89. Second, judicial review also provides "a positive encouragement to maintain high standards in public administration by public bodies".[232] The possibility of judicial review motivates decision-makers to ensure that their decisions, policies and procedures are lawful. Ultimately, as the summary of Government submissions to the IRAL states, judicial review ensures "that care is taken to ensure that decisions are robust", which "improves the decision".[233]

90. Third, as the Government recognises, the decisions and guidance from the courts can "help improve policy development and decision making in government".[234] Judicial review helps guide future administrative conduct.[235] For example, court decisions can provide valuable guidance on how to improve bodies' processes in the future and encourage good governance.[236] Further, judicial review, including the pre-action stages, provides the opportunity to bring to light legitimate concerns with a public body's processes and decision-making.[237] Regardless of the outcome of the case, this allows decision-makers to efficiently rectify any such flaws. Importantly, the objective of judicial review is effective and lawful decision-making[238], rather than the "zero-sum"[239] method of accountability attributed to it by the Consultation.

91. As recognised by the majority in *Privacy International*, ouster clauses risk creating 'islands of law'.[240] As explained at paragraph 31 above, and as recognised by the Consultation,[241] this is undesirable. In particular this can cause incoherence and uncertainty where, as was

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London School of Economics (2015), available at: https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Value-and-Effects-of-Judicial-Review.pdf.

[232] HM Government, 'Consultation Paper: Access to Justice With Conditional Fees' (1998).

[233] Summary of Government Submissions to the Independent Review of Administrative Law, para. 29.

[234] Government Legal Department (2016), no.195, p. 4.

[235] *Unison*, no.13, at [72].

[236] Empirical research has shown that the outcome of judicial review claims which are allowed are often correlated with better quality public services, L. Platt, M. Sunkin and K. Calvo (2010), no.196.

For specific examples of the link between judicial review and good administration, see the Public Law Project submission to the IRAL, pp. 6 – 8.

[237] V. Bondy, L. Platt and M. Sunkin (2015), n. 231.

[238] In judicial review the relationship between the courts and public bodies has been described as a "partnership based on a common aim, namely the maintenance of the highest standards of public administration", *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at p. 945.

[239] Consultation, para. 86.

[240] *Privacy International,* no.165, at [139].

[241] Consultation, para. 94.

the case in *Privacy International* specialist tribunals are interpreting legislation that does not apply only to the specialist area of law before the tribunal, but could have implications for legal rights and remedies more generally. In such circumstances, "consistent application of the rule of law requires such an issue be susceptible in appropriate cases to review by ordinary courts".[242]

Procedural reforms

Time limits – promptitude requirement

Question 9: *Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.*

92. We agree with the proposal in the Consultation to remove the requirement for promptness within the three-month time limit for judicial review claims at CPR 54.5(1).[243] It is established that a judicial review application may not meet the promptness requirement, even though it is made within three months.[244] However it is "rare" for claims for judicial review to be dismissed on this ground[245] and the existence of the promptness test and the three-month period creates uncertainty. Removing the promptness requirement would reduce this uncertainty without creating delays in public administration. It could also encourage pre-action engagement by providing certainty on the time period for pre-action negotiations and reducing the time pressure at this stage. We also note that the requirement for a claim for judicial review to be brought promptly was abolished in 2018 in Northern Ireland.[246] Likewise in Scotland, since 2015,[247] the time period has been three months or "such longer period as the Court considers equitable having regard to all the circumstances."[248] We understand that this time limit is working well.

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242 *Privacy International,* no.165, at [139].

243 Judicial review applications currently must ordinarily be filed "promptly" and "in any event not later than 3 months after the grounds to make a claim first arose". We recognise that for certain judicial reviews this time limit is reduced and there is no promptness requirement.

244 *R (Sustainable Development Capital LLP) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin).

245 IRAL Report, paras. 4.135 and 4.147.

246 Pursuant to The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017, s.2.

247 Pursuant to the Courts Reform (Scotland) Act 2014.

248 Court of Session Act 1988, s.27A.

93. However, we are concerned by the statement in question 9 that the result of removing the promptness requirement "will be that claims must be brought within three months" (emphasis added). As set out further below (paragraph 97) the court's discretion to extend the time limit for issuing a judicial review claim[249] is important in ensuring access to justice.

