Response to the Independent Review of Administrative Law Panel's Call for Evidence

Bindmans LLP

"Proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary.

These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly…"

> Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Consultation Paper CP12/10, November 2010), para 4.16

"Judicial review allows individuals, businesses and others to ask the court to consider whether, for example, a government department has gone beyond its powers, a local authority has followed a lawful process or an arms-length body has come to a rational decision. As such, it is a crucial check to ensure lawful public administration."

> Chris Grayling, former Lord Chancellor, Foreword to *Ministry of Justice, Judicial Review, Proposals for Further Reform* Cm 8703, September 2013

A. Introduction

1. The Panel ('the Review Panel') charged with undertaking the Independent Review of Administrative Law ('the Review') has issued a Call for Evidence on:

> *"how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally. The panel is particularly interested in any notable trends in judicial review over the last thirty to forty years. Specifically, the panel is interested in understanding whether the balance struck is the same now as it was before, and whether it should be struck differently going forward."*

2. The Review Panel has said it is particularly interested to hear from *"people who have direct experience in judicial review cases, including those who provide services to claimants and defendants involved in such cases"* including *"professionals who practice in this area of law".*

3. What follows is Bindmans LLP's response to the Call for Evidence. Our firm specialises in judicial review work and has done so throughout its 46-year history. It is part of our core identity, one of the things we are best known for and we are considered to be one of the leading firms in the field. Four departments of the firm (Public Law, Actions Against Police and State, Crime and Media) litigate judicial review claims and others are occasionally involved in judicial review

claims that relate to their specialisms. We handle a very broad range of judicial review cases at all levels of the UK court system and cases that progress to international courts, in particular the ECtHR and CJEU.

4. Most of our judicial review litigation work is for claimants, but we also regularly act for interested parties, including local authorities, and interveners. We also sometimes act for some defendants such as schools, regulators and, recently, the UK's National Standards Body, BSI. Mindful of the Review Panel's request for submissions to be evidence based, the 30 examples given below to illustrate the points we make are all cases where we have acted for a party and we have taken care to ensure they are broadly representative of our work.

5. Bindmans' response to the Review Panel's Call for Evidence draws directly on our experience:

   (1) as advisers on the legality of public authority decision-making and potential judicial review claims;

   (2) as litigators undertaking:

      (a) judicial review in well-established sub-specialities such as immigration, community care, education, mental health, housing and inquests including for claimants with Legal Aid but also those funding their cases privately;

      (b) a number of commercial and regulatory judicial review claims; and

      (c) public interest litigation i.e. judicial reviews affecting large numbers of people on issues where there is not a developed body of case law such as access to justice (e.g. around legal aid provision), the parameters of compensation schemes, school transport provision, freedom of assembly and speech, data sharing and retention and press regulation along with legal issues connected to Brexit and Covid-19;

   and:

   (3) as professionals who seek to ensure judicial review is used responsibly and appropriately - for example, we regularly train other lawyers on judicial review; several of our solicitors are involved on a voluntary basis on Law Society committees that are concerned with judicial review; others are on the boards of charities and NGOs with an access to justice focus; one of us was a member of a judge-led working group on the Judicial Review Pre-Action Protocol, Legal Services Commission and Legal Aid Agency's panels dealing with funding for public interest cases and the 'Westgate costs group'; and another was a member of the Civil Justice Council. In relation to the Review specifically, our solicitors have participated in: a Law Society expert forum; the claimant firm discussion with the Review Panel organised by the Law Society; the Public Law Project's 'expert group' seminars; and the Public Law Solicitors' Association discussions. All of this has enabled us to test our thinking on the Review with peers, whether they act for claimants or defendants or, like us, for both.

6. Our response to the Call for Evidence can be summarised as follows:

(1) The starting point for the Review is highly problematic. Most troubling is the false premise that there is a *"balance"* to be struck between citizens' *"interests"* in *"being able to challenge the lawfulness of executive action"* in one pan of the metaphorical scales and, in the other, *"the role of the executive in carrying on the business of government"* – the reality is that accountability through judicial review (to citizens but also to organisations and other state bodies) is necessary for the proper discharge of executive and governmental functions (see paras 8 to 15 below). We also do not agree that there has been a general trend *"over the course of the last 40 years at least"* that has broadened the focus of judicial review from the existence of powers to the manner of their exercise.

(2) The Review Panel faces an impossible logistical challenge if it is to reach sound evidence-based conclusions in the set timeframe on the issues raised by the Review's Terms of Reference – the best it can do is to consider the limited evidence it will be able to gather alongside that which has been analysed in the past by others with more time and greater resources and assess whether their recommendations remain useful (see paras 19 to 24 below).

(3) That said, there is no case for significant reform - in general, judicial review works very well for those who can access it with properly funded specialist advice and representation (see paras 25 to 32 below).

(4) However, judicial review has a significant shortcoming as a remedy in that relatively few citizens and small organisations can access it because of the costs and costs risks (see paras 36, 54 to 62 below) – that aside, costs are not a problem and there is strong evidence that costs are reasonable and proportionate, given what is at stake and the complexity of cases (see paras 63 to 66 below).

(5) There is no case for general codification in the interests of clarity or otherwise (see paras 41 to 49 below).

(6) Judicial review procedure has been independently examined carefully a number of times in the last decade and sensible reforms have been recommended – in particular, on costs shifting, Legal Aid eligibility, candour and document exchanges between the parties and the Court – these should be implemented if, as we believe is the case, there remains an evidence base for them (see paras 52 to 62 below).

(7) Multiple filters, checks and balances already exist to deal with delayed and unmeritorious claims and they work well – there is no evidence-based case for further reforms of this kind and changes would be counter-productive (see paras 50 to 51 below).

(8) Remedies are appropriate and dealt with by the Courts in a manner that is sensitive to the realities of government (see paras 67 to 70 below).

(9) Settlement is common, pre- and post-issue, and part of the way judicial review works well, but ADR could be used more in certain cases were there a cultural shift in some public authorities (see paras 71 to 79 below).

(10) The standing rules developed by the Courts also work well and encourage efficient, responsible litigation by representative bodies – narrowing them would be counter-productive and inefficient (see paras 80 to 82 below).

B. Some concerns regarding the Review and the Call for Evidence

7. Before addressing the Call for Evidence, we need to set out some of the significant concerns we have about the approach taken in the Review. Our discussions with peers (see para 5(3) above) indicate these are widely shared by those who act for claimants and defendants alike.

The false premise

8. As noted above, our first concern is the premise on which the Review is based – that some form of balance needs to be struck between different interests of citizens on the one hand and those of government on the other. This premise is false.

9. Judicial review exists to ensure public authorities (and other bodies with public functions, in respect of those functions) are subject to the Rule of Law, just like individuals and private organisations. The *"constitutional function"* of a court determining a judicial review claim is to ensure that *"public authorities respect the rule of law"* (*AXA General Insurance Ltd and Others v HM Advocate and Others* [2012] 1 AC 868 at para 142 per Lord Reed). It *"requires that the laws enacted by Parliament, together with the principles of the common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive"* (*R (Cart) v Upper Tribunal (Public Law Project intervening) & Another* [2012] 1 AC 663 at para 64 per Lord Phillips). *"[T]here is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review"* (*Cart* at para 122 per Lord Dyson).

10. All British governments are irritated by judicial review from time to time (for example, David Blunkett when Home Secretary described himself as *"not a fan"*). But no British government has challenged the basic principle set out above and it is often restated by Government, for example in the consultations quoted at the start of this response and in the *Judge Over Your Shoulder* (2016) guidance to officials, to explain why judicial review is a vital part of the UK's constitutional settlement. It is easy to understand why: once the proper role of judicial review is understood, there is no 'balance' to be struck between the existence and availability of judicial review and effective government because, to be genuinely effective in a democracy, government must act lawfully and be accountable through the Courts if it is not. Unlawful decision-making can never be justified in the interests of 'effectiveness' in a democratic system.

11. Besides being a false premise at a principled, constitutional level, the idea of seeking a 'balance' between citizens' and government interests is unreal in practice for three main reasons.

12. First, in our experience, public authorities do not seek the freedom to act unlawfully and unaccountably; on the contrary, they take their responsibilities to act within the law seriously. When strong arguments are put to them that they have not acted in that way, backed up with a Court remedy to determine the matter definitively, they will often reconsider and settle (see paras 73 and 79 below). Doing so is efficient, effective and good government. There is no value to public authorities being free to maintain poor decisions they cannot defend or being perceived to breach the law with impunity; indeed it is counter-productive to public trust and confidence in government. If public authorities believe they have acted lawfully, they can explain that in pre- action correspondence and, if the proposed claim proceeds, to the Court. The costs of these initial steps are affordable for all public authorities (and far less than those a non-legally aided prospective claimant will incur at this stage). If permission is granted, public authorities will be required to justify their actions as lawful, or concede. None of this undermines good government.

13. Secondly, the availability of judicial review does not impede decision-making processes and only impacts the implementation of decisions in a limited, very temporary sense. Judicial review claims do not automatically halt, reverse or suspend decisions when threatened or issued. Public authorities may choose not to proceed with implementing decisions until judicial reviews are determined, but may press on and will only reverse their intended course of action if a claim is settled or succeeds at a full hearing. Interim injunctions may be sought but, in our experience, are fairly rare, the main exception being in the contexts of immigration removal or emergency housing and support where the impact of implementing the challenged decision is irreversible and/or very serious. The exceptions are conventional applications of the 'balance of convenience' test common to all forms of civil litigation.

14. Thirdly, judicial review is not primarily about citizens enforcing rights against public authorities as adversaries; at its most basic level, it is about public 'wrongs' and their obverse, the permitted, lawful use of power. The claimant may be another public authority rather than a 'citizen' and other public authorities will be involved in judicial reviews as interested parties when the outcome directly affects them. All – citizens, organisations and public authorities alike – have an interest in knowing what the law is where there is a significant dispute and room for doubt. Judicial review claims may not often be welcomed, but all responsible public authorities appreciate that it comes hand in hand with their responsibilities.

Example 1: *R (NMA) v PRP* [2017] EWHC 2527 (Admin)

The NMA, a press representative organisation, was concerned that IMPRESS, an organisation represented by this firm, had been unlawfully recognised as a Leveson-complaint press regulator by the Press Recognition Panel ('PRP'), the Royal Charter body established by Parliament to recognise independent regulators. It challenged the PRP on procedural fairness and rationality grounds, but its recognition decision was upheld by the Divisional Court. No individual interests were involved. The case was important to conclusively establish the legality of the PRP's decision (and so IMPRESS' mandate to regulate those who wanted to

join its voluntary scheme). No 'rebalancing' of judicial review could occur without denying all three parties access to the Court to resolve the dispute.

