Judicial Review and Courts Bill

(Part 1 – Judicial Review)

House of Commons Report Stage

Briefing and Endorsed Amendments

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our 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.

2. JUSTICE has put together separate briefings on different elements of the Judicial Review and Courts Bill (the "Bill") for Report Stage on 25 January 2022. This briefing addresses Part 1 of the Bill, which relates to judicial review. Further detail can be found in JUSTICE's previous briefings for the Bill's Second Reading in the House of Commons[1] and the Committee stage of the Bill.[2]

3. JUSTICE has several significant concerns with both Clause 1 and Clause 2 of the Bill. Judicial review is of critical importance to the UK's constitutional arrangement, the rule of law, access to justice, and in promoting good governance. However, Clauses 1 and 2 seek to limit this vital check on executive action.

   - Clause 1 (s. 29A(1)(b)) introduces prospective-only remedies in judicial review. This risks undermining individuals' ability to hold the government to account, erasing legal rights, and creating significant uncertainty in practice. **Section 29A(1)(b) should be removed (Amendment 1, 2, and 3)**.

   - Clause 1 fails to protect the ability of individuals to rely on the finding of unlawfulness of a measure in other contexts, for example as a defence to criminal proceedings. **A further subsection should be included to protect third-party rights and defences to rely on the unlawfulness of a measure where a remedy under s.29A(1) is ordered (Amendments 26).**

   - Clause 1 (s.29A(8)(e)) requires the courts to consider actions which a public body has "proposed" to take. This provides little legal basis for those relying on such statements and introduces unnecessary uncertainty. **Reference to action**

[1] JUSTICE, 'Judicial Review and Courts Bill Part 1 – Judicial Review) House of Commons Second reading Briefing' (September 2021).

[2] JUSTICE, 'Judicial Review and Courts Bill Part 1 – Judicial Review) House of Commons Committee Stage Briefing" (November 2021).

"proposed to be taken" should be removed (Amendment 28).

- "Good administration", referred to at Clause 1 (s.29A(8)(b)) as a factor the courts must consider when exercising the new remedial powers, must also depend on public bodies acting in accordance with the law. **A new subsection should be included to clarify that the principle of good administration includes the need for administration to be lawful (Amendment 29).**

- Clause 1 (s.29A(9) and s.29A(10)) contains a presumption in favour of the use of suspended quashing orders and prospective only quashing orders. This undermines the courts' remedial discretion and risks making the new remedial powers becoming the default. Further, s.29A(10) favours the assurances of the executive over other important considerations, including the potentially severe impact of the new remedies on claimants and third parties. **S.29A(9) and s.29A(10) should therefore be removed (Amendment 4).** We also support the **Amendment 32 which removes s.29A(10)**

- Alternatively, if s.29A(9) is not removed s.29A(9) should be amended (and s.29A(10) removed) to introduce a precondition that **the new remedial powers should only be exercised if they offer an effective remedy to the claimant and any other person materially affected by the impugned act (Amendment 25**);

- The new remedies risk breaching the requirements of the European Convention of Human Rights, including the right to an effective remedy. The courts should be required to give **due consideration to the ECHR rights when deciding whether to exercise their new remedial powers** (**Amendment 37)**; and

- Clause 2 would severely restrict *Cart*[3] judicial reviews ("*Cart* JRs"). This type of judicial review is a crucial and proportionate safeguard against legal errors in the Tribunal system in decisions often involving the most fundamental rights. **Clause 2 should therefore be removed (Amendment 5).**

Quashing Orders – Part 1, Clause 1

4. Clause 1 subsection (1) inserts a new s.29A into the Senior Courts Act 1981. This

[3] *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

introduces on a statutory footing two types of remedies when a court finds that a public body acted unlawfully: (i) a quashing order which does not take effect until a date specified by the court (s.29A(1)(a)) (we refer to these as suspended quashing orders ("SQOs")); and (ii) a quashing order which takes effect only from the point of the court order onwards (s.29A(1)(b) (we refer to these as prospective only quashing orders ("POQOs")). Ordinarily a quashing order nullifies or invalidates the unlawful measure and the measure's consequences must be "unwound."

5. The Government has proposed extending the provisions of Clause 1 to all proceedings where secondary legislation is challenged as being incompatible with the Human Rights Act 1998 (or a new bill of rights).[4] We are concerned that Clause 1 will be used as a model for remedies beyond judicial review and in situations involving serious breaches of human rights. It is vital that the concerns with the clause are addressed now.

Prospective only quashing orders (POQOs)

6. **JUSTICE is opposed to POQOs and urge parliamentarians to vote in favour of Amendments 1, 2 and 3 that would remove s.29A(1)(b) from the Bill.**

> Amendment 1
> Clause 1, page 1, line 8, leave out from "order" to the end of line 9
>
> ***Member's Explanatory Statement***
> *This amendment would remove the provision for making quashing orders prospective-only.*
>
> Amendment 2
> Clause 1, page 1, leave out lines 15 to 18
>
> ***Member's Explanatory Statement***
> *This amendment is consequential on Amendment 1, which removes the provision for making quashing orders prospective-only.*
>
> Amendment 3
> Clause 1, page 2, line 2, leave out "or (4)"
>
> ***Member's Explanatory Statement***
> *This amendment is consequential on Amendment 1, which removes the provision for making quashing orders prospective-only.*

[4] Ministy of Justice, Human Rights Act Reform Consultation, question 16, para. 252.