Time limit - extensions

Question 10: *Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?*

Question 11: *Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?*

94. We do not consider that the three-month time limit should be extended or that it should be possible for parties to extend the time limit by agreement. In summary, we are concerned by the impact that this would have on third parties who rely on or are potentially affected by the judicial review. However, we also recognise the difficulties the three-month time limit can pose to claimants (especially those who rely on legal aid). It should, however, be for the court to decide on a case-by-case basis whether the time limit should be extended, considering all the circumstances of the case, including the public interest nature of judicial review as well as the need for there to be a good justification.

95. A key element of judicial review is its quick resolution of claims.[250] The short time limit of three months was designed to ensure that claims are brought promptly and resolved efficiently,[251] recognising the "public interest in good administration".[252] Unlike civil litigation, as the IRAL Report recognised, judicial review is not purely about the "protection of private interests".[253] There is a significant public interest dimension in ensuring the

[249] Under its general case management powers at CPR 3.1(2)(a).

[250] Ministry of Justice, 'Judicial Review: proposals for reform' (Cm 8515, 2012), para. 44, available at: https://consult.justice.gov.uk/digital-communications/judicial-reviewreform/supporting_documents/judicialreviewreform.pdf, "Judicial Review is a process which requires claims to be brought and resolved swiftly, reducing the uncertainty for public authorities which can have an impact on the delivery and cost of public services."

[251] Michael Fordham QC et al, 'Streamlining Judicial Review in a Manner Consistent with the Rule of Law', Bingham Centre for the Rule of Law, Report 2014/01 (2014), p. 4, available at:

https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistant_with_the_rule_of_law.pdf.

[252] *O'Reilly,* no.117, at 280H–281A.

[253] IRAL Report, Introduction, para. 34.

lawfulness of administrative actions[254] and thus also in the "[t]he efficiency and cost-effectiveness of judicial review proceedings".[255] Delay in deciding claims therefore has a negative impact on both claimants and public decision-makers, but it is also adverse for others who are affected (both positively and negatively) by the legal challenge and require certainty,[256] undermining judicial review's aim of effective administration.[257] The limit on extending time and the current time period therefore ensure that the wider public interest elements of judicial review, which it is both for the courts and the defendant public bodies to work towards,[258] are not hindered by concerns typical of private parties in civil litigation.

The three-month time limit

96. We understand that in most cases, the three-month time limit provides the appropriate balance between (a) the need to ensure promptness in the resolution of claims, and (b) the need to provide claimants with sufficient time to make an application and to encourage pre-action engagement. We therefore agree with the Consultation that the current three-month time limit should not be amended. However, as we set out in our submission to the IRAL we are strongly opposed to any reduction to the three-month time limit.[259] This would have a negative impact on access to justice and would hinder effective government, though reducing out of court settlements and potentially increasing the number of weak and premature claims.

Extensions to time

97. We therefore do not consider that CPR 54.5(2) should be amended to allow parties to agree an extension to the time limit to bring a claim between themselves. This would risk undermining the public interest elements of judicial review. Further, judicial review can

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254 For instance, see *State of Mauritius v CT Power Ltd* [2019] UKPC 27 at [44] "the judicial review jurisdiction…exists to safeguard the public interest".

255 IRAL Report, Introduction, para. 34.

256 Fordham et al (2014), no.251, p. 4.

257 The courts have frequently recognised this need for time limits and how, generally, enforcement of time limits to bring a judicial review claim still ensures sufficient scrutiny in accordance with the rule of law, for example, *Privacy International,* no.165, at [130] (Lord Carnwath).

258 *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at [22], public authorities "are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest" (Singh LJ).

