SWALA

South West Administrative Lawyers Association

Response to the Call for Evidence Issued by the Independent Review of Administrative Law on behalf of the South West Administrative Lawyers Association

Thank you for your call for evidence issued by the Independent Review of Administrative Law ("the review") panel on the question "*Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government*?". We take this opportunity to respond on behalf of the South West Administrative Lawyers Association (SWALA).

It may assist if we set out that we are an organisation comprised of legal practitioners (barristers, solicitors, legal executives, paralegals etc) and other persons with an interest and/or practice in administrative law based in the South West of England. We have been in existence since 2012 when the Administrative Court hearing centre in Bristol opened at the Bristol Civil and Family Justice Centre (the administration for which is run from Cardiff Civil and Family Justice Centre). Our membership is made up of legal practitioners who act for claimants and defendants in judicial review proceedings. As such, we hope that the range of experience we can offer is of assistance.

Before turning to the terms of reference and questions in the call for evidence, we would like to take the opportunity to set out some initial observations and concerns.

Initial Observations

Broad terms of reference and timescales

The terms of reference and the apparent remit of the review is extremely broad. The combination of a review of "*public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers*" and "*a review of the machinery of JR generally*" is in effect a review of the entire constitutional purpose, practice and procedure of judicial review. It is a huge topic which has occupied extensive empirical academic research, whole textbooks, and hundreds of years of

jurisprudence. A call for evidence which is so broad causes two problematic issues. Firstly, it makes full response to what, at present, are unknown proposals, very difficult, potentially impossible. It is anticipated and expected, on behalf of SWALA, that full consultation would take place when and if any concrete proposals are established. Secondly, it makes it even more difficult to respond in a meaningful way in the timescale offered in the call for evidence.

We would also observe that the remit of the review is inconsistent between the terms of reference, the title of the call for evidence, and through the questionnaire. For example, in places it is suggested that the remit of the review will focus on executive action generally, in places executive action with a focus on prerogative powers, and in places on all public body decision making (including that of local authorities). Inconsistency in such broad terms of reference also makes responding in a meaningful way a challenge.

Need for an evidence-based approach and questions as to evidence of need for the review

We consider that any changes to the current practice, and procedure of judicial review must be based on and led by empirical evidence. We are not aware of evidence, and none is referred to in the call for evidence, which suggests that there are such significant problems with judicial review that may justify such an all-encompassing, expensive, and time-consuming review.

We consider it likely that academic institutions will be better able to address whether there is any evidence of a need for changes as anticipated in the terms of reference. A useful example (and only an example) of useful research that illustrates a lack of a problem to be addressed can be found in the research of Dr Joe Tomlinson, Research Director for the Public Law Project[1]. That research finds that of 3,384 cases filed with the Administrative Court Office in 2019 only 156 went as far as a substantive hearing, of which in 68 claims the claimant was successful, in 79 the defendant was successful, and in 9 the claim was withdrawn or involved some other result. That trend is consistent over the last few years. As noted in the MOJ's *Guide*

[1] Most recently reported in Graham, Marsons, Sunkin and Tomlinson, "*A guide to reading the Official Statistics on judicial review in the Administrative Court*", October 2020 https://administrativejusticeblog.files.wordpress.com/2020/10/a-guide-to-reading-the-official-statistics-on-judicial-review-in-the-administrative-court-october-2020.pdf

to Civil Justice Statistics Quarterly, June 2018[2], in 2017 of the 4196 cases issued, only 207 went to a final hearing, of which in 88 claims the claimant was successful, in 90 the defendant was successful, and in 27 the claim was withdraw or there was some other result.

This consistent trend would suggest the current process incorporates an appropriate filter system in the requirement to obtain permission to apply for judicial review which allows for the Court to eliminate claims which are unarguable or otherwise lack merit without resorting to full hearings, and which allow the parties to settle the matter without recourse to the Court. It should also be observed that in 2019 in only 79 cases were public bodies held not to have acted lawfully where they did not, without the Court's intervention, accept that the relevant decisions had not been lawfully taken. There is, by definition, no "interference" with lawful public body decisions and the opportunity to review such decisions, in any event, is constitutionally necessary. This position accords with our practical experience in conducting judicial reviews and is indicative of there being no clear identifiable problem with the present position.

