

## **Mind's submission to the Independent Review of Administrative Law**

About Mind:

1. We're Mind, the mental health charity for England and Wales. We believe no one should have to face a mental health problem alone. We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

Summary:

2. People with mental health problems are more likely to rely on public services and be the subject of decisions by public authorities because of their need for community care services, hospital treatment, specialist care packages, accommodation and support. Our research shows people with a mental health problem are also more likely to experience legal problems than others and their only legal recourse is often through judicial review.
3. We think that the ability to hold public bodies, including the Government, to account is a fundamental tenet of a democratic society. Any attempt to limit the court's ability to scrutinise those bodies' decisions would severely dilute the constitutional rights of citizens, undermine the role of the judiciary in holding public bodies accountable and could have a disproportionate impact on people with mental health problems.
4. We are also calling on the panel to confirm the steps they are taking to engage with individual Claimants, including those with mental health problems, in this inquiry.

### **Section 1 – Questionnaire to Government Departments**

**Based on the Terms of Reference as set out in the Introduction, the IRAL has created the following questionnaire to be sent to Government Departments. The questions are as follows:**

**1. In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?**

**a. judicial review for mistake of law**

**b. judicial review for mistake of fact**

**c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)**

**d. judicial review for disappointing someone's legitimate expectations**

**e. judicial review for Wednesbury unreasonableness**

**f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account**

**g. any other ground of judicial review**

**h. the remedies that are available when an application for judicial review is successful**

**i. rules on who may make an application for judicial review**

**j. rules on the time limits within which an application for judicial review must**

**be made**

**k. the time it takes to mount defences to applications for judicial review**

**2. In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?**

**3. Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?**

**From this, we would appreciate your response to the following questions:**

**1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?**

Our research into the impact of legal aid reforms, *An unjust system?*<sup>1</sup>, shows that people with mental health problems are:

- more likely to experience legal problems than others. 52 per cent of respondents with mental health problems reported one or more legal problems, compared to 27 per cent of other respondents; and
- more likely to have more legal problems than others. 23 per cent of those with mental health problems reported experiencing six legal problems or more, compared to just eight per cent of people without mental health problems.

Judicial review is routinely the only way that people with mental health problems can enforce their rights and seek redress for unfair and unlawful decision making.

It is therefore concerning that the questionnaire for government departments and other public bodies appears to be designed in a way that seeks only negative perceptions of judicial review from them. Judicial review is only successful when a public body has acted unlawfully and it therefore aids good governance by ensuring that public bodies are held accountable for

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<sup>1</sup> Mind (2018), *An unjust system*: <https://www.mind.org.uk/media-a/4345/an-unjust-system-mind-may-2018.pdf>

unlawful decisions. Rather than being a burden on public bodies, it is a vital mechanism to ensure fairness in their decision making.

By focussing on perceived burdens of prospective judicial review, the questionnaire is also unlikely to collect evidence on two important aspects of judicial review for public bodies. Firstly, that public bodies can also be Claimants in judicial review and secondly, that judicial review can clarify the law in a way that is beneficial for public bodies.

Earlier this year, the Secretary of State for Health and Social Care published a determination<sup>2</sup> on a dispute between local authorities on funding responsibility for section 117 aftercare<sup>3</sup>. One of the local authorities affected by the determinations began judicial review proceedings against the Secretary of State. In response, the Secretary of State issued a note stating that his statutory guidance on the issue was wrong and paused determination of those types of disputes pending the conclusion of the judicial review and the clarification of the law<sup>4</sup>. In this case, judicial review was a vital tool for a public body in challenging the lawfulness of a decision by a Governmental department, the outcome of which will provide legal clarity for numerous other public bodies.

Whilst Mind recognises the need to engage specifically with public bodies who can be claimants and defendants in judicial review, hearing evidence from individual claimants is also vital. Judicial review is a vital tool for people with mental health problems to access the support that they have a right to both in hospital and in the community. It is routinely the only way in which they can enforce their rights and seek redress for unfair and unlawful decision making.