Example 2: *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6

Schedule 7 of the Terrorism Act 2000 loosely defined 'terrorism' and allowed seizure of journalistic material at airports that related to it. This was challenged by Bindmans' client David Miranda who had material seized when traveling to meet his spouse. Allowing the judicial review, the Court of Appeal went on to hold that police powers under Schedule 7 are incompatible with Article 10 ECHR because they did not provide effective protection for the basic rights of journalists and those who work with them. The judgment also provided an important clarification of the definition of terrorism, overturning the High Court's ruling that acts of lawful political activity that unintentionally and inadvertently endanger life may constitute terrorism. Parliament amended the law to ensure it aligned with the UK's ECHR commitments and the Police had critical guidance on the scope of the concept of terrorism.

Example 3: *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36

The Secretary of State rejected parts of an Ombudsman's report that had found government literature about the security of company pension schemes misleading. We acted for a group of claimants who challenged the reasons given for the rejection decision which both the High Court and Court of Appeal held were irrational. Nothing compelled the Secretary of State to follow the recommendations, but once the report was reconsidered on a lawful basis and key findings of maladministration were accepted, this prompted a decision to significantly widen a compensation scheme and award £13 billion in compensation.

15. None of these claims impinged on the *"role of the executive"* or any other public authority properly or effectively *"carrying on the business of government".* They simply, but critically, determined what was legally permissible. The net result in NMA was that a regulator, established in line with arrangements proposed by the Government, was left free to regulate. In *Miranda* and *Bradley* the Government was left, entirely appropriately, to decide the appropriate way to remedy the legal problems the judicial review claims had exposed.

No blurring of any historic distinction

16. Note to paras 2 and 3 of the Terms of Reference states:

> *"Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last*

forty years (at least), the distinction between "scope" and "exercise" has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end ("scope") to all of the conventional [JR] grounds and proportionality at the other ("exercise")."

17. We expect specialist academics and judicial respondents to the Call for Evidence will have much to say on this, but from our perspective as specialist practitioners we do not agree with the assertion that there had been a blurring of any such historical distinction by the Courts or otherwise. 'Judicial review' was not given its own set of Court rules until 1977, but the Courts have always been willing to examine the unlawful exercise of power. In *Proportionality, Rationality and Review* [2010] NZLR 265, Professor Craig identifies rationality review cases extending back for 250 years. Going back 100 years, *R v Speyer* [1916] 1 KB 595 concerned the exercise of power to expel Privy Councillors from their office, *Roberts v Hopwood* [1925] AC 578 concerned the taking onto account of irrelevant considerations and *Board of Education v Rice* [1911] AC 197 concerned the duty of decision makers to act in good faith, of which one element was giving those affected by their decisions a procedurally fair opportunity to be heard. None of these cases were controversial, less still, heretical when they were decided. Proportionality is identified by the Terms of Reference as being at the extreme end of a 'scope-exercise' spectrum. But proportionality is a long-established common law doctrine seen, for example in sentencing decision-making. The Courts have not been willing to extend it to all public law decision-making, however, demonstrating that 'judicial mission creep' is more myth than reality.

Example 4: *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69

Scots Guards were deployed to Selangor, then part of colonial Malaya, to help tackle insurgent activity. On arrival at Batang Kali village in December 1948, they surrounded it, questioned villagers at gunpoint and, the following morning, killed all but two of the unarmed male inhabitants. The killings were described as a military victory at the time and the official account that they were necessary and lawful has been maintained for decades, despite six of the soldiers involved confessing to murder in 1970 and further evidence of culpability and emerging over the next 40 years. We argued that human rights law and the common law both demanded an adequate investigation in the form of a public inquiry. The Supreme Court was invited to accept that proportionality was a free-standing ground of judicial review and to hold that the refusal of the inquiry was disproportionate, irrational and an ECHR breach. It declined to do so, despite grave concerns about what had happened (Lord Kerr, described the case as *"shocking"* adding that the *"overwhelming preponderance of currently available evidence"* showed "*wholly innocent men were mercilessly murdered and the failure of the authorities of this state to conduct an effective inquiry into their deaths";* Lord Neuberger, commented *"the evidence which first came to light in late 1969 and early 1970 plainly suggested that the Killings were unlawful"*).

18. The Courts have been empowered to consider issues of proportionality and human rights breaches beyond those recognised in the common law, but that power has arisen through their proper constitutional function of interpreting and enforcing statutes that grant rights, most significantly the European Communities Act 1972 and Human Rights Act 1998. That power has been conferred by Parliament, not as a result of judicial 'line blurring'.

The Review Panel's logistical challenges

19. The next difficulty for the Review Panel is that it has resolved to take an evidence-based approach, which is commendable, but has been permitted hardly any time and resources to gather and analyse evidence in comparison to past reviews of this kind. They include, most significantly:

    (1) the JUSTICE/All Souls Review, *Administrative Justice, Some Necessary Reforms*;

    (2) the Law Commission review, *Administrative Law: Judicial Review and Statutory Appeal*;

    (3) the Bowman review*, Review of Crown Office work*;

    (4) Lord Justice Jackson's first costs review, *Review of Civil Litigation Costs: Final Report*; and *Supplemental Report on Fixed Recoverable Costs*;

    (5) the Bingham Centre review, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*;

    (6) the Government's last review of judicial review, *Judicial Review – proposals for further reform*, undertaken in 2013 to 2014, which had the express aim of *"tackl[ing] the burden that the growth in unmeritorious judicial reviews has placed on stretched public services whilst protecting access to justice and the rule of law"*;

    (7) the Bingham Centre review, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*; and

    (8) Lord Justice Jackson's second costs review, *Supplemental Report on Fixed Recoverable Costs*.

