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Submission to the Independent Review of Administrative Law

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Introduction

*This is the joint response of the Kingsley Napley LLP Public Law Team. We are an experienced team of specialist public lawyers who have acted in a number of significant and high profile judicial review matters for a variety of individual and institutional clients. We regularly act for both claimants and defendants in judicial review cases as well as for interested parties and intervenors. The team is led by two former senior government lawyers, Stephen Parkinson and Adam Chapman. The below is the joint response of the team to the Call for Evidence of 7 September 2020 in connection with the Independent Review of Administrative Law (the "**Independent Review**"). With our collective experience we have sought to approach this Call for Evidence by seeking to assess the current state of law and practice in a dispassionate way.*

In our view, the starting point for the Independent Review must be to recognise a fundamental point about the purpose and function of administrative law and judicial review in a democratic society. Administrative law and judicial review exist not to impede public sector decision making, but to refine and improve it. They thereby assist the delivery of good public administration: performing public duties speedily, efficiently and fairly. Every civil service administrator should be familiar with 'The judge over your shoulder – a guide to good decision making', first published in 1987.[1] Its purpose is "*to inform and improve the quality of administrative decision making*". It achieves this by ensuring that administrators are familiar with the key legal principles applicable to their actions, and can therefore act in a way that minimises their susceptibility to challenge. As the guide states (at 1.1):

> "*The approach used in this guidance is not to directly focus on what 'good administration' is, but to describe the body of law developed by the Courts to supervise public bodies in carrying out their public functions. The need to reduce law to a set of standard rules means administrative law is not identical with the principles of good administration. But understanding the requirements of good administration often gives a good idea of what administrative law will say on the same point. Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked."*

In 2010, the Treasury Solicitor published 'Guidance on Discharge of the Duty of Candour and Disclosure in Judicial Review', again aimed principally at civil service administrators.[2] A theme running through that guidance, and one we endorse, is that success for the defendant in a judicial review challenge is about the vindication of values, rather than being measured by reference to victories and defeats. Civil servants must act with integrity and respond to scrutiny with honesty, openness and transparency. As the guidance puts it: "*A public authority's objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration*". Once this is recognised, it becomes obvious that judicial review is a partnership between all

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf
[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf

concerned, in which the defendant benefits as much as the claimant does from the court receiving a full and accurate explanation of all the facts relevant to the issue it must decide, so that it can come to the right conclusion.

Exercising public power is rightly a weighty responsibility. The existence of high legal standards, to which administrators may ultimately be held, safeguards the proper discharge of that responsibility and protects citizens from administrative overreach. The existence of such standards focuses and sharpens administrative decision making, even when no challenge is ever brought (or threatened). Finally, judicial review offers public bodies the opportunity to obtain guidance and clarification as to the scope and proper exercise of their responsibilities. Many claims are brought not because some alleged mistake comes to light, but because the exact scope of a power or duty has been left ambiguous in the legislation made by Parliament or the relevant Minister, so the court is called upon to clarify its interpretation. It is with all this in mind that we take issue with the notion, expressed in the Independent Review's questionnaire to government departments and other public bodies, that judicial review can *"seriously impede the proper and effective discharge of central or local governmental functions"*. Advocating government action 'unimpeded' by judicial review has significant potential to undermine administrative law's functions of encouraging high quality decisions and refining public powers and duties. It also exposes the public administration to an increased risk of degradation or abuse. Everything we say below is also informed by this fundamental point.

Preliminary views on the Terms of Reference

The Terms of Reference are framed in very broad terms. They do not say with any real specificity the ambit of the issues that the Independent Review will address. This makes it very challenging to give effective preliminary comments about them; responders do not know for certain any specific, perceived issues about administrative law that the Independent Review will investigate. A better way to conduct the Call for Evidence could have been to issue it in stages: first, to public bodies, in order to identify whether the primary pool of judicial review defendants perceive there to be issues with the substance or procedure of judicial review; then, to a broader range of judicial review participants, in order to gain the full picture about any issues that are identified.

The Terms of Reference explain that the review "*should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law.*" It is misplaced to understand judicial review only as a way of balancing individual rights with the interests of central government. The executive is not a monolithic structure. A whole range of bodies are amenable to judicial review, some of whom will have interests quite distinct from central government. Two very famous examples of judicial review have been proceedings brought against local councils whose political aims diverged from the central government of the time.[3]

Whilst it is true that judicial review may be brought by citizens either individually or collectively, it does not follow that it is just a way of enforcing, or seeking recognition of, individual rights. A finding of courts in judicial review that, for example, there has been no proper consultation process may provide the outcome that the individual or organisation bringing the claim wanted, but it also serves to encourage good public administration. Judicial reviews that are more closely connected with protection of individual rights, such as those that raise issues under the Human Rights Act 1998, are also related to good administration – acting lawfully is a fundamental element of good administration.

The *Miller* cases[4], which stirred controversy about judicial review, are atypical cases. Cases of such constitutional significance happen infrequently. That a case of constitutional significance occurred whilst a layer of the constitution was in the process of being changed through the Brexit process is not surprising. The cases were not novel, in the sense that the judiciary are considered under the British constitution to be the proper institution to adjudicate on the constitutional boundaries between parliament, the executive and the courts**.** Of the three branches of state, the judiciary benefit from interpretive experience and neutrality, and are clearly best placed to perform this function.

Indeed, Brexit and the challenges posed by covid-19 have thrown up unprecedented, once in a generation legal issues, that can be said to have little bearing on normal life. They have given rise to a proliferation, at a highly-accelerated pace, of law-making by statutory

[3] *Bromley LBC v Greater London Council [1981] UKHL 7 [1982] 2 WLR 62* and *R v Lewisham London Borough Council, ex parte Shell UK Ltd [1988] 1 All ER 938*.
[4] *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3) [2017] UKSC 5* and *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* ([2019] UKSC 41)

instruments. This new convention of law-making differs from usual legislative convention and, it is fair to say, is susceptible to error. Judicial review is an essential means to correct such errors. Proper parliamentary scrutiny, and additional efforts to ensure the quality of drafting of statutory instruments, would reduce the risk of challenges arising in such circumstances.

Question 1: 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?

The questionnaire proceeds on the assumption that judicial review can "seriously impede" governmental function and implies that there is a trade-off between judicial review and the operation of effective government. We are not aware of evidence to support that position. As indicated in the Introduction to this response, and informed by our experience, we would argue the opposite view.

As indicated above in our 'Preliminary views on the Terms of Reference', we suggest that there should be another stage of the Call for Evidence after responses have been received from Government Departments. This would allow the full range of judicial review actors to comment on any perceived issues about judicial review from Government Department defendants. This would be best for the quality and range of evidence that is put in front of the Independent Review.

Question 2: In light of the Review'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?

Two improvements to judicial review that we suggest making relate to costs and the duty of candour.

Costs

Reform should address the issue of proportionality of costs in judicial review. When funded privately, judicial reviews can be extremely expensive for claimants. Our experience is that the adverse costs risk to claimant clients is a significant deterrent to taking cases to court, regardless of the case's merits. This significantly impedes access to justice; means that cases with merit are not heard; and entrenches inequality of arms as between claimants and defendants, the latter of whom are on the whole much better resourced. Our experience is that the risk of adverse costs means that, in practice, decision-making by public authorities with a high risk of being unlawful is able to stand unchallenged.

The proportionality of costs in privately funded judicial reviews is a topic that has been considered for reform. In its consultation "Extending Fixed Recoverable Costs in Civil Cases: Implementing Lord Justice Jackson's proposals", launched in March 2019, the Ministry of Justice did not take forward two proposals that could have had a significant impact on the ability of claimants to hold public bodies to account through judicial review. These were two of Lord Justice Jackson's recommendations in relation to judicial review costs from his report of July 2017[5]:

1. To extend the 'Aarhus rules' to be adapted to all judicial review claims, and not just environmental claims. Lord Justice Jackson's proposal was that the regime would be extended to all judicial reviews where the claimant was not in receipt of legal aid, would be optional and would be means tested. The cap on adverse costs liability would be (as under the existing Aarhus regime) £5,000 for a claimant (or £10,000 when claiming as or on behalf of a business) and £35,000 for a defendant.

2. That costs management should be introduced in the case of 'heavy judicial reviews'. Lord Justice Jackson suggested that in any judicial review case where the costs of a party are likely to exceed £100,000 or the hearing length is likely to exceed two days, the court should have discretion to make a costs management order at the stage of granting permission.

