# Response to Independent Review of Administrative Law Call for Evidence

## A PURPOSE OF SUBMISSION

1 This submission expresses the views of its signatories in response to the questions asked by the Independent Review of Administrative Law ("**IRAL**"). All the signatories are practitioners in public law of varying seniorities, are members of Brick Court Chambers, and act for judicial review claimants and defendants. This submission provides a high-level response to the high-level questions in the Call for Evidence (the "**Call for Evidence**"). It does not seek to provide a detailed and technical analysis of the relevant issues.[1]

2 Members of Brick Court Chambers practise independently from one another. This submission is made on behalf of its signatories, and not Brick Court Chambers more generally.

## B SUMMARY OF VIEWS

3 In summary, it is our view that there is no need for any significant reform to any part of the substantive or procedural elements of judicial review ("**JR**"), or any reform that would limit its availability in any way.

4 We consider that both the bespoke procedure, and substantive principles, of JR strike a fair balance between two important priorities. First, the need to protect the individual and society from unlawful and overbearing government action and to encourage high quality decision-making. Second, the need to enable government to function effectively. The JR procedure accords significant protection to government decision-makers. The substantive principles of JR are applied flexibly by the courts and afford public authorities extensive freedom to act. In our experience, acting both for and against the government, the courts recognise that it is in general for the government to strike the balance between competing policy interests. In the circumstances, we see no need for changes that would substantively

[1] This submission is limited to an examination of the position in England and Wales, although we note that the IRAL is examining matters across the United Kingdom and separate considerations may arise in Wales, Scotland and Northern Ireland.

or procedurally limit or otherwise restrict the availability of JR in relation to all powers (statutory and non-statutory) of government.

## C CONCERNS ABOUT THE IRAL TERMS OF REFERENCE AND CALL FOR EVIDENCE

5 The IRAL Terms of Reference and the Call for Evidence are both exceptionally wide-ranging. They touch on all areas of substantive and procedural public law.

6 The Call for Evidence appears by its title page to contemplate interfering with the existing "*balance*", though it is not clear what is meant by this. We have considerable experience of acting for both claimants and defendants in JR. Based on that experience, and as we have said, we see no need for changes that would substantively or procedurally limit or restrict the availability of JR in relation to all powers (statutory and non-statutory) of public bodies. We are concerned that the IRAL Terms of Reference appear to contemplate introducing such restrictions in the name of shifting the current "*balance*". We do not think that this is a helpful framing. JR (by both its substantive rules and its practical procedures) plays an important part in securing good administration, which is in the interests of both claimants and defendants.[2]

7 The wide-ranging nature of the IRAL Terms of Reference means that they engage issues of fundamental constitutional importance. JR plays a central role in the UK's constitutional settlement: it ensures that public action is subject to the rule of law. The rule of law is itself a foundational constitutional principle.[3] Being able to hold public bodies to account through JR is a basic function of an independent judiciary. JR ensures fair decision-making by public bodies affecting the lives of citizens. On the rare occasions when acts of the executive are subjected to JR, it protects democracy and secures the separation of powers by ensuring that executive action conforms with limits imposed by Parliament and governed by the constitution. Any alteration in particular to the substantive rules of JR, however well intentioned, risks trampling on this foundational principle.

8 JR is also very old. Its principles and procedures have been developed incrementally over centuries, beginning with the ancient prerogative writs. The High Court's JR jurisdiction

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2 That is the view also of the Government Legal Department: see *The judge over your shoulder – A guide to good decision making* (5th ed., 2016), page 31.

3 See the Constitutional Reform Act 2005 s 1, acknowledging the existing principle.

derives from the inherent jurisdiction of the High Court to ensure that inferior courts and public officials act in accordance with the law.

9 Statutory intervention in this area risks disrupting this careful and hard-won constitutional balance and may have significant unintended consequences. Even an apparently minor and/or procedural change may have the practical effect of preventing certain decisions or types of public or governmental action from being challenged at all.

10 JR has been subject to various reforms over the years. Features of the process have also been carefully scrutinised by expert panels and bodies, including recently. While of key constitutional importance, it is important not to overstate the practical burden it places on the courts and public bodies, particularly in light of a steady reduction in the number of JR claims brought in recent years.[4]

11 For these reasons, if the IRAL Panel were to conclude that some limitation or restriction to JR should be proposed (for which, as we explain below, we consider no case exists), it should proceed with extreme caution.