7. POQOs were not recommended by IRAL, nor do they build on the IRAL panel's narrow recommendations, which related to suspended quashing orders.[5] In issuing a POQO, the courts will be determining that an unlawful measure should be treated as if it were lawful retrospectively.[6] This goes directly against the rule of law and could significantly undermine the effectiveness of judicial review to the detriment of individuals' rights and the accountability of the government.

   a. **POQOs deny redress to those impacted by unlawful government action, including the claimants and others who have suffered loss. This risks creating unjust outcomes and weakens the protection of citizens against abuse of power.** As the Government has acknowledged the use of POQOs "*could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy*."[7] This also risks **breaching the requirement for an effective remedy for breaches of the European Convention on Human Rights, as provided for in Article 13 ECHR**.

      By way of example, in 2018 the High Court declared the decision of the Home Office to cut weekly benefits to asylum seeking victims of trafficking by over 40% - from £65 to £37.75 per week - to be unlawful. There was significant evidence of the considerable detrimental effect that the cuts had had on the claimant and other highly vulnerable victims of trafficking, and the judge also held that the claimants and anyone else subjected to the cut be entitled to backdated payments.[8] However, wif the court had ordered a POQO, the claimant, and thousands of other trafficking victims affected by the policy, who had suffered significant hardship due to the reduced funds, would not be entitled to any backdated payments.[9]

   b. **POQOs arbitrarily distinguish between people who have been impacted by the unlawful measure before and after a court judgment**. As the Joint

[5] As Jermey Wright recognised at the second reading of the Bill, House of Commons, Volume 702, Column 212.

[6] New ss.29A(4) and (5) set out the implications of doing this – the decision or act in question is to be treated as valid and unimpaired by the relevant defect for all purposes for the period of time before the prospective effect of the quashing order.

[7] The Government Response to the Independent Review of Administrative Law' (Consultation), para. 61

[8] *K, AM v Secretary of State for the Home* Department [2018] EWHC 2951 (Admin).

[9] For further examples if where the application of Clause 1 could have created significantly unjust outcomes for the claimants and others see Public Law Project, Judicial Review and Courts Bill, Case Studies – Clause 1.

Committee on Human Rights ("**JCHR**") has said that *"It would be unjust for potentially large numbers of people who have been impacted by an unlawful decision or measure to be denied a remedy simply because of the point at which they were impacted*. *Those affected before the court's decision are just as entitled to the law's protection as people who may be affected by an unlawful decision or measure in the future*."[10] We fully agree.

c. **POQOs undermines Government accountability**, **good administration and the quality of decision-making**.[11] POQOs allow the executive to act unchecked, safe in the knowledge that were the act to be unlawful the implications would be limited. 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*".[12] The Lord Chancellor has said that the reforms lead to *"a better outcome, allowing both essential judicial accountability and good governance at the same time; those two aspects can and should go hand in hand*". However judicial accountability and good governance already go "hand in hand". Reducing judicial accountability for public bodies to act lawfully risks jeopardising good governance, rather than improving it.

d. **POQOs remove a key motivation to bring a judicial review – to reverse the consequences for the claimant of the unlawful measure. This will likely have a chilling effect on judicial review**. As the JCHR has said "*judicial review claimants already face significant obstacles when seeking justice, and it is unfair and unreasonable to introduce changes that could further dissuade them from bringing unlawful action by public authorities before the court*."[13] POQOs may also prevent claimants from securing legal aid, which requires there to be "sufficient benefit" to the individual of the advice and representation.[14]

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[10] JCHR, Legislative Scrutiny: Judicial Review and Courts Bill, Tenth Report of Session 2021-2022, para. 26.

[11] 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), considering research showing the various benefits to local authorities and their public service provided by judicial review.

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

[13] JCHR, no.10 above, para. 24.

[14] Regulation 32 of the Civil Legal Aid (Merits Criteria) Regulations 2013 in relation to Legal Help.

e. **POQOs introduce serious legal and practical certainty.** The transition between a measure being valid and then quashed going forward will be difficult and unwieldy to navigate, including for public bodies. For example, what would happen to ongoing criminal proceedings in respect of a regulation found to be unlawful but quashed only prospectively?

f. As Professor Tom Hickman QC has pointed out, **POQOs allow the courts to in effect "re-write the law retrospectively"**[15] – by issuing a POQO courts can decide that unlawful measures should be treated as lawful; even where they contravene primary legislation. This risks important and difficult social policy and economic issues, which require and deserve Parliament's attention, being decided by the courts.[16]

8. In short, as well as undermining judicial accountability and good governance, POQOs risk leaving claimants and others continuing to suffer the consequences of unlawful measures. It is not clear how this can be described as a "*better"*[17] or "*successful*".[18]

9. **The courts already have considerable flexibility with remedies** to address circumstances where, despite the concerns set out above, a quashing order would not be appropriate.[19] The courts will frequently consider the impact of quashing on third parties, certainty and *"the needs of good public administration*"[20], often declining to issue a quashing order and issuing a declaration instead.[21]

10. A declaration of unlawfulness does not quash the measure in question, and therefore avoids the concerns about the impact on administration. However, the unlawfulness of the measure is still recognised, both retrospectively and prospectively, so the claimant

[15] T. Hickman 'Quashing Orders and the Judicial Review and Courts Act', (July 2021), UK Const. L Blog.

