# Independent review of administrative law panel

## Evidence

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## Introduction

1. Thank you for the invitation to contribute evidence to the Panel. I am principally an academic lawyer, with advisory experience in the United Kingdom and judicial experience in Bosnia and Herzegovina. Much of my work has been in the fields of administrative law and constitutional law, both domestic and comparative.[1]
2. I have already contributed to the evidence submitted on behalf of the Centre for Public Law, University of Cambridge, and endorse the views expressed there. In this document I offer further comments on:
    a. the Panel's terms of reference;
    b. the practical and constitutional significance of judicial review of executive and administrative decision-making;
    c. the virtues of clarity and flexibility.

    These comments reflect my own views and are not necessarily shared by my colleagues.

## Terms of reference and procedure

3. Despite the terminology of 'independent review of administrative law', the Panel's terms of reference seem to focus wholly on applications for judicial review. Administrative law is much wider, covering the law governing the administration, including myriad statutes governing individual areas of public administration and the powers and procedures available in each. The legislation on, for example, immigration and social welfare benefits is supplemented by vast bodies of non-

[1] Further information, including list of publications, is available at https://www.law.cam.ac.uk/people/dj-feldman/723

statutory rules (some of which have some degree of legal force), policy statements, practices, guidance, and ministerial instructions binding on administrators although not necessarily on appellate or reviewing tribunals. The principles applied in judicial review proceedings are a mixture of these detailed provisions so far as they give rise to legal obligations and broader, common-law principles designed to give general guidance and to be applicable with appropriate adaptations to the circumstances of many different contexts in which executive and administrative decision- and rule-making takes place. Principles of judicial review should be considered in the light of the matrix of legislation and other material in which they operate. Administrative law is the whole of that matrix, and the various elements are to a great extent inter-dependent, since legislation is drafted and enacted in the knowledge (actual or presumed) of both legal and quasi-legal material, and of both context-specific and general legal principles and rules.

4. The AJR procedure is, of course, only a tiny part of the vast range of processes for checking and, where appropriate, changing decisions emanating from a massive array of executive and administrative bodies and decision-makers. As the evidence of the UK Administrative Justice Institute points out, judicial review is a final-stage remedy resorted to only if other methods have been tried and failed or would be ineffective to uphold the law. The need for and performance of the application for judicial (AJR) procedure cannot be properly assessed in isolation from those other methods of redress.

5. One way of reducing the burden on all forms of appeal and review is to improve the quality and legality of initial decision-making and the effectiveness of internal review mechanisms for securing compliance with law in decision-making.

Administrative decision-making has been affected over the years by steady reductions of funding and personnel for first-stage decision-making regardless of the level of case-load. Decision-makers are forced to make more decisions in less time and with fewer resources. It is hard to imagine the intellectual and emotional demands of working in this way, with daily or weekly targets for making decisions in often complicated cases of vital importance to people subject to the decisions, with managers assessing performance more by reference to the number of cases processed than the quality of the decisions. Changes to improve the overall quality and reliability of decision-making and internal review, such as a general duty on all decision-makers to give reasons for their decisions and improved resources for decision-making would help to reduce the burden on external appeal and review mechanisms. This has to some extent been done in Australia, where legislation on judicial review at both Commonwealth and State levels has routinely included a duty to give reasons for decisions, either automatically or on request. In the case of the Commonwealth, this has been complemented by the introduction of an Administrative Appeal Tribunal to review the merits, not merely the legality, of administrative decisions (see below, paragraph 33 *et seq.*). Any changes the Panel recommends to judicial review should, in my view, be accompanied by changes to the law governing decision-making and internal review procedures to give proper weight to the need to maintain active control over the quality and legality of executive and administrative decision-making.

6. There is a good deal of research literature concerning the working of judicial review and other mechanisms for securing administrative justice. Some of that will be

referred to in the evidence to the Panel, which will no doubt be conscious of its value in guarding against drawing conclusions without a sound evidential base.

## The practical and constitutional significance of judicial review of executive and administrative decision-making

7. This section (i) reflects on the constitutional significance of judicial review in the context of the U.K.'s constitution, (ii) draws attention to some aspects of the practical impact of judicial review as revealed by socio-legal research.

### Judicial review in the U.K.'s constitution

8. Judicial review is important. Despite being a last resort in most cases, it is the only process by which the law governing public-sector decision-making can be authoritatively determined so as to provide not only a decision in a particular case but also guidance for future decisions in the same field or, sometimes, in many fields. It is also often the only means whereby parliamentary legislation, imposing procedural or substantive limits on the powers of public-sector decision-makers, can be enforced. Its constitutional importance to parliamentary sovereignty, the rule of law and the separation of powers is far out of proportion to the small number of cases brought. It is also of great importance as a long-stop for people who wish to test the lawfulness of action affecting them or the public in general.
9. Like other dispute-resolution procedures, judicial review operates both in the short term, in respect of individual decisions (although individual decision may, of course, have long-term consequences), and in the long term in terms of its impact on administrative and executive behaviour and procedures and on the respect in which the law and constitution are held. All of these are important.