259 JUSTICE's IRAL submission, paras. 70 – 75.

have a significant impact on third parties,[260] extending beyond "interested parties".[261] In many cases it will be difficult to identify everyone who could potentially be impacted by the outcome of a judicial review, especially at the early stages to a judicial review claim, and what impact an extension of time could have on them, let alone to obtain their agreement to the extension of time (if this were required).[262] Allowing potential parties to a judicial review to extend time by agreement without the supervision of the court risks creating significant uncertainty for such third parties.[263] In addition, allowing an agreement to extend time does not resolve concerns around the time limit being too short, since in practice it gives defendants a veto if they do not want to engage in alternative dispute resolution or to give a claimant pressed for time an opportunity to bring a claim.

98. However, it is vital that the courts' discretion, which is currently exercised under the courts' general case management powers,[264] to extend the time limit if there is a good reason,[265] is retained.[266] There are many reasons why a claimant may not, despite their best efforts, be able to bring an application within the three-month time limit. As has been previously recognised by the Government, short-time limits can adversely impact those with disabilities, mental ill-health and neurodivergence.[267] Further, claimants who rely on legal aid regularly encounter difficulties in securing funding within the current three-month time

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[260] Consultation, para. 100; IRAL Report, para. 4.144. Often there will be matters for unrelated third parties which are dependent on the outcome of the judicial review, for example, in the planning context.

[261] Being those "directly affected by the claim", CPR 54.1(2)(f); *R v Rent Officer and another ex parte Muldoon* [1996] 1 WLR 1103 (Lord Keith).

[262] We note that the recommendation from a 2014 report by the Bingham Centre for the Rule of Law depended on "all parties to proposed judicial review proceedings, including defendants and interested parties" agreeing to the extension of time. Fordham et al (2014), no.251, p. 17.

[263] As the IRAL Report concluded it would be "difficult to implement without creating undesirable side effects for third parties, including other government agencies", IRAL report, para. 4.144.

[264] CPR 3.1(2)(a).

[265] Examples of when the courts have accepted that there was a good reason for the delay include: if the applicant was unaware of the decision complained of, 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 Transport Ex p. Presvac Engineering Ltd* (1992) 4 Admin. L.R. 121); if the claim raises issues of general public importance (*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); and the pursuit of alternative legal remedies (*R. v Secretary of State for the Environment Ex p. West Oxfordshire DC* [1994] C.O.D. 134).

[266] In Scotland, the court has a general discretion to extend the three months for "such longer period as the Court considers equitable having regard to all the circumstances", Court of Session Act 1988, s.27A(1).

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

limit[268] or finding the necessary specialist legal help required.[269] The ability of the courts to be able to exercise their discretion to extend the time limit, taking into account the impact on third parties and the public interest,[270] is therefore vital in safeguarding fair access to justice. However, given the recent hesitance in the caselaw as to when there exists a good reason to extend time, especially in relation to whether legal aid is a factor excusing delay,[271] we consider that it may be helpful to invite the CPRC to consider elaborating, through a non-exhaustive list, what a good reason to extend time may be. We would argue this should include time taken to secure legal aid. This could help ensure that the courts when considering an extension application consider the particular nature of judicial review claims and do grant an extension where it is required.

Track system

Question 12: *Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?*

99. We do not agree that a track system would assist judicial review claims. In particular, it is not clear what criteria could be used to allocate claims. As the Consultation recognises, unlike civil claims, judicial review claims are not dependent on value and cannot be allocated based on the amount claimed.[272] The Consultation refers to the need to have "procedural requirements proportionate to the complexity of the case". However, the "complexity" of a case cannot easily be determined. Judicial review claims vary considerably: in the issues they raise, the decisions they challenge, and the types of

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[268] Legal aid processing times will create delays before any legal assistance which will be remunerated by the Legal Aid Agency can be provided, and the rules which allow emergency applications for legal aid or emergency funding under delegated authority are restrictive.

[269] This is especially due to the significant contraction in the public law legal aid supplier base following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. There are now areas of the country where there is a lack of public law solicitors, representing a significant barrier to individuals' access judicial review.

[270] The Administrative Court Judicial Review Guide 2020 (July 2020), para. 5.4.4.3, provides that "[t]he Court will only extend time if an adequate explanation is given for the delay, and if the Court is satisfied that an extension of time will not cause substantial hardship or prejudice to the defendant or any other party, and that an extension of time will not be detrimental to good administration."