[16] See further, Jeremy Wright, House of Commons, Volume 702, Column 212: "f*inding a decision to be unlawful but then saying that that unlawfulness applies only to those affected by it in the future and not in the past puts the court in a strange position.*"

[17] Dominic Raab, House of Commons, Volume 702, Column 192

[18] James Cartlidge, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 130

[19] See further, JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021), paras. 45 – 50.

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

[21] Research by PLP has in fact shown that in challenges to statutory instruments, a declaration, rather than a quashing order, is the most common remedy following a successful judicial review. See, https://publiclawproject.org.uk/content/uploads/2021/04/210429-PLP-JR-consultation-response.pdf.

and others in similar circumstances can rely on the unlawfulness to obtain a remedy or defend themselves in other proceedings (see further paragraphs 13 to 17 below). This provides the public body with the necessary flexibility in how it addresses the consequences of the unlawful measure, while providing protections to those impacted.

11. The government has referred to the case of Natural England revoking unlawful gun licenses due to a threatened judicial review, which caused considerable uncertainty for farmers who required the licences, as an example of the sort of uncertainty Clause 1 will avoid. Had Clause 1 been in force at the time, the Government has said that it would have provided Natural England with the confidence to contest the threatened judicial review without fear of a quashing order were the licences to be found unlawful.

12. It is unclear why the Government is encouraging unnecessary litigation. If a public body realises that it has acted unlawfully, it should be encouraged to seek to remedy this, considering third parties who have relied on its actions – not hold firm and fight it out in court. Further, it is unlikely that Natural England would have wanted to go through costly litigation (even if POQOs were available) to defend licences that it had realised were unlawful. The uncertainty that arose for farmers was not a consequence of the judicial review remedies, but of Natural England enacting an unlawful measure, withdrawing it in haste and then not issuing replacement licences. Even if the case had gone to court, given the farmers' interests it is highly unlikely that a full retrospective quashing order would have been issued - a simple declaration of unlawfulness being more likely.

Erasure of defences and private law rights based on the unlawfulness of a measure

13. We have significant concerns about the impact of s.29A(5) on individuals' ability to defend themselves against unlawful measures or exercise their private law rights in relation to an unlawful measure. **JUSTICE therefore recommends that parliamentarians vote in favour of Amendments 26 which would protect third-party rights and defences where a remedy under s.29A(1) is ordered.**

> Amendment 26
> Clause 1, page 2, line 4, at end insert—
>
> "(5A) Where the impugned act consists in the making or laying of delegated legislation (the impugned legislation), subsections (3) or (4) do not prevent any person charged with an offence under or by virtue of any provision of the

impugned legislation raising the validity of the impugned legislation as a defence in criminal proceedings.

(5B) Subsections (3) or (4) does not prevent a court or tribunal awarding damages, restitution or other compensation for loss."

Member's explanatory statement

This amendment would protect collateral challenges by ensuring that if a prospective only or suspended quashing order is made, the illegality of the delegated legislation can be relied on as a defence in criminal proceedings.

14. Ordinarily, where a court has found a measure unlawful, even if it has not been quashed, it is possible for individuals / bodies to rely on this finding of unlawfulness in criminal and civil proceedings – to defend themselves against criminal charges and to bring claims for compensation (see paragraph 0). However, s.29A(5) precludes individuals from being able to do this. As IRAL stated this would leave the law in a "*radically defective state*"[22] and risks significant unfairness in some circumstances. For instance:

- an individual could find themselves being prosecuted or continuing to have a criminal record under an unlawful statutory instrument,
- a person who has had to pay a tax under unlawful regulations, would not be able to bring a claim against HMRC to be refunded the money,[23]
- individuals who have suffered mistreatment due to unlawful actions would not be able to bring a claim for compensation, for instance for unlawful imprisonment, and
- individuals found ineligible for a welfare benefit under unlawful eligibility regulations would not receive back payments of the benefit. They would likely have to make a new application and wait for another decision to be made to receive the correct entitlement going forward.

15. We recognise that the interests of those who would benefit from the quashing is one of the s.29A(8) factors that the courts must consider, and that under s.29A(2) the court could add conditions to protect third parties' rights and defences. However, this does not

[22] IRAL Report, para. 3.66.

[23] A cause of action under the law of restitution exists for money to be returned where tax has been unlawfully extracted from a taxpayer by virtue of a legislative requirement. *Woolwich Equitable Building Society v IRC* [1992] STC 657; *Test Claimants in the Franked Investment Income Group Litigation v IRC* [2012] All ER (D) 188.

provide anywhere near sufficient protection for third parties. It cannot ever be justifiable for an individual to face the loss of their liberty or financial penalty on the basis of an unlawful measure. The position for third parties under the new remedies could be significantly worse than if a court had just issued a declaration of unlawfulness. This gap in protection needs to be remedied.

16. It is also completely unrealistic to expect a court to envisage all the potential third parties and groups of individuals who may be negatively affected by an unlawful measure being treated as lawful and impose conditions to address this. The Government has raised the wide-ranging effects of public body decision making as a reason why the retrospective quashing of a measure should be avoided, but it is this wide-ranging effect that means that the impact on third parties of issuing one of the new remedies could be so difficult to predict. This is especially since the public body defendant has no obligation, or incentive, to consider and bring the potential risks to third parties to the court's attention. It is much simpler to have a clear protection on the face of the Bill for third parties that applies in all circumstances.