20. Notably, having considered the evidence they gathered over many months and several years in some cases, none of these reviews recommended radical changes to judicial review of the kind which the Review's Terms of Reference suggest are now under consideration. What the two most recent reviews have recognised are the costs impediments to accessing judicial review and the need for some procedural streamlining. Thus far Lord Justice Jackson's proposals for addressing the first of these problems have not been acceptable to the Government (in fact, its 2019 consultation response states, without giving comprehensible reasons, that there is no access problem – see para 60 below). The Bingham Centre's recommendations have not been taken forward either. We would urge the Review Panel to look closely at both along with the 2017 recommendations of the Bach Commission, which touched on judicial review

(http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf).

21. What is also strikingly absent from any of the reviews undertaken over the last 30 years is a body of evidence that indicates a need for radical change to judicial review and nor is there such a body of evidence now.

22. Numbers of judicial reviews certainly are greater than at the time of the JUSTICE/All Souls Review, but they fluctuate with legislative and policy trends and are currently falling. To properly understand trends in judicial review and establish whether the number and type are problematic, the Review Panel would need to look closely at decision-making, through to advice where available, cases litigated, settlements and outcomes following full hearings in a sufficiently large sample set. That is not possible given the time and resource constraint on the Panel's work creating a real risk of making reform proposals based on anecdote and atypical examples.

23. However, at the highest level, judicial review numbers tend to depend upon:

    (1) the complexity of administrative systems;

    (2) the number and quality of decisions made by public authorities;

    (3) whether there are adequate appeals mechanisms available; and

    (4) access to adequately funded specialist advice and representation (which can ensure unmeritorious cases are not brought, as well as providing access to justice for those with strong cases).

24. None of these factors relates to the grounds available for claims or to the Courts themselves.

Seeking solutions for unidentified problems

25. A further difficulty is the lack of clarity of the problems the Review is seeking to address. If there is a lack of 'balance', how is that manifesting itself? It is hard to imagine that "*the right balance"* is synonymous with a particular number of judicial reviews, so it possibly has to do with whether and how judicial reviews succeed. If that is the underlying problem, what is the *"right"* success rate? In our experience, most judicial review claims we are involved with as claimants' representatives, threatened or issued, succeed either through settlement at pre- action or post-issue stage, or at trial. Permission is very rarely refused. We see that as evidence of judicial review working well; the right cases are being taken which mainly lead to a positive benefit for the claimants we represent. Not all cases will succeed because outcome depends to some extent on the judge, given judicial review is discretionary, and on developments over the life of a case.

26. That said, in the discussion organized by the Law Society, the Panel did helpfully identify two instances of what they saw as potential problems with judicial review: claims being pursued

opportunistically for purely commercial or campaigning objectives rather that to seek the determination of a genuine legal question. We are grateful for the opportunity to address these concerns and respond as follows:

(1) we think a 'pure motive' test would be impossible to formulate and enforce – the reality is that claimants tend to have several overlapping motives, with seeking a lawful decision overwhelmingly the dominant one;

(2) the standing, manifestly without foundation and permission tests exist to prevent abuse of the process – a case that surmounts these hurdles is one which it is proper for the Court to determine, regardless of claimant motives;

(3) however, we can see some force in an argument that the time between an unmeritorious case being issued and permission being rejected may, in some cases, be problematic for public authorities – given this, there may be some scope for a minor procedural amendment permitting an application for accelerated consideration of applications for permission where a defendant can demonstrate that a delay in a permission decision would be detrimental to good administration and the rights and interests of others.

C. Comments on the questions asked in the Questionnaire for government departments and other public bodies (Call for Evidence, Questions 1 and 2)

No serious impediment to the proper or effective discharge of central or local governmental functions

27. The questionnaire the Review has sent to government departments and other public bodies ('the Questionnaire') begins:

> *"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?"*

28. This pointed question is then followed by a list which approximates to the main grounds of judicial review, followed by some features of the procedure.

29. This is a suboptimal approach to evidence-gathering from public bodies for several reasons. For one thing, the invitation is premised on the listed 'aspects' of judicial review grounds and procedure representing potential impediments to the discharge of governmental functions, but there is no invitation to say how they might be helpful. The omission of the existing mechanisms that empower the Court to deal with weak claims and exercise care when granting remedies in successful ones suggests that they are not functioning as they should. Asking the question at the same time as asking other organisations and individuals to comment makes it difficult to respond to any evidence government departments provide.

30. Our view, based on our experience, is that all the grounds of judicial review identified are proper bases on which the exercise of power should be tested by those with a sufficient interest

to put the matter before the Court and not impediments to good government in any way. This point can be illustrated with further examples, using the list of grounds in the Questionnaire.

Example 5: *R (Baroness Jones & Others) v Metropolitan Police Commissioner* [2019] EWHC 2957 (Admin) - judicial review for error of law ('mistake of law' in the Call for Evidence)

We represented seven Claimants in an urgent judicial review of the Metropolitan Police's order under s.14 Public Order Act 1986 on 14 October 2019 which purported to bring the Extinction Rebellion environmental protests in London to an immediate end. Hundreds of protesters had been arrested for breach of the s14 order. The Claimants argued that s14 POA 1986 only enabled the police to manage an ongoing protest at a specified location by imposing conditions on it, not to ban protests across different locations before they had taken place. The Divisional Court agreed with the Claimant's arguments and quashed the s.14 order. The Police did not appeal.

The case was important to clarify Police powers under the Public Order Act and so ensure that any limitation on the democratic right to protest is in accordance with the law. It also promoted the proper discharge of public functions in a very practical sense: up to a thousand individuals had been arrested and were facing prosecution for having breached an order unlawfully made; which had the potential of serious consequence not only for the individuals but also the police and court service who were investing a very significant amount of resources and money in bringing individual prosecutions on an unlawful basis.