In the absence of empirical evidence, and without further explanation, we are concerned that the review is primarily a reaction to two decisions of the Supreme Court which found actions and/or proposed actions of the executive to be outside of the lawful powers of the executive (see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 ("Miller 1") and *R (Miller) v The Prime Minister* [2019] UKSC 41 ("Miller 2")). The concerning question which follows is whether the review is a response to a legitimate and genuine issue which impacts society or whether this may be or be seen to be an attempt to alter our system of checks and balances to remove judicial scrutiny and thus allow executive action to be taken without a manner of determining whether it is lawful or not. Indeed, the concerning result of a recasting of the system of checks and balances is illustrated in *Miller No.2* where, were the Courts not able to decide whether the Prime Minister's decision to prorogue Parliament was a lawful exercise of his power, and thus whether he had in fact exercised the power at all, the result would be that one man would have the power to close Parliament, for any period of time,

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714289/civil-justice-stats-guide-jan-mar-2018.pdf

without any lawful mechanism to prevent him from doing so. Such power has the mark of authoritarianism, not democracy.

Questions as to lawfulness and powers relating to judicial review

The review appears to be based upon the premise that the UK Government and/or Parliament has the power to oust common law based judicial review of executive action. The panel may have in mind a more nuanced approach which may become clear in future consultation(s). However, we feel it important to note at this stage that we question the extent to which it would even be lawful to implement changes which would remove the judicial check on executive action, and in particular the exercise of prerogative power or seek to effectively remove the judicial check by way of restricting the role of the Courts.

We note that it is a long-established constitutional principle that the arbiters who decide the (lawful) limits of executive prerogative power are Her Majesty's Judges, not Her Majesty nor those exercising prerogative powers on her behalf. That is not a development in the last few decades, it is a long-established constitutional principle affirmed in the *Case of Prohibitions* [1607] EWHC KB J23, (1607) 12 Co. Rep. 64 (the administration of justice according to law is irrevocably delegated to Her Majesty's Judges) and the *Case of Proclamations* [1610] EWHC KB J22, (1611) 12 Co. Rep 74 (the Crown has no prerogative other than the law of the land allows). It is not possible for either the legislature or the executive to define the extent of their own powers. Parliament (ultimately only to the extent allowed by law) may grant executive powers, the extent and lawful exercise of which are determined by the courts, or the executive may exercise prerogative power as recognised and defined by judicial decisions.

Following this principle, we have in mind the forceful decision of the House of Lords in *R (Jackson) v. Attorney General* [2005] UKHL 56 at paragraph 103 (per Lord Steyn):

> *The supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have*

> *to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.*

A similar point was made in *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46 at paragraph 51 (per Lord Hope):

> [T]*he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. I would take that to be, for the purposes of this case, the guiding principle. Can it be said, then, that Lord Steyn's endorsement of Lord Hailsham's warning about the dominance over Parliament of a government elected with a large majority has no bearing because such a thing could never happen in the devolved legislatures? I am not prepared to make that assumption. We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.*

We would, therefore, invite the panel to carefully consider, when making any recommendations, whether any such recommendations may fall foul of the warnings set out in *Jackson* and *AXA* and thus be incapable of lawful implementation as falling outside of the powers of the Government or Parliament.

Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute

In considering this question, it is convenient to incorporate the answers to questions 3-5 of the call for evidence:

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?

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?

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?

We firstly question whether any statutory codification of the grounds for judicial review would be consistent with the UK's unwritten constitution and our system of checks and balances. It is difficult to comment without specific proposals to comment upon. It is also unclear if there would be any public appetite for such a change, there being a lack of any empirical evidence supporting such a change.

It may be, and we can go no further than to say it *may*, be possible to draft a statute or code which sets out a set of circumstances in which the decisions of public bodies are deemed not to be lawful but there cannot, by definition, be any circumstances in which unlawful decisions can be deemed to be lawful. It *may* also be that some clarity and simplicity would follow. A litigant in person, for example, would be more likely to be able to apply codified terms than principles of administrative law arising out of common law.