[271] For instance, the time taken to obtain legal aid funding has previously been found to be a good reason to extend time (*R. v Stratford on Avon DC Ex p. Jackson* [1985] 1 W.L.R. 1319), however the Court of Appeal has also stated (in obiter dicta) that waiting for legal aid funding will often not be a good reason (*R (Kigen and Cheruiyot) v Secretary of State for the Home Department* [2015] EWCA Civ 1286).

[272] Consultation, para. 101.

claimants and defendants.[273] Claimants bring judicial reviews for different reasons[274] and there are often varying pressures on, and implications of, judicial review judgments on the defendant public bodies, all of which impact a claim's "complexity".[275] The difficulty in determining the complexity of a case may also create further procedural complications if a case needs to switch tracks, which would undermine the aim of increasing the efficiency of the Administrative Court.

100. It is also unclear from the Consultation how the urgency of a case would be factored into the proposed track system since the complexity of a case does not necessarily equate to its urgency. There already exists a procedure for urgent judicial review applications in the Administrative Court[276] and we are concerned that the proposed track system could undermine the efficacy of this important process.

101. Effective case management already exists in the Administrative Court.[277] As with any other court proceedings, the overriding objective at CPR 1.1 to deal with all cases "justly and at proportionate cost" applies. This includes dealing with cases "in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues, and to the financial position of each party"[278] and allocating to cases "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".[279] The Administrative Court routinely makes case management directions, often in the order granting permission,[280] and will routinely vary the standard directions to accommodate, for example, the complexity, urgency or importance of the case. The Administrative Court will do this on its own motion or on an application from the parties. The parties may also apply for an interim order or request a case management conference if this is needed.[281] This ensures that, where necessary,

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[273] For instance, see the diverse variety of claims identified in the case studies by V. Bondy, L. Platt and M. Sunkin (2015), no.231.

[274] ibid, p. 12.

[275] L. Platt, M. Sunkin and K. Calvo (2010), no.196.

[276] Whereby a claimant can ask for an application for permission for judicial review to be expediated or for interim relief to be issued urgently, The Administrative Court Judicial Review Guide 2020 (July 2020), Section 15.

[277] The Administrative Court Judicial Review Guide 2020 (July 2020), Section 12.

[278] CPR 1.1(c).

[279] CPR 1.1(e).

[280] Fordham et al (2014), no.251, p. 24.

[281] The Administrative Court Judicial Review Guide 2020 (July 2020), no.276, Section 12.2.2.

the judicial resources in the Administrative Court are tailored to the claims, including their complexity. A track system is therefore not required.

Interventions

Identifying interveners

Question 13: *Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?*

102. Since the mid-1980s, JUSTICE has used third-party interventions with the aim of promoting a fairer, more effective, justice system, capable of protecting individual rights. Interventions can play an important role in assisting the courts[282] and the value of interventions has been repeatedly recognised by the judiciary at all levels.[283] Interventions are particularly important in our adversarial system in which the courts rely on the parties to bring to light the essential issues, relevant evidence and legal arguments.[284] 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

[282] For further analysis of the important role of interventions, see JUSTICE, 'To Assist the Court: Third party interventions in the public interest' (2016), available at: https://justice.org.uk/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf.

[283] There are many examples at Supreme Court, Court of Appeal and High Court level where the court has expressly relied on, and thanked, the submissions of third-party interveners in its judgment. For example:

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".

PH and HH v Deputy Prosecutor of Italian Republic, Genoa [2012] UKSC 25 at [21] were Lady Hale referred to the "valuable interventions by JUSTICE and the Coram Children's Legal Centre" and referred repeatedly to JUSTICE's submissions, including a table of prior cases prepared by JUSTICE (at [68]).*Cadder v HM Advocate* [2010] UKSC 43 at [47], where Lord Hope described JUSTICE's submissions, on the case-law of the European Court of Human Rights and international and comparative law practice, as "helpful".

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".

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 for Penal Reform.

