DLA response to the IRAL call for evidence on judicial review

1. The Ministry of Justice has established the Independent Review of Administrative Law (IRAL). The IRAL panel have issued a call for evidence 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* '.

2. This is the response of the Discrimination Law Association (DLA). The DLA is a non-profit network that brings together a broad range of discrimination law practitioners, policy experts, academics, and concerned individuals and organisations, all united around a commitment to strengthening anti-discrimination law, practice, advice and education in the UK.

3. Equality is an important principle in our society. As the Equality and Human Rights Commission state on their website: *'Equality is about ensuring that every individual has an equal opportunity to make the most of their lives and talents. It is also the belief that no one should have poorer life chances because of the way they were born, where they come from, what they believe, or whether they have a disability.'*

4. In the United Kingdom over the last fifty or more years discrimination law has significantly developed to promote equality and protect people against discrimination. Many of these developments have been driven by European Law. The Equality Act 2010 is the primary source of equality law. Protection is derived from other sources including the European Union Law, the Human Rights Act 1998 and the common law.

5. Most discrimination litigation occurs in employment tribunals and, to a lesser extent, county courts within the rubric of the Equality Act 2010. However, discrimination litigation also takes place within the Administrative Court. Examples of important discrimination litigation pursued by way of judicial review includes *Regina v Secretary of State for Employment Ex Parte Seymour Smith And Another* [1995] ICR 889; *Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 WLR 153; *Regina (MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58; and, *In re Brewster* [2017] ICR 434.

6. The DLA's publication *Briefings* charts developments in the field of equality and discrimination law.

7. DLA recognises that many important legal developments in the field of discrimination have occurred in the jurisdiction of the Administrative Court.

8. The DLA would respond to the Call for Evidence as follows:

Section 1 - Questionnaire to Government Departments

Based on the Terms of Reference as set out in the Introduction, the IRAL has created the following questionnaire to be sent to Government Departments. The questions are as follows:

1. In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?

1. ***judicial review for mistake of law***
2. ***judicial review for mistake of fact***
3. ***judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)***
4. ***judicial review for disappointing someone's legitimate expectations***
5. ***judicial review for Wednesbury unreasonableness***
6. ***judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account***
7. ***any other ground of judicial review***
8. ***the remedies that are available when an application for judicial review is successful***
9. ***rules on who may make an application for judicial review***
10. ***rules on the time limits within which an application for judicial review must be made***
11. ***the time it takes to mount defences to applications for judicial review***

2. In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?

3. Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?

From this, we would appreciate your response to the following questions:

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

   First DLA is concerned about the central question being posed, i.e. *do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions?* Judicial review challenges and findings of illegality may be awkward for, and disruptive to public administration, but the question fails to fully appreciate the important function of judicial review and the importance of the rule of law.

   Judicial review is a supervisory jurisdiction whereby the courts ensure public authority decision-making operates within the parameters of the law. Whilst the demands of the law may cause inconvenience or difficulty for administrators, this is part and parcel of the rule of law and life in a democracy. Whilst government must be permitted and enabled to operate efficiently and have sufficient discretion to effectively govern, government must also operate within the law.

   It is accepted that responding to a judicial review can be demanding in terms of the resource (time and money) needed to be allocated to defend challenges.

   However, it is submitted that judicial review practice and procedure promotes the efficient resolution of meritorious challenges, it encourages pre action resolution, it discourages delay and does not countenance unmeritorious claims.

   Three key constraints on pursuing judicial review challenges are:

   (a) a preliminary expectation to engage in Pre Action Protocol where the parties are expected to constructively engage to see

if the matter can be resolved without resort to court proceedings;

(b) a short time limitation period where claims must be lodged promptly but in any event within three months of the ground of challenge (subject to extensions in appropriate cases);

(c) a requirement to obtain permission to bring a judicial review.

Permission (formally known as 'leave') is designed to ensure only meritorious challenges advance to full hearing. This significantly reduces the toll on government resource. Once a Court decides what can and cannot be pursued in a judicial review, the parties can focus on the relevant issues and pursue the litigation as expeditiously as possible.

Administrators should not run in fear of judicial review if they are exercising their powers carefully and reasonably, i.e. taking into account relevant matters, leaving out of account irrelevant matters and acting rationally. It is contended that the possibility of a decision being subjected to judicial review should if anything assist administrators and decision makers in their role. For example, taking steps such as double checking the validity of proposed administrative action, or considering how existing policy should be altered given legal developments, will militate in favour of correct decision making thereby avoiding meritorious challenges and adverse judicial findings.