The above said, it is our view that, in line with the aforementioned issues as set out in *Jackson* and *AXA*, that any such code cannot, and in any event, should not, seek to oust judicial review of prerogative powers on grounds which would fall outside of the code. It would not and could not *wholly* define the circumstances in which in which any executive decision may be determined to be unlawful by the higher courts. A code would, in effect, create a two tier system of judicial review, whereby executive action could be held to be unlawful on the basis that it is not compatible with the terms of the code *and* on the basis that it breaches common law principles. Whilst any such statutory intervention may, depending on how carefully that statue is drafted, have the effect of clarifying *some* grounds on which executive action may be determined to be unlawful it cannot define *all* of the grounds.

In any event, we would question whether any such code would bring clarity. Historically, statutory intervention in judicial review has been problematic, seeking to define a process which has developed in common law over hundreds of years, the unwritten nature of which provides the advantage of flexibility. As an example, we note s.31(2A) and (3C)-(3F) of the Senior Courts Act 1981 (as amended) and the introduction of the "no substantial difference" test, which sought to define an aspect of the judicial discretion to refuse to grant a remedy and refuse permission to apply for judicial review. We observe that these changes did little to bring clarity to the judicial discretion, and have required subsequent consideration and definition by the courts in a number of cases (see for example *R (Goring on Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, *R (Williams) v Powys County Council* [2017] EWCA Civ 427, and *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin)).

With regards to the scope of judicial review, we consider that the common law tests of legality are sufficiently clear, whilst not being so prescriptive as to act as an inflexible bar to judicial review as times change. Judicial review is the exercise of the supervisory jurisdiction of the higher courts which "*regulates the affairs of subjects vis-à-vis public authorities*" (*O'Reilly v Mackman* [1983] 2 AC 237 at 255).

The common law definition of a public authority is deliberately wide with a view to ensuring that those exercising "*public functions*" (CPR 54.1(2)(a)(iii) and see also *R v Panel on Takeover and Mergers ex parte Datafin* [1987] QB 815) are subject to the supervisory jurisdiction of the courts. The flexibility of the common law tests are, in our view, a necessary safeguard to ensure that all actions and decisions taken by a body on behalf of the public are taken lawfully. Flexibility is increasingly necessary as public powers are outsourced to private bodies more commonly than ever before and such action must not be permitted to act as a mechanism to avoid judicial scrutiny and our system of check and balances. Any attempt to define in statute the bodies or decisions which may be subject to judicial review is both undesirable, given the advantages of common law flexibility, and in any event, appears to us to represent an unlawful attempt to oust judicial review by limiting its application, contrary to the rule of law (and again, see *Jackson* and *AXA* above).

With regards to the clarity of the procedure for making and responding to an application for judicial review, it is our view that the process is sufficiently clear as set out in Civil Procedure Rules Part 54 and would be unlikely to be improved if the procedure was to be moved to a

statutory code. We further note that the Administrative Court publishes guidance annually on judicial review practice and procedure in the *Administrative Court Judicial Review Guide* (latest edition, 2020, published September 2020)[3]. We would observe that this guide does much to clarify the process and is set out in a user-friendly format, which is intended to be clear for lawyers and non-lawyers alike.

Whether the legal principle of non-justiciability requires clarification and whether, where the exercise of a public law power should be justiciable, the grounds

We consider that a statutory definition of the concept of justiciability would be difficult. As noted above, one of the advantages of the common law definition of justiciability is its flexibility. We observe that prior to *Miller 2* it would have been unlikely to have entered the thought process of those who may have been charged with defining justiciability in statute that the Prime Minister may seek to prorogue Parliament, for a lengthy period, without reason or justification, at a time when the UK's constitutional framework and relationship with Europe was at a critical juncture. It was the flexibility of the common law system which ensured there was a proper check on executive power and the constitutional manner by which the extent of prerogative power was defined. It would be worrying if the wielder of the prerogative power could also define its limits. Again, that is the mark of authoritarianism, not democracy.

In any event, we would observe that the common law definition of the concept of justiciability has been well discussed and adequately defined, without seeking to inappropriately cap the concept, in *Miller 2*, see paragraphs 28-52, as well as other important cases, such as *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513).