**2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?**

This call for evidence is highly technical and not accessible to the wider public. **Mind seeks confirmation from the panel to confirm the steps they are taking to engage with individual Claimants, including those with mental health problems, in this inquiry.**

**Section 2 – Codification and Clarity**

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

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<sup>2</sup> DHSC (2020), Ordinary residence 8: 2020 <https://www.gov.uk/government/publications/ordinary-residence-anonymised-determinations-2020/ordinary-residence-8-2020>

<sup>3</sup> Section 117 Mental Health Act – aftercare provided to people detained under certain sections of the Act to meet a need arising from their mental health and to reduce the risk of a deterioration of the person's mental condition and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder

<sup>4</sup> DHSC (2020), DHSC's position on the determination of ordinary residence disputes pending the outcome of the Worcestershire case <https://www.gov.uk/government/publications/care-act-statutory-guidance/dhscs-position-on-the-determination-of-ordinary-residence-disputes-pending-the-outcome-of-r-worcestershire-county-council-v-secretary-of-state-for>

The ability to hold public bodies, including the Government, to account is a fundamental tenet of a democratic society. Any attempt to limit the court's ability to scrutinise those bodies' decisions, including by defining grounds of public law illegality more narrowly or shielding certain decisions from review, would severely dilute the constitutional rights of citizens and undermine the role of the judiciary in holding public bodies accountable.

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

This Government has expressed concerns about the use of judicial review against the executive in particular areas, including immigration expulsion and asylum cases<sup>5</sup>. As stated above, judicial review is only successful when a public body acts unlawfully. Mind have been involved in a number of cases where judicial review of Government policy and decision making in the immigration context was the only way to ensure, firstly, that the rights of individuals with mental health problems were protected and secondly, that the Government complied with the laws made by Parliament:

- MDA v SSHD [2017] EWHC (Admin) 2132

MDA arrived in the UK as a child aged 13 or 14 years, having fled war in Somalia where he recounted he had been subjected to very serious ill treatment and traumatic violence including sexual violence.

He was quickly admitted to a children's psychiatric unit to receive support and treatment for his mental health and over the next few years, he spent time in hospital suffering distressing psychotic symptoms and complex PTSD.

As an adult, he was imprisoned for offences that he had committed whilst he was on a psychiatric ward and during this imprisonment, a decision was made to detain him in an immigration removal centre pending deportation.

MDA lacked capacity to instruct a legal representative and he remained detained in various immigration removal centres, where he refused to accept medical treatment, until lawyers were alerted on his behalf. MDA via his litigation friend challenged the decision the detain him pending his deportation.

The court found that there had been a breach of MDA's common law right to fair procedural safeguards and that the Secretary of State for the Home Department (SSHD) had breached section 149 of the Equality Act 2010 (the Public Sector Equality Duty)

- Hossein & Ors v SSHD [2016] EWHC 1331

The Claimants' in this judicial review asserted they were representative of the general issue of the lawfulness of the "Detained Asylum Casework" process established by the Detention: Interim Instruction policy (DII). The Claimants included victims of torture, a victim of trafficking and one who had a complex forced marriage immigration claim. The Claimants' argued that the DII process did not address the particular needs of

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<sup>5</sup> Law Gazette (2020), Patel lashes out at 'lefty lawyers' in asylum speech  
<https://www.lawgazette.co.uk/news/patel-lashes-out-at-lefty-lawyers-in-asylum-speech/5105870.article>

protected groups under the Equality Act 2010 and the Claimants' highlighted as examples, the complexities in cases of those with mental illness and for victims of sexual violence.

The SSHD conceded in the proceedings that the victim of trafficking had been unlawfully detained and in the judgment, the SSHD was found to have breached section 149 of the Equality Act 2010 (the Public Sector Equality Duty)

In Mind's view, any restrictions on the decisions that are subject to judicial review would not only put the Government above the laws made by Parliament but would also remove an important, and sometimes the only, legal recourse available to people with mental health problems who are affected by those decisions.

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

The Civil Procedure Rules and Senior Courts Act provides sufficient clarity for lawyers to navigate the judicial review and appeal process.

However there is a wider issue in the accessibility of the court system to litigants in person, including people who are unable to get free legal advice because of legal aid reforms. Our research shows that people with mental health problems feel less confident handling legal issues by themselves despite being more at risk of having legal problems than others. People with mental health problems need a well-functioning legal aid system which ensures they have the legal support they need to manage life's day-to-day challenges, stay well and avoid crisis by making sure they can access and navigate the court system when they need to.