10. Judicial review also offers a way in which people with little or no leverage in the political process can, with goodwill of public-interest lawyers, make sure that their rights and interests are not ignored in policy-making and decision-making. Litigation by or on behalf of immigrants, prisoners, homeless people, children in care and mental patients (to name but a few) can ensure that the requirement to treat them lawfully is not overwhelmed by administrative or political exigencies. I refer on this point to the evidence of the University of Cambridge Centre for Public Law in relation to the issue of standing. Without resort to courts it would be too easy and tempting for public bodies and officials to ignore inconvenient legal requirements when dealing with people who essentially lack 'clout'.[2]
11. Whilst judicial review is required by and supports the rule of law, understanding the nature of its relationship to the rule of law requires an understanding of the intangible character of the rule of law itself. It is not really a rule, and is not primarily law. It is shorthand for some of the principled expectations that we as citizens have of people who hold positions in which they exercise the power of the state. These can be seen as the terms on which we tolerate their exercise of authority to change the laws and make decisions that affect us, often adversely to our interests. We expect holders of power to act fairly, to act reasonably (in the sense of having good reasons for decisions and being willing to explain what those reasons are), and to act lawfully (in the sense of being able to point to legally

[2] See e.g. Peter Cane, 'Standing up for the public' [1995] P.L. 276; David Feldman, 'Public interest litigation and constitutional theory in comparative perspective' (1999) 52 M.L.R. 44; Richard Rawlings, 'Courts and interests', and Peter Cane, 'Standing, representation and the environment', in Ian Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995), chs 4 and 5 respectively; Joanna Miles, 'Standing under the Human Right Act: theories of rights enforcement and the nature of public law adjudication' [2000] C.L.J. 133; Carol Harlow, 'Public law and popular justice' (2002) 65 M.L.R. 1.

authoritative sources of authority for their acts and decisions, particularly those that affect us). We further expect that lawmakers will ensure that they exercise their power in such a way as to make it possible for us to know the rules applicable to our activities before we undertake them, and will provide, or not interfere with, mechanisms for establishing authoritatively and independently whether we are being treated fairly, reasonably and lawfully. Finally, we expect that there will be tribunals independent of the executive and the legislature to determine whether actions and decisions affecting us are lawful, and that those adjudged to have acted unlawfully will acknowledge the tribunal's authority and abide by its judgment. These are the expectations that underpin the rule of law.

12. There is nothing surprising about these expectations; it would be strange if rational people were prepared to accept arrangements including, for example, parliamentary sovereignty, prerogative power, and executive and administrative discretion unless the people empowered under those arrangements were subject to such constraints. The expectations underpinning the rule of law, therefore, also underpin the legitimacy of the political and governmental system as a whole.

13. It does not follow, however, that the constraints always are, can be or should be enforced by judicial means. Judicial policing, inevitably spasmodic and subject to the unpredictable drivers of litigation, could never be sufficient to secure the benefits of the expectations encompassed by the rule of law. The rule of law is instead (as Professor Sir Jeffrey Jowell has observed) an 'institutional morality'.[3] If it is to be effective, its expectations have to be understood and internalised by

[3] Jeffrey Jowell, 'The Rule of Law', in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* 9th edn (Oxford: Oxford University Press, 2019), ch. 1 at p. 17.

the people who operate the constitution, including our system of politics. They have to be part of the often unarticulated, conscientious beliefs governing their day-to-day work, usually accepted without challenge. Aspects of these expectations have been incorporated in, for example, the Ministerial Code and the Seven Principles of Public Life, but the rule of law runs deeper than any of these documents; it works when it forms part of the psyche of public service. Particular expectations may be challenged from time to time, and sometimes it will be concluded, on reflection, that change is good; but more usually a challenge will result in push-back from other holders of public office, reasserting the importance and primacy of the old expectations. A recent example of this process in action was the widespread criticism of a Government Minister's statement from the dispatch box in the House of Commons that particular provisions of a Bill introduced by the Government to Parliament were unlawful as a matter of international law. But in order for this method of testing the constitutionality of executive behaviour to work, it is necessary for everyone involved in the process to adopt in their day-to-day work an ethos that accepts obligations of personal and professional integrity, is respectfully open to criticism, and requires people to assess their own behaviour by reference to the constitutional expectations of them.