And DLA would emphasise that administrators should always be conscious of equality issues and the duty not to discriminate.

The importance of judicial review is demonstrated in how the law has evolved in the light of challenges to government policy and practice. In challenges spanning a wide range of issues, the courts have established principles for the correct exercise by central and local government bodies and other public authorities of their statutory duties. Many Court decisions have had significant ramifications and ripple effects. Relevant cases that gave shape to the law and the obligations of state bodies include: *R v Secretary of State for Defence ex p. Elias* [2006] EWCA 1293 (on eligibility for compensation for prisoners of war); *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] EWCA Civ 882 (on the lawfulness of rules restricting the possibility of employment for immigrants); *EISAI Ltd. v National Institute for Health and Clinical Excellence (NICE)* [2007] EWHC 1941 (Admin) (on disclosure requirements in a consultation process about guidance on the use of a drug for treating Alzheimer's disease).

Generally speaking, discrimination is inconsistent with rational decision making and more consistent with arbitrariness.

Sometimes indirectly discriminatory rules, policies or practices may be justifiable. In those instances, it is important for the public authority to be clear about the aim of the rule, policy or practice and the reasons why it is deemed necessary.

Administrators should be afraid of discriminating rather than afraid of getting caught.

DLA places particular emphasis on the constitutional and socio-economic significance of equality-based challenges in the Administrative Court. Judicial review has been a vital tool or mechanism in tackling discriminatory public authority policies and practices, including forms of institutional discrimination.

One of the most important judicial review challenges resulted in the Supreme Court decision in *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC51*. The Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 introduced a fees regime for bringing claims. (Costs do not 'follow the event' in the employment tribunal or the EAT and legal aid is not available.) The Order had caused a reduction in employment tribunal claims in the region of 66-70%. The Supreme Court struck the Order down under domestic and European Law on the ground that it effectively prevented access to justice. The decision had huge ramifications re-opening the door of justice for thousands of employees and workers seeking to bring claims in the employment tribunal. And of course, this had a very significant impact on the efficacy of equality law in the workplace. This case demonstrates the importance of judicial review in regulating the administration of justice and protecting fundamental rights such as the right of access to justice.

The Public Sector Equality Duty.

Section 149 of the Equality Act 2010 contains the public sector equality duty requiring public authorities and persons exercising public functions to have due regard to *inter alia* eliminating discrimination, harassment and victimisation and advancing equality of opportunity. (This important provision is set out in full at the end of the submission.[i]) Challenges to identified non-compliance and the enforcement of this obligation has often involved individuals, groups

and organisations engaging in pre action protocol correspondence and bringing judicial review challenges. *Bracking v Secretary of State for Work and Pensions* [2013] EWCA 1345 was a case brought by people with disabilities who used the Independent Living Fund. The Court of Appeal held that the Secretary of State for Work and Pensions had not produced sufficient evidence that he had given regard to the public sector equality duty in reaching his decision to close the Independent Living Fund, making the decision unlawful. *Moore and Another v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin) was a case brought by Romany Travellers. The Administrative Court considered the approach of the SOS to the recovery and determination of planning appeals relating to the provision of Travellers' pitches within the green belt and found the recoveries constituted indirect discrimination under section 19 of the 2010 Act and a breach of the public sector equality.

The vast majority of such JR cases rarely reach the High Court, since public authorities seek to resolve matters, to re-make policy decisions, to carry out proper consultation etc., conscious of the need to meet their statutory obligations. However, it is the continuing possibility that judicial review can be used as a last resort to effectively hold state bodies to account that can ensure they comply with the public equality statutory duty which is geared to eliminate discrimination and advance equality. Any undermining or dismantling of the supervisory jurisdiction of the Administrative Court would be counter-productive to our society's continuing efforts to promote equality and eradicate discrimination.

In summation, DLA has particular concerns about any abrogation or dilution of judicial review given the important constitutional role played by the Courts in exercising their supervisory jurisdiction in maintaining and developing legal protection for equality and eliminating discriminatory public authority laws, policies and practices.

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)?**

DLA is mindful that over the years the Courts have played an important constitutional role in developing judicial review law in the United Kingdom, particularly as there is no written constitution. The body of administrative law is regarded as one of the British judiciary's greatest achievements.

DLA accepts that decision making is for the Government and not the courts. In *Reid v Secretary of State for Scotland* [1999] 2 AC 512 Lord Clyde stated:

> *Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.*

Whilst the judiciary have a limited role it is an important one being guardians of the rule of law; in *R v Ministry of Defence ex parte Smith* [1996] QB 517, Lord Bingham stated: *"the court [has] the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power" and "must not shrink from its fundamental duty to 'do right to all manner of people'".*

The Courts have maintained a 'review' jurisdiction and resolutely avoided developing an 'appeal' jurisdiction which would shift the constitutional balance and be much more demanding for government.

Within the review jurisdiction the Courts have sought to strike a balance between facilitating the business of government and protecting against arbitrariness. A good example of how this balance has developed and operates lies in the varying degrees of scrutiny (or intensity of review) applied by courts to different types of administrative decision-making.

It is submitted that greater scrutiny or intensity of review than is currently brought to bear may be appropriate in certain cases; in

particular the concept of proportionality lends itself to a more robust review jurisdiction.

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?**

   There is always potential scope for law reform and legislative intervention. DLA is currently not persuaded of the need for codification of judicial review procedure in legislation, subject to what is said below.

   As regards to the substantive law, codification is not perceived to be of value. The substantive body of judicial review law has developed through judicial decision-making and DLA believes the independent judiciary to be the best arbiters of the substance of judicial review / administrative law and its application in any given case.

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?**

   In a democracy the government should obey the law. And as a general rule all administrative action should be justiciable and subject to judicial review. There are a range of matters which are beyond the reach of judicial review because they are 'private' or if public because the courts have regarded the matter as non-justiciable. For example, as a general rule judicial review does not extend to employment situations with some notable exceptions, e.g. where there is an applicable statutory scheme in issue, or where the case raises a matter of public interest. Historically the Courts have sought to negotiate the boundaries between justiciable and non-justiciable matters – the position is summarised in Fordham's book at chapters 34-35. Recently the Supreme Court ruled a decision by the Government was justiciable in *R (on the application of Miller) v Prime Minister; Cherry and others v Advocate General for Scotland* [2019] 4 All ER 299. DLA believes that constitutionally it is important to leave such adjudication to the independent judiciary with its considerable expertise and sense of balance.

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 law relating to judicial review procedure is clear, that is to experienced public lawyers. However, what might be clear to a lawyer may not be so clear to a lay person. Whether a discrete statute which sets out judicial review procedure would be of particular assistance to non-lawyers may be a matter worth considering.

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?**

   DLA has no strong view on this issue and recognises that the current position seeks to strike a reasonable balance.

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

   See below.

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?**

   The present system is sufficiently merit-focuses and flexible to ensure meritorious cases can be pursued and unmeritorious cases are discouraged and disposed of as quickly as possible.

   As regards costs, the distinction between the permission stage and proceedings following the granting of permission is of significance. In judicial review cost becomes a more significant factor after the permission stage. A court has the power to award costs at the permission stage and whilst the Judge will exercise their discretion, unsuccessful Claimants are rarely heavily penalised for failing to obtain permission to bring a judicial review. However, after the permission stage costs generally go with the event; but again the Court enjoys discretion on costs orders.

   In the context of the current call for evidence DLA has no particular submission on judicial review and costs at this time.

   However DLA believes there is an urgent need for consideration to be given to an integrally related issue: access to funding. It is a matter of public interest that unlawful public authority policies and practices are identified and reformed. Access to justice is costly. Funding or a lack thereof (particularly where the prospective claimant is not eligible for

legal aid) is a deterrent to the bringing of meritorious legal challenges which may have a broad and significant societal impact.

Where there is an identifiable issue deserving of public law challenge, an inability to pursue the matter due to a lack of funding has potentially significant adverse consequences. The arguably unlawful public authority act or omission remains unchallenged and, as may be appropriate, un-remedied. Whilst the law has developed costs protection in the form of protective costs orders, the scope of such protection is limited.(See *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 and *Eweida v British Airways* [2009] EWCA Civ 1025) Notably in *Eweida* (referenced above) a protective costs order application was turned down.

DLA believes that in respect of equal rights, the stymieing of challenges by reason of a lack of funding undermines the rule of law, leaving unlawful and discriminatory policies and practices unchallenged and in place. In his book 'The Rule of Law' Lord Bingham states that *"means must be provided for resolving without prohibitive cost or inordinate delay bona fide civil disputes which the parties themselves are unable to resolve".* (Page 85)

Where there is an arguable case that a public authority is discriminating through its policies or practices, it is a matter of public interest that the matter be addressed and the dispute resolved. If inequality of arms as between the public authority and the prospective claimant may result in the matter not being pursued, funding is required to enable access to justice and adjudication. This is not just a question of access to funding / justice, it is a matter of constitutional import going to the heart of the rule of law. Consideration should be given to an extension of legal aid to enable cases such as *Eweida* or the Unison challenge to be brought on a public interest basis.

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?

The remedies available have been carefully developed over time. Again, the courts play a delicate constitutional role in judicial review and this is demonstrated in the way the available remedies are exercised. Often the only remedy required is a Declaration. Sometimes a quashing remedy is appropriate. The Courts have developed a flexible range of remedies and take care in their exercise.

The area of a monetary remedy is ripe for reform. (See Fordham and White [2001] JR 44 and 109.) There is a strong case for ensuring people

who have suffered a financial loss by reason of maladministration should have the right to proper compensation.

As regards the role of the administrative court, the traditional restrained approach to damages comports with the primary purpose of judicial review i.e. to ensure lawful decision making, rather than to provide a mechanism for compensation.

Possibly the best way to address the question of just compensation for loss sustained by maladministration would be through a discrete statutory scheme.

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

DLA believe there is scope for the pre-action stage to be developed to encourage resolution. One idea is for a new statutory role where an experienced lawyer considers the pre-action correspondence and makes recommendations to the parties on the merits of the claim and as appropriate how the matter could be resolved. The recommendation and the parties' response to same could be taken into account in judicial review proceedings. Lodgement could be deferred to facilitate this process. Such a mechanism would potentially encourage parties to 'grasp the nettle' and look at the weaknesses in their position. This could lead to more disputes being resolved at the leave stage or unmeritorious claims abandoned.

The recommendation and response could be taken into account in the proceedings: for example:

- a recommendation which cast doubt on the lawfulness of a public authority position might demonstrate intransigence where the said authority was not prepared to respond positively and quickly to address the potential issue as highlighted in the recommendation. This may be prejudicial to a respondent's chances of successfully defending a challenge.
- a Claimant failure to respond constructively to an explanation as to why the claim was unmeritorious could be penalised in costs.
- an aberrant public authority who failed to rectify obviously unlawful conduct could be liable for the pre-action costs as well as the costs of the permission application.

The Government should consider the application of the environmental 'polluter pays' principle to cases involving alleged discriminatory public authority policies and practices. Said principle should apply at the pre-action stage so that where the public body is found to be responsible for unlawful discriminatory conduct, it pays the Claimant for their legal

costs at the standard rate - this places a greater onus and incentive on the public body to equality-proof its policies and practices and get the decision right first time.

Such a mechanism could impact how the parties conducted themselves at the pre-action stage and could significantly reduce the number of claims lodged.

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?

Judicial review is a form of litigation and it is inevitable that some disputes will resolve during the litigation. Satisfactory resolution between the parties is generally the best form of resolution.

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?

See 10 above.

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?

As an interest group DLA is strongly committed to the concept of public interest litigation. Litigation of this kind is now an accepted and greatly valued dimension of the judicial review jurisdiction.

DLA favours a constructive approach to standing where a person, grouping or organisation with an identifiable interest in a matter seeks to bring a challenge of public interest before the courts.

DLA is utilitarian in its standpoint believing that encouraging meritorious public interest litigation on equality issues (or any other valid matter) will (a) potentially benefit a wider constituency, and (b) is in the interests of democracy generally. Often such litigation is brought by or on behalf of vulnerable groupings in society with issues that ought to be properly considered by a Court and who have no other effective means of addressing the issue raised.

9. DLA thanks the IRAL for the opportunity to make representations. Further clarification can be obtained on request.

The Discrimination Law Association
19th October 2020

[i] Equality Act 2010 section 149 - Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a)remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b)take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c)encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a)tackle prejudice, and
(b)promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a)a breach of an equality clause or rule;
(b)a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect.