Submission of the Bach Commission to the Independent Review of Administrative Law
26 October 2020

1. INTRODUCTION AND SUMMARY

1.1 This short submission has been prepared by members of and advisors to the Bach Commission on Access to Justice.[1] It deals with the key points within our spheres of expertise and interest to assist the review panel.[2]

1.2 As the Bach Commission acknowledged in its report, judicial review enables ordinary people's voices to be heard and is a vital part of a healthy democracy.

1.3 Judicial review needs to be more accessible.
The proposition in the call for evidence that there is a need to balance the right of people to challenge public authorities with the need for effective governance is flawed. There is no robust evidence that judicial review currently impedes good governance. Rather, it supports good governance. Urgent work is required to ensure that it is more readily accessible.

1.4 The breadth of public law cases is little acknowledged: it ranges from victims of crime seeking open justice to children in care and people with mental illness ensuring they get the support they are legally entitled to.

1.5 Some of the most effective cases are those that never get to Court but where the availability of judicial review means that people are able to hold statutory bodies to account and uphold the law at a local level.

1.5 The Panel is urged not to recommend any changes to administrative law that would encroach on the rights of ordinary people, impact on the unwritten constitution on the United Kingdom, restrict access to justice or undermine the Rule of Law.

1.6 Given the constitutional importance of judicial review, any changes that are recommended should be subject to full and anxious scrutiny once the proposals have been formulated by Government in the form of a public consultation.

[1] For more information about the Bach Commission see https://fabians.org.uk/about-us/our-projects/previous-projects/the-bach-commission/
[2] We endorse the submission of the Public Law Project - https://publiclawproject.org.uk/wp-content/uploads/2020/10/201020-PLP-Submission-to-IRAL-FINAL.pdf

2. THE CONSTITIONAL IMPORTANCE OF JUDICIAL REVIEW AND THE FINDINGS OF THE BACH COMMISSION

2.1 The report of the Bach Commission was published in September 2017, just over three years ago. In Appendix 5 of that report the late Sir Henry Brooke described judicial review and the evidence received by the Commission as follows:

> "Judicial Review (JR) is an essential tool in the citizen's armoury against unjust or unlawful decisions by the state or other public authorities. Although they accepted that it was a remedy of last resort, experienced practitioners told the Commission that all too often local authorities – and the Home Office, too – refused to reconsider a matter until JR proceedings were contemplated – or, in some cases, actually issued." (Appendix 5, page 64)

2.2 At the time of the Commission, the main concern from those giving evidence was the "chilling effect" of changes to remuneration for judicial review work under the Legal Aid Scheme. The Commission was concerned that new regulations had "dissuaded providers from issuing proceedings" (page 9: para 16) and undermining "the right of individuals to challenge the actions of public bodies" (page 33, para 69). The commission recommended that the regulation limiting the remuneration of legal aid providers for judicial review should be repealed (page 33, para 72).

2.3 While the Commission did not expressly consider the effect of narrowing judicial review in any way other than funding, the concerns about the impact of funding arrangements were raised precisely because of the vital role judicial review plays in upholding the Rule of Law and the right of people to hold public authorities to account.

2.4 Judicial review enables ordinary people's voices to be heard and is a vital part of a healthy democracy. An accessible system of judicial review is the mark of a confident, mature democracy and part of the important checks and balances our unwritten constitution relies on. Judicial review can be uncomfortable to those challenged, but ultimately can strengthen the integrity of a decision which survives challenge, as many do.

2.5 Judicial review remains a vital part of our constitution. It is often the only way for people to challenge decisions and omissions that have a profound and enduring impact on their lives. The Panel is urged to bear in mind the vital importance of a principled approach that respects the role of judicial review protecting Parliamentary sovereignty, good governance & accountability, a well-functioning democracy and good quality, lawful decision-making.

3. THE NEED FOR JUDICIAL REVIEW TO BE ACCESSIBLE

3.1 The notion that there is a need to balance the right of people to challenge public authorities and the need for effective governance is fundamentally flawed: there is no robust evidence that judicial review currently impedes good governance. As the Public Law Project notes there have only been fewer than ten cases that have been decided in the last eight years that concern the use of prerogative powers and most were decided in favour of the executive. This mirrors the judicial culture in judicial review cases generally, in which the courts already show significant deference to the government in areas where they lack the competence to decide particular questions, rendering further intervention unnecessary.

3.2 On the contrary, there is evidence that judicial review supports good governance. If anything, urgent work is required to ensure that it is more readily accessible.

3.3 Over time there has been an erosion in the accessibility for the ordinary person of judicial review as a remedy for unfairness. We consider that it is a fundamental tenet of the rule of law that all have reasonable access to justice and the law. Judicial review must remain an effective and accessible remedy.

3.4 Codification of the scope and nature of this important remedy carries the risk that it will restrict it and render it even more inaccessible for the reasons outlined by the Public Law Project. It is also out of kilter with our current unwritten constitution.

3.5 Many ordinary people are not aware of the existence of judicial review as a remedy for the problems they face: the pressing need for good public legal education was a key theme of the Bach report.

3.6 Judicial review is a slow, expensive, risky and legalistic procedure, and this already makes it less accessible to individuals. Even where people are aware of the availability of judicial review, many cannot access it due to the low eligibility thresholds for full legal aid[3] and the small number of legal aid providers specialising in judicial review work.

3.7 The chilling effect of these concerns can be seen by reduction in the number of judicial review cases issued each year: numbers dropped below 4000 for the first time in 2017 and data from the first half of this year shows only 1448 applications were lodged.[4]

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[3] Donald Hirsch, 'Priced out of Justice? Means testing legal aid and making ends meet' (Loughborough University, March 2018) as cited in the Public Law Project submission

[4] Ministry of Justice, Civil Justice Statistics Quarterly: April to June 2020(3 September 2020) Tables 2.1 and 2.2 available at https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2020

3.8 Given the inaccessibility of judicial review to many people, it is essential that civil society organisations that 'hold the door open' for those individuals who are effectively shut out of the justice system are able to bring claims in their own name. There are many benefits to such organisations being able to marshal the relevant evidence and present a coherent case to court in judicial review proceedings, thereby avoiding the need for a plethora of individual cases.

4. SCOPE AND BREADTH

4.1 The scope of challenges that may be brought are appropriately wide. The breadth of public law cases is little acknowledged in the shadow of high profile cases: as stated above, cases range from victims of crime seeking open justice to children in care and people with mental illness ensuring they get the support they are legally entitled to.

4.2 The Panel is no doubt aware of the breadth of important and high profile cases that have been determined in the Courts. There are many other reported but less high-profile cases that have had a significant impact and have improved the law and people's lives. We would be happy to provide examples upon request.

5. PUBLIC LAW AS A MEANS OF UPHOLDING THE LAW

5.1 Some of the most effective cases are those that never get to Court but where the availability of judicial review means that people are able to hold statutory bodies to account and uphold the law at a local level. For every high-profile case that hits the media, there are many more cases that never get to Court because the availability of judicial review means that people are able to hold statutory bodies to account.

5.2 The process of sending a letter before claim often forces a public body to examine its actions and keep pace with the law. The availability of judicial review is an important means of keeping public bodies current and accountable for their actions. It often serves to clarify the law and enables public bodies to carry out their duties in a fair way.

5.3 One member of the Commission who is a family law specialist has been involved in several cases where the local authority has acted in a way which parents have viewed as inappropriate. On each occasion where a detailed letter before action highlighting the actions complained about and why they were wrong has been sent, it has resulted in the resolution of the issue without the need for further litigation. Another member of the Commission who specialises in community care law has achieved similarly good results for vulnerable young people who

have not been provided with accommodation and support they are entitled to from their local authority. Case studies can be provided upon request.

6. CONCLUSION AND NEXT STEPS

6.1 The Panel is urged to refrain from recommending any changes to administrative law that would further alter that balance against the rights of ordinary people, impact on the unwritten constitution on the United Kingdom, restrict access to justice or undermine the rule of law.

6.2 Any changes that are recommended should be subject to full and anxious scrutiny once proposals have been formulated by Government. Any proposals should have full impact assessments that take into account the impact on children's rights, equalities and human rights. The impact assessments should be published in full alongside the proposals, which should be subject to full and proper public consultation for a reasonable period of time (at least 12 weeks excluding holidays).

26 October 2020