ramblers
at the heart of walking

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To: The Independent Review of Administrative Law by Lord Faulks, QC
IRAL Secretariat
Ministry of Justice
102 Petty France
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By email

Dear IRAL Secretariat

INDEPENDENT REVIEW OF ADMINISTRATIVE LAW BY LORD FAULKS, QC
RESPONSE BY THE RAMBLERS' ASSOCIATION TO THE CALL FOR EVIDENCE

1. This response is on behalf of the 100,000-strong Ramblers' Association ("the Ramblers"), who are grateful for the opportunity to make the following representations. We are the organisation which helps everyone, everywhere, enjoy walking, and protects the places people love to walk in; we are the charity dedicated to looking after paths and green spaces, leading walks, opening up new places to walk, and encouraging everyone to get outside and discover how walking boosts health and happiness.

2. It may be convenient to set this response into two parts. First, general principles and answers to some of IRAL's questions; and secondly some instances of the Ramblers' use of judicial review ("JR").

3. In our work, at any rate over the past 40 years, we have occasionally had recourse to action in the higher courts. Most often this is by way of a statutory challenge[1] of, for example, a decision by a planning Inspector, acting on behalf of the Secretary of State,[2] on the basis that she or he misdirected herself or himself as to the law, when determining a public path order or a definitive map modification order. This statutory challenge is available when an Inspector confirms an order and has misapplied the law, or when an order is confirmed but there has been a procedural irregularity at some stage in the due process.

4. But sometimes there is no statutory right of challenge. That is so where an Inspector through self-misdirection declines to confirm an order of the sort mentioned in the previous paragraph, or where an order is not confirmed and there has been a procedural irregularity. The only option is JR of the Secretary of State's (i.e., the Inspector's) decision. It is this kind of thing that has led to much of our involvement in JR.

5. So in order to set right a misapplication of the law, even in the case of an isolated local matter, it is sometimes necessary to use JR.

[1] E.g., under Paragraph 5 of Schedule 6 to the Highways Act 1980 (diversion, extinguishment, etc of public rights of way), or under Paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 (concerning modification orders made to public rights of way on the definitive map and statement).
[2] Usually the Secretary of State for the Environment, Food and Rural Affairs.

IRAL's points

IRAL Q1

6. In the Ramblers' view, JR improves public decision-making. Civil society plays an important role in this regard, by ensuring that decisions with adverse consequences for the wider population are brought to light early. It is in everyone's best interests for adverse unintended consequences of public decisions to be highlighted early, and for unintended adverse precedents set in the courts, see our paragraphs 17–19 and 24–27, below, to be put right. The alternative is often for the decision-maker to implement a flawed decision and have to deal with consequential issues arising (including, potentially, compensation) for years.

IRAL Q2

7. The Ramblers believe the law of judicial review could be improved by allowing longer deadlines to bring claims, or at least allowing parties to agree an extension to the current three month time limit. We are sure other commentators could suggest improvement of further aspects of JR law.

IRAL Q3

8. We are opposed to any codification to reduce the grounds of JR or its availability.

9. In our experience, the grounds of JR and the circumstances from which it can arise can be immensely complicated, and it might be impossible to include the level of detail required to make the legislation useful, whilst keeping it accessible. But there may well be merit in codifying in legislation the *procedure* (as opposed to the substantive grounds) for bringing a JR claim. JR procedure can be hard for claimants to understand, and it would assist potential parties to get from legislation a sense of the process.

IRAL Q5

10. The Ramblers find the process of making and appealing a JR claim clear. Obviously, persons unversed in the procedures would usually require expert advice.

IRAL Q6

11. The Ramblers are not in favour of shortening the current three month time limit; indeed, we can see a case for increasing the time limit, to increase access to justice and ensure adequate time for claimants to complete pre-action engagement with government and public bodies. We say this not least because charities can have necessarily complicated procedures at local (where much of the committee (and other) work is done by volunteers) and national level for making their internal decisions.

IRAL Q7 & Q8

12. The Ramblers do not think that costs in JR are disproportionate, or that they are too lenient on unsuccessful parties. JR claims are often brought by charities, some if not most of which have limited funds, but they raise points in the public interest. See the *Sunningwell* case mentioned in our paragraphs 24–27 below, in which, thanks to the assistance of a charity with tiny resources, a legal precedent which had been misapplied by the courts and at public inquiries for 70 years was finally reversed by the House of Lords. If a real issue has been raised by the claimant it will be obvious to both the defendant and the court very quickly, and settlement should be possible to allow the issue to be resolved without parties incurring high costs.