Good administration – s.29A(8)(b)

17. Section 29A(8)(e) states that the court must consider "*any detriment to good administration that would result from exercising or failing to exercise the power"* to order the new remedies. **JUSTICE is concerned that this fails to recognise the value of lawful administrative action, and recommends that parliamentarians vote in favour of Amendment 29:**

> Amendment 29
> Clause 1, page 2, line 23, at end insert—
>
> "(8A) In deciding whether there is a detriment to good administration under subsection (8)(b), a court must have regard to the principle that good administration is administration which is lawful."
>
> ***Member's Explanatory Statement***
> *This amendment would clarify that the principle of good administration includes the need for administration to be lawful.*

18. It has been repeatedly stated that Clause 1 will ensure good governance.[24] However,

[24] See for instance, 'Judicial Review Reform Consultation The Government Response', paras. 72 and 83.

these statements fail to recognise the importance of public bodies complying with the law in ensuring such good governance (see paragraph 7.c above). As the IRAL Report recognised, all of society, including public bodies, "*have an interest in legality as an element of good administration*"[25], as is also recognised by the Government's guidance on judicial review for civil servants.[26] Amendment 21 would ensure that the courts take this into account when considering "good administration."

Proposed executive actions - s.29A(8)(e)

19. The requirement at s.29A(8)(e) on the courts to consider any action "*proposed to be taken*" by a responsible body provides little or no legal basis to require the public body to act, especially if only said during submissions and not reflected in the court's judgment. The reality of public body decision-making, executive action and the legislative timetable, is that priorities and policy positions change, and resources and time may have to be diverted. In the meantime, the judicial review claimant and all others adversely impacted by the measure must wait – continuing to be detrimentally impacted – with limited, if any, legal recourse.

20. **JUSTICE urges parliamentarians to vote in favour of Amendment 28.** This does not prevent the courts from looking forward but limits it to where the public body has given an undertaking that it will carry out the proposed future acts, helping provide certainty and legal recourse if the undertaking is not followed.

> Amendment 28
> Clause 1, page 2, line 21, leave out "or proposed to be taken"
>
> ***Member's Explanatory Statement***
> *This amendment would remove the requirement to take account of actions which the public body proposes or intends to take but has not yet taken.*

Presumption - s.29A(9) and s.29A(10)

Section 29A(9)

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

[26] This states that its purpose is "*to inform and improve the quality of administrative decision making*." The judge over your shoulder – a guide to good decision making' (2016), page 5.

In the same way the Parliamentary and Health Service Ombudsman in their 'Principles of Good Administration' state that "Good administration by public bodies means: Getting it right," which includes "Acting in accordance with the law and with regard for the rights of those concerned.

21. JUSTICE is opposed to the presumption at s.29A(9) in favour of the new remedies. This clause, which was not recommended by IRAL, unnecessarily fetters remedial discretion, risks excessive litigation and creates the "default" position that the new remedies should be applied, when they should only be applied in exceptional circumstances, if at all. **We recommend that parliamentarians vote in favour of Amendment 4, which would remove s.29A(9) and s.29A(10)** (on s.29A(10) see paragraphs 26 to 29 below).

> Amendment 4
> Clause 1, page 2, leave out lines 24 to 32
>
> ***Member's Explanatory Statement***
> *This amendment would protect the discretion of the court by removing the presumption in favour of issuing suspended, prospective-only quashing orders.*

22. The presumption conflicts with the Government's stated aim of increasing courts' flexibility by requiring particular remedies to be used in certain circumstances. The Government continues to reiterate the importance of the courts having the discretion to issue the new remedies as "*they see fit and proper*"[27], but the courts freedom to do so is jeopardised by the inclusion of a presumption. As Professor Verhaus has stated, the presumption: *"could very well subvert the premise of reform – which is to reiterate remedial flexibility, and thus that remedial decisions should be based on reasoned analysis of all relevant factors implicated on the facts."*[28]

23. The Government states that s.29A(9) can provide "*a clear message that Parliament expects to see the new powers used where appropriate*."[29] However, the courts already use the most appropriate remedy for the circumstances of the case before them. A court, with its experience, will issue a POQO / SQO if it is the most appropriate remedy. Not only does it display a lack of trust in the judiciary to have such a legislative presumption, but it risks preventing the courts from being able to provide the most appropriate remedy.

24. Nor is a presumption required to "*encourage[e] and expedit[e] the accumulation of*

[27] Caroline Johnson, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 106; James Cartlidge page 144, 145: *"On the question of whether they should be used, of course that is a discretionary matter."*

[28] J. N.E. Varuhas, 'Remedial Reform Part 1: Rationale', U.K. Const. L. Blog (3 November 2021)

[29] James Cartlidge, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 127.

jurisprudence"[30] or for the courts to "*state the reasons, whether they do or do not*" [31] use the new remedies. The courts will, as they do with any legislation, build up jurisprudence as they consider the new remedies, including providing reasons for their decisions.

25. The Government has recognised that *"removing the presumption from the Bill would not necessarily prevent the new modifications to quashing orders from operating effectively*".[32] Instead its inclusion will not only reduce remedial flexibility, but is likely to increase the length and costs of judicial review by encouraging further arguments and submissions at the remedy stage. This is particularly so in light of the convoluted drafting and multiple stages to the presumption.

Section 29A(10)

26. The presumption is made worse by the inclusion of s.29A(10). This provision requires the court when applying the presumption to "*take into account, in particular*" anything under s.29A(8)(e). This directs the court to give special consideration to anything which the public body with responsibility for the impugned act had done or says it will do. The public body with responsibility may not even be party to the litigation.