14. Judicial review of executive and administrative decision-making (in which for this purpose I include rule-making otherwise than by Act of Parliament) is thus a last resort. When people resort to judicial review, something is likely to have gone wrong. On rare occasions officials may be acting without caring whether or not they are complying with their legal obligations, usually laid down by Act of Parliament and/or subordinate legislation. More frequently, they do their best to

act lawfully but fail through misunderstanding, error, shortage of time and resources, and administrative, managerial or political pressure under which they work. Legal remedies in any of those circumstances serve to protect parliamentary sovereignty by ensuring that rules made by Parliament or under powers conferred by Parliament are complied with. Remedies also reinforce the rule of law by ensuring that government and public administration is conducted in accordance with the law, and support representative democracy by giving effect to the expectations which underpin citizens' consent to the exercise of power by the legislature and executive (see paragraphs 11-12 above). Lastly, they help to limit the harm that can be done to people as a result of organisational and funding deficiencies in public bodies.

15. Legal remedies cannot guarantee that parliamentary sovereignty, the rule of law or representative democracy will continue to operate. That depends in the first instance on officials and politicians accepting the need to operate in accordance with relevant legal rules and expectations. On the other hand, courts and tribunals act as long-stops both to protect people against the effect of failure to comply with rules and to remind officials and politicians of their obligations when those are forgotten or misunderstood.

16. Judicial review operates as a safety-net after all other means of redress have been tried; a party will not be given permission to apply for judicial review if another avenue of redress provides a convenient and effective way of obtaining a remedy,[4] although this may not be applicable if the other remedies available are likely to be

[4] See e.g. *R. (Cowl) v. Plymouth City Council (Practice Note)* [2001] EWCA Civ 1935, [2002] 1 W.L.R. 803 at [27].

less effective,[5] and advisers have to bear in mind the risk of being out of time to apply for judicial review should attempts to resolve the matter by other means fail. Only a tiny proportion of interactions between agents of the state and ordinary people result in applications for judicial review. As the Supreme Court held in *R. (Cart) v. Upper Tribunal (Public Law Project and another intervening)*,[6] the question is whether in the circumstances the rule of law requires that the lawfulness of the act or rule in question be examined (or re-examined) by the High Court, bearing in mind other opportunities for independently testing its lawfulness.

## Impact of judicial review in practice

17. There is a good deal of empirical evidence about the impact of judicial review on both claimants and the public bodies subject to review. Most of it relates to the procedure as it operated before the last set of restrictions introduced under the Coalition Government, but it remains useful, not least because the more recent statistics suggest that, while the number of judicial review applications has dropped very significantly, the success rate of those which are brought has not changed significantly (a matter which is, I think, discussed in the evidence of the Public Law Project, and was discussed by Alison Pickup, Legal Director of the Public Law Project, in her evidence to the Joint Committee on Human Rights on 12th October 2020).[7] This seems to indicate that the most recent changes excluded claimants from judicial review without distinguishing between meritorious and unmeritorious claims; had the changes predominantly excluded meritorious claims,

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[5] *R. v. Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd* [1966] 1 Q.B. 380, CA, especially at 400 *per* Lord Denning M.R.

[6] [2011] UKSC 28, [2012] 1 A.C. 663.

[7] Accessible for streaming at https://parliamentlive.tv/Event/Index/ea844279-9c4b-42fa-8900-eea4d3c11eca.

one would have expected the success rate for claims that go to trial to have increased very significantly.

18. Impact of applications for judicial review must be considered by reference to its impact first on the claimant and secondly on the respondent, in addition to its impact on the community as a whole. In each case there may be both a short-term and a long-term impact. I shall consider here the impact in relation to the impact on the claimant and on the public body against which review is sought.

19. *Impact on the claimant.* The ability to start proceedings may benefit the claimant in a number of ways.[8]

    a. It encourages the decision-maker to re-examine the decision with a critical eye, and often results in the decision being changed wholly or partly in the claimant's favour.

    b. In a good number of cases, this makes it unnecessary to continue the proceedings to an application for permission (although from the point of view of the claimant's legal advisers, this may make it impossible for them to obtain payment for their work up to that point if the claimant depends on legal aid).

    c. It encourages the defendant to talk to the claimant and/or the claimant's legal advisers, enhancing the possibility of a negotiated settlement. (It has to be said, however, that the combination of strict time-limits for making an AJR, arrangements concerning costs including the requirement relating to alternative dispute resolution (ADR), and restrictions on legal aid may put

[8] For rich, empirical research, see Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project, 2009), especially sections 2 and 3.

pressure on a claimant to start proceedings earlier rather than later. This point is discussed in the evidence of the UK Administrative Justice Institute.)

d. Where the defendant public body has not previously entered into constructive discussion with the claimant and does so in response to initiation of proceedings, the opportunity to be heard may assuage the claimant's sense of grievance and facilitate settlement even if the substantive decision is unchanged.