13. Disproportionate costs risks for claimants at the permission stage would also pose real access to justice issues, since, be the claims ever so meritorious, claimants would be deterred from bringing them. The onus should be on defendants to keep down costs at the permission stage.

14. Whilst we entirely understand that frivolous JRs should be discouraged and dismissed at an early stage, it is important to ensure meritorious claims go ahead without disproportionate costs risks for claimants. It is also important to ensure that defendants do not push up costs in order to deter claimants with fewer financial resources. In our view, protective costs orders in JR—set at a reasonable level—are imperative to allow impecunious claimants to bring litigation in the public interest.

IRAL Q13

15. Below we have cited some cases brought by the Ramblers which were very much in the public interest, connected with preserving public rights of way which have been in use for a long time and with providing greater public access. See for example in particular our comments below about *R (Drain and Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, and *R v Secretary of State for Wales ex parte Emery* [1998] 4 All ER 367. We do not think it too extravagant a claim to say that these cases were of huge public importance in areas of the law which very definitely needed correction and clarification.

16. We doubt that any individual would have brought cases which would have had this effect. It is quite clear that public interest standing is vital to the proper functioning of the UK as a constitutional democracy. It is a democratic requirement that the public are able to hold the government to account for actions taken in their name, and individual claimants do not always have the time, funds or knowledge required to play this important role alone.

The Ramblers' JR cases and experiences

<u>The "*Godmanchester*" case in the House of Lords</u>

17. It was to set right a misapplication of the law that by way of JR the Ramblers brought the cases of *R (on the application of Dr Leslie Ernest Drain) v Secretary of State for the Environment, Food and Rural Affairs and R (on the application of Godmanchester Town Council v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28. This was not to challenge the Government. It was nothing to do with the Government: it was to correct a piece of judge-made law, and so to reassert, not undermine, the will of Parliament. It concerned the application of the proviso in section 31(1)[3] of the Highways Act 1980. The section is the measure by which through 20 years' uninterrupted public use of a way as of right, the way becomes a public right of way; the case was about what a landowner needs to do to prevent this occurring. As a result of two decisions, by judges in *ex parte Billson*[4] (1998) and *ex parte Dorset*[5] (1999), the provision had been rendered virtually a dead letter: it had made it technically possible for a landowner to defeat a claim for a right of way by the mere *post-hoc* assertion that it had not been her or his intention to dedicate the way as public, when previously the position had been that it was necessary to communicate the lack of intention (by notices, challenges, etc[6]) to *users of the way* during the qualifying period of use. The intention behind the legislation (which originated with the Rights of Way Act 1932) was to remove the arbitrary and illogical[7] rules which exist at common law for the dedication of

[3] In full, "Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is <u>sufficient evidence that there was no intention during that period to dedicate it</u>." The JR was about what the here-underlined words mean.

[4] *R v Secretary of State for the Environment, ex parte Billson* [1998] 3 WLR 1240.

[5] *R v Secretary of State for the Environment, Transport and the Regions ex parte Dorset County Council* [1999] EWHC Admin 582.

[6] Or by using certain other measures mentioned in the section.

[7] Lord Hoffmann in *Godmanchester* and *Drain*, paragraph 37.

rights of way, and generally to make it easier[8] for the public to acquire rights. But by ruling in this way, the judges in *Billson* and *Dorset* effectively reversed that position, making a claim under common law rules more likely to succeed than under the legislation which was enacted to address their arbitrariness and illogicality.