To the extent that it may be suggested that greater clarity is needed, we would suggest that the advantages of flexibility afforded by the common law far outweigh any potential for a clearer definition that may follow from a concrete definition in statute. We would, further and again,

[3] See - https://www.gov.uk/government/publications/administrative-court-judicial-review-guide

question whether it would be contrary to the rule of law if ousting of the judicial interpretation of justiciability were attempted.

Whether procedural reforms to judicial review are necessary

Before turning to the specific points set out in the questionnaire on procedural reforms, we would generally observe that there is already a well-known and, in our view, appropriate procedure for judicial review claims, as set out in CPR Part 54. Again, useful and more user-friendly guidance on the procedure is available in the Administrative Court Judicial Review Guide 2020. It is our view and experience that, generally, the judicial review procedure is fit for purpose and is sufficiently "streamlined", incorporating a permission stage to filter out unarguable and unmeritorious claims at an early stage (which as observed above is an effective and working system).

We now turn to the broad headings as set out in the terms of reference and will, in considering these headings, seek to address questions 6-13 of the call for evidence.

Disclosure and the Duty of Candour

In our view, disclosure and observance of the duty of candour is simply a principle of good governance and administration. The knowledge that there may be a need to disclose decision making documents as part of the Defendant's duty of candour (or as part of an order for disclosure) in Court proceedings encourages good first-time decision making.

We are mindful, as some of us have been civil servants in the past, of the excellent guidance issued by the Government Legal Department in "*The Judge Over Your Shoulder – A Guide to Good Decision Making*"[4], which quite properly records that "*Its purpose is not "How to survive Judicial Review", but rather to inform and improve the quality of administrative decision-making*". Any watering down of the principle of the duty of candour or removal of the ability of the Court to order disclosure would be contrary to that principle

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf.

and would encourage, at best bad decision making, and at worst, corrupt decision making. It is also an important factor in a system of checks and balances. Removal of the scrutiny of public decision makers is a dangerous exercise. The Court represents the Crown and the people ensuring their public officials are acting lawfully and in line with the principles of good administration.

In any event, as observed in the Administrative Court Judicial Review Guide 2020 at paragraph 6.5, "*The duty of candour ensures that all relevant information is before the Court. The general rules in civil procedure requiring the disclosure of documents do not apply to judicial review claims… In practice, orders for disclosure of documents are rarely necessary in judicial review claims.*" The duty of candour, reinforced by the power of the Court to order disclosure of evidence, is as streamlined as it can be without removing a vital check on public decision making, contrary to the principle of good administration as well as the rule of law. The persons to whom powers are entrusted to exercise on behalf of the public would be unaccountable, if there was no duty of candour. We would also observe that the alternative to observance of the duty of candour would be a system of standard or specific disclosure, which is likely to be more onerous for public bodies and less streamlined.

Standing

It should first be observed that none of those who took part in formulating this response on behalf of SWALA have any experience of a case where standing to bring a claim was successfully questioned. That, in itself, is a useful indicator of how infrequently this issue troubles the Court.

The law on standing is well defined and appropriate. It is based on a sufficient interest in the claim (see s.31(3) of the Senior Courts Act 1980). This is a test which ensures that, generally, only those directly affected by the claim or public interest groups may challenge the decision of a public body by way of judicial review, unless there is a genuine public interest in a claim proceeding. Given that it is impossible to list all decisions that a public body has in the past made or will in the future make, it is impossible to definitively define whom may have a sufficient interest. It is for that reason that there is no test defined in statute or code (as recognised in *Inland Revenue Commissioners v National Federation of Self-Employed and*

Small Business Ltd [1982] AC 617 and in the Administrative Court Guide 2020). It is a judgment made in all the circumstances which must be applied in a case by case basis.

Both the impossibility of definitively defining standing and a sufficient interest and the principle that executive action and public body decision making must not be inappropriately shielded from judicial scrutiny without good reason, favours the current common law principle of standing.

Judicial Review Time Limits

CPR 54.5(1) requires that claims are brought "*promptly and in any event not later than 3 months after the grounds for making the claim first* arose". The Court has power to refuse permission to apply for judicial review should the claimant not have acted promptly, which ensures that claims are brought as expeditiously as possible. That said, we would observe that in our experience it is rare that permission is refused for such a reason.

We would suggest that there is a balance to be struck between allowing a claimant time to properly prepare their case and ensuring that public body decision making in not inhibited by delays. In our view, the balance is already appropriately struck.

We would observe that we are not aware of any evidence that the current time limits cause any problems with good public administration or the judicial process. Nor are we aware from our experience of working with and representing public bodies of the time limits causing any such issues. In our view, reducing the time limit would require evidence of significant administrative difficulties.

We would observe that there are already difficulties for claimants and claimant practitioners in a 3 month time limit, especially in cases which involve vulnerable clients who may be slower to obtain legal advice and where delays in obtaining legal aid impact upon how expeditiously a claim can be prepared and issued. There may be an argument for a longer time limit or at least greater flexibility, given that there is such an enormous range of executive action, not all of which has wide ranging effect or is urgent, so that the need for public bodies to act on decisions may have more or less importance, depending on the nature of the decision and the circumstances.

We would be concerned that any change to the current time limits, not supported by any need for a change, may be and/or appear to be simply a method of avoiding appropriate scrutiny of public body decisions. In our view the balance in the current process is appropriately struck and no change is required, at least in so far as it would make it more difficult to bring judicial review proceedings.

Remedies and the principles on when relief is granted

The current remedies available in judicial review are based upon the centuries old common law prerogative writs system which were recognised in statute by s.7 of the Administration of Justice (Miscellaneous Provisions) Act 1938, and see ss.29(1) and (1A) and 31(1), (2) and (4) of the Senior Courts Act 1981 for the present statutory provisions. We would observe that any amendment of the remedies available in judicial review is, therefore, not a procedural point which may be amended by the executive or the Civil Procedure Rules Committee. It would require an Act of Parliament to alter the remedies available and it is doubtful, for the reasons given above, as to whether Parliament even has the power to regulate the remedies available in any manner which would take away from the courts the power to administer justice by granting the remedies which they consider appropriate and it would be improper for it to attempt to do so.

We would also observe that we are not aware of any evidence and have no experience in practice which would suggest that the current remedies available to the higher courts are inflexible or have not delivered appropriate redress when granted by the courts.

We would also observe that inherent in the present system is a natural flexibility as all remedies are discretionary (see *R (Baker) v Police Appeals Tribunal* [2013] EWHC 718 (Admin)) and, thus, where, for example, a remedy would serve no useful purpose or the claimant has suffered no prejudice or harm. The flexibility of the discretionary remedy allows the court to assess on a case by case basis whether a remedy is appropriate.

In our view, the present system of remedies is fit for purpose.

Permission and appeal routes

The procedural routes on for judicial review, including permission to apply for judicial review and appeals thereafter are well set out in the Civil Procedure Rules, parts 54 and 52 and explained in accessible terms in the Administrative Court Judicial Review Guide 2020, parts 6-10 and 25. We consider that the current procedural framework is appropriate and there is no evidence of which we are aware of issues arising from the appeal framework which act as any barrier to access to justice or good administration.

Clearly, other procedural regimes are possible, although as we note, in our view unnecessary. We would suggest that there is already an expert body in existence to consider necessary changes the procedural framework, the Civil Procedure Rules Committee. Any changes to the procedural framework should be a matter for that committee. The committee has the advantage of expert and longstanding knowledge of procedure and independence from Government and public bodies. Changes to procedure which do not involve the committee risk being or being seen to be a manner of authorising or removing the judicial check on unlawful executive or public body action through the backdoor.

We would also observe that it is our experience, supported by statistics (see above), that the current system appears to act as an appropriate filter to remove unarguable and meritless claims and it is appropriately streamlined. Any apparent delays may well be down to lack of sufficient judicial resources, albeit we would observe that more recently statistics suggest that the Administrative Court Office and the Administrative Court are allocating, hearing, and concluding cases in relatively good time.