Example 6: child 'J' - judicial review for error of law ('mistake of law' in the Call for Evidence)

J suffered a severe stroke and as a result needs assistance to carry out everyday tasks, including shopping and caring for her 11-year-old son. J previously received support from her local Council under the Care Act 2014, but in 2018 she was told that her immigration status meant she had to pay for her care in future, which she could not afford. Her support worker continued to help voluntarily when she could, as did members of her Church. A pre- action letter was sent explaining that eligibility for community care services did not depend on immigration status. The Council immediately agreed to fund five hours of essential care per week. The Council's mistake of law, which had disabled it from supporting a very vulnerable woman, was corrected thanks to the threat of judicial review.

Example 7: *R (Diocese of Menevia and others) v Swansea City Council* [2015] EWHC 1436 (Admin) - judicial review for linked mistakes of fact and law

Swansea City Council decided to amend its school transport policy by withdrawing free buses that served the county's six faith schools whilst maintaining those that served 12 Welsh language schools. Instructed by the local Catholic Diocese, one of the schools and a child who could not attend the school with his siblings because of the policy, we gathered and analyzed demographic data from analyzed the county, identifying that the faith schools' pupils were far more likely to be from Black and Ethnic Minority ('BAME') backgrounds than the average Swansea child, whereas the Welsh language school pupils were far less likely to be of BAME backgrounds than the average child. Using this analysis, we demonstrated that the Council's view its decision had no discriminatory effects was misconceived and that, in law, it discriminated indirectly without justification. Swansea's policy was withdrawn and the free school transport restored. Another Welsh local authority decided to adopt a similar policy, but was successfully challenged before it was implemented and a further authority that had done so was pressed to review its position and withdrew its policy. The net result was the maintenance of free school transport to faith and Welsh language schools on an equal basis throughout most of Wales.

Example 8: child 'R' – threatened judicial review for mistake of fact

'R' was a looked after-child with a very minor conviction. His nationality application was refused for failure to meet a 'good character' requirement, but this applied to adults and only when the conviction was in the year immediately before the application. We sent a pre-action letter, the Home Office reconsidered, and nationality was granted. Here the threat of judicial review exposed a fundamental factual error in this decision.

Example 9: 'N': judicial review for procedural impropriety

N was an experienced teacher who decided to undertake supply work because of his caring responsibilities. The local authority maintained an extra-statutory vetting policy and decided to debar him from supply teaching on learning of an allegation he had been rude to a former pupil. He challenged the decision on the basis that he ought to have been given a fair opportunity to meet the allegations and the claim was conceded post-permission. It came to light that the allegation had been made by a pupil retaliating against a disciplinary decision, the authority reconsidered and he was allowed to work again. The Council's unfair approach, which had deprived N of his livelihood, was exposed through judicial review.

Example 10: *Duty Solicitors Scheme Litigation* HT-2015-000373 - judicial review for procedural impropriety

The largest ever UK procurement competition was launched to select a small proportion of solicitors' firms to deliver certain Criminal Legal Aid services in future, resulting in decisions to cease contracting with most firms. Proceedings were issued in the Technology and Construction Court for individual firms, as was a parallel judicial review challenging the overall procedural fairness of the decision-making system given the high number of perverse decisions generated. The claims contended that there had been inadequate training for bid markers, insufficient time allowed for assessment and a confused process of moderation that unfairly penalised firms that bid in multiple areas. The individual errors within the process of which Bindmans is aware included a failure to properly transcribe the correct marks (which cost at least one Bindmans' client a contract), copying markers' comments between bids despite substantial differences between them, and a lack of geographical awareness regarding the location of Ipswich. Following disclosure, the Lord Chancellor acknowledged the procurement had been fundamentally flawed and abandoned it.

Example 11: *R (RD) v Worcestershire County Council* [2019] EWHC 449 (Admin) - judicial review for legitimate expectation breach

We acted for four children with significant disabilities and support needs in respect of the withdrawal of 'Portage' care services. The decision to withdraw the services had been premised on an assurance that any needs for alternative support would be identified, a transition plan prepared and the impact mitigated in full prior to its cessation and therefore no challenge to the decision was pursued at the time. No such transition plan was prepared in advance of the cessation of the services. The Court found that this had breached the Claimants' legitimate expectations and that the Council was therefore required to undertake an assessment of needs and prepare such a transition plan to ensure relevant needs were met. In the absence of the doctrine of legitimate expectation, there would have been no means of forcing the Council to fulfil a promise it had made specifically as a condition of its decision.

Example 12: 'Z' judicial review for legitimate expectation breach

Our client suffered from a number of serious underlying medical conditions (including Tuberculosis) and medical evidence indicated that his detention using immigration powers would continue to have a negative impact on his physical and mental health. Notwithstanding this, the Home Office continued to detain him and failed to apply its own 'Adults at Risk' policy, even after the Covid-19 lockdown that made removal impractical. We issued an application for an expedited judicial review and applied for an urgent interim relief

hearing, which took place on 6 April 2020. At the hearing, having been granted permission for an expedited judicial review, the Judge stated *"the claimant has established a strong prima facie case that his detention is unlawful".* Shortly after, the Home Office reconsidered its position and informed us that our client would be released on immigration bail.

