Submission from Dame Vera Baird QC, Victims' Commissioner for England and Wales, to the Independent Review of Administrative Law Panel call for evidence '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 out the business of government?'

Introduction

As Victims' Commissioner, I passionately believe everyone, including victims of crime, should have access to justice. What this means on an individual level will look different for different people, but fundamental principles apply in a fair and democratic society, including the ability of individuals to challenge and hold to account government departments and agencies. Challenge should never be regarded as a hinderance, but a means of ensuring effective and accountable decision making and policy.

The 'Rule of Law' (along with Parliamentary Sovereignty and judicial oversight), is fundamentally the defining principle of our 'unwritten constitution'. Judicial review is often the prime method by which compliance with the Rule of Law is sought as such, I hope the Panel will approach its task with care and caution.

Section 1 – Questionnaire to Government Departments

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

I am concerned by the questions for government departments and public bodies. Their tone seems to suggest judicial review may seriously impede the function of their work, that it is always antagonistic in nature and that it could adversely affect decision making. Judicial review by its' nature will only succeed where a public body has acted illegally. Indeed, there are examples where even the mention of judicial review has compelled public authorities to review and amend their actions.

As judicial review considers the lawfulness of actions by public authorities and government it can serve the important function of clarifying the legal position for government and public authorities.

As outlined above it is a key mechanism of accountability and is often one of very few options open to victims of crime who have been let down by criminal justice agencies and are seeking justice.

As an example of how important judicial review is as a method of oversight and accountability, two survivors of the so -called 'black cab rapist' John Worboys won their claim for compensation from the Metropolitan Police after the supreme court ruled that the force had failed to carry out an effective investigation into the serial sex attacker. The judgment sets a far-reaching precedent for police liability by allowing victims to argue that they have been subjected to inhuman or degrading treatment under article 3 of the European convention on human rights.

In a second judicial review, the claimants challenged the Parole Board decision to release Worboys. This was the first time that a decision to release a prisoner had been challenged in the courts. Previous cases had been brought only by prisoners appealing against decisions to deny parole. The case was also notable as the claimants underwrote their legal costs entirely through crowdfunded resources. The High Court ruled that the Parole Board

behaved “irrationally” by not seeking more information, both for the offences for which Worboys was charged and for other potential offences and quashed the release decision.

Further, the Court upheld the challenge to the vires of Rule 25(1) of the Parole Board Rules 2016. There were no obvious reasons why the open justice principle should not apply to the Parole Board in the context of providing information on matters of public concern to the very group of individuals who harbour such concern, namely the public itself. This information could readily be provided in a fashion which in no way undermines the prisoner’s ECHR, art 8 rights and the confidentiality which attaches to it.

This ruling has had a profound impact on the parole process and has resulted in thousands of victims being entitled to receive high level summaries of parole decisions for the first time.

No victim had challenged the Parole Board before or since this case and without the means of judicial review, I am confident extending of the principle of open justice to parole would never have happened. The findings were embraced by the government and it is an example of how judicial review can enhance public policy.

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)?*

The call for evidence places a great deal of emphasis on government, organisations and legal actors within the process, but there seems to be less focus on individuals. I would like to understand what steps the panel is taking to ensure claimants’ views are sought as part of the reform process. In particular, I believe it is vital the panel hears from victims of crime, like those of John Worboys (above), who have used judicial review as a means to challenge decisions.

The “Duty of Candour” in judicial review is vital both to ensure equality of arms and to ensure important information, which may otherwise be hidden, comes to light. It would be a hugely retrograde step if this was lost through any reform.

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?*

I question whether the grounds, rules and remedies of judicial review are ‘uncertain’. It is vital judicial review be accessible, knowable and certain, but it is possible any statutory codification could obfuscate things further. If the panel is minded to go down that route, it will need to ensure codification does not make it harder for individuals to challenge unlawful actions by government and does not undermine access to justice or the rule of law.

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?*

I reiterate my earlier points. An essential component of a fair and democratic society is that everyone has the means to challenge the lawfulness of actions taken by government and that there are proper mechanisms for accountability. If certain decisions were taken outside the scope of judicial review, what mechanism would take its' place to ensure that government is held to account?

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 process of making and responding to judicial review, as set out in the civil procedure rules, is generally well understood by lawyers. However, I accept there are issues of accessibility for those claimants who cannot afford legal representation.

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?*

The time-limits in judicial review are already tight and even applications within the three-month time-limit can also be excluded if the court does not consider the application to have been brought promptly. Any shortening of these time limits risks excluding meritorious claims.

The current time-limit is already problematic for those who need to seek legal advice and representation, apply for legal aid, follow pre-action protocol and, as judicial reviews are front- loaded, file most of their evidence with their claim. This can be very onerous for any claimant, but particularly one who has been a victim of crime and may be experiencing significant trauma.

In terms of the impact on effective government, an effective government must surely be one which is open to challenge, is accountable to those it governs and is able to defend its actions robustly when scrutinised. Judicial review should be regarded as a means of enhancing the effectiveness of government and not undermining it.

It should also be pointed out that claims without merit are more often than not filtered out at the permissions stage and only those that progress to full consideration are those that are identified as having an arguable case.

It is only right and proper that access to justice is upheld including by ensuring that time-limits are realistic and fair.

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

The risk of having to pay the other sides costs is a serious barrier for many individuals and organisations seeking judicial review. This is unfair.

Legal aid is essential for many claimants and access to judicial review should not be dependant on means. Current eligibility rules mean many cannot afford to take the risk of

being ordered to pay their opponents' costs and are not eligible for legal aid. This is a clear access to justice issue.

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?*

(a) *Are costs in JR proportionate?*

See above

(b) *Should standing be considered by the panel?*

See question 13 below.

(c) *Should unmeritorious claims be treated differently?*

No -comment other than maybe this is a good reason for legal aid to be available so individuals can have advice from a lawyer.

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?*

Surely the majority of remedies imposed by the courts are designed to ensure the decision-maker complies with the rules set out by Parliament? It is not clear what alternative remedies the panel may have in mind.

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

Judicial reviews are frequently settled at an early stage because decision-makers recognise the merits of the claim. Extending the time-limits for judicial review may give more time for this kind of pre-action negotiation, which would in turn reduce applications. Reducing the time-limits would lessen the opportunity for such a settlement.

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?*

Settlement whenever it happens is part of the process and should be seen in this context as a positive, see above.

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?*

No comment here

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 majority of judicial review applications are made by individuals and the courts are careful to limit the standing of inappropriate parties. For example, in DSD (the case involving a challenge to the Parole Board's decision to release John Worboys, above) the Court accepted the victim's family had standing to bring the case but rejected the standing claim of the Mayor of London.

However, public interest standing is a vital mechanism for challenging the decisions of public bodies. For example, the judicial review brought by the Centre for Women's Justice and the End Violence Against Women Coalition in respect of changes in CPS policy and the resulting decline in rape prosecutions included a dossier of evidence from victims of rape, who did not have their cases prosecuted is brought on that basis. The advantage of these charities having public interest standing is that there is one judicial review and not many.

A charity or organisation with public interest standing will still need to have a legal argument, just like any individual claimant. They may not simply challenge the merits of a decision.

As stated elsewhere it is vital to a fair society that someone should be able to challenge unlawful decisions and actions of public bodies. It will depend on the circumstances whether this is an individual or an organisation with public interest standing. Claims without merit claims will be rejected. Access to justice in this way is of paramount importance and limiting public interest standing would impede access to justice for many individuals.