[284] Lady Hale, 'Who Guards the Guardians?', Public Law Project Conference (2013), available at: https://www.supremecourt.uk/docs/speech-131014.pdf. See also Sir Henry Brooke, 'Interventions in the Court of Appeal' [2007] PL 402.

importance, where the outcome of the case will be felt much more widely, which, given the nature of judicial review, is often the case.

103. We are opposed to the suggestion of introducing a requirement on parties to identify organisations or wider groups that might assist litigation. Judicial review cases often raise a range of significant issues, which are of relevance across society. A wide variety of organisations may assist in judicial reviews.[285] Organisations will also have varying considerations when deciding whether to seek permission to intervene. These will include their relevant expertise and what value they could bring, but also their resources and finances.[286] It may be difficult for parties to effectively identify all the relevant organisations who would both be interested in, and capable of, intervening.

104. Further, the exact issues of contention in a judicial review application, and thus where an intervener could be of assistance to the court, will frequently only crystallise after the Summary Grounds of Resistance are filed by the defendant (or later). Permission will also sometimes only be given on certain issues. This means that identifying interveners early-on will often be a futile exercise. This will also risk increasing the burden on the court, as judges may be required to address intervention applications, which may turn out to not be necessary, at an early stage. Additional advance notice of interveners is not necessary. CPR 54.17(2) expressly provides that an intervention application in a judicial review should be made "promptly" and the courts will exercise their discretion to refuse permission to intervene if the court and the parties are provided insufficient notice. It is also usual practice to seek the parties' consent to the intervention prior to an application.[287]

105. Once an organisation or group is identified as a potential intervener by a party, it is unclear what impact, if any, the Consultation envisages this would have on the likelihood of that organisation/ group being granted permission to intervene. We are concerned that it could negatively impact the likelihood of permission to intervene being granted for organisations

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[285] By way of example, a wide variety of different organisations and individuals have sought permission to intervene in the upcoming Court of Appeal hearing of the High Court decision in *Bell v Tavistock* [2020] EWHC 3274 (Admin), which concerns the use of hormone blockers for children under the age of 18. We understand that, to date, the organisations / individuals who have been granted permission to intervene include NGOs, Hospital NHS Trusts and an individual doctor, see, https://mermaidsuk.org.uk/news/luis-hormone-blockers-qa-for-trans-young-people/.

[286] JUSTICE (2016), no.282.

[286] Practice Direction 54A, para. 13.2.

[287] It is also a requirement to do so for interventions in the UK Supreme Court, UK Supreme Court, Practice direction 6, para. 6.9.2.

that had not been identified. Conversely, it should not automatically follow that if an intervener has been identified by a party at an early stage, they should be granted permission to intervene. The role of interveners is to assist the court,[288] and it should be for the court to decide if an intervention would be of use, rather than the parties. Moreover, we would be concerned that, rather than being seen as an independent third party intervening to assist the court, the proposed intervenor would be seen to be aligned with the party that has proposed them. Currently, parties who consider that there would be benefit from a particular organisation / wider group intervening will contact those organisations informally. This provides flexibility in the identification of potential interveners and does not add unnecessary procedure or resource burden upon the parties.

Criteria for interventions

106. We note that the IRAL Report recommended that criteria for permitting interventions should be developed and published, suggesting that this should be included in the Guidance for the Administrative Court.[289] The Consultation expresses support for this proposal but states that it will be considered separately.[290]

107. We are concerned that this suggestion risks further stifling interventions and adding unnecessary additional barriers. No intervener has permission to participate in proceedings as of right – the need for and the scope of any intervention is entirely at the discretion of the court.[291] The courts will consider each application on the facts of the case and the experience of the would-be intervener.[292] Permission to intervene will only be granted where there is evidence that it will be of genuine assistance to the court. For instance, as identified in the IRAL Report, the courts will refuse permission to intervene if the intervener is only echoing the position of one of the parties.[293] The courts will also "balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to

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[288] *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 at [32].

[289] IRAL Report, para. 4.108.

[290] Consultation, para. 102.

[291] CPR 54.17.

[292] JUSTICE (2016), no.286.