These two reforms to costs should be taken forward. As Lord Justice Jackson has remarked, "[c]ontrolling the costs of litigation and providing clarity as to each party's financial commitment are vital elements in achieving access to justice". The proposal to extend Aarhus, in particular, strikes a fair balance between the protection of the public purse and the

[5] Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs By the Right Honourable Lord Justice Jackson, July 2017

constitutional centrality of judicial review. No balance on this issue will be perfect given the countervailing considerations. We find that we cannot improve upon Lord Justice Jackson's four principal reasons for this proposal, which are worth repeating:

(i) *…the risk of being held liable for £5,000 in adverse costs may make it impossible for some claimants to proceed; also the prospect of only being able to recover £35,000 in costs from the defendant may deter other claimants from using the scheme. On the other hand, the fact that the scheme is optional means that claimants who do not like it need not opt in. It is abundantly clear to me from all the evidence gathered during this review that some claimants (a) can accept an adverse costs risk of £5,000 or £10,000 and (b) can proceed in the knowledge that they will not recover more than £35,000 at the end.*

(ii) *The fact that the defendant will not normally be liable for more than £35,000 in costs will protect the public purse against open-ended liability.*

(iii) *The opportunity to vary the default figures at an early stage provides (a) an additional opportunity for claimants to secure access to justice, as well as (b) an opportunity for defendants to protect the expenditure of taxpayers' money in litigation brought by wealthy claimants.*

(iv) *Overall, in my view, this proposed reform will promote access to justice. It will strike the right balance between (a) the need to protect the public purse and (b) the need to hold public authorities to account.*

Duty of candour

The duty of candour is central to the proper functioning of administrative law. Public authorities giving full, frank and accurate disclosure and explaining comprehensively their decision-making promotes openness and transparency. This inspires confidence from citizens and is key to democracy. It enhances standards of good administration and governance by encouraging proper record-keeping and tracking of reasons for decisions. It can also bring efficiency in the pre-action protocol procedure, as full and frank exchange of information from the defendant lets each party properly consider its position; the parties can then consider out of court resolution if necessary.

In April 2016, a carefully reasoned discussion paper about possible amendments to the duty of candour was prepared by Mr Justice Cranston and Mr Justice Lewis[6]. The recommendations were:

1. To amend the CPR Practice Directions to reflect the case law on the duty of candour:

   "*12.2. A defendant should, in its detailed grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted*".

2. To set out a procedure in the Practice Directions to allow parties to apply to the court for specific directions in addition to the normal provision of information / voluntary

[6] Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings, A Discussion Paper, April 2016

disclosure by the defendant, after detailed grounds and evidence are exchanged. This would only in practice be used in a minority of cases to help narrow the issues.

3. To amend CPR Practice Direction 54A, on acknowledgements of service, to add the following:

   "If a defendant chooses to file an acknowledgement of service, the summary grounds of resistance referred to in CPR 54.8(4)(a) should identify succinctly any relevant facts, and provide a brief summary of the reasoning, underlying the measure in respect of which permission to apply for judicial review is sought unless the defendant gives reasons why the application for permission can be determined without that information"

The reasoning of the two judges underpinning the recommendations is careful, pragmatic and well-researched on how the duty of candour could be improved. We endorse the suggested amendments as set out in the discussion paper.

Question 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?

There has already been statutory intervention in the judicial review process dealing with *inter alia*:

1. delays in beginning the judicial review process[7];
2. standing[8];
3. considering applications for permission[9]; and
4. remedies and relief[10].

There is legislation passed in connection with judicial review, which has still not been implemented.[11]

Statute could be used to make clear:

1. That permission to proceed with a judicial review claim can only be granted when no adequate alternative remedy is available, though this is currently clear from the case law.
2. When the duty of candour applies. It is not altogether clear whether it applies during the pre-action stage[12].

It was recently reaffirmed that there are three grounds for judicial review: illegality, irrationality and procedural impropriety[13]. These grounds have remained unchanged for 35 years.[14] These grounds could be placed on the statute book, but it is not clear what additional clarity would be achieved. The grounds for judicial review are inevitably broadly framed because of the range of different decisions, and decision making bodies that are amendable to judicial review. Any codification of the grounds for judicial review would need to be drafted at a level of abstraction that could capture this range of decision-making. If not, codification would risk bringing in a degree of inflexibility, which would be damaging.

[7] s.31(6-7) Senior Courts Act 1981.
[8] s.31(3) Senior Courts Act 1981.
[9] s.31(3-3F) Senior Courts Act 1981.
[10] s.31(1-2C) and S31(4-6(b)) Senior Courts Act 1981.
[11] See for example s.85 of the Criminal Justice and Courts Act 2015.
[12] As noted above in our response to question 2, we endorse Lewis J's recommendation about how the CPR Practice Directions should be amended for the acknowledgement of service stage.
[13] *Regina (Gallaher Group Ltd and others) v Competition and Markets Authority [2018] UKSC 25*
[14] They were first described in this way by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, at p. 410 and are often referred to as the "Diplock Tripartite".