Example 13: ***R (Law Society) v Lord Chancellor*** **[2018] EWHC 2094 (Admin): judicial review for *Wednesbury* unreasonableness (irrationality) and procedural impropriety**

Our client, the Law Society, challenged a decision made by the Lord Chancellor to introduce a 40% cut to the maximum number of pages of prosecution evidence ('PPE') that counted for payment of criminal defence solicitors. In practical terms, the cut meant a huge amount of work on the most complex Crown Court cases would be unremunerated as the Legal Aid Agency expected precisely the same amount of work to be done as before. This was the first occasion in which a cut of this kind had been made to Criminal Legal Aid. Allowing the judicial review, the Divisional Court's judgment was highly critical of the way the cut decision was made. Consultees were not told about or shown an analysis of costs trends officials had prepared for the Lord Chancellor to answer the *"crucial question"* of whether a cost judge's decision had caused a substantial increase in Legal Aid costs and undermined the policy intention of the scheme. When examined by an expert, the analysis was shown to be so fundamentally flawed as to make reliance on it irrational. The Court commented *"we see no escape from the conclusion that the LAA analysis was vitiated by methodological flaws and that no reasonable decision-maker could reasonably have treated the figure of £33m [of increased cost] produced by that analysis as an estimate of increased expenditure… on which reliance could reasonably be placed".* The Court also found the consultation was procedurally unfair. *"No reason - let alone a good reason – has been given for not disclosing during the consultation process the LAA analysis and its results..."*, concluding *"the failure to disclose this information was a fundamental flaw in the consultation process which made it so unfair as to be unlawful."* This case exposed irrationality and procedural unfairness in a decision with serious consequences for the functioning of Legal Aid in the most serious criminal prosecutions. It is also highly significant to the duty of candour: see paras 32 and 35 below.

Example 14: *R (Good Thinking Society) v the Professional Standards Authority ('PSA')* - judicial review for *Wednesbury* unreasonableness (irrationality)

This claim concerned the PSA decision to reaccredit the Society of Homeopaths as an approved professional body despite some of its member homeopaths falsely claiming that toxins from vaccines are responsible for autism and that a form of homeopathy known as CEASE therapy could be used to 'cure' the developmental disorder, a position strongly criticised by the NHS. Permission was granted for the claim to proceed, prompting the PSA

to take a fresh decision qualifying its accreditation and requiring the Society to take firm action against proponents of CEASE therapy.

Example 15: *R (Eisai and another) v NICE* [2007] EWHC 1941 (Admin): judicial review for failure to take into account relevant considerations or taking into account irrelevant considerations

We acted for the Alzheimer's Society, which became an interested party when two pharmaceutical companies challenged a National Institute for Clinical Excellence ('NICE') rationing policy for new drugs that inhibited the progress of Alzheimer's. The Society was concerned that the memory and language tests to be used by GPs making decisions under the policy were too rigid and indirectly discriminated against people with learning disabilities and those with less than fluent English, breaching the public sector equality duty ('PSED') to have due regard to the need to avoid unlawful discrimination, an argument not made by the Claimant drugs companies. NICE had hitherto been considered near-impossible to challenge because of the highly technical and expert nature of its decisions, but judicial review was granted because mandatory equality considerations had not been grappled with and the policy was declared unlawful. We developed, and succeeded with, similar arguments in the first ever PSED case, *R (Elias) v Ministry of Defence* [2006] EWCA Civ 1293. *R (Harris) v London Borough of Haringey* [2010] EWCA Civ 703, was the first in the planning context, *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin) the first concerning public transport, and *R (E) v JFS* [2009] UKSC 15, the first concerning schools admissions. All succeeded, advancing equality not just for the claimants but for many others affected by similar decisions.

Example 16: child 'A' - judicial review for failure to take into account relevant considerations or taking into account irrelevant considerations

'A' was a 13 year old child with an education, health and care ('EHC') plan maintained by his local authority, but was only being provided with 90 minutes of education per week at a school totally unsuitable for meeting his extremely high anxiety levels, depression, ADHD and autism. The school itself maintained it was unsuitable. Judicial review proceedings resulted in a court order for an increased package of tuition, arrangements for transfer to a special school and a plan to address A's social isolation. This had a massive positive effect on A's quality of life.

Example 17: *R (Palestine Solidarity Campaign) v Secretary of State for Housing Communities and Local Government* [2020] UKSC 16 - another ground of judicial review

We acted for the Claimants in this case in which the Court confirmed the need to ensure that a statutory power is exercised for a proper purpose. In that case, a majority of the Supreme

Court concluded, consistent with the Administrative Court, but contrary to the Court of Appeal, that the Secretary of State had acted for an improper purpose when introducing guidance preventing Local Government pensions schemes from making disinvestment decisions contrary to UK foreign and defence policy. In issuing such guidance, Lord Wilson and Lady Hale found that the Secretary of State was probably acting under the misapprehension that the scheme administrators were part of the machinery of state, when they are, in fact, quasi-trustees required to act in the best interests of their members. The case therefore reinforced the important distinction between the Executive and Parliament, with the Executive required to act for purposes consistent with their statutory powers. It also provided useful guidance on the roles and responsibilities of the scheme administrators for the Local Government Pension Schemes, one of the largest pension schemes in Europe.

Example 18: child 'A' - judicial review for lack of reasons

In this case we were instructed to challenge the failure of the Home Secretary ('SSHD') to grant indefinite leave to remain ('ILR') exceptionally to a family. The SSHD has a policy which sets out the type of criteria when an early application for ILR might be granted. We argued it applied where one child of the family, A, had suffered catastrophic brain injuries due to NHS negligence at birth, leaving him severely disabled. The SSHD claimed there were no exceptional reasons to consider granting ILR, but failed to provide any specific reasoning why not. The claim argued there was an unlawful lack of reasons along with a mistake of fact on the relevance of the policy and a lack of any regard for the child's best interests. In response to the service of the proceedings, the SSHD withdrew the decision to refuse to grant ILR and agreed to reconsider and make a new, reasoned decision applying the policy.

31. It cannot be said that judicial review *"seriously impede[d] the proper or effective discharge of central or local governmental functions"* in any of this series of representative cases. They illustrate the considerable value of judicial review in helping to ensure good and lawful decision-making. We do not accept there is any case, less still an evidence-based one, for restricting the remedy to certain grounds only or to certain contexts (beyond the principled limitations already developed by the Courts: see para 33 below).

The importance of candour

32. Question 1 of the Questionnaire continues by asking a series of questions about whether procedural features of judicial review impede government functions. We address standing, costs and time limits below at paras 80, 52 and 50.

33. However, there are two issues raised expressly in the Terms of Reference that are conveniently dealt with here: first, candour and, secondly, procedural streamlining.

34. As regards candour, the Terms of Reference indicate there will be a focus on:

"4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular… (b) in relation to the duty of candour, particularly as it affects Government"

35. The duty of candour has been a feature of judicial review throughout modern times. We can see some merit in it being codified (for example in the CPR), given its importance, but the case law is clear (see in particular *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244 at para 53, R *(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at paras 19 and 20). What is also clear are the practical benefits of the duty in its current form:

(1) It applies to claimants, defendants and interested parties equally, the ultimate aim being to ensure the Court has all the relevant information to determine the issue of law that arises. To avoid inequality, any dilution or qualification of the defendant's duty would need to have the same effect on other parties, with the risk that too little was put before the Court (because parties had withheld what was relevant) or too much (because a normal civil disclosure approach ended up being taken, with relevant material made inaccessible by its disclosure as part of a far greater disclosure exercise).

(2) Defendants need to be reminded of their candour obligations from time to time, sometimes firmly. However, specific disclosure applications are extremely rare. The Law Society case – Example 13 - involved several requests for disclosure being made and, when it became apparent some material was still being withheld, a letter warning that an application for disclosure might need to be made. The analyses of costs trends and associated advice to Ministers, once disclosed, revealed the fundamental failure to consult properly. Once the analysis was examined, its irrationality was exposed. This is not uncommon in our experience.

Example 19: *R (E and others) v Chief Constable of Kent* CO/10579/2008

Some three thousand five hundred stop and searches were carried out in August 2008 at the perimeter of a protest near Kingsnorth power station that took the form of a climate camp on farmland with the owners' consent. A test case was brought by 11 year old twins who were attending their first political event along with veteran campaigner Dave Morris. Kent Police maintained they had no policy and that searching officers had individual suspicion to justify each and every search, until the day of the hearing when the existence of a secret, 'Police eyes only' briefing document known as 'Slide 18' was belatedly disclosed. Slide 18 instructed officers to search every protestor. The Police then offered to concede the claim, but the Divisional Court considered what had happened needed to be marked with a formal Order and went on to rule that the searches had not been lawful and had breached the Claimants' privacy and protest rights under Articles 8, 10 and 11 of the Human Rights Act 1998. The case was the first

domestic one following *Gillan v UK* to hold that privacy rights are breached by a police search.

(3) Disclosure is almost always illuminating and helpful. Ideally it happens at the pre- action stage (as the protocol and the 2010 *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceed*ings anticipates should happen). This enables a proper, fully informed view to be taken on whether to proceed with the claim.

(4) Only in the very rare instances where a public authority is required to produce a complete, comprehensive set of reasons which are the sole focus of the judicial review is disclosure less likely to be significant - and even then it can be.

Example 20: *R (Georgiou) v London Borough of Enfield* [2004] EWHC 779 (Admin)

This planning judicial review concerned a proposed development in a congested area of North London near a school. Our client was a member of a local action group and brought a claim on various bases. During the proceedings, disclosure revealed first that a councillor who had cast a critical vote approving the development appeared biased and secondly that junior planning officers' concerns had been excised from a report that went to the Planning Committee. Bias and failure to produce an accurate report were two of the bases on which the claim was allowed. Neither flaw was apparent from the statutory reasons produced by the Committee and were only revealed because of the duty of candour.

Procedural streamlining

36. There are ways in which procedural improvements could be made which would save time and costs without damaging access to justice. Detailed proposals to this end were set out in the 2014 Bingham Centre for the Rule of Law report, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*. Disappointingly, the proposals made there have not been taken forward. The reasons are not clear: costs savings could be made as recommended by eliminating procedural steps that do not add value proportional to their cost and incentivising cost-efficient behaviour. In particular, we see value in:

(1) certification by claimants and defendants or their representatives in Claim Forms and Acknowledgements of Service respectively that they understand and have complied with their candour obligations;

(2) an entitlement for claimants to file a short reply to Summary Grounds of Resistance so the Court is properly informed;

(3) a presumption that permission stage costs will be awarded against defendants that contest permission in cases where it plainly should be granted (we suggest a 'manifestly arguable' test); and

(4) a single 'defence to judicial review claim' being required either at permission stage or following permission, rather than Summary and Detailed Grounds of Resistance, which tend to be highly duplicative.

Impact on decision making

37. Questions 2 and 3 of the Questionnaire ask:

> *"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?"*

and:

> *"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?"*

38. Our experience, based on sometimes acting for defendants and having sight of disclosed decision-making materials and witness statements in hundreds of litigated claims is that decision-makers' ability to make sound decisions is enhanced by judicial review, not impeded and there are no compromises undermining effectiveness.

39. In particular:

(1) knowing a decision may be scrutinised by a court prompts decision-makers to be more careful, test their thinking, consult where appropriate, identify when they need expert assistance (whether technical expertise or proactive legal advice) and record their reasoning;

(2) decision-makers are particularly conscious that failures to undertake mandatory statutory assessments, such as environmental impact assessments, community care assessments or analyses to comply with the PSED, can easily flaw decisions, prompting them to discharge these duties properly;

(3) receiving a pre- action letter prompts most public authorities to seek legal advice and reconsider with the benefit of it, often leading to poor decisions being quickly reversed;

(4) as discussed above at para 12, public authorities do not want to act unlawfully. Many decisions are not clear cut and the correct legal answer may be debatable. Public

authorities will often litigate a case when they are unsure to secure the definitive guidance of the Courts.

40. The risk of costs does not materially impact on public authority decision-making. Cases will often be defended where the consequences of conceding would cost little or nothing. We see this as a further evidence of public authorities wanting to be sure their decisions are lawful.

D. Codification (and scope of judicial review) (Call for Evidence, Questions 3 and 4)

41. Next, the Call for Evidence asks:

> *"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?"*

42. Judicial review is based on the common law, but significant parts of the process are already codified in statute and the Civil Procedure Rules ('CPR'), consistently with other forms of civil litigation. At that level, codification is helpful.

43. However, we see no good reason to attempt to codify further. The *Judge Over Your Shoulder* (2016) guidance and *Administrative Court Guide* (2020) set out, respectively and reasonably accessibly, summaries of judicial review principles and procedure. These span 104 and 153 pages respectively. There is no practical way this information could be condensed into a statute in a way that would make it clearer so as to improve the process. There is no avoiding the fact that judicial review is a complex specialist area of the law and litigation calls for properly funded specialist advice and representation. We agree fully with Professor Elliot's points about the difficulties of meaningful (and so highly complex) codification and the lack of value in high level statements about the scope and purpose of judicial review in statute: see https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/. To the extent it changes anything materially, codification will lead to counter-productive satellite litigation and uncertainty.

44. The next, linked questions ask:

> *"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?"*

45. Broadly, we believe that the current limits on the scope of judicial review are appropriate: private acts should not be susceptible to judicial review, neither should government action purely on the international plane, nor acts and decisions of Parliament. The Courts should not use judicial review to examine questions that raise no public law issue, or which are beyond their constitutional competence.

46. Even for specialist practitioners, it is very rare indeed for a case to arise where there is serious doubt about whether or not decisions/powers are susceptible to judicial review at all; the

parameters are fairly clear from case law. We have, however, been involved in two recent cases where scope arguments have been made and each merits brief comment.

Example 21: *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 ('*Miller 1*')

We acted for a group of interested party citizens in this case who were permitted by the Court to play an active role in the proceedings to advance arguments that triggering Article 50 required Parliament's authority because it would cut down important EU law rights. These arguments were vindicated in the Divisional and Supreme Courts. *Miller 1* was controversial for many reasons, not least because it was said by the Government, and some commentators maintain, that the power to enter into and leave treaties was a non-justiciable prerogative power. However, that part of the Court's judgment was wholly orthodox: the prohibition on using prerogative power to abrogate rights was centuries old.

Example 22: *R (Wightman) v Secretary of State for Exiting the EU* [2018] 3 WLR 1965 (CJEU) and [2018] CSOH 61 (Court of Session)

This case involved acting for two 'parties affected' in the Scottish Courts and the CJEU, specifically MPs who wanted Parliament to be in a position to make an informed decision on whether it could revoke the withdrawal of the Article 50 notification Parliament had authorized following Miller 1 were there a likelihood of an early 'no deal' Brexit. The Government argued that the question was academic and so non-justiciable. The Courts disagreed, with the Inner House's Lord President, Lord Carloway, noting that the MPs sought *"a ruling on whether there is a valid third choice; that is to revoke the notification with the consequence, on one view, that the UK would remain in the EU. If that choice were available… members of the UK Parliament could decide which of three options was preferable. They could not only elect to reject the agreement because it was, in their view, a worse deal than having no agreement at all, but also because both the agreement or the absence of an agreement were worse than remaining in the EU"* (Inner House, para 7). The CJEU endorsed this: *"[t]he referring court states that those Members of the United Kingdom Parliament have an interest in the answer to that question of law, since that answer will clarify the options open to them in exercising their parliamentary mandates…."*

47. Both cases were, in our view properly in scope. No doubt they were intensely frustrating for the Executive, but they ensured Parliament was able to exercise and understand its proper constitutional role. There was no material delay to the exercise of executive power either; both were dealt with appropriately on a highly expedited basis.

E. Clarity (Call for Evidence, Question 5)

48. Question 5 asks:

> *"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?"*

49. For specialist practitioners, it is clear. It is very difficult for litigants in person to navigate and research suggests cases brought by them have a very low success rate at permission stage: see Sarah Nason, *Reconstructing Judicial Review* (Hart, 2016). We agree with the Public Law Project that the answer to this is to improve access to specialist advice and representation.

F. Time limits (Call for Evidence, Question 6)

50. Question 6 asks:

> *"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?"*

51. Yes, with qualifications. The 'promptly and within three months' time limit is intended promote legal certainty in a case-sensitive way. It is operated reasonably well by the Courts. There are, however, some difficulties that need to be addressed.

    (1) The truncated 14, 28 and six-week time limits in inquiry, most procurement and planning cases are too short and undermine the pre- action protocol significantly. Only in planning cases where we are instructed immediately after an adverse decision is there time for a meaningful pre- action dialogue and attempts at settlement. In general, clients are advised to press on and issue if they have a meritorious case of these kinds as any hesitation is likely to compromise their position. This results in needlessly issued claims which may be withdrawn later because the defendant satisfactorily explains its actions post-issue, or because it concedes having reflected on the claimants' grounds.

    (2) There is no facility to agree an extension of time for ADR, so claims are often issued protