CENTRE FOR MILITARY JUSTICE
Justice - Welfare - Law

Independent Review of Administrative Law

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Dear Sir or Madam

Independent Review of Administrative Law – call for evidence

The Centre for Military Justice is a new, small, legal charity that was established this year to provide legal services to current and former members of the Armed Forces or their bereaved families where there are allegations of sexual violence, bullying, including racist bullying, and other serious issues of public concern including discriminatory policies and practices. In addition to general advice, inquest law, Human Rights Act and employment law claims, we advise on public law remedies and are beginning to act for clients in judicial review matters where they raise issues of wider importance. The Defendant in all of these cases is almost always the Ministry of Defence (MoD).

Because we are so new, we are not in a position to provide a detailed response to the IRAL call for evidence. However, the charities JUSTICE and the Public Law Project have prepared extremely detailed submissions which the CMJ wholeheartedly endorses and will not repeat.[1]

We would simply wish to make the following short additional observations insofar as is relevant to our work.

Re: Section 1: Questionnaire to Government Departments

The CMJ is concerned that the framing of the IRAL's questions will not encourage a true or fair assessment of the full benefit of judicial review to individuals, to public body decision-making and in the public interest generally. That is because the IRAL terms do not appear to be designed to capture information about what are likely to be the majority of cases – those where claims settle following pre action protocol correspondence and/or prior to a final hearing, cases that are unreported, but that have potentially far-reaching beneficial impacts on public policy.

The premise of the questions (Qs 1-2) that have been directed to Government Departments reveal the bias at the heart of the Government's agenda. Question 1 is directed to generating extensive and detailed examples of potentially negative responses (from the perspective of a defendant public body) concerning up to 11 different aspects of judicial review law and procedure. The question only elicits examples of where the aspects may have 'seriously *impede(d*)' public functions – it seeks no similarly detailed examples of where the aspects may have *improved* public functions.

In taking such an approach, the IRAL gives the impression that less weight will be given to examples of how the use of judicial review (including the mere prospect of it), improves the effectiveness of the lawfulness of central or local government activity.

[1] JUSTICE: https://justice.org.uk/justice-submits-response-to-the-independent-review-of-administrative-law/; PUBLIC LAW PROJECT: https://publiclawproject.org.uk/latest/plps-submission-to-the-independent-review-of-administrative-law/

Judicial review is a vital tool for those groups in society for whom the state looms large in their lives. It is concerning that a question like this has been specifically directed largely to government departments and not, with equal weight and purpose, to the legal constituencies that work with particularly affected groups, such as, for example, social housing lawyers, community care lawyers or welfare benefits lawyers. We are aware that lawyers working with those groups are responding as best they can to the IRAL, however the absence of a concerted set of questions specifically directed to seeking particular evidence from those constituencies (and directed to the positive impact of judicial review) is concerning.

Re: Section 3 – processes and procedures

The CMJ's typical clients tend not to be eligible for legal aid on means grounds. Legal aid can be an important way of securing costs protection for clients. When considering a public law challenge, our clients must therefore choose to either bear the costs risk of a legal challenge themselves or try to secure some sort of indemnity.

This means that the rules around costs and costs protection in the context of judicial review claims are of particular interest. It is of concern that the terms of reference do not appear to invite constructive input on how the costs rules relating to judicial review might be reformed to *improve* claimants' access to justice.

The reforms introduced in the Criminal Justice and Courts Act 2015 limited the ability of the court to provide costs protection to a claimant pre-permission stage, in that a Costs Capping Order (CCO) may now only be made if and when permission to proceed with judicial review is granted. This means that claimants are at risk of an adverse costs order up to that point. The vast majority of claimants in our experience cannot take that risk. The CMJ is currently acting for 3 vulnerable victim-survivors of rape in the military that are challenging the MoD's handling of rape cases in the service justice system. While all are earning a salary and are not eligible for legal aid on means grounds, none can afford to take the risk of being ordered to pay the MoD's costs if they are refused permission or if the claim proceeds and they lose. They were not able to issue the proceedings without the achieving the difficult task of finding a third party indemnity-provider willing to lose several thousand pounds in the event that their claim was not granted permission to proceed. They have been fortunate to be able to secure such an indemnity – but this was extremely unusual. Without it, this important claim which has already had a significant impact in terms of improving the public's understanding of the situation affecting rape victims on the military, simply could not have proceeded. The CMJ has advised in other cases – including in cases where there is no wider public benefit in the claim - where an early decision has been taken not to go down the judicial review 'route' because it is clear that it will be extremely difficult to secure a costs indemnity and other sources of funding are not available. In recent case, a potential judicial review claim that would be brought by victims of both racist and sexual abuse concerning an important MoD policy, an application for a third party costs indemnity has recently been refused, meaning that claim cannot proceed because the claimants cannot afford to take the costs risk.