e. Where the claimant seeks to compel a public body to do something in accordance with its legal duty, or to stop action which is or would be unlawful, and, in response to the start of an AJR, the body agrees to act in accordance with its duty, the claimant will probably feel that there is no need to continue the proceedings.

f. Where the public body is unwilling to reconsider or adjust its decision or conduct, continuing the AJR procedure gives the claimant a chance to obtain an authoritative judgment concerning the lawfulness of the decision or conduct, and remedies as appropriate in the circumstances of the case.[9] It is sometimes said that, where a decision is quashed on procedural grounds and has to be retaken by a public body, the new decision will usually be the same as that which has been quashed. But the available empirical evidence, though based on small samples, does not bear this out.[10] Even if the

[9] Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, the Outcomes and Consequences* (Public Law Project, 2015), provides an excellent analysis of this in the light of empirical research.

[10] Robin Creyke and John McMillan, 'The operation of judicial review in Australia', in Marc Hertog and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 161, especially at 176-182; Varda Bondy,

claimant fails to secure a remedy in court, there are likely to be other tangible and intangible benefits flowing from the defendant public body having had to reconsider the claimants' needs.

g. Where the claimant is challenging a rule, policy or guidance affecting many people, either as someone with a personal interest or as a public-interest litigant, the claimant, if successful, has the satisfaction of seeing the treatment of a large number of other people put on a lawful footing.

20. *Impact on defendants*. Public-sector decision-makers' costs and pressure on human resources are inevitably increased by the need to review decisions and respond to legal challenges. It would also be wrong to underestimate the impact on individual decision-makers' mental well-being of being subject to legal challenge. There are, however, advantages for public-sector institutions to being subject to review, although these advantages depend on the institution being, as Professor Simon Halliday has put it, both conscious of the standards of lawfulness and conscientious in trying to meet them consistently.[11] Inevitably there are tensions between demands of lawfulness and demands of other administrative and sometime political objectives, complicated by limited resources; it is proper for public bodies to be motivated by policy objectives, just as it is proper for courts to be motivated by legality, which acts as a side-constraint on means in which policies should be pursued.[12]

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Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: the Nature of Claims, their Outcomes and Consequences* (London: Public Law Project, 2015), pp. 33-45.

[11] Simon Halliday, 'The influence of judicial review' [2000] P.L. 114.

[12] I tried to summarise some factors affecting this in 'The limits of law: can laws regulate public administration?' in B. Guy Peters and John Pierre (eds), *The SAGE Handbook of Public Administration* 2nd edn (London: Sage, 2012), ch. 22, where some of the empirical research literature is cited.

a. Amenability to review provides an incentive to try to act lawfully at all times, particularly in being conscious of the limit's to statutory powers.

b. Judicial review can clarify the law where it is uncertain, allowing the public body to organise itself and act in future with greater confidence. This is so even if the public body is not successful, or wholly successful, in the litigation. It is important to remember that public bodies, including Government Departments, have an interest in making the outcomes of their decisions, including their lawfulness, as predictable and consistent as possible. They can benefit generally from increased clarity as to the law, even if they lose a particular case. Conversely, winning a case in a way that does not achieve clarity in the law is administratively disadvantageous for the public body for the future, increasing risks and transaction costs.

c. The need to consider whether decisions are supported by fair procedures and good reasons helps to maintain a high quality of decision-making. Many public bodies recognise that judicial review helps to secure fairness, although the response may be affected by financial and other resource constraints and the body's view as to whether the court's decision was right.[13]

d. Conscientiousness in establishing fair procedures and encouraging a reflective attitude to decision-making processes is likely to improve the quality of an institution's performance generally. It is interesting that the best-performing local authorities as judged by the National Audit Office are

[13] Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: the Nature of Claims, their Outcomes and Consequences* (London: Public Law Project, 2015), pp. 45-46.

> often those most often subject to AJR. The reasons for this are not clear, but it is at least not inconsistent with the possibility that frequent judicial review encourages continuous reflection on the quality of a body's processes and decision-making.[14]

21. It is therefore important to bear in mind that public bodies as well as claimants can benefit from judicial review, and that they are often aware of that fact. The relative predictability and clarity that can result from an AJR helps to improve public administration. The cost to a defendant of responding to an AJR can, in the longer term, be offset by reduced transaction costs and risks in the future, as long as the body is set up to reflect on lessons from judicial reviews and incorporate the lessons in its procedures and managerial arrangements.

## Flexibility and clarity

22. Two of the great virtues of judicial review are the clarity of its principles and the flexibility of their application to facts. The rules or principles are generally easy to state, and yet their application is highly sensitive to the facts of each case. As in any field of law, there can be fierce debate about the precise scope and content of principles, yet it is surprisingly rare for there to be real difficulty for judges in applying them to particular facts. In this, judicial review is no different from the law of tort, restitution, or employment. The phenomenon stems from the nature of laws. They are expressed linguistically, and the limits of determinacy of language

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[14] Lucinda Platt, Maurice Sunkin and Kerman Calvo, *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (Institute for Social and Economic Research Working Paper No. 2009-05, February 2009). See also Maurice Sunkin, Kerman Calvo and Lucinda Platt, *Does Judicial Review Influence the Quality of Local Authority Services?* (Public Services Programme Discussion Paper No. 801, 2008), reporting fascinating research with local authorities, worth reading in its entirety.

affect the limits of certainty of law. They are expressed in more or less general terms, but have to be applied to very concrete circumstances. Bridging the gap between the general and the particular is one of the tasks of legal interpretation, which is not a purely linguistic exercise. Another characteristic of law and laws is that they need to be operated in a way that produces practicable results. Law is not idealism; it is concerned with making things work for real people in real life. Judges must grapple with the untidiness of real life, suffused with competing policy objectives and moral standards and having to accommodate the needs of people who are affected in different ways. This makes flexibility essential.

23. The law of judicial review responds to these necessities in several ways. Assessing the fairness of a decision-making procedure takes account of the importance of the decision to its subject, the practicalities facing decision-makers, and the importance of allowing people to participate effectively in decisions affecting them. Applicable legislation is read and given effect accordingly.

24. The same is true of what is sometimes called 'illegality'. A decision may be tainted with unlawfulness in different ways, and the impact on the effectiveness of the decision depends in part on the reason for its unlawfulness and partly on how that affects others. A decision taken outside the scope of the power conferred by statute is unlawful and ineffective, although if it is partly within and partly outside the scope of the statutory power a court will sometimes be able to save at least part of the decision by severing the unlawful elements from the lawful ones. Decisions flawed in other ways are not necessarily wholly ineffective. If the decision-maker has failed to follow procedural requirements in the empowering legislation, the court will ask first whether the requirement was central to the legislative scheme in

the circumstances, so that not complying with it should undermine the lawfulness of the decision. Secondly, at the remedial stage, the court may ask whether the error affected everyone subject to the decision equally or only disadvantaged certain people; if the latter, the decision is less likely to be quashed, and the remedy is more likely to take the form of a declaration that the decision does not apply to those who were disadvantaged by the error.[15] Thirdly, public-law decisions, as well as rules and regulations, may indirectly affect people other than their primary subjects. A grant or refusal of planning permission, for example, affects the occupier of premises, but also neighbours, contractors, purchasers, enforcement agencies, and others. They have an interest in being able to assume that what appears to be a valid decision is lawful and effective, or to challenge it if they think that it is unlawful. The lawfulness or otherwise of a decision or regulation may also affect people's civil or criminal liabilities, potentially having knock-on effects on the administration of the law of tort, contract, restitution and property (among other areas of law) as well as criminal law.

25. It follows that the idea that an unlawful decision is void ab initio and a nullity isa serious over-simplification. Whatever its merits may be in the realm of public-law and political theory, it obscures the complexity of competing interests, duties and rights with which judges have to deal and therefore the reality of what is happening in courts. After analysing these matters in some detail in an article on

[15] See, e.g., *Agricultural, Horticultural and Forestry Industrial Training Board v. Aylesbury Mushrooms* [1972] 1 W.L.R. 190.

the subject, I tried to summarise the principles which, in my view, are actually operating in administrative law as follows.[16]

> 'Principle 1 – the access principle: In order to protect the overall effective of judicial protection against unlawful administrative action, judicial resources should be concentrated on (a) cases in which people have no other reasonably effective means of seeking redress, and those in which other means of redress have been pursued unsuccessfully, and (b) the rule of law requires a further review because of the importance of the issue or of the consequences of the case. This principle is associated with two rules: (i) claimants must usually exhaust statutory routes to redress before resorting to judicial review; (ii) the use of judicial resources should be proportionate to the significance of the case. Those rules are subject to a condition based on fairness under the rule of law: overall, the claimant must have had a fair opportunity to have the lawfulness of his or her treatment adjudicated on by an independent and impartial tribunal.
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> 'Principle 2 – the principle of legality: it is in principle unacceptable to coerce or impose a penalty on a person unless there is authorization for doing so in a positive legal rule.
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> 'Principle 3 – the principle of certainty: legal certainty requires that people, including both public bodies and those with whom they deal, generally be able to assume that a rule, order or decision which has not been successfully challenged is lawful, and to act accordingly without risking legal sanctions. This operates hand in hand with Principle 4.
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> 'Principle 4 – the principle of finality: as an particular aspect of Principle 3, a decision of a judicial tribunal determining rights and obligations of parties to the proceedings as against each other, which is not subject to appeal or judicial review, binds the parties to the proceedings regardless of any subsequent events, including subsequent judgments which show the decision in question to have been made on an erroneous understanding of the law.
>
> 'Principle 5 – courts do not act in vain: a court will not usually entertain a case, or give a remedy, where it would provide no practical benefit to the parties to the case, unless it would serve to clarify an important legal issue so as to guide official behaviour or help to resolve disputes in other cases before courts and tribunals.