27. There are significant difficulties with making a POQO or SQO on the basis of statements made, or even undertakings given, by the defendant. First, only the claimant would be able to enforce the undertaking or statement, even though others will also be impacted by the defendant's non-compliance. Second, claimants may not have the funds, ability, or resources to bring the case back to court. Second, the recourse would only be against the defendant public body not any other public bodies who have said they would act. Third, the Government has recognised the practical difficulties and potential for further protracted litigation that could arise in deciding whether a condition in an order has been complied with[33] – the same concerns apply equally to court orders made on the basis of public body assurances.

28. The new remedies could have a significant impact in denying redress to those impacted by an unlawful measure – ordering them based on public bodies' assurances not only risks uncertainty but also the further denial of redress. For example, where someone

[30] *Ibid* page 113.

[31] *Ibid*, page 144.

[32] *Ibid*, page 127.

[33] 'Judicial Review Reform Consultation, The Government Response, no.24 above, para. 68.

has been deemed ineligible for a welfare benefit under regulations subsequently found unlawful the court may order a POQO on the basis of Government assurances that a mechanism for ensuring back payments will be put in place. However, such a process may take longer than initially anticipated. In the meantime, the claimant, and others, continue to be denied the money they are due - which could very easily be the difference between whether they can afford their food and rent.

29. The courts already take into account steps that the executive or Parliament are intending to take[34] or have taken[35] (as well as now being required to by s.29A(8)(e)), and generally accept that the defendant will comply with the court's ruling on lawfulness.[36] However, it should be for the courts to determine in the circumstances of the case what weight should be given to public body assurances, rather than being required to preference these assurances at the expense of the claimant and others. As the JCHR has concluded "*Clause 1 appears to be an attempt to weight the scales in favour of the defendant public authority over the claimant."*[37] Such an intrusion cannot be acceptable.

30. For the reasons set out above, if the amendments to remove (Amendment 4) or replace (Amendment 25 – see paragraphs 31 to 35 below) ss.29A(9) and (10) **JUSTICE supports Amendment 32 which would remove s.29A(10) from Clause 1.**

> Amendment 32
> Clause 1, page 2, leave out lines 31 and 32
>
> ***Member's Explanatory Statement***
> *This amendment removes the extra weight which would otherwise be given to subsection 8(e) by the courts when applying the test created in subsection 9(b) to establish whether the statutory presumption is applicable.*

Precondition of an effective remedy

31. **If Amendment 4 to remove ss.29A(9) and (10) is not successful, we recommend that parliamentarians vote in favour of Amendment 25.** This amendment would

[34] For example, in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, in refusing to make a declaration of incompatibility under the Human Rights Act 1998 regarding the prohibition of assisted suicide, the Supreme Court considered the fact that Parliament was "still actively engaged in considering associated issues" in the context of a private members bill in the House of Lords at the time.

[35] The courts will exercise their discretion to not provide a remedy if events have overtaken the proceedings, *R. v Sunderland Juvenile Court Ex p. G* [1988] 1 W.L.R. 398.

[36] *R (Langton) v Secretary of State for Environment and others* [2019] EWHC 597 (Admin) at [130].

[37] JCHR, no.10 above, para. 29.

replace ss.29A(9) and (10) with a new s.29A(9). The new s.29A(9) would (a) create a precondition to the exercise of the new remedies; and (b) ensure that the new remedies are only used where (i) they provide an "effective remedy", rather than "adequate redress" and (ii) the effective remedy is for the claimant and any other person materially affected by the unlawful measure.

> Amendment 25
> Clause 1, page 2, leave out lines 24 to 32 and insert—
>
> "(9) Provision may only be made under subsection (1) if and to the extent that the court considers that an order making such provision would, as a matter of substance, offer an effective remedy to the Claimant and any other person materially affected by the impugned act in relation to the relevant defect."
>
> ***Member's Explanatory Statement***
> *The amendment would remove the presumption and insert a precondition of the court's exercise of the new remedial powers that they would offer an effective remedy to the claimant and any other person materially affected by the impugned act.*

Precondition

32. As has been recognised by the JCHR, Clause 1 does not prevent the courts using the new remedies in situations where their use would not offer "*adequate redress"* for the claimant or others impacted by the unlawful measure[38]. A safeguard should be introduced to directly address this.

Effective remedy rather than "adequate redress"

33. When exercising their remedial discretion in judicial review claims, the courts starting position is that an effective remedy should be ordered.[39] The use of the words "*adequate redress*" at s.29A(9) risk unnecessarily lowering this bar to the detriment of those impacted by unlawful measures.[40] The Government has stated that it does not consider the change of wording "*would result in a higher test or make any material difference to the clause."*[41] However, this can easily be clarified by explicitly using the "effective

[38] JCHR, no.10 above, para. 20.

[39] "The Court will need a cogent reason if it is to exercise its residual discretion, to decline the claimant a practical and effective remedy, in a case establishing a material public law error on the part of the defendant public authority", The Hon Sir Michael Fordham, Judicial Review Handbook, Seventh Edition, para 24.3.

[40] As Joshua Rozenberg QC has pointed out why were the words "sufficient redress", "full redress" or just "redress" not used?, *A Lawyer Writes,* 'Fettering the courts' discretion' (July 2021).