12 The members of the IRAL Panel are each distinguished lawyers. However, we are concerned that the IRAL process is too short, and the Terms of Reference insufficiently precise, for them to gather adequate material and make informed recommendations as to how to reshape the existing constitutional balance struck by JR in its present form. In particular:

(1) As mentioned, both the Terms of Reference and the Call for Evidence are very (we would suggest unusually) high-level and broad-ranging: the IRAL's goals are unclear.

(2) The Call for Evidence contains no concrete proposals to comment on, or even specific questions about particular issues faced in practice. Responses to the Call for Evidence have been solicited in only six weeks (with a last-minute one-week extension). In the circumstances, responses to the Call for Evidence cannot offer in-depth commentary, or indeed much evidence from experience, on the areas of law affected.

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4 Ministry of Justice, *Civil Justice Statistics Quarterly: January to March 2020 Tables* (June 2020), Table 2.1 <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020>. The total applications for permission in 2017 (4,196), 2018 (3,595) and 2019 (3,384) were all lower than that in 2000 (4,238), and on a straight-line basis the total for 2020 (Q1 798) is also set to be lower than that in 2000.

(3) The Panel consists of only a small number of individuals drawn from legal backgrounds. It does not have the resources of (for example) the Law Commission. Nor does it have the time usually afforded to the Law Commission when it embarks on consideration of a law reform proposal, particularly one as ambitious as the possible codification (let alone reform) of English public law. It is understood that the Panel is expected to report in only six months.

13 We are also concerned about the following matters, which we encourage the IRAL Panel to address expressly in its report:

(1) **Questionable assumptions:** One of the main assumptions set out in the IRAL Terms of Reference is incorrect and no recommendations should be made on that basis. The Terms of Reference are wrong to suggest that: (a) the distinction between the "scope" and "exercise" of a power is a reliable and readily drawn distinction; and (b) it is only over the last forty or so years that the courts have regarded as unlawful and nullities decisions affected by errors as to the "exercise" of powers. On the contrary, this approach has a long and established pedigree. A classic example is the failure to accord natural justice, whether by denying a fair hearing or because a decisions-maker was actually or apparently biased, which may render a decision a nullity (and has done for centuries),[5] but which is an error as to the "exercise" of powers, almost inevitably occurring in relation to a decision otherwise within the "scope" of a power.

(2) **Use of foreign comparisons (particularly Australia):** It is important, when looking at foreign jurisdictions (in particular Australia), not simply to "cherry pick" an aspect of that system that may, in isolation, seem capable of ready transplantation into our system. For example, the Australian "codification" of grounds of judicial review in the Administrative Decisions (Judicial Review) Act 1977 (Commonwealth) does not purport to exclude (and expressly provides that the Act does not cut back)[6] common law principles of judicial review. Indeed amongst the "codified" grounds of review is "*that the decision was otherwise* [than in the other grounds set out] *contrary to law*".[7] Similarly, in Australia, under the Administrative Appeals Tribunal Act 1975

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5 See, e.g., *Cooper v Wandsworth Board of Works* (1863) 13 CB NS 180 at 194; *Bonaker v Evans* (1850) 16 QB 172 at 171 (Parke B).

6 Administrative Decisions (Judicial Review) Act 1977 (Commonwealth), s 10.

7 Administrative Decisions (Judicial Review) Act 1977 (Commonwealth), s 5(1)(j).

(Commonwealth), a great many decisions under federal law that affect an individual's rights may be "appealed", on their merits, to the Administrative Appeals Tribunal.[8] That Tribunal substitutes what it considers to be the correct or preferable decision, whether or not the original decision-maker can be shown to have erred in some way.[9] Significantly for present purposes, the High Court of Australia has held that the Australian Constitution expressly or impliedly prevents both federal and state legislation that purports to oust or impermissibly restricts the ability to seek judicial review.[10] Further, by contrast to the position in England and Wales, there is no procedural requirement in either the High Court or Federal Court of Australia (the senior federal courts) nor in the State and Territory Supreme Courts (their senior courts) to first obtain permission in order to bring a JR claim.[11]

(3) **Need for further consultation on any proposals and the supporting evidence/reasoning:** As already noted, the Call for Evidence, including its Questionnaire, are very high-level and do not include any concrete proposals. The Questionnaire appears to us likely to elicit a large amount of anecdotal and other information from government departments that has not previously been published, and which it is therefore not possible for other respondents or consultees to address. It is not clear whether the IRAL Panel proposes to carry out any comprehensive empirical surveys. To the extent that the IRAL Panel feels itself able to make any recommendations at all given the limited time and resources made available to it, for any such recommendation to be robust and have legitimacy, it is necessary that: (i) the IRAL Panel sets out in writing the recommendations it intends to make and explains fully the evidence and the reasoning that behind those recommendations; and (ii) there

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8 Other specialist tribunals exist, for example, the Refugee Review Tribunal and the Migration Review Tribunal. Further, most Australian States have Civil and Administrative Tribunals similarly empowered to review many decisions on their merits *de novo*.

9 Administrative Appeals Tribunal Act 1975 (Commonwealth), s 43(1).

10 See *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476 as to the "*minimum provision of judicial review*" which s 75(v) of the Australian Constitution establishes and *Kirk v Industrial Relations Commission* [2010] HCA 1, (2010) 239 CLR 531 as to the inability of the Australian State legislatures to exclude judicial review.

11 See generally Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed., 2016), ch 2, which provides an overview of the basis for JR claims federally and in each Australian State and Territory.

is an opportunity for the public to comment on those proposed recommendations, in light of their supporting reasoning and evidence.

## D CODIFICATION AND CLARITY (SECTION TWO OF THE CALL FOR EVIDENCE)

### (1) Codification

14 We consider that there is no viable case for codification of the principles of substantive JR such as the grounds of JR, amenability, or non-justiciability.

15 The IRAL Terms of Reference do not explain how such principles would be codified, propose any terms of codification, or explain why this should occur, in particular what the perceived benefits of this are. In general, English law, unlike that of most European states, is not codified, although there are many statutes by which Parliament has laid down particular regimes (for example, the Human Rights Act 1998).

16 It is unlikely that codification would achieve any real benefits in terms of accessibility or clarity. Any legislation will ultimately need to be interpreted by the courts, and they will do so (as for all statutes) against the backdrop of the common law. Further, codification is likely to have the effect of decreasing clarity and increasing litigation in the short term, by generating a significant number of additional cases that will need to be argued on appeal to the highest courts in order to establish the meaning of the new provisions.

17 Moreover, to the extent that any such exercise sought to restrict or limit the number or scope of the existing grounds of review, it would trespass on dangerous constitutional ground and risk unintended effects, for the reasons we have explained. It is important to recognise that "codification" by definition cannot resolve issues that are presently unclear.

18 Furthermore, as we have already explained, any attempt to codify the principles of JR would be a major undertaking. It would deserve and require extensive consultation on concrete proposals with the public, including users, practitioners and academics.

19 Insofar as the Australian codification in the Administrative Decisions (Judicial Review) Act 1977 (Commonwealth) is pointed to as a model, it is important to recognise that it is non-exhaustive and thus leaves common law principles of JR standing and available to all litigants, as is constitutionally required in Australia (see paragraph 13(2) above).

20 In this regard, we consider it important that any proposed recommendation that goes beyond attempting to capture the effect of the existing law is not described as a "codification". That is particularly the case if the IRAL Panel were to recommend that the High Court's jurisdiction should in some manner be ousted in any situation where JR would or might otherwise have been available.

**(2) Reform to substantive JR**

21 In any event, we do not see any case for recommending any changes to or for any statutory intervention in substantive JR. The current grounds of JR, and their sphere of application (including the rules of amenability and justiciability), have been carefully formulated and developed over centuries, and are still being considered and developed incrementally by the courts, in accordance with their constitutional function. Where a ground of JR is made out, it represents a serious failure in decision-making, often visiting unfairness on an individual. The current law of JR represents a fair compromise between, on the one hand, (i) preventing unlawful action, (ii) protecting individuals and (iii) promoting high quality decision-making, and, on the other hand, allowing public bodies to function effectively.

22 Further, it is important to recognise that many JR claims are not brought against central government, nor do they concern policies, but are instead brought against agencies and authorities in relation to individual decisions. This is of potential importance in relation to whether there is in reality any need for change and possible unintended consequences, were the IRAL Panel to make recommendations by reference (say) to the exercise of certain prerogative powers (for example, the prorogation of Parliament). We urge the IRAL Panel to obtain robust data in relation to the number of claims brought that in fact raise any issues it wishes to address (for which data is likely to be readily available), in order to assess whether there is any real and empirically-based (rather than anecdotal) need for reform.

23 We also note that the existing grounds of review necessarily fall to be applied in the context of the exercise of a particular power, often a statutory power. They take their content from that power, and their applicability may depend on the nature of the power. For example, the Supreme Court has held that the *British Oxygen* principle that a decision-maker must consider a request to depart from a policy under a statutory power does not apply to non-statutory powers, because there is no implied requirement of Parliament in the case of the

latter to keep an open mind to departures from a policy: *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [60]-[66]. For this reason we consider that attempting to amend the grounds of JR or their application at a high level is likely to produce confusion and unintended results.

24 The IRAL Terms of Reference ask whether certain decisions should not be subject to JR. As will be apparent, we do not consider that that would be appropriate (and, once more, no suggestion is made or possible benefit identified). It is difficult to see any principled case for a class of decisions not being subject to JR. The courts are experienced in context-specific analysis, the practical effect of which is often to circumscribe the reach of JR, particularly in relation to decisions that might be considered matters of policy or politics. Further, in practice, we expect it would be almost impossible to identify by legislation distinct and specific, but appropriate, limitations to the court's powers. We also consider there would be constitutional difficulties in limiting the court's powers in such a manner.

## E PROCESS AND PROCEDURE (SECTION THREE OF THE CALL FOR EVIDENCE)

25 The IRAL Terms of Reference refer to the possibility of procedural reforms to "*streamline the process*" of JR. We do not consider that JR is in need of streamlining or that any procedural changes are required. No concrete changes are proposed for us to comment on. At this stage we make the following general observations in relation to the topics raised in the Call for Evidence and Terms of Reference.

26 The procedure for making, responding to and appealing JR claims appears to us to be clear and not in need of reform. It has recently been streamlined by the introduction of two modifications, which are still bedding in: the introduction of the requirement ("*must*") to refuse permission where it appears "*highly likely*" that the allegedly unlawful conduct in question did not affect the outcome (s 84(5) of the Criminal Justice and Courts Act 2015), and the introduction of the possibility of certifying a claim as totally without merit such that no oral reconsideration hearing is possible once permission is refused (CPR r 54.12(7)).

### (1) Time limits

27 We do not consider that any change is needed to the time-limits for bringing JR claims. The three-month time-limit, with a rarely exercised discretion to extend time, fairly

balances the need for a claimant to have a proper opportunity to present a claim with the need for government to be able to assume a decision is valid (subject to the possibility of collateral challenge). If anything, in our experience, the time-limit is relatively harsh on claimants, particularly those who must seek to obtain pro bono assistance before they can issue a claim, and particularly in view of the lack of clarity introduced by the requirement to apply "*promptly*" in any event (and within three months).

**(2) Permission and appeal**

28 We consider that, in principle, the permission stage performs a useful function in ensuring that unmeritorious claims are not over-burdensome on the court and defendants. However, our experience is that there is a tendency for defendants to contest permission even where a claim is clearly arguable, which increases the chance of a refusal on the papers followed by an unnecessary oral renewal hearing, with significant waste of time and resources on all sides. This is a matter that the IRAL Panel may wish to consider in more detail. We consider that there is no basis for any recommendation that would further restrict the grant of permission.

29 We consider that the ability to appeal to the Court of Appeal against a refusal of permission is a valuable safeguard: in any human system, things do sometimes go wrong and require correction. Such appeals can and do succeed. One recent example – in which two of the signatories to this submission acted for the claimant – was the challenge brought by the End Violence Against Women Coalition to CPS rape prosecution policy and practice, which was refused permission at first instance ([2020] EWHC 929 Admin) but granted permission by the Court of Appeal in July 2020 (Appeal No C1/2020/0720). In another case – in which two of the signatories to this submission were involved for the defendant public authority – permission for one ground of challenge was initially refused at first instance (after an oral hearing) but allowed by the Court of Appeal.[12] That ground was then successful at the substantive hearing before the High Court (*Uber London Ltd v Transport for London* [2017] EWHC 435 (Admin), [32]–[41]).

[12] Order of Holgate J dated 2 September 2016 (paras 1(1) and 2) in Claim No CO/4130/2016 and Order of the Court of Appeal dated 20 October 2016 in Appeal No C1/2016/3551.

### (3) Duty of candour and disclosure

30 We do not consider that any restriction is needed in relation to the duty of candour. Nor is that duty in our experience overly burdensome on defendants.

31 The duty of candour as it applies to public authorities in judicial review proceedings reflects the fact that they do not participate in JR as private litigants defending private interests, but rather as representatives of the public interest who are expected to cooperate with the court "*to fulfil the public interest in upholding the rule of law*": *R* (*Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), [20]. Broadly speaking, it requires a defendant to provide information and (exceptionally) disclose documents that will assist the Claimant's case or give rise to additional grounds of challenge and so as to cooperate with the court.

32 The duty of candour is also fundamental to the operation of JR in practice: because of the duty of candour, the court is prepared to undertake only a limited inquiry into the facts of the case, thereby significantly streamlining the process. Defendants in JR do not generally give disclosure (and in our view no change needed to the principles that govern those rare cases where disclosure is ordered in JR). Satisfying the duty of candour is far less onerous than the ordinary standard disclosure process that applies in civil litigation, which requires the listing and provisions of copies of all relevant (non-privileged) documents.

33 In our experience of advising defendants in relation to JR challenges, the burden entailed by the duty of candour is appropriate and not excessive. In a small number of cases fulfilling the duty of candour does become burdensome. However, that often reflects the seriousness and/or widespread and/or systemic nature of the alleged unlawful action.

34 The only realistic alternative to the duty of candour would be to import a full standard disclosure process into judicial review. But that would add significant time and cost to the JR process, for government and claimants.

35 For the avoidance of doubt, we do not consider that it would be acceptable both to remove or limit the duty of candour and also to permit defendants to JR claims not to disclose documents that they know would assist the other side. That would introduce a profound level of unfairness into JR and would imperil the rule of law, insofar as the court would be required to proceed on an incomplete factual basis. It would also greatly increase the

number of disclosure applications in JR. Claimants would seek orders for specific disclosure, in the knowledge that the defendant is – or might be – withholding potentially relevant information. We anticipate that this would significantly increase the length and cost of JR proceedings.

36 We note that there is a lack of clarity in practice around the time at which the duty of candour arises. In our experience it is neither practical for the defendant nor of assistance to the claimant or court for defendants to resist disclosure until the stage of permission. The IRAL panel may in particular wish to consider the views expressed by Cranston and Lewis JJ in their consideration of this matter in 2016. We suggest that their valuable discussion paper should be the starting-point for any further discussions.[13]

**(4) Costs and interveners**

37 The limitations of the IRAL process mentioned above are particularly acute in relation to costs, an area where empirical evidence is especially necessary (and likely available), there are numerous complex and recently developed regulatory systems, and where a misalignment of incentives could seriously restrict access to justice and so individuals' ability to challenge unlawful government action.

38 Sir Rupert Jackson, an eminent judge with particular expertise in civil costs issues, has recently (in 2017) completed a review of costs issues in judicial review claims.[14] He had the benefit of more time than the IRAL Panel and was thus able to carry out a lengthy and detailed consultation. We do not see any pressing or immediate need for costs reforms. However, we consider that any further review must start with Sir Rupert's 2017 recommendations.

39 In our experience, the costs of JR are significant and often prohibitive, particularly for individuals. A short, two-hour judicial review can cost from £8,000–£12,000, with a substantial two-day hearing costing as much as £80,000 to £200,000.[15] This is of significant concern for access to justice. Moreover, existing costs rules, in particular s 87

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13 Cranston and Lewis JJ, *Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper* (28 April 2016).

14 Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report* (London: Judicial Office, 2017).

15 Tom Hickman, "Public Law's Disgrace" (UK Constitutional Law Association, 9 February 2017) <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>.

of the Criminal Justice and Courts Act 2015, significantly discourage interventions. That is unfortunate: in our experience, interveners usually behave responsibly and can be very helpful to the court, particularly appellate courts. They rarely add materially to the length of proceedings but they frequently add to the quality of submissions. We are clear that no further rules to discourage or limit interventions are required.

**(5) Standing**

40 The Government relatively recently (in 2014) considered reform of the law of standing and concluded that no reform was necessary.[16] We are not aware of any change since that last review which might affect its conclusion. We agree with its conclusion that no change is needed to the law of standing, which currently protects government decisions from challenge by those with no sufficient interest.

41 The recent Government review rightly recognised the importance of JR in providing "*a critical check on the power of the State*".[17] Any restriction on the law of standing would hinder JR's ability to provide this critical check. Public law is about wrongs, not rights – that is, it is about restraining misuse of power, not vindicating private rights.[18] The courts have recognised this by developing a flexible, merits-sensitive approach to standing, which permits NGOs and others to bring forward meritorious claims where appropriate and so ensures that potentially unlawful government decisions are not immune from scrutiny simply because a suitable (i.e., directly affected) claimant lacks the financial or other resources necessary to bring a claim. (We note too that under the Human Right Act 1998 the rules on standing are more restrictive due to the requirement that a person invoking the scheduled rights be a "*victim*" under s 6.)

42 Further, the remedial flexibility discussed below also provides protection to government in situations where a claimant is less immediately affected by a decision.

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16 Ministry of Justice, *Judicial Review — Proposals for Further Reform: The Government Response* (February 2014), paras 32–35.

17 Ministry of Justice, *Judicial Review — Proposals for Further Reform* (September 2013), para 1.

18 *R v Somerset City Council and ARC Southern Ltd, ex p Dixon* [1997] JPL 1030, 1037 (Sedley LJ).

### (6) Remedies

43 The courts possess significant flexibility in relation to remedies in JR, which are discretionary and which are also subject to various limits. As we have noted, JR remedies are very old and derive from the ancient prerogative writs. In that regard:

(1) The courts have a common law discretion to refuse relief, for example, because a claim was brought tardily or because that relief would serve no useful purpose. Further, a court may make a declaration but not quash or set aside a decision where further relief is futile, as occurs on occasion in relation to consultation challenges.

(2) The courts may refuse a remedy where its grant would be detrimental to good administration: s 31(6)(b) of the Senior Courts Act 1981.

(3) The courts are barred by s 84 of the Criminal Justice and Courts Act 2015 from granting a remedy where substantially the same outcome would have been "*highly likely*" for a claimant notwithstanding the alleged ground of review.

44 The availability of a remedy also of course affects the substantive usefulness of JR and so claimants' willingness to bring clams. Accordingly, we do not suggest that that this is an area in need of any Parliamentary intervention or reform. In the absence of specific proposals to consider, we are not able to comment further.

### (7) Steps taken by decision-maker to avoid JR, settlement, and ADR

45 It is our experience that many claims "settle" at the letter before action stage, when a letter is sent under the Judicial Review Pre-Action Protocol. Either, the public authority recognises that the decision was flawed and withdraws it (or consents to quashing orders); alternatively, the claimant recognises – from the fuller explanation for the decision set out in the defendant's letter – that the challenge has no merit. Letters before action promote fair and effective decision-making. They prompt government departments to double-check their thought processes and enable claimants to assess the merits of their case. Further, in contrast to private claims, a decision-maker is often required to give a person affected by their decision a hearing, and thus will already have considered (or at least purported to consider) their views, evidence and arguments.

46 We doubt that there is much, if any, scope for the promotion of alternative dispute resolution ("**ADR**") in JR. ADR in general presupposes some ability and willingness of both (or all) parties to give something in a negotiation and to change their position. It is particularly effective in private law litigation where one party is seeking damages and the parties can reach a compromise over the quantum of those damages. However, JR cases are concerned with whether government action is unlawful, and parties (particularly defendants) are constrained by the positions they have taken. A defendant that considers that it lacks power under a statute to take an action or make a payment, for example, cannot agree to pay a proportion of what is claimed following a negotiation. In JR, it is often more desirable than in civil claims to go to court for a legal ruling, including for defendants. In our experience, JR cases, unlike civil claims, tend not to settle at the door of the court.

47 In the absence of any proposal, we are not able constructively to comment further.

## F CONCLUSION

48 For the foregoing reasons, and particularly in the absence of any proposals, concrete or otherwise, we do not consider that the IRAL Panel should recommend any change to the substance or procedure of JR that would limit or restrict its availability.

49 Insofar as the IRAL Panel proposes to make any recommendation, we consider it necessary for the evidence and reasoning in support to be the subject of a further period of consultation, so that respondents can address specific proposals and their basis. To proceed otherwise will likely result in any recommendations lacking a robust basis and legitimacy.

Signed:

Zahra Al-Rikabi

Malcolm Birdling

Paul Bowen QC

David Heaton

Tim Johnston

Matthew Kennedy

Aaron Khan

Sarah Love

Emily MacKenzie

Jennifer MacLeod

James McClelland

Professor Robert McCorquodale

Emma Mockford

Tom Pascoe

Jemima Stratford QC

Charlotte Thomas

Victoria Wakefield QC

Tom Wood

**Brick Court Chambers**

**October 2020**