18. It was to remedy that situation that the Ramblers pursued the case. The House of Lords unanimously agreed with us on the point, with Lord Hoffmann stating[9] that the interpretation of the law in the courts below "would make nonsense of the Act". So, as Mr David Braham QC, writing in the *Rights of Way Law Review* since put it, "section 31 is now back in full working order".[10]

19. It is sometimes said that charities bring JR proceedings in order to wrong-foot or embarrass a Government, or to obtain publicity, or both. We trust that it will be accepted that we brought this JR action not to wrong-foot a duly-made ministerial decision, or to derail some major infrastructure project of the Government's, or to obtain publicity. It was done to correct an injustice and to *reassert*, not frustrate, the intention of Parliament. All civilized legal systems have rules which respect activities which have been carried on for a long time, and this matter was about one such rule which the courts had misapplied (and, consequently, Inspectors at public inquiries into these matters were misapplying). It is unfortunate when the law thus goes astray; it is fortunate that there is a means of addressing it when it does. Curtailment of JR by bodies concerned with certain aspects of the law—as the Ramblers are, with its application to public rights of way—could prevent the rectification of such injustices.

<u>The Ramblers' JR of a decision by the Secretary of State for Defence</u>

20. Another case in which we brought JR was *Ramblers' Association v Secretary of State for Defence* [2007] EWHC 1398 (Admin). Lest the reader suppose that this was some defiantly anarchic onslaught on a great Department of State, we hasten to add that it concerned a public footpath in rural Suffolk, at Mildenhall, which goes along the edge of an airfield currently used by American forces. For the security of the occupants of the airfield, the Secretary of State sought, and the Ramblers did not oppose, the closure of the path. But the authorities chose a procedure which would extinguish the path in perpetuity, without regard to the possibility of the land being sometime put to other use when (but for this proposal) the use of the right of way could be resumed. We asked that the Secretary of State make a temporary order under section 22C[11] of the Road Traffic Regulation Act 1984; but instead an order was made under section 16 of the Defence Act 1842, a measure against which (unlike with the extinguishment of a highway under any other legislation) there is no statutory process for objection, *except for judicial review.*

21. Hence, our JR. Since the 1842 Act requires there to be provided a convenient replacement route,[12] and here none was so provided, Sullivan J agreed with the Ramblers that the decision to make the order should be quashed. Subsequent negotiation with the (very helpful) staff at the Ministry of Defence has resulted in a compromise involving our preferred measure.

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[8] Lord Hoffmann in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335. He said "In passing the [Rights of Way Act] 1932, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in *de facto* use. As Scott L.J pointed out in *Jones v Bates* [1938] 2 All ER 237, 249, there was a strong public interest in facilitating the preservation of footpaths for access to the countryside."

[9] Lord Hoffmann in *Godmanchester* and *Drain*, paragraph 31.

[10] David Braham QC, "Godmanchester in the House of Lords", *Rights of Way Law Review,* July 2007, section 6.3.109, 115.

[11] Inserted into the Act by the Civil Contingencies Act 2004 Schedule 2 Paragraph 16 to deal with this very type of situation.

[12] Section 17.

The Ramblers' JR of a decision by the Secretary of State for Wales

22. In the 1990s our member Mr Gordon Emery applied[13] for a well-used path to be recognised as a right of way through its addition to the definitive map and statement. Despite credible evidence by persons testifying to their use of the route, the surveying authority (Clwyd County Council) rejected the application on the footing that a *prima facie* case was ousted by credible assertion by the landowner that there was no intention to dedicate. Mr Emery appealed[14] to the Secretary of State who also rejected the application. Believing this to be a misapplication of the law—in our view, the credibility of evidence for and against the recognition of a right of way was a matter for testing at public inquiry rather than for summary dismissal by the County Council or Secretary of State—the Ramblers sought JR in Mr Emery's name. The result was that the Court of Appeal, in *R v Secretary of State for Wales ex parte Emery* [1998] 4 All ER 367, upheld our argument, thus clearly defining[15] an aspect of the procedural provisions which in our experience had previously been applied or misapplied in various inconsistent and arbitrary ways by different surveying authorities.

23. From this it will be seen that it was to clarify the confused application of the law that we brought the action. It was not to undermine the decision of a duly-elected legislature.

The *Sunningwell* case in the House of Lords

24. Though we were connected with it only indirectly, we would like to mention this other matter of which we are well aware as an example of use of JR to set right an error of judge-made law as opposed to overturn a decision by Parliament or an order of a minister. It concerned the definition of the term "as of right". For it to acquire village-green status, a piece of land must be used *as of right* by local inhabitants for 20 years; likewise for it to become a public right of way through inferred dedication at common law or through 20 years' use under statute, a way must be used by the public *as of right*. The term "as of right" was (we believe) first used as a statutory term in the Prescription Act of 1832, but has its origins in Roman law, and for many centuries was taken to mean no more and no less than *nec vi, nec clam* and *nec precario*: without force, without stealth and without permission. That is how the ancient authorities treated it: Bracton, Littleton, in *Tenures,* Coke, and Blackstone.

25. But an adverse precedent was set in *Hue v Whitely* [1929] 1 Ch 440, when Tomlin J, in a case about a footpath on Box Hill, Dorking, conjured out of thin air the additional requirement that users must *believe* they are exercising a right. The fallaciousness of this is surely obvious (for a start, the 20-year period of use required under section 31(1) of the Highways Act 1980 could never begin, if the users had to believe they were exercising a right, since if they think about it at all they will in most cases know that are doing nothing of the sort).

[13] Under section 53(5) of the Wildlife and Countryside Act 1981.

[14] Under Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981.

[15] Roch LJ said that "... where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of twenty years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication." The result is now that an order is made; and the landowner (or any person) may object, when the testimonies of all parties, for and against, are tested in cross-examination. This is a far more just process than what had sometimes occurred previously, when which witnesses were credible or not was treated as a matter for the individual member of council-staff handling an application.

26. Tomlin J's remark (despite it being more like an aside) led to a succession of judges[16] adopting, and in some cases embellishing, the error for the remaining 70 years of the 20th Century. Thus was the law misapplied by many an inquiry and court as a result of this remark by Tomlin J in which without explanation he adopted a meaning for the expression at odds with the law as established down the centuries in cases of the highest authority. As a result even Halsbury himself was to define[17] "as of right" by reference to Tomlin J's dictum.

27. It was JR of an Inspector's decision by a parish council, assisted by the Open Spaces Society, in a village-green matter, which eventually set this right—*R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335. Lord Hoffmann (the rest of the House agreeing) held that "to require an inquiry into the subjective state of mind of the users would be contrary to the whole English theory of prescription." As a result, affirmants of private or public rights of way or of village green status have been relieved of the onerous burden of proving the unlikely "fact" that users during the qualifying period believed or had deluded themselves into believing that their use was in the exercise of a right.

<u>JR under the Marine and Coastal Access Act 2009</u>

28. In another challenge, the Ramblers in 2015 questioned the government's exclusion of the Isle of Wight from the provision of a coastal path around England. The Marine and Coastal Access Act 2009 allowed for exemptions for islands, which in our view makes obvious sense for small or uninhabited ones: it was less understandable in relation to the sizeable Isle of Wight, an inhabited island and a county in its own right with a spectacular coastline and a footpath infrastructure on the same model as the rest of England. A (perfectly friendly) pre-action letter and communication with MPs brought this issue to the attention of the Secretary of State, who quickly addressed the concerns of the public by reversing the original decision. The result is that everyone will be able to enjoy the Isle of Wight's stunning coastal scenery in future.

Closing

29. We reiterate our point that, historically, our main use of JR has been to reassert the will of Parliament, through the correction of adverse precedent, or to clarify law where it is being applied illogically; not to challenge a decision by a government.

30. We repeat our thanks for this opportunity to give evidence to the IRAL review.

EUGENE SUGGETT
SENIOR POLICY OFFICER, THE RAMBLERS

[16] Among them were: Farwell J in *Jones v Bates* [1938] 2 All ER 237, Harman J in *Alfred F Beckett Ltd v Lyons* [1967] 1 All ER 833, Sedley J in *R v Secretary of State for the Environment ex parte Perko* (unreported, 11 May 1994), Staughton LJ in *R v Secretary of State for the Environment ex parte Cowell* [1993] JPL 851, Pill J in *O'Keefe v Secretary of State for the Environment and Isle of Wight County Council* [1997] EWCA Civ 2219, Brooke J in *R v Secretary of State for the Environment and Herefordshire County Council ex parte Badman* (1996) JPL B107, Pill LJ in *R v Suffolk County Council ex parte Steed* (1995) 75 P & CR 102, Laws J in *Jaques v Secretary of State for the Environment* [1995] JPL 1031, Latham J in *R v Secretary of State for the Environment ex parte North Yorkshire County Council* [1999] JPL B101.
[17] Volume 21, paragraph 76.