**Section 3 - Process and Procedure**

**6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?**

People with mental health problems are more likely to rely on public services and be the subject of decisions by public authorities because of their need for community care services, hospital treatment, specialist care packages, accommodation and support. Our research shows they are also more likely to experience legal problems than others and their only legal recourse is often through judicial review.

The current judicial review procedure leaves claimants a relatively short amount of time to lodge a claim. Where individual claimants are in the midst of a mental health crisis, struggling to find a lawyer or forced to act as a litigant in person, the current timeframes may not be realistic for lodging a claim and any moves to shorten them could place an unacceptable barrier on access to justice for people with mental health problems.

Shortening the current timeframes would also reduce the time available to resolve the issues with the defendant. This could force people with mental health problems into stressful and unnecessary litigation where settlement would have been possible.

**7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?**

Mind does not believe that the current rules on courts are too lenient or that they are applied too leniently.

People with mental health problems are more likely to rely on public services and be the subject of decisions by public authorities because of their need for community care services, hospital treatment, specialist care packages, accommodation and support. They are also more likely to experience legal problems than others and their only legal recourse is often through judicial review. Our experience from engaging with people with mental health problems is that unless a lawyer is involved and a judicial review is threatened, local authorities and hospitals frequently refuse to discharge their obligations.

We know from our research that people with mental health problems are already choosing not to seek legal advice because they are worried about the costs associated with getting help from a lawyer. This is despite evidence that they more likely to successfully resolve a legal problems than others.

We are concerned that any changes to costs in judicial review could deter people with mental health problems from pursuing judicial review claims with good merits. It would become an unseen barrier to equal access to justice and would disproportionately impact people with mental health problems.

**8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?**

The framing of this questions fails to engage with the wider context and purpose that judicial review serves.

Judicial review, or even the potential to be judicially reviewed, aids good governance by focusing the minds of decisions makers on the lawfulness of their actions. The ability to hold public bodies, including the government, to account is a fundamental tenet of a democratic society. These benefits must be considered as part of any analysis of the perceived costs involved in judicial review claims.

**9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?**

Having reviewed the submissions made by the Child Poverty Action Group to question 9, Mind agrees with their position in respect of the difficulties that arise where challenges to secondary legislation result in declarations of unlawfulness but it is left to the government department to bring forward amending legislation to remedy the unlawfulness with no specific timetable being set. Mind also endorses their suggestion that the courts use remedies more robustly, for example to prohibit the application of legislation in those cases

where to do so would be unlawful even if the legislation in its totality cannot be struck down.

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

Where public bodies do act unlawfully, this may be the result of under resourcing or insufficient training on the relevant law. Judicial review, or even the potential to be judicially reviewed, aids good governance by focusing the minds of decisions makers on the lawfulness of their actions.

The proper resourcing of public bodies alongside comprehensive training on the relevant law is the best way to ensure that public bodies are able to make lawful decisions and implement lawful policies and therefore the best way to minimise the need to proceed with judicial review.

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

The aim of a judicial review claim is to correct unlawful decision making and reach a resolution. Settlement is a part of the judicial review process, not a problem with it.

Mind has achieved excellent results for people with mental health problems through settlement even before a claim has been issued. For example, Mind sent pre action correspondence to Secretary of State for Work and Pensions in respect of draft regulations governing the managed migration of people onto universal credit. We argued, amongst things, that the parts of the regulation unlawfully discriminated against people with mental health problems. In their response, the Secretary of State for Work and Pensions confirmed that a small scale pilot would be undertaken to ensure smooth transition to universal credit and laid new regulations. Mind obtained the resolution we wanted for people with mental health problems through settlement and we consider this a successful use of the judicial review process.

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

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

The framing of this question around courts acting "too leniently" suggests that public interest claims are somehow inherently negative.

Where a public body acts unlawfully, someone must be able to hold them to account and sometimes the most appropriate claimant will be a body that does not hold a direct interest such as a representative organisation like Mind. The same rules apply to these judicial reviews as apply to judicial review brought by individuals and, as with judicial review brought by individuals, the focus will be on the lawfulness of a decision or action by the public body.

Where representative organisations bring a claim, it means the court can focus on the underlying issues rather than on the specific facts of an individual case. The risk posed by any change to the rules on standing is that the courts will face a series of claims from various individuals when one would do. This would be neither cost effective nor efficient.