[293] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin*); R (Philip Morris Brands Sarl) v Secretary of State for Health* [2014] EWHC 3669 (Admin); *E (A Child) v Chief Constable of Ulster* [2008] UKHL 66 at [1] – [3] (Lord Hoffmann).

the existing parties."[294]

108. The statutory framework for the treatment of costs and interventions introduced by the Criminal Justice and Courts Act 2015 already in essence provides a set of criteria for interveners. It introduced a duty to award costs against an intervener if any of four conditions are satisfied: (i) the intervener has acted as a party; (ii) the intervener's evidence has not been of "significant assistance" to the court; (iii) a significant part of the intervener's evidence relates to matter it is not necessary for the court to consider; or (iv) the intervener has behaved unreasonably.[295] As set out in our submission to the IRAL,[296] this has already reduced the number of interventions, in particular from smaller organisations.[297] Further criteria are not required.[298]

109. The courts also proactively exercise their powers to manage interventions appropriately. Where the courts do grant permission to intervene, they may do so on conditions and give case management directions,[299] for example, directing joint interventions or limiting interventions to brief written submissions, thus allowing the courts to limit access to their time and resources.

110. As recognised by the Senior Judiciary's response to the Government's 2013 consultation on interventions, significant "caution" should be adopted before implementing any

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[294] *Re Northern Ireland Human Rights Commission,* no.288, at [32] (Lord Hoffman).

[295] Criminal Justice and Courts Act 2015, s.87(5).

[296] JUSTICE's IRAL submission, para. 98 – 100.

[297] JUSTICE's IRAL submission, para. 100. There was significant contemporaneous concern at the time that the measures were introduced that the measures would unnecessarily restrict the capacity of interveners to act to assist the court in judicial review claims of constitutional significance. See for example, The Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project (2015), no.28, para. 3.43.

[298] We understand that the Administrative Court is intending to introduce rule changes which would require intervenors to submit alongside their intervention application the evidence they intend to rely on. JUSTICE is opposed to these changes as they risk further stifling the number of interventions. It would require intervenors to obtain the necessary evidence in a short period of time, which often entails considerable evidence gathering and resources, prior to making an intervention application. Many intervenors are NGOs who do not have the resources to undertake these tasks without prior confirmation that they have been granted permission. However, we also note that these rule changes will mean that the Administrative Court has access to a considerable amount of information on the proposed intervention and how it might assist the court at the application stage. Further criteria or limits as to when an intervenor should be granted permission are therefore not necessary.

[299] Practice Direction 54A, para. 13.2.

restrictions which may "discourage interventions which are of benefit to the court".[300] We therefore hope that the Government will not be taking forward this suggestion.

Provision for a Reply

Question 14: *Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?*

111. We agree with the proposal that there should be a formal provision in the CPRs which allows a claimant to file a 'Reply' following the receipt of the Acknowledgement of Service and the defendant's Summary Grounds of Resistance. In practice Replies are frequently used by claimants to address the key reasons why the judicial review claim should be considered. However, there exists uncertainty as to whether a Reply will be admitted.[301] The Administrative Court Guide provides that "Replies are rarely if ever necessary and are not encouraged".[302] However, this does not reflect the reality of judicial review applications, where often the defendants' Summary Grounds of Resistance will be the first time that points are raised. A Reply provides an opportunity to address such issues and assists the permission judge in having access to the key arguments of both parties. Including a formal provision for a Reply would therefore formalise the current practice and provide certainty.

112. We consider that seven days to file the Reply will in most cases, and in particular for individual claimants, be sufficient and will not unduly delay the court making a decision on permission. However, we also recognise that seven days will likely be too short for more complex judicial review applications. We acknowledge the need for a short time limit, considering the swift nature of judicial review and the need for brevity. Though we also understand that practitioners currently often serve a reply within seven days because of concerns that the earlier the Reply is provided to the judge the higher the likelihood that it will be admitted. We therefore consider that 14 days would be a more realistic time limit, which would help ensure that Replies are of a high quality and are filed where they are

[300] "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.

[301] The Administrative Court Judicial Review Guide 2020 (July 2020), para. 7.2.5; *R (Wingfield) v Canterbury City Council* [2019] EWHC 1975 (Admin) at [80] - [81].

[302] The Administrative Court Judicial Review Guide 2020 (July 2020), para. 7.2.5,

needed. To encourage brevity in the length of Replies and the points addressed, wording could be included in the CPRs as to the need for Replies to be as brief as possible.

Grounds of Resistance

Question 15: *As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?*

113. It is unclear to us what the purpose is of the proposals in relation to Summary Grounds of Resistance and Detailed Grounds of Resistance. The Consultation states that the Defendant would "only be obliged to submit Summary Grounds of Resistance where either: (i) the Pre-Action Protocol was not followed; or (ii) the Claimant has raised (without sufficient notice) new grounds not foreshadowed in the Pre-Action Protocol correspondence."[303] However, the Consultation also states in relation to (i): "If the Claimant has failed to follow the Pre-Action Protocol, which could have obviated the need for a Judicial Review to be filed, then it seems disproportionate for Defendants to be compelled to draft detailed grounds before permission is granted";[304] and in relation to (ii): "the requirement for detailed grounds to be drafted is disproportionate when a Claimant could have provided the opportunity for the Defendant to explain their position at the pre-action stage, but chose not to do so."[305]

114. The statements at paragraphs 106 and 107 of the Consultation therefore suggest that the proposal is that if the Pre-Action Protocol is not followed or new grounds are raised with insufficient notice then Summary Grounds of Resistance will not need to be filed by the Defendant. This directly contradicts with the statement at paragraph 105 of the Consultation, which suggests that it would only be in these situations that Summary Grounds of Resistance would be required.

115. Further, although paragraph 105 refers to Summary Grounds of Resistance, both paragraphs 106 and 107 refer to Detailed Grounds of Resistance. These are two different documents that are filed at separate stages of the judicial review procedure. The Summary Grounds are filed alongside the Acknowledgment of Service where the Defendant seeks

[303] Consultation, para. 105(a).

[304] Consultation, para. 106.

[305] Consultation, para. 107.

to defend the claim,[306] while the Detailed Grounds are required to be filed only once permission has been granted.[307] It is therefore unclear exactly which procedural requirements the Government considers should be changed.

116. We also note that it is a fundamental principle of judicial review that a party must respond to a claim to be able to defend it.[308] Grounds of Resistance must be served to participate in judicial review. This should apply, regardless of whether the Pre-Action Protocol has been followed or what pre-action correspondence has occurred. As the Consultation itself argues, the Pre-Action Protocol is a means of resolving cases pre-proceedings[309] and encouraging conciliation. [310] It is a "precursor to Judicial Review"[311] and it should not be treated as an alternative to the need to plead a case. There may also have been good reasons, including insufficient time, why it was not possible to follow the Pre-Action Protocol in a particular case.

117. Further, it is unlikely that removing the requirement to file either the Summary Grounds or Detailed Grounds would have any significant impact on the demands of judicial reviews on the resources of public bodies. A public body can always reuse the information in its response to the letter before claim letter if it considers that no additional points need to be made in the Summary Grounds.[312] The Summary Grounds are a key part of contesting the grant of permission, especially as permission is almost always decided (in the first instance) on the papers. Defendants ordinarily seek to respond to a claimant's points and clarify their case prior to the permission decision, especially if a claimant has not complied

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[306] CPR 54.8. The time limit for filing Summary Grounds of Resistance is 21 days from service of the claim form.

[307] CPR 54.14(1). The time limit for filing Detailed Grounds of Resistance is 35 days from the order granting permission.

[308] A failure to file an Acknowledgement of Service means that the defendant may not participate in any permission hearing, unless the court allows them to do so. However, the defendant may still take part in the substantive hearing if they comply with the rules on submitting detailed grounds for contesting the claim and evidence (CPR 54.9).

[309] Consultation, para. 109.

[310] This point was expressly made by Government Departments when responding to the IRAL who expressed concern as to the use of the Pre-Action Protocol as a formal procedure rather than as an "early dispute resolution mechanism". 'Summary of Government Submissions to the Independent Review of Administrative Law', para. 53.