[16] David Feldman, 'Error of law and flawed administrative decisions' [2014] C.L.J. 275-314 at pp. 313-314.

> 'Principle 6 – the principle of difference: courts should recognize that people affected by a single course of administrative decision-making may have different legal interests and obligations from each other arising from the various relationships between them. It is inappropriate to try to determine the effect of those interests and obligations as if the relationships were of the same kind. For example, the difference between public law and private law is significant, because interests are weighted differently in each. It is also inappropriate to try to determine them by applying a decision taken in relation to a relationship to which a party to present litigation was not a party. This is the converse case to Principle 4.
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> 'Principle 7 – the principle of morality and efficacy: courts try not to make decisions or give remedies which would cause administrative chaos or be morally questionable.'

26. These are not mere aspirations. As explained in the article, they reflect the substance of the law as it is put into practice in courts, both in AJR proceedings and in other proceedings to which the lawfulness of administrative or executive acts, decisions or rules are relevant. The operation of those principles is in the public interest, particular that of good administration, although it imposes a cost on people who are unable, in some circumstances, to protect their legal rights or freedoms adequately as a result.

27. Any change that would restrict the flexibility of the law of judicial review and so interfere with the general ability of public bodies to protect the public as a whole should be avoided. Flexibility in practice works to the advantage of public bodies and helps to avoid unfairness to third parties.

## Grounds of review

28. This section considers (i) codification of the grounds of review and (ii) *Wednesbury* unreasonableness.

## Codification of grounds of review

29. If one seeks to clarify the grounds for judicial review through codification, it is necessary *first* to bear in mind first the importance of flexibility, and *secondly* to decide at what level of generality to express the grounds in legislation. At their most general, it might be said that courts should ask whether public bodies have acted lawfully, and/or have abused their powers. Few people, I think, would find those propositions controversial. This would not be very helpful, however, as it would be necessary to decide, in the circumstances of each case, what 'lawfully' and 'abusing powers' mean.

30. At a slightly lower level of generality, one might adopt the so-called 'Diplock catalogue'[17] of testing for illegality, procedural impropriety and irrationality. Those terms are umbrellas under which gather unlawful action, acting for an improper purposes, procedural unfairness, non-compliance with statutory conditions, failing to take account of relevant considerations, taking account of irrelevant considerations, failing to act in accordance with the purpose of a statute, exceeding power, failing to honour a legitimate expectation, acting without supporting evidence, doing something so inexplicable that it should be regarded as unlawfully unreasonable, failing to make a correct assessment of important facts, and so on. The 'Diplock catalogue' is in practice unhelpful because it does not tell us which substantive type of error fits under which heading. For example, failing to take account of relevant considerations and taking account of irrelevant considerations, or failing to give someone a fair hearing when one is due, may fall under 'illegality' or 'procedural impropriety', or individually or collectively may

[17] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 at 410 *per* Lord Diplock.

produce a situation in which someone says, 'This course of official conduct is so unreasonable that the body can be said to have acted in a legally irrational way'. Not only is are the contents of each element in the 'Diplock catalogue' unclear, but the catalogue itself fails to reflect the way in which the various elements interact in practice.

31. At a more concrete level, one might list each of the various individual tests of lawfulness, some of which were mentioned in the previous paragraph. That would be possible, but it would add only a little to the clarity of the present law. If this approach were adopted, the drafter would have to consider whether to include explicitly heads of non-compliance with general legal requirements, sometimes relevant to but not exclusively standards of judicial review. Examples include compliance with anti-discrimination law, the public sector equality duty, obligations under the Human Rights Act 1998, requirements concerning environmental impact assessments, and duties to parents and children under the Children Act 1989 and subsequent legislation. These might be regarded simply as feeding into the test for general unlawfulness, as long as that were not limited to restrictions imposed by legislation specifically empowering the public body's actions and decisions.

32. Finally, a statutory code of grounds of review would have to be given effect, and thus interpreted, by the judges. The significant inter-connectedness of grounds of review, noted above, would present significant difficulties unless the codification were expressed at a very deep, perhaps unachievable, level of detail.