[41] James Cartlidge, Public Bill Committee, House of Commons, Judicial Review and Courts Bill, page 128.

remedy" standard instead — ensuring that the standard is followed by the courts and helping avoid unnecessary litigation over the meaning of "adequate redress".

34. Further, explicit reference to effective remedy will help mitigate the risk of the new remedies, and in particular POQOs, breaching the UK's human rights obligations to provide an effective remedy for a violation of ECHR rights (see paragraph 6.a above). A point which has been raised by the JCHR.[42]

The Claimant and any other person materially affected

35. Amendment 25 would also provide clarity that in considering whether a remedy is effective the courts need to consider all those impacted by the impugned act. The current presumption at s.29A(9) does not specify for whom "*adequate redress*" is for – whether just the claimant or all those impacted by the unlawful measure. Unlike civil litigation, as IRAL recognised, judicial review is not purely about the "*protection of private interests*",[43] it is also about addressing the unlawfulness of administrative action for all those impacted. Given that the new remedies could override the rights and defences of third parties who are not represented in court (paragraphs 13 to 16), they must only be ordered if they do in fact provide a remedy for all impacted by the unlawful measure.

<u>European Convention of Human Rights (ECHR)</u>

36. The provision of a prospective only remedy risks breaching the requirements of the ECHR (see paragraph 6.a above), which the UK Government has clearly said it wishes the UK to remain party to. Article 13 ECHR requires there to be an effective remedy for a breach of a human right protected by the ECHR.[44] A POQO which provides no remedy to the claimant and others impacted by the unlawful measure, cannot be an effective judicial remedy and thus not withstanding a challenge before the European Court of Human Rights.[45]

37. **JUSTICE therefore recommend that Parliamentarians vote in favour of Amendment 37**, which follows the JCHR's recommendation that Clause 1 should be

[42] JCHR, no.10 above, para. 28.

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

[44] The European Court of Human Rights has held that certain remedies which have prospective only effect cannot be regarded as effective. *Ramirez Sanchez v. France* [GC], 2006 §165-166. See further, 'Liberty's briefing on the Judicial Review and Courts Bill for second reading in the House of Commons', para. 14.

[45] The JCHR explicitly raised the risk of the courts granting the new remedies in situations which do not meet the standard of an effective remedy for a breach of ECHR rights. JCHR, no.10 above, para. 28.

amended "*to require judges to give Convention rights, and Article 13 in particular, due consideration when deciding whether a particular remedy is appropriate*."[46]

Amendment 37
Clause 1, page 2, leave out line 23 and insert—

Member's Explanatory Statement
This amendment would ensure that the courts would take into account the ECHR rights of those affected, including the right to an effective remedy, before exercising the new power to suspend a quashing order or give it prospective-only effects.

Cart judicial reviews – Part 1, Clause 2

38. Clause 2 of the Bill, through a new s.11A in the Tribunal, Courts and Enforcement Act 2007, seeks to greatly restrict 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"). This will jeopardise the tribunal system and increase the risk of serious injustices occurring. **We recommend that parliamentarians vote in favour of Amendment 5, which would remove this provision from the Bill.**

Amendment 5
Page 3, line 14, leave out Clause 2

Member's Explanatory Statement
This amendment would preserve the ability of claimants to seek judicial review of a decision by the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal (also known as "Cart judicial review").

Cart JRs prevent serious injustices

39. As the JCHR has stated "*removing the right to judicially review refusals of permission to appeal in all but the most exceptional circumstances will result in a, statistically small, number of these cases being wrongly decided, and those individuals facing a real risk of serious human rights abuses.*"[47] Almost all the cases in the Immigration and Asylum Chamber of the UT relate to asylum and human rights appeals, which engage the most fundamental rights, including in some cases the difference between life and death.[48]

[46] *Ibid.*

[47] JCHR, no.10 above, para. 39.

[48] As Lord Dyson recognised in *Cart,* no.3, 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*."

40. This can be seen by the 57 examples of successful *Cart* JRs provided by the Immigration Law Practitioners' Association (ILPA) in response to the Consultation, as well as the 10 cases identified by IRAL.[49] Each case involved a person's fundamental rights and the UT incorrectly applying the law in refusing to grant permission to appeal. The examples include parents' applications for their child to be reunited with them, a child's application to remain in the UK to receive life-saving treatment, the asylum claim of a victim of human trafficking and Female Genital Mutilation, and many other decisions where, if removed from the UK individuals faced persecution.

41. It is important to remember that *Cart* JRs apply to all permission decisions of the UT – not just in the immigration context. The tribunal system includes many other areas of law, including tax, property, social security, health, education, social care, and pensions, to list a few. For instance, in the Administrative Appeals Chamber of the UT many of the appeals relate to access to benefits, which can be the difference between whether an individual and their family face destitution and homelessness. As a further example, in one of the first reported *Cart* JR cases, the High Court found that the FTT had failed to consider a significant witness statement which could have vitiated its decision upholding findings of misconduct against a mental health nurse.[50]

Cart JRs are not about having a 'third bite at the cherry.'

42. **First, there is an important wider public interest at stake**. *Cart* JRs prevent the UT from becoming insulated from review, by ensuring that there is a means by which errors of law, which could have very significant and ongoing impacts across the tribunal system, can be identified and corrected. As Lord Philips said, *Cart* JRs "*guard against the risk that errors of law of real significance slip through the system*".[51] UT judges are specialists in their field, however as Lady Hale recognised "*no-one is infallible*".[52] *Cart* JRs mitigate against the risk of erroneous or outmoded constructions being perpetuated within a 'closed' tribunals system,[53] with the UT continuing to follow erroneous precedent that itself, or a higher court has set.