[311] 'Summary of Government Submissions to the Independent Review of Administrative Law', para. 55.

[312] *Ewing v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583 at [43], "If a party's position is sufficiently apparent from the Protocol response, it may be appropriate simply to refer to that letter in the Acknowledgement of Service. In other cases it will be helpful to draw attention to any 'knock-out points' or procedural bars, or the practical or financial consequences for other parties (which may, for example, be relevant to directions for expedition)."

with the Pre-Action Protocol or pleaded a point late and therefore the defendant has not already set out their case. Summary Grounds also often promote early settlement as they encourage defendants to engage with the issues, particularly if they have not done so fully at the pre-action stage, and provide claimants with a clearer idea of defendants' position – both of which are crucial for settlements. The duty of candour is considered more likely to be engaged at this stage,[313] which encourages defendants to ensure that all relevant information and facts are put before the court,[314] in turn encouraging settlement. Moreover, since Detailed Grounds are an essential element of a defendant's argument as to why a judicial review application should not be successful, it appears odd to say that filing this would be "disproportionate". [315] The application of the duty of candour also means that defendants should not be able to avoid, by not being required to submit either Summary Grounds or Detained Grounds, setting out relevant information and material facts both in support of and against their case.[316] It is counter-intuitive to remove this requirement which helps ensure that court decisions[317] on judicial review applications are based on both the claimant's and defendant's arguments.

Grounds of resistance time limit

Question 16: *Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?*

118. It is unclear to us why the time limit for serving Detailed Grounds of Resistance needs to be extended. As set out above (paragraph 95), judicial review seeks to ensure the swift resolution of claims.[318] Increasing the time limit unnecessarily undermines this purpose and the need for certainty. Delay is bad for claimants, especially if they have to wait to secure the relief to which they are entitled, and is also bad for public decision-makers and

[313] Although we recognise that there exists uncertainty as to when it starts to apply during the judicial review process.

[314] The Administrative Court Judicial Review Guide 2020 (July 2020), para. 14.1*; R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin).

[315] Consultation, para. 106.

[316] See for instance, *R (Gillan) v Commissioner of Police of the Metropolis* [2004] EWCA Civ 1067 at [54]; *R (Caroopen) v SSHD* [2016] EWCA Civ 1307 at [97]; *R (AHK) v SSHD (No 2)* [2012] EWHC 1117 at [22]; *R (Quark Fishing Ltd) v Secretary of Sate for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50].

[317] See for instance, *Graham v Police Service Commission* [2011] UKPC 46 at [18] "It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision".

[318] Ministry of Justice (2012), para. 44, no.250.

others who are affected by the legal challenge.[319] Further, Detailed Grounds of Resistance must only be filed and served 35 days after permission is granted.[320] There is therefore generally ample time for the defendant to consider the merits of the claim, especially since they will already have filed and served Summary Grounds of Resistance (which defendants can rely upon if they wish to).[321] If a defendant is unable to meet the 35 day time limit, they can apply to the court for an extension,[322] which is ordinarily granted by the court if there are good reasons.

Pre-Action Protocol

Paragraph 109 of the Consultation states "[t]he Government invites consultees to submit feedback and comments on (a) what issues are currently being faced in relation to the PAP; and (b) how to best clarify this."

119. In our view, as the IRAL Report concluded[323], the Pre-Action Protocol for Judicial Review ("PAP") is generally working well. The success of the PAP procedure in resolving disputes outside of the courts is, of course, dependent on the engagement of both parties in the process, as well as the nature of the parties and issues in dispute. However, as we set out in our submission to the IRAL,[324] further pressure on claimants and defendants to engage in alternative dispute resolution would not be appropriate in the context of judicial review.

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[319] Fordham et al (2014), no.251, p. 4.

[320] CPR 54.14(1).

[321] The Administrative Court Judicial Review Guide 2020 (July 2020), para. 12.2.3.

[322] The court can grant an extension to time limits under its general case management powers, CPR 3.1(2)(a).

[323] IRAL Report, para. 4.74.

[324] JUSTICE's IRAL submission, paras. 113 – 116.