Our experience indicates that there are many meritorious cases like this that could be brought but which are not, because of the issue of costs protection. The CMJ would like to see the IRAL consider ways to better protect the financial position of the claimant, including by removing the bar on the court from making a CCO at the pre-permission stage.

The CMJ would also like to see the IRAL consider recommending implementing Lord Justice Jackson's recommendations to extend the Aarhus rules to all judicial reviews and/or his earlier recommendation to introduce a form of Qualified One Way Costs Shifting (QOCS) in judicial review claims.

On the matter of settlement prior to trial, in all of the judicial review cases involving the MoD that our Director has been involved in, all settled prior to issue or hearing and on terms favourable to the claimant. None were reported however, as the summaries below indicate, we suggest that all had wider beneficial impacts. We do not think that the terms of reference of the IRAL have been designed to capture this kind of evidence. If the review is to be comprehensive, fair and unbiased, it will ensure that these kinds of outcomes are captured.

- Joe Ousalice, a Royal Navy veteran who served almost 20 years had his Long Service & Good Conduct medal taken from him when he was dismissed from the Navy because of his sexuality. After years of attempting to engage the MoD constructively in correspondence, he issued judicial review proceedings to compel the MoD to return his medal to him, and to compel them to introduce a new policy whereby other LGBT veterans could apply to have their medals restored. The MoD refused, relying in part on an argument that decisions about the granting and withholding of medals was a prerogative power and

one that was not amenable to judicial review. A third party indemnity was secured to enable the claim to be issued and to cover the costs, pre permission if Mr Ousalice was refused leave. In the event, permission was granted and the matter listed for trial. However, less than 2 months before the final hearing, the MoD offered to settle the claim – it restored Mr Ousalice's medal to him and agreed to introduce a new policy for LGBT veterans that had lost their medals.

- 'H' threatened judicial review proceedings against the MoD concerning the existence of a power contained within the Armed Forces Act 2006, that enabled Commanding Officers (COs) to investigate and dispose of allegations of sexual assaults in the military themselves, without having to involve the service police. Following H's pre action protocol letter before action, the MoD agreed to lay a new statutory instrument before Parliament, requiring all allegations of sexual assault from now on to be referred to the service police for investigation, removing such cases from the complete control of the COs. This was all resolved by way of pre action correspondence.
- Judicial review proceedings were also threatened against the MoD, concerning its failure to have in place an independent oversight complaints system for the service police. Following the sending of the pre action protocol letter, the MoD agreed to add the issue of independent oversight of the service police to the Service Justice System Review that was then being conducted by HHJ Lyons – this issue had not been part of the review terms of reference and came about exclusively as a consequence of the pre action correspondence. In due course, HHJ Lyons recommended that an independent oversight body should be established for service police complaints. The MoD has now accepted that recommendation.
- The family of the late Cpl Anne-Marie Ellement issued judicial review proceedings against the first Coroner to examine their sister's death, seeking an order that the inquest be quashed and a fresh inquest ordered that could investigate the aftermath of their sister's report of multiple acts of rape/sexual assault and her allegations of bullying which, they feared, had led her to take her own life (and which the first inquest had overlooked). The proceedings settled by consent and a fresh inquest was held which revealed serious failings in the support and care provided to soldiers who report sexual assault, bullying and overwork and which had all contributed to her death. The inquest led to important policy changes within the MoD around how victims of alleged sexual violence and those suffering mental ill health are to be treated.
- The family of the late Cpl Anne-Marie Ellement also secured a fresh independent investigation into their late sister's allegations of rape and sexual assault following a pre action protocol letter before action threatening judicial review. That letter was only sent after the family repeatedly attempted to persuade the MoD to re-open the investigation and which, time after time, the MoD resisted. As a consequence of the threatened judicial review, the fresh police investigation resulted in two former soldiers being charged but acquitted of rape at court martial and led to formal apologies and wider reforms in the way in which the service police investigated sexual crime being recommended.
- The Deepcut families made it quite clear, in their initial correspondence with Surrey Police back in 2011, that if full disclosure of the materials held by the force about their deceased children was not made in full to their lawyers, that legal action by way of judicial review would follow. Disclosure was made upon which basis applications for fresh inquests were made and granted.
- Three victim-survivors of rape in the military issued judicial review proceedings in May 2020 against the MoD following its refusal to accept the recommendation of an independent judge that all rape cases in the UK involving service personnel should be handled by the civilian justice system, not the service justice system. After the proceedings were issued, the Secretary of State for Defence agreed to give fresh consideration to the matter (which remains under review at the time of writing).

We have no doubt that in many cases, the defendant public body's approach is to 'wait and see' how serious the claimant is before engaging meaningfully, which has the effect of using up court time and increasing costs, not to mention causing extreme stress to vulnerable people.

Yours sincerely

Director