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

We recognise that certain actions or decisions of the executive may fall more within the political realm and be more appropriate for political rather than judicial scrutiny. Parliamentary scrutiny and the development of constitutional conventions rightly play a significant role in ensuring executive accountability. In our experience the courts have been very mindful of their institutional competence when adjudicating across different policy areas. They have been cautious about interfering with, for example, macro-economic policy decisions and decisions relating to foreign policy[15], when expertise on decision-making lies with the executive.

The *Miller* cases have brought back to the forefront debates about the justiciability of the prerogative. As we have stated above, cases of such constitutional significance occur very infrequently. We do not believe these cases warrant a dramatic reappraisal of the current balance in the constitution, in which the courts are seldom called to rule on matters about the executive's prerogative.

The historical development of the prerogative, and its past exclusion from some types of review, does not easily appear to be underpinned by coherent principle. We do not think that prerogative powers being justiciable is an undue supervision, or hindrance, for government. In our experience public bodies aim to abide by the rule of law and act within the lawful parameters set out by the judiciary. The courts will always have a role in policing and helping to define the boundaries of prerogative power. Whilst the courts may be hesitant to rule on the exercise of prerogative power, recognising the limitations of their institutional competence for adjudicating on this, we do not believe it would be appropriate or necessary to oust permanently the jurisdiction of the court altogether from any area of executive power. If the executive were to exercise any power in a way that was (for example) clearly irrational or exercising an improper purpose, it is right that the courts should in theory be able to intervene.

The separation of powers rests on effective checks and balances of the executive by the legislature and the judiciary; this system of scrutiny between the three branches of state underpins the UK constitution. In this regard, the guiding principle must be that one needs judicial control to make sure that any government decision is lawful. This fits with the judiciary's neutral role within the separation of powers and guards the foundational principle of Parliamentary supremacy.

It would not encourage good administration or efficiency if the government was to seek to prevent the scrutiny of the courts into certain areas of policy or procedure. We have mentioned the link between judicial review and good administration above and, in addition:

15 Lord Bingham in *R(Gentle) v Prime Minister [2008] 2 W.L.R. 879* described the courts traditional restraint "in ruling on what has been called high policy—peace and war, the making of treaties, the conduct of foreign relations" and in *R. v Jones [2006] 2 W.L.R. 772* described this as an area where the courts "have entered, if at all, with reluctance and the utmost circumspection."

1. Policy and procedure may have a number of legitimate aims linked to a number of different policy areas. A decision of the Foreign and Commonwealth Office, for example, may have implications for domestic trade. Judicial review may become more cumbersome for the government to deal with if they are made to engage in litigation on the proper scope of a decision as part of judicial review proceedings.

2. A wide range of bodies are amenable to judicial review. If a body was acting unlawfully but in an area not amenable to judicial review, there would be no legal mechanism to challenge that behaviour.

3. If an area was shielded from the scrutiny of the courts then the government may face increased difficulty in gaining political support for initiatives within it. There would be no one to adjudicate on whether an action was lawful or not and the government could only rely on legal advice. There are complications about how legal advice can be properly disclosed and it clearly does not hold the same weight as a decision of the courts.

When it is not clear whether an act or omission is amenable to judicial review this is not necessarily because the judiciary have begun intruding into an area considered by some to be the preserve of the state. When it is unclear whether a matter is judicially reviewable this may also be because all or part of a function of the state has been contracted out; or because it is not clear where the frontiers of the state, and therefore public function, lie.

Judicial review is considered by the courts[16] to be a remedy of last resort and it is right that it should continue to be so. The courts should continue to be wary of judicial review being used unnecessarily for satellite litigation, or in circumstances where there is an adequate alternative remedy available to the claimant.

[16] see *R (Archer) v Commissioners for Her Majesty's Revenue and Customs [2019] EWCA Civ 1021 at [87] – [95]*

Question 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 Administrative Court Guide provides a very useful overview of how the judicial review process works. The rules in the guide that underpin the judicial review process are found across the Civil Procedure Rules.

Question 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?

CPR 54.5 states with respect of the deadline for making a claim that

> *(1) The claim form must be filed –*
>
> *(a) **promptly**; and*
>
> *(b) in any event not later than 3 months after the grounds to make the claim first arose.*
>
> *(2) The time limits in this rule may not be extended by agreement between the parties*

In our experience the courts have been willing to find that a claim form has been delayed for no good reason, and are wary of claimants seeking to use later decisions to artificially extend the timeline. We have also found that a common reason for matters being delayed at both the pre-action stage, and after the claim has been lodged, has been a lack of resources on the part of the defendant.

We think that current judicial review procedure strikes the right balance. The backstop of three months balances appropriately the considerations of: allowing enough time for the parties to engage in the pre-action protocol process and consider resolution pre-issue; the right of claimants to have sufficient time to prepare their papers; and the administrative certainty of public bodies. If judicial review procedure was truncated, this would likely increase the number of claims, and lead to inefficiencies. Claimant lawyers would need to issue more protective proceedings for their clients before receiving engagement and information from the defendant through the pre-action protocol. The parties would not be given the time properly to engage in the pre-action protocol and explore the possibility of ADR. Issues between the parties would be less likely to narrow before the permission stage, again leading to inefficiencies before the courts.

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

We do not consider that the rules, or interpretation of the rules, on costs in judicial review are too lenient on unsuccessful parties. Like in other forms of litigation, the general rule for costs in judicial review is that costs follow the event and generally the 'unsuccessful party' pays[17]. We are not aware of courts interpreting the rules such that this general rule is fundamentally altered or disapplied. The awarding of indemnity costs, and the non-cost sanctions we outline below in response to question 8, give flexibility in the case of unmeritorious and/or vexatious claims.

Question 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?

On the proportionality of judicial review costs, please see our response to question 2. We argue that proportionality is best achieved by an optional extension of the Aarhus regime for all judicial review claims and not solely environmental ones, previously proposed by Lord Justice Jackson.

In our experience, standing has not regularly caused an issue for either side in judicial review proceedings. In what we have termed "constitutional cases" above such as the *Miller* cases, which occur rarely, and in which each citizen may claim to have a sufficient interest, individual citizens have been found to have standing. In the *Miller* cases Gina Miller was granted standing to judicially review processes surrounding exiting the European Union. In 1994 standing was granted to Lord Rees-Mogg in his personal capacity to judicially review the ratification of the Maastricht Treaty[18].

The Court has a number of tools available to it to deal with unmeritorious claims in addition to the costs sanctions dealt with above:

1. The Court has power to make a civil restraint order under CPR PD 3C in relation to any person who has brought claims or made applications considered to be "totally without merit."

[17] The position is in CPR 44.
[18] *Regina v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg [1994] 2 W.L.R. 115*

2. The Court has the power to make a civil proceedings order under section 42 of the Senior Courts Act 1981 in respect of a person who has used litigation vexatiously.

3. The Court has stated that it will refer a legal representative to their regulatory body to consider further sanctions for failures to comply with procedure when immediate consideration is sought.[19]

We do not consider that standing should be an issue for the panel. The test for standing in judicial review is contained in statute. Standing is rarely a significant issue in judicial review proceedings, and it is unlikely to improve efficiency if the point is litigated upon more often. Standing has an important practical filtering role, and can be used by the court to filter out unmeritorious claims. We consider that the coming of the 'totally without merit'[20] rule in the 2013 judicial review reforms, to ensure that clearly unmeritorious claims do not reach oral permission stage, was useful.

Standing also feeds, centrally, into the constitutionality of judicial review. It defines the rules by which citizens have the right to challenge the actions of the executive. Having a stronger standing filter would impact adversely on that constitutional review.

Our view is that the rules on standing have been developed prudently by the courts with these considerations in mind. They ensure that review of executive decision-making is appropriately enabled while retaining a carefully balanced filtering function. In the case of *Worboys*[21], for example, the Mayor of London was not granted standing to review the Parole Board's direction to release John Radford, in circumstances where survivors of Mr Radford's former crimes were able to bring the judicial review. We do not see the case for the rules of standing to be examined by the panel. The sufficient interest test is flexible and the courts apply it to ensure only meritorious cases are heard in relation to representative claimants.

The costs rules also supplement the 'filtering' function of standing to treat unmeritorious claims: at the permission stage they discourage vexatious or inappropriate claimant actions. Regarding interveners and representative claimants, there are powers to refuse permission at an early stage if the court does not consider that the public interest would be served. Costs may be awarded routinely against representative claimants and, in appropriate cases, against interveners.

[19] *R (Hamid) v SSHD [2012] EWHC 3070 (Admin)*
[20] Amendments as made to CPR r. 54.12, para. 7 and Upper Tribunal Rules 2008, r.30.
[21] *R (DSD & Anor) v The Parole Board of England and Wales [2018] EWHC 694 (Admin)*

Question 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?

In our experience, the outcomes of successful judicial review claims lead to any of the following immediate remedies granted by the court or further consequential outcomes: an order preventing the authority from carrying out an action; an order requiring the authority to perform a duty; quashing of secondary legislation; an injunction pending proceedings; encouraging the public body to change secondary legislation, policies or procedures in a positive way that benefits those in a similar situation to the claimant; improvements in the future decision-making of the public body. We do not consider that it regularly leads to compensation for the individual or to encouraging the public body to change secondary legislation, policies or procedures in a negative way that would be either more restrictive or result in the same treatment as the claimant experienced for those in a similar situation.

Our view is that the rules regarding judicial review remedies are appropriately flexible and generally work. We suggest this question is an example of where it would be useful for Call for Evidence participants to hear any perceived issues about the remedies regime from public bodies; perhaps as these develop from responses to the questionnaire sent to public bodies. Any perceived issues can then be explored and appropriately responded to.

There have been suggestions in the past about the inflexibility of judicial review remedies. The Law Commission has previously, for example, explored the possibility of modest damages as a remedy to successful judicial review claimants, in lieu of a quashing order. We think there would be significant concerns with such an approach. Constitutionally, it could be problematic for the judiciary to enable situations where a judicial review defendant can ‘buy its way’ out of its legal obligations.

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

In our experience, measured and thorough engagement with the pre-action protocol process is the best method of avoiding court proceedings between the parties, where the circumstances are that this can be avoided. Engagement can allow the parties to consider their positions, and compromise or withdraw as appropriate, after they reflect and clarify the issues between them.

Question 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?

We have very limited experience of settlement prior to trial or 'at the door of court'. This is likely to be because of the nature of public law litigation. Public authority defendants do not have considerable scope to settle decisions, or compromise in a 'third way', if they believe that their decision in issue was correct.

Question 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?

We do not consider that generally there should be more of a role for ADR in judicial review proceedings. This is, largely, because of the reason outlined above in our response to question 11. Public law litigation does not always lend itself to ADR. Where the public interest and questions of principle are at stake, it is more challenging for parties to compromise, as compared with private law litigation. As we write above, it is also constitutionally important, and highly useful for public bodies, to have judicial clarification about the scope of the state's powers and its proper exercise of those powers. This cannot be achieved in ADR.

It is possible that an 'interests based' solution that the courts currently cannot order - such as an apology and public commitment to act differently in future - could be available via ADR. This could in theory deliver on many of the objectives of some claimants whilst avoiding costly litigation.

Question 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?

We have very limited experience of litigation where issues of standing have arisen. This has arisen recently with regards to a set of high-profile procurement decisions that have been challenged by a public interest organisation. The court's decision on permission in this case is pending. As to our view on the rules of public interest standing, please refer to our comments about standing in our response to question 8 above. We do not consider the rules to be too

lenient. The judiciary has struck a careful balance through the standing rules between: the need to hear cases of high public importance; ensuring that such cases are brought by appropriate parties; and filtering out unmeritorious cases where this is appropriate.

Additional Evidence: should there be additional evidence that is not asked for in the questionnaire but that you believe is relevant, we welcome any such evidence in your response.

If the duty of candour was curtailed in judicial review it would need to be replaced by another disclosure process, that would not necessarily be less onerous on defendants. Information that currently falls to be disclosed under the duty of candour could often be obtained through different routes including Freedom of Information and Subject Access Requests. If defendants had to deal with these alongside judicial review litigation it is likely that this would complicate, not simplify, litigation.

The duty of candour could be clarified as to its extent and the timing of its application (but it should not be diluted to a lesser standard of thoroughness at the substantive stage of judicial review proceedings, and nor should it be elided with the costly requirements of 'standard disclosure'). Any dilution of the duty would lead to more applications for specific disclosure and increase costs whilst decreasing public bodies' transparency. The current duty is designed to strike the right balance between holding public administration to a high standard whilst focussing on the substance of the decision making being communicated, rather than any formal requirement for every ‘relevant’ piece of paper to be shared. This is advantageous to the administration of justice and in allowing public authorities to comply with the requirement in the most cost effective and least burdensome manner.

Kingsley Napley LLP