33. Australia provides instructive examples of legislation in this field. At the Commonwealth level, the Administrative Decisions (Judicial Review) Act 1977 put

non-constitutional review of Commonwealth decisions on a statutory footing, alongside a new tribunal, the Administrative Appeals Tribunal, established innovatively to entertain appeals against administrative decisions on their merits (see Administrative Appeals Tribunal Act 1975). In relation to the statutory judicial review jurisdiction, section 5 of the Act provides as follows.

> 5 Applications for review of decisions
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> (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:
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> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
>
> (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
>
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
>
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
>
> (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
>
> (g) that the decision was induced or affected by fraud;
>
> (h) that there was no evidence or other material to justify the making of the decision;
>
> (j) that the decision was otherwise contrary to law.
>
> (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
>
> (a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

34. This sought to codify Australian common law grounds for review while leaving open a degree of flexibility to take account of oversights or developments in the jurisprudence (e.g. subsections (1)(j) and (2)(j)). It also provided for a general duty (subject to limited exceptions) on decision-makers to provide, on request, reasons for their decisions (section 13). The courts continued to refer to pre-1977 case-law and the codification made little if any difference to the development of administrative law at Commonwealth level.

35. At State level, Queensland legislated to put judicial review on a statutory footing in 1991, benefiting from more than a decade of experience of the working of the Commonwealth legislation. As to grounds for review, section 20 of the Judicial Review Act 1991 (Qld) provides as follows.

> 20 Application for review of decision
>
> (1) A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision.
>
> (2) The application may be made on any 1 or more of the following grounds—
>
> (a) that a breach of the rules of natural justice happened in relation to the making of the decision;
>
> (b) that procedures that were required by law to be observed in relation to the making of the decision were not observed;
>
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (d) that the decision was not authorised by the enactment under which it was purported to be made;
>
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
>
> (f) that the decision involved an error of law (whether or not the error appears on the record of the decision);
>
> (g) that the decision was induced or affected by fraud;
>
> (h) that there was no evidence or other material to justify the making of the decision;
>
> (i) that the decision was otherwise contrary to law.
>
> (3) This section applies only to a decision made after the commencement of this Act.

Sections 21 to 24 then expand on the meaning of the grounds, but each ends with a catch-all to allow for oversights and developments in the jurisprudence. Section 23, for example, headed 'Meaning of Improper Exercise of Power', provides that 'a

reference to an improper exercise of a power includes a reference to – … (i) any other exercise of a power in a way that is an abuse of the power.' In Tasmania, the Judicial Review Act 2000 (Tas) broadly follows the Queensland model.

36. These examples suggest that codification of the grounds of review can be achieved in a way that might be thought to increase clarity but preserve desirable flexibility. Putting the general principles into legislation does not, however, make the task of deciding individual cases, or predicting their outcome, very much easier, because working out how the general principles apply in specific factual circumstances remains a matter of judgment. Judges must work out how, in all the circumstances of the case, the principles identified in the legislation should operate in concrete situations, and this is never a mechanical process. It is not surprising that the case-law on judicial review in Australia, both at Commonwealth level (mainly in the Federal Court of Australia) and in the States, continues to be highly contested.

37. It is difficult to say how the development of jurisprudence would be affected in England and Wales by the presence or absence of catch-all provisions such as subsections 5(1)(j) and (2)(j) of the Commonwealth's 1977 Act and sections 21 to 24 of Queensland's 1991 Act. Their presence would be a statutory recognition of the ways in which the common law may develop. But even in their absence the grounds expressly stated in the codifying legislation would have to be interpreted by judges, and it is quite possible that as much could be achieved by interpreting existing grounds of review as by developing new ones. For example, the principle of legitimate expectation (rarely successfully deployed except in cases relating to procedural expectations, and not often even in those cases) developed from public-law estoppel, essentially an application in public law of the doctrine of promissory

estoppel in the law of contract. When I was a student, my Administrative Law tutor, Mr Martin Matthews, described public-law estoppel as the last gasp of a despairing advocate; legitimate expectation is little different in that respect. But if the principle of legitimate expectation were to be removed, I have little doubt that something like it could be developed to cover those unusual cases in which it is successfully invoked by way of interpreting the common-law duty of fairness (which itself developed out of the narrower common-law rules of natural justice in the 1960s). One way or another, the law develops in response to perceived unfairness and arbitrariness, and it is right that it should.

## *Wednesbury* unreasonableness

38. Much has been written about *Wednesbury* unreasonableness, often arguing for one or both of two propositions: (i) that as a ground of review it lacks analytical rigour, relying on a judicial gut-reaction rather than systematic reasoning, and that it would be desirable to replace it with some variety of proportionality; (ii) that (in common with proportionality) it involves assessing merits of decisions or rules rather than their legality, and so draws judges into acting in a non-judicial way.