In 2019, 69% of cases applications for permission were considered within 3 months and 71% of substantive hearings were determined within 9 months (see Administrative Court User Group Meeting Minutes of Wednesday 27 March 2019)[5]. Delays appear, therefore, minimal, and do not, in our experience, act to inhibit proper access to justice or good administration.

In summary, we do not consider that any changes to the current procedural framework are necessary or desirable.

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5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831268/Administrative_Court_User_Group_meeting_minutes_27.3.19.pdf

Interveners

We would note that interveners (the intervention of other parties in proceedings) have a distinct role within judicial review proceedings, separate to that of the original parties. Interveners can be a useful tool for the Court and can bring evidence and perspectives before the Court which may not be available or apparent to the parties (as observed by Mr Justice Ouseley in *R (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change* [2010] EWHC 1554 at paragraph 8). For example, in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, a case considering a scheme under the Immigration Act 2014 imposing obligations on landlords to take measures to ensure that they did not provide private accommodation to tenants who were disqualified as a result of their immigration status, the Court allowed the National Residential Landlords Association and the Equality and Human Rights Commission to intervene. Clearly, such organisations can and do assist the Court in a different way to the parties.

The current procedural regime on when an intervener may take part in proceedings already acts to prevent unnecessary intervention. Under CPR 54.17, an intervenor requires the permission of the Court to file evidence or make representations and any application must be made promptly. Further, the Court will not grant permission in intervene simply on the basis of an interest in the proceedings and the Court will not grant permission if the intervention would be unlikely to have a significant impact on the case (see *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin)). As such, intervention is controlled by the Courts on a case by case basis and is reserved for those cases where the intervention will have a beneficial impact on proceedings.

We would also note that in the rare cases where interveners are permitted to make representations in judicial review proceedings, they are doing so in the knowledge that no other party can be ordered to pay their costs unless there are exceptional circumstances (per s.87(3) and (4) of the Criminal Justice and Courts Act 2015). Further, in the event that the intervenor has, in intervening, acted as a principal party, has not been of significant assistance to the Court, has submitted evidence the significant part of which relates to matters the Court does not need to consider, or has acted unreasonably, then the Court must order the intervenor to pay the costs

of an applying party relating to the intervention (per s.87(5) of the 2015 Act). As such, where an intervenor decides to and is granted permission to intervene, they will almost inevitably have to meet their own costs and they run the risk of paying the costs of other parties associated with the intervention. We would suggest that a costs regime which is weighted so heavily against intervenors will already do much to reduce intervention to only those cases where the intervenor has significant resources and where the intervenor is satisfied that their intervention is absolutely necessary and can add a necessary perspective for the Court.

Considering the above, we do not consider that any changes to the procedural and costs regime relating to intervenors is necessary. There is no evidential basis to suggest that intervenors cause a particular issue for the Court or the parties. Further, the regime is already weighted so heavily against intervention that we consider it more likely that intervenors who could genuinely add useful perspective for the Court will already be dissuaded from intervention. Attempts to put in place procedural reforms to further dissuade intervenors would disproportionately prejudice such intervenors and risk genuine and useful evidence and submissions from perspectives that may be relevant but not shared by the parties from coming before the Court.

Costs

We would observe that the call for evidence appears to concentrate on and be informed by the implicit suggestion in the call for evidence that "*the rules regarding costs in judicial reviews* [are] *too lenient on unsuccessful parties or applied too leniently in the Courts*". We would observe this suggestion is directly contrary to the actual law on costs in judicial review. The general rule in judicial review proceedings is that the unsuccessful party will pay the costs of the successful party (see CPR 44.2(2), *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595 at paragraphs 58-65, and the Administrative Court Judicial Review Guide 2020 at part 23). We do not have any experience of cases where this rule has not been applied, for example, where an unsuccessful party was awarded their costs.