[49] ILPA, 'ILPA's response to the government's consultation on Judicial Review Reform' (April 2021).

[50] *R. (on the application of Kuteh) v Upper Tribunal* [2012] EWHC 2196 (Admin).

[51] *Cart,* no. 3, at [92] (Lord Phillips).

[52] *Ibid*, at [37] (Lady Hale).

[53] *Ibid,* at [43] and [37] (Lady Hale).

43. It is therefore a misstatement to say that the existence of *Cart* JRs "*undermines the integrity of the two-tier tribunal process*"[54]. In fact, the intention of the Supreme Court in *Cart* was to uphold and strengthen the integrity of the tribunal process by ensuring that legal errors, and their potentially severe consequences, were not duplicated without means of correction by tribunals.

44. **Second, *Cart* JRs do not determine the claimant's substantive case on the merits**, **or whether the claimant should be allowed permission to appea**l – this is for the UT to decide following a successful *Cart* JR.[55] During a *Cart* JR the court will be looking at specific serious errors of law (see paragraph 45 below), this is a completely different assessment than that of the FTT (being on the substantive case) and the permission stage of the UT. If a *Cart* JR is successful, it will mean that **the applicant had not been given a lawful "proper first bite of the cherry"[56]** in appealing a decision to the FTT, and the UT had unlawfully refused permission to appeal the unlawfulness.

45. **Third, any "bite" that *Cart* JRs provide is incredibly limited and is a proportionate way of rectifying only the most serious errors of law (**see paragraphs 47 to 52 below on the limited and proportionate costs of *Cart* JRs). The *Cart* JR cases that succeed will involve either (i) an important point of principle or practice, which would not otherwise be considered; or (ii) some other compelling reason, such as a wholesale collapse of fair procedure.[57] These are the second-tier appeals conditions that were set as a threshold by the Supreme Court in *Cart,* and are now in the Civil Procedure Rules, for a *Cart* JR to be considered.[58] The Supreme Court sought to address the most significant injustices while making efficient use of judicial resources. It was in fact the Supreme Court's intention that few *Cart* JRs would be successful, but those that were would be the most egregious and important cases with serious errors of law. *Cart* JRs that succeed are therefore by definition the sort of "*serious and credible cases*" that the Government has said the courts should focus on.[59]

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[54] Dominic Raab, House of Commons, Volume 702, Column 190

[55] he 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.

[56] See Public Law Project, 'Judicial Review and Courts Bill, Briefing on House of Commons Committee stage amendments', page 8.

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

[58] As well as requiring an "arguable case, which has a reasonable prospect of success" (CPR 54.7A(7)(a)).

[59] Dominic Raab, House of Commons, Volume 702, Column 190.

46. **It is also, as described by Lady Hale in *Cart*, a "constitutional solecism", to say that since Parliament designated the UT as a "superior court of record" Parliament excluded any possibility of judicial review**. The decision in Cart did not involve the interpretation of any statutory provision that could be described as an ouster clause, and statutorily designating a body as a superior court of record, as Laws L.J. pointed out at first instance, "*says nothing on its face about judicial review*".[60] The courts' approach to clauses which are alleged to be ouster clauses is well known to Parliament – only clear and unequivocal wording is acceptable. The Supreme Court applied this well-known approach in *Cart;* Parliament was not deceived.

Proportionate use of resources

Cart JR "success"

47. The Government's Impact Assessment in respect of the Bill concludes that the "success" rate for *Cart* JRs is around 3.4%,[61] which it is worth noting is a highly significant increase (15.5x) from the figure of 0.22% used to initially justify the removal of *Cart* JRs by IRAL and which has been strongly criticised as unfounded and statistically flawed.

48. The Government's definition of "success" does not reflect the purpose of *Cart* JRs and is unduly narrow. The Government defines "success" as not only success in the judicial review but also a finding in favour of the claimant at the subsequent substantive appeal in the UT.[62] However, *Cart* JRs have several purposes, including the identification of errors of law in UT permission decisions where important issues of principle or practice are raised. This will be achieved if the UT's refusal of permission to appeal is quashed. The Impact Assessment states that a total of 92 cases, out of 1249 applications,[63] were remitted to the UT for a permission to appeal decision, in the context of immigration *Cart*

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[60] *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/.

[61] The Government conducted its own statistical analysis following strong criticism of IRAL's analysis, which seriously misrepresented the IRAL's statistical findings, had methodological flaws and did not represent the range of "positive results" for claimants, including settlements (as is recognised by the Government, Impact Assessment, paras. 59 – 60). See, 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), JUSTICE response to the Consultation, n.19 above, paras. 24 to 29.

[62] 'Judicial Review and Courts Bill: Judicial Review Reform, Impact Assessment', para. 62.

[63] *Ibid*, para. 74.

JRs for 2018 to 2019[64] (minus cases pending an appeal decision in the UT). Based on these figures and a more accurate definition of "success", which still does not account for settlement, the "success rate" is **7.37%** – more than double the 3.4% relied upon by the Government and more than 30 times the 0.22% relied upon by IRAL.

49. The Government's analysis also fails to properly take into account the importance of settlement (formal or informal), simply concluding that the settlement rate is "negligible".[65] "Success" for a claimant does not necessarily equate to the UT providing permission to appeal. A case could easily be resolved out of court, either before or after permission is granted, for example by a promise from the Home Office that the challenged initial decision will be reconsidered. But this resolution only occurs due to the claimant being able to progress a *Cart* JR.

The costs of Cart JRs

50. The costs of Cart JRs are described as a "*disproportionate and unjustified burden*" on the system.[66] The Impact Assessment estimates that between 173 to 180 High Court and UT sitting days will be freed up each year by Clause 2, representing savings of between £364,000 to £402,000 a year. This figure is not high at all – especially when considering the important role of *Cart* JRs in preventing serious injustice and in ensuring key decisions of the UT are not insulated from challenge. By comparison, the Government Legal Department's total administration costs from 2020-2021 was £226.7m[67] (564 times larger than the upper estimate for yearly *Cart* JR costs).

51. This figure is also inflated since it considers the costs of the UT rehearing the case, which will occur because an unlawful UT permission decision has been identified by the High Court. To include these costs in the Impact Assessment is to include savings that result from allowing unlawful decisions to stand. This position cannot be acceptable.[68]

52. Further, the average number of hours per *Cart* JR in the High Court that the Impact Assessment provides for is 1.3 hours, or five *Cart* JRs per day. This could easily be overestimating the time it takes a High Court judge to consider a single *Cart* JR case.

[64] Which the Impact Assessment determines to be the relevant years and are used for the figure of 3.4%.

[65] Judicial Review Reform Consultation, The Government Response, no.24 above para. 38.

[66] Judicial Review Reform Consultation, The Government Response, no.24 above para. 37.

[67] Government Legal Department Annual Report and Accounts 2020 – 21, page 25.

[68] See, PLP, Judicial Review and Courts Bill, PLP Briefing for House of Commons Second Reading, para. 23.

This is especially since there is a specific streamlined procedure for *Cart* JRs, including that if permission is granted, unless a substantive hearing is requested, the court will automatically quash the UT's refusal of permission.[69]

Natural justice exception - Amendment 6

53. Under Clause 2 of the Bill as introduced, the removal of *Cart* JRs would be subject to certain exceptions, including where the permission "*decision involves or gives rise to any question as to whether…the UT is acting or has acted…in fundamental breach of the principles of natural justice"* (new section 11A(4)(c)(ii) of the Tribunals, Courts and Enforcement Act 2007). Amendment 6 specifies that this exception would only apply to procedural defects that amount to a fundamental breach of natural justice. **JUSTICE opposes this amendment which is overtly prescriptive, encourages litigation and risks insulating from review breaches of the basic principles of fairness.**

54. The concept of natural justice refers to the basic standards of fairness and effectiveness in decision-making.[70] It is a core doctrine of the UK's common law, rooted in centuries of UK legal tradition, and forming the basis of parties' fundamental rights in decision-making and court proceedings.

55. A procedural defect could amount to a breach of natural justice, but natural justice is a broader concept. Fairness can be both procedural and substantive[71] and Amendment 6 risks unduly narrowing the breaches of natural justice that can be contested in court. In fact, limiting judicial review for breaches of natural justice is something which the Government has said *"would be unusual for Parliament"* to do in its Consultation which preceded the Bill:

> The Government believes there is a distinction between (1) excess of jurisdiction (the body didn't have power to do what it did), (2) abuse of jurisdiction (the body breached principles of natural justice) and (3) all other errors, including errors of law. The Government also believes that, at least for quasi-judicial bodies, there is no rule of law issue with removing Judicial Review for (3). The Government thinks

[69] CPR 54.7A(9) and 5A.7A(10). The approximations of time taken to review a Cart JR in the High Court is based on a time and motion study conducted by Lord Justice Briggs in 2016. However, as the Impact Assessment recognises this study did not focus on a specific court level or case type.

[70] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [123], "*natural justice*" is one of "*the essential requirements laid down by the rule of law for [a statutory decision-making] process to be effective*".

[71] *R v SSHD, ex p Pierson* [1998] AC 539, 591F, (Lord Steyn).

it would be unusual for Parliament to do so for (1) and (2). Following *Privacy International*, which involved discussion of such distinctions, the Government is confident the courts will accept the distinction between (1), (2) and (3), despite the possible existence of borderline cases.[72] (emphasis added)

56. Amendment 6 introduces an artificial distinction which will lead to uncertainty and additional litigation. The distinction between what amounts to a "procedural defect" and what does not but is still a breach of natural justice cannot be clearly defined. As Lord Mustill set out in *ex parte Doody* "*The standards of fairness are not immutable*…*What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects*."[73] The concept of "natural justice" is found across other pieces of legislation,[74] where it is not limited to procedural defects. It is not a fixed concept[75] and seeking to restrict it will undermine the flexibility the courts require to apply to the term to the circumstances of the case before them.

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[72] Judicial Review Reform Consultation, The Government Response, no.24 above, para. 53.

[73] *R v Secretary of State for the Home Department, ex p. Doody* [1993] UKHL 8 [14].

[74] For instance, see the Trade Union and Labour Relations Act 1974 Status and regulation of trade unions and employers' associations s.6(13): "In making provision for any hearing or a determination of any question, whether in relation to an alleged offence, an appeal or a dispute, the rules shall be so framed as not to depart from, or permit any departure from, the rules of natural justice."

[75] Lord Bridge Lloyd v McMahon "*the so called rules of natural justice are not engraved on tablets of stone*".