39. It seems to me that both these claims are superficially attractive, but on careful analysis turn out to be based on misapprehensions of the ways in which the unreasonableness standard and proportionality work in practice.

40. This can be seen most clearly by reading the whole of the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,[18] instead of just the paragraph or two usually cited in text-books. The company

[18] [1948] 1 K.B. 223, C.A.

applied to the council for a licence to show films on Sundays at the Gaumont Cinema, Wednesbury. The council granted the licence, but used its power under the Sunday Entertainments Act 1932, section 1 to attach a condition. Section 1(1) allows licences for Sunday opening to be given 'subject to such conditions as the authority think fit to impose'. The council attached a condition that no children under 15 years of age should be admitted with or without an adult. The company challenged the condition, on the ground that it was unreasonable and so *ultra vires* the council; there should have been no such condition, or at any rate children should have been able to attend with an adult. Henn Collins J. decided that the condition was not unreasonable, and the company appealed. In the Court of Appeal, Lord Greene M.R., with whom Somervell L.J. and Singleton J. agreed, dismissed the appeal without requiring counsel for the council to address them on the substantive issues. Lord Greene pointed out that the power to impose conditions was 'in quite general terms',[19] and that the case concerned an executive, not judicial, act, and statute provided no appeal from the council's decision.[20] The court is not acting in an appellate capacity, and where a body such as a local authority (i.e. an elected, representative, executive body) is challenged as to the exercise of its absolute discretion the court is only concerned with whether the council has stayed within the four corners of its discretion, avoiding the fettering discretion, taking account of matters expressly excluded by statute or failing to consider matters expressly required by statute to be considered, and so on.

> 'It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those, of course, stand by themselves—unreasonableness, attention given to extraneous

[19] Ibid. at 227.
[20] Ibid. at 228.

> circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable".
>
> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* [1926] Ch. 66 at 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.[21]

41. Lord Greene noted that counsel for the company had accepted that the physical and moral health of children could be regarded as extraneous to the council's decision-making under this legislation. That was fatal to the company's case: if it was within the four corners of the council's discretion, a court would not replace the view of the council on the matter with its own, Parliament having conferred responsibility for the decision squarely on the council. Only if the council were to reach a decision that no reasonable council could ever have come to would the court then intervene.[22]

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[21] Ibid. at 229.
[22] Ibid. at 230-231, 234.

42. *Wednesbury* shows two things about unreasonableness as a basis for review. *First*, it is not one thing but a collection of overlapping principles relating to the quality of the decision-making process. For example, has the decision-maker been actuated by fraud or dishonesty, or taken account of matters which, on a true construction of the legislation, are inadmissible? Has the decision-maker stayed within the legal bounds of the discretion? Failings of these kinds may be said to make the *decision-making process*, rather than the substance of the decision itself, unreasonable and unlawful. Circumstances leading a court to say that the *decision itself* (rather than the procedure or reasoning leading to it) is unreasonable are those where a decision-maker has done something so odd (in the context) that it strongly suggests, even if it does not make explicit, reliance on improper and inadmissible considerations, as in the dismissal of a teacher for having red hair. Cases in which judges say that decisions are unlawful because unreasonable, purely because they disagree with an otherwise properly reached decision, are vanishingly rare, if they exist at all. *Secondly*, courts are and have always been sensitive to the institutional context in which a challenged decision has been made. Is the decision-maker 'judicial' or 'executive'? Is the discretion widely or more narrowly expressed in statute? Are the issues within the experience and competence of judges as readily as of the statutorily designated decision-maker? Is the court exercising an appellate or a supervisory role?

43. It follows, in my view, that critiques of judicial review for unreasonableness mentioned in paragraph 38, above, are based on a misapprehension as to the way in which judges approach complaints of unreasonableness in relation to executive and

legislative decisions. The criteria are clear and rarely, if ever, lead to review of the merits of a decision (unless such review is authorised by statute).

44. It is in addition a mistake to imagine that a doctrine of proportionality could take the place of unreasonableness. Unreasonableness starts from the proposition that a decision or rule is, on its face, within in the powers conferred on its makers. Proportionality is different: in its best known form, at any rate, is starts from the proposition that a decision or rule is apparently unlawful (because, for example, it interferes with a Convention right under the Human Rights Act 1998), and is one of the criteria the decision-maker has to meet in order to justify that apparent unlawfulness, so that the decision may be upheld without it. Most administrative decisions do not give rise to interference with Convention rights or similar, legally protected rights, so proportionality is unsuited to them. If something called 'proportionality' were to be used in place of 'unreasonableness', it would have to change its form, becoming so like 'unreasonableness' (in its various manifestations) as to be indistinguishable from it. This is why we talk about 'unreasonableness' not reasonableness in a public-law context, and 'proportionality' not disproportionality.