We would observe that there is an element of uncertainty as to which party will be awarded costs, if any, where a claim settles without a determination by the Court. This is not to say that there is not an established and appropriate process in place for dealing with such scenarios. The

procedure is well set out in the Administrative Court Judicial Review Guide 2020 at part 23 and the ACO Costs Guidance of April 2016 and anticipates short submissions and a decision on the papers to minimise further costs. *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595 sets out the principles as to when costs will be awarded after settlement, which maintains the point that the claimant must have succeeded in terms of the relief sought before costs can be recovered. The uncertainty comes from the inevitable fact that it is often difficult for the parties and the court to establish if the claimant has obtained relief as a result of the proceedings or not. This is, in our view, a qualitative judgement that is best taken by a judge and it is appropriate that the procedure is kept to a minimum to reduce further costs. In summary, whilst the costs on settlement process can represent something of a 'lottery' in terms of whether costs will or will not be awarded, it is our view that the present system is as effective as it can be, taking into account the need for such proceedings to be proportionate.

We note the suggestion in the call for evidence that costs in judicial review claims may be disproportionate. We would, in general, agree with this point. Costs in judicial review claims which end at the permission stage will generally run to thousands of pounds. At the substantive stage they will generally run to tens of thousands of pounds. It is our experience that sums so large, whilst undesirable for central government, do not generally act as an influence on whether to defend a claim or not. However, we have experience of claimants deciding not to bring judicial review claims which have merit due to the risk of incurring such high costs should they be unsuccessful. Conversely, where smaller public bodies such as local authorities are the defendants, we have experience of concession of a claim despite a potential defence with merit due to the risk of incurring such high costs should they be unsuccessful. It may be that that the panel would wish to investigate and gather evidence on this point to consider if this is a wider experience. It appears to us that where costs are acting as a bar to bringing or defending a claim they are a bar to proper justice and, thus, we can see merit in exploring an alternative regime that recognises that, in many cases, the claimant represents a class of persons affected and that it is in the public interest for the matter to be brought before the court.

Some proposals for an alternative system could include a mandatory costs cap (similar to that under the *Aarhus* costs cap in environmental claims) or a system of costs management. We would expect that any such changes should be evidence led and would, again, most likely be more appropriately considered and implemented by the Civil Procedure Rules Committee.

Alternative Dispute Resolution

In our experience ADR is sometimes, but seldom used in judicial review proceedings. That is not to say that negotiations do not often take place between the parties to settle proceedings, they do (as evidenced by the statistics as referred to above). In our experience the parties often comply with their duties to consider their case when permission is refused or granted before proceeding.

However, formal ADR is seldom embarked upon. This is, in our experience, in part due to the tight time limits which often do not allow for any form of ADR before a claim must be filed. In part this can be, but is not exclusively, because the remedy sought focuses upon a point of law, such as statutory interpretation or the lawfulness of a policy, rather than a specific outcome sought by the claimant.

It may be that a more effective use of ADR could be encouraged or required as part of the formal judicial review process. We have in mind a system akin to the round table meeting which is often incorporated after permission has been granted in age assessment judicial reviews in the Upper Tribunal (and in other jurisdictions such as the Court of Protection). A requirement for the parties to hold a roundtable meeting (or engage upon another method of ADR) after permission is granted but before a substantive hearing may, in some cases, encourage settlement and remove the need for a final hearing, particularly in a case where there is a specific goal sought by the claimant, such as full or partial reinstatement of a benefit withdrawn by the defendant.

In any event, we would encourage and expect any such changes to be implemented after proper investigation of options and to be evidence based. We would also suggest that any such recommendations by the panel would be best considered and implemented by the Civil Procedure Rules Committee.

Conclusion

In conclusion, we would reiterate that we have concerns that this review, and in particular the call for evidence, does not allow for proper consideration and participation, the terms being far

too broad and imprecise, and does not appear to be rooted in any evidence base. We also consider that the review may be aimed at attempts to or the temptation to transgress into making changes to our centuries old system of checks and balances which may be unlawful and contrary to the rule of law. Finally, where evidence is called for in relation to practice and procedure, whilst we accept there may be a case for some changes to improve access to justice and allow for good administration, those cases are discrete and narrow. In general, it is our view that the current judicial review procedure operates in a streamlined and balanced manner.

We thank the panel for considering this submission and would welcome the opportunity to respond to a more specific consultation.

Guy Adams

St John's Chambers, Bristol, Chair of SWALA

David C. Gardner

No.5 Chambers, Secretary of SWALA

For and on behalf of the SWALA Committee