RESPONSE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW SECRETARIAT

"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?"

INTRODUCTION

1. The Chancery Bar Association ('ChBA') represents the interests of some 1,300 members handling the full breadth of Chancery legal work at all level of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association.

2. Chancery work is that which was traditionally dealt with the Chancery Division of the High Court of Justice but, from 2 October 2017 has been dealt with principally by the Business and Property Courts ("B&PCs"), which sit in London, and in regional centres outside London. The B&PCs attract high profile, complex and, increasingly, international disputes.

3. Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

4. Many Chancery practitioners, for example those working in the area of Revenue Law, will deal on a regular basis with administrative law matters, including applications for judicial review. These can be heard by Judges of the B&PCs, in the Upper Tribunal Tax Chambers, and in the Administrative Division.

5. Members of the ChBA are on the AG's panels and so represent the government in this work. Members also represent individuals, trustees (including trust companies), partnerships (including LLPs) and corporate entities in applications.

RESPONSE TO SECTION 1 – QUESTIONNAIRE TO GOVERNMENT DEPARTMENTS

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?

6. With reference to the framing of the first question to government departments, we do not consider that allowing judicial oversight in matters of legality should ever be said to "impede the proper and effective discharge of … government."

7. It seems to us that the question presupposes that this is a possibility, whereas we consider that the availability of judicial review as a remedy (and, even more so, properly conducted judicial review applications) can only ever assist in good governance by offering the possibility of independent oversight.

8. We note, agree with and endorse the comments made by the Bar Council in its response to this consultation about the importance of judicial review as a remedy and its enormous value in ensuring good governance. We note the Bar Council has made strong, reasoned and evidence-based submissions on these points, which we consider compelling. Similarly, we endorse the strong stance taken by Lord Neuberger and Lord Kerr, two recently-retired Supreme Court judges (before whom our members have had the privilege of appearing, and whose impartiality we do not for one moment doubt), on the importance of judicial review and its current wide remedies. In the words of Lord Kerr, these are "entirely healthy and entirely appropriate".

9. For the reasons given below, in our experience, the possibility of entirely unmeritorious or vexatious applications is vanishingly small and there is no reason that it should be taken into account by governmental decision makers in the proper exercise of their functions.

10. In particular, the established grounds for a successful application for judicial review, as scoped by decades of independent judicial consideration, should have a beneficial effect and not a damaging one.

11. These grounds include the following, about which you specifically ask the government departments:

> "a. judicial review for mistake of law

b. judicial review for mistake of fact

c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)

d. judicial review for disappointing someone's legitimate expectations

e. judicial review for Wednesbury unreasonableness

f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account."

12. Briefly, we comment as follows on each of these.

13. Mistakes of law might arise in governmental decision making. The possibility that they can be challenged should result in more careful decision making *ab initio* and, when they occur in spite of this, recourse to the law assists good governance by ensuring fairness between the state and those resident or doing business here.

14. Mistakes of fact can similarly arise and the same applies. In addition, often those challenging decisions on this basis will, *a fortiori*, know most about the relevant facts and should have the opportunity to make a case, where necessary, to an independent judiciary.

15. Procedural impropriety is regrettable but, as the case law shows, does sometimes occur. As with mistakes of law, knowing that judicial review is a possibility should help governance by ensuring those in power exercise their procedures with due care and when they fall short it is right that the law assists good governance by ensuring fairness between the state and those resident or doing business here.

16. Emanations of the State often create legitimate expectations in their dealings with the public. It is right that these should not be created in a less than rigorous manner or that, having been created, they should be ignored. The same considerations apply.

17. The bar for *Wednesbury* unreasonableness is very high. It is right that very unreasonable acts are subject to the jurisdiction of the independent judiciary.

18. The taking into account of irrelevant factors (or the failure to take into account relevant ones) is effectively a question of procedural impropriety. Materially identical considerations apply.

19. It is an essential and very sensible characteristic of judicial review applications, which we entirely support, that permission must be granted before substantial time can be taken up in front of the Court; and before really significant amounts of government time will be taken up in defending applications.

20. Therefore, there is (compared to usual *inter partes* litigation) very little risk of time wasting, vexatious litigation. Only sensible cases with a real prospect of success should be pursued. While the odd application might be lodged by applicants who are badly advised or who are advised by people with an unrealistic view of the prospects, this is extremely rare indeed in the areas in which our members work. It is not, in our experience, a material concern and should not, in our view, be one that affects the future of judicial review proceedings.

21. Turning to the other issues raised for government departments to consider, we comment as follows.

22. The remedies that are available when an application for judicial review is successful are, as a result of the historic case law, occasionally obscurely phrased but are, in essence, very simple. For judicial review to be effective, the remedies currently available must be preserved. They could, however, be simplified and renamed.

23. The parties to an application for judicial review are already tightly proscribed. The established rules on *locus standi* reduce the number of claims, but ensure that those with real reason have the opportunity to have cases considered.

24. The rules on the time limits within which an application for judicial review must be made are very tight. They can lead, when combined with the amount of evidence often needed in Chancery-related applications, to significant costs being incurred by the applicants before permission has even been granted. In most cases, on balance, we consider that the tight time limits do not prevent justice being done. In respect of a limited category of cases, however, they are too short. We do not advocate a blanket extension but suggest further consideration be given to a mechanism for the courts to extend time in rare cases, subject

to a default position mirroring the current requirements and, in particular, preserving the requirement that claims should always be brought promptly in their own circumstances, as

is currently the law. See further paragraphs 28 to 32 below.

25. The time it takes to mount defences to applications for judicial review is significantly less than the time it takes to prepare an application. We speak as an association with members on both sides. The pre-action protocol assists both sides in narrowing issues, and in seeking to head off claims where there are no prospects of success for one side or the other.

26. While we are not governmental decision makers, ChBA members work with them. There is no good reason of which we can conceive that decision making should be hindered or compromised by the potential for challenge and independent judicial oversight. Quite properly, costs issues in respect of judicial review are not, in our view, a relevant consideration for the vast majority of decision makers. To the extent that a challenge is so likely that a costs issue is a relevant concern, it seems to us that it is sensible that decision makers need to take it into account. The only obvious alternative – that tenuous decisions are made in the comfortable knowledge that they cannot be challenged and so no legal costs can ever be incurred – is not preferable.

27. We have expressed above our view that independent judicial oversight (or the possibility of it) is an essential check on government and that it should result in better governance, more careful decision making, and a fairer society.

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)?

28. We have considered whether time limits should be extended for applying for permission to bring judicial review as, occasionally, claims can be made prematurely on a protective basis; or pleaded too fully because there is not the time to cut out points which might be abandoned if there were longer to prepare.

29. On balance, however, as set out above, we think the time limits work to the advantage of good governance and in the interests of justice in the majority of cases. This is principally because it avoids uncertainty for governmental decision makers and, consequently, for the public at large.

30. There is, however, a category of cases where a longer time limit for bringing a claim would be appropriate. This is because there are some cases in which the interests of good governance do not require prompt applications to the court. This category of case arises typically where the original decision was quasi-judicial (e.g after a public inquiry) which is completely different from a decision taken, for example, by a government department about whether or not to fund a public service or whether or not to impose a charge to tax. For example, in the area of public rights of way, cases frequently have a gestation period running into years if not decades. It would not be unusual for a local authority to take five years to make a definitive map modification order under the Wildlife and Countryside Act 1981 and then for there to be several years before a public inquiry concludes that such an order should not be confirmed. We consider that, against a backdrop like this, the imposition of a three month period to challenge such a decision is unduly and unhelpfully short. The current position therefore leads to applications for judicial review being lodged in circumstances where it would be beneficial to the government to have more time to consider the points being made. There will of course be some cases, for instance those concerned with imminent development, where a short extension of time might be undesirable to the interests of the landowner but such cases are, in the experience of our members, very rare.

31. We therefore consider in relation to time limits that:

a) consideration should be given to introducing a mechanism by which potential applicants for judicial review can apply to the court to extend the period from the default, which should remain as currently in place;
b) but in any event time limits should not be shortened any further than the current three month period because
   (i) shortening the current three month period would undermine the government's ability to deal appropriately with challenges,
   (ii) shortening the current period would lead to more protective challenges incurring costs and time unnecessarily for all parties, and
   (iii) shortening of time limits would lead to increased pressure upon the court system.

32. If provision is to be made for time limits to be extended at the discretion of the courts, then the requirement that judicial review applications should be brought "promptly" in the circumstances of the case should be retained.

33. We think that specialist tribunals, at the lower level, could be given judicial review functions. Specifically, in the area of Revenue Law, we think that the First-tier Tribunal could be the court of first instance in judicial review actions. Often, tax appeals will have a

public law angle which necessitates concurrent proceedings, with one or other set stayed, because the First-tier Tribunal Tax Chamber does not have the relevant jurisdiction. This would reduce the pressure on the High Court and enable the government legal service to deal with claims in a consolidated manner. This should result in costs savings to both applicants and the government.

34. We consider that the remedies available should be preserved but that they could be simplified and codified. We strongly suggest that the legal profession be involved in a more detailed consultation on this point if it is to be taken forward.

RESPONSE TO 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?

35. The minor reform to time limits suggested above could be achieved by modification of the Civil Procedure Rules. Both the other reforms suggested above could be implemented by statute. In the case of the jurisdiction of the tribunals, this would be essential.

36. We consider that the scope of judicial review should, in other ways, be left as a matter of common law. Otherwise, the legislature from time to time and, in effect, the executive branch of government will be able to limit the role of the judiciary in its oversight of government, which would damage the rule of law and undermine the integrity of our legal system. There would be knock-on effects for the way in which our judicial system is perceived in the world in general and, inevitably, in the quality and scope of work undertaken in the courts of England and Wales.

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?

37. In our view, this is a question of law. To lawyers conversant with the relevant law, it is clear. To governmental decision makers, it should be clear. If there are difficulties in interpreting or applying the law, that is a question of taking better legal advice, or taking legal advice more quickly, or of a better explanation of the law to those people whom it most affects. It is not a reason for substantive legal reform.

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?

38. The process is clear at all stages. It is well codified in the relevant court rules, which are the appropriate places. (This is a different question from whether parties, on either side, seek to make arguments that correct procedure has not been followed. That may be a question of litigation strategy or, as above, a question of the correct advice being taken at the right time. But it is not a reason for substantive legal reform.)

RESPONSE TO 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?

39. As set out above, on balance we do think that the timing is appropriate in the majority of cases. We have suggested minor modifications might be appropriate to deal with a minority of cases, most of which are likely to fall into a particular category.

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

40. In our experience, the costs rules are appropriate and applied appropriately. In particular, the costs rules enabling the government to claim their costs in actions which are unsuccessful at the permission stage is a sensible disincentive to unmeritorious claims.

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?

41. The litigation costs are, in our view, proportionate. As set out above, the onus is on the applicant to make out a decent *prima facie* case and this encourages applicants to be careful and as cost-conscious as possible from the earliest stages. It saves unnecessary costs being incurred by government. The court costs are appropriate.

42. In our view, standing is, appropriately a consideration.

43. In our view, unmeritorious claims are often weeded out by the correct application of the pre-action protocol. Failing that, the permission procedure is a useful bar. The costs consequences are, as set out above, appropriate.

44. It is never going to be possible, in any area of law, to avoid every unmeritorious claim. But well-advised applicants will, in our view never bring them, given the timing, cost, pre-action protocol, and permission procedure. Even applicants without good advice should find claims difficult to sustain beyond the very earliest stages for the same reasons. In an ideal world, legal aid would be available to prevent less well funded applicants from lacking the resources to take the relevant advice, but we do not suggest extending legal aid, given the current budgetary restrictions in the legal world. Unmeritorious claims should not be differently treated.

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?

45. In our view, the remedies available are, in essence and in effect, appropriate to the grounds on which a successful claim can be pursued. We have noted above that the nomenclature could be streamlined and simplified but it is imperative that, if this is done, none of the subsisting remedies is taken away. We have considered expanding the scope for awards of damages but in our view this would be likely to result in a larger number of less meritorious claims being pursued for financial gain. It would also lead to the complexities of quantification. In most cases, where there has been pecuniary loss, there will be an alternative claim and the judicial review procedure is best left to deal with issues of governance and the rule of law.

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

46. Sensible and well informed correspondence during the course of dealings is the first step that will minimise the need to apply for judicial review. That, however, should always be hoped for and is not in the ambit of this review. Secondly, as with all litigation, the preaction protocol is helpful. We have considered, in this context (i) amending it and (ii)

stricter sanctions for non-compliance. However, we do not, on balance, think either is a sensible course of action.

47. The protocol is sensible and fit for purpose. No obvious amendments are necessary. Unnecessary amendments will simply add complexity to a well-understood procedure for all parties. We have also considered the timings prescribed. For the reasons given above in respect of the timing restraints on judicial review applications generally, we do not think these should be amended. They balance the need for swift action with the ability to allow for proper consideration of the issues. Both delay and rushed consideration are undesirable. There is some scope for flexibility where a case demands it, which is sensible.

48. The Courts have the power to impose sanctions for non-compliance with the pre-action protocol and this should remain a matter of judicial discretion. If parties are forced to comply in unsuitable ways for particular outlying cases, it will probably lead to more premature claims, protracted correspondence and entrenched positions from an abundance of caution. These are all what a pre-action protocol should seek to avoid.

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?

49. Our members have experience of one or other of the parties withdrawing at the pre-action correspondence stage under the protocol. This shows the protocol works. Our members have experience of one or other of the parties withdrawing later, which is regrettable, but does not, in our experience, happen very often. We have no experience, however, of "settlement" where that means a deal as distinct from one or other of the parties

withdrawing absolutely. We think this does not happen often, at least in the Chancery sphere, because the types of claim tend to be all-or-nothing issues; and because, in particular in the area of Revenue Law, HMRC's Litigation and Settlement Strategy tends to preclude it in any event.

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?

50. At present, in the experience of our members, all parties consider ADR. The pre-action protocol expects this.

51. In general, governmental decision makers have, in our experience, resisted ADR until referral to their solicitors, at which points strong defences are pursued or strong claims are not contested. We do not currently see that a more inflexible demand for ADR will add anything and would be concerned that it might cause delay. Because of the requirement to present evidence with the application for permission, it would not save much cost for the applicant party, either.

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?

52. Our members have occasionally had to deal with questions of standing, most often when representing intervenors, or appearing in cases where intervenors have sought permission to be involved. In our experience, the Courts deal with these issues sensibly. A recent example was providing permission for a public policy intervention in written form only in the Supreme Court, ensuring the issues were aired but avoiding the need for extended court time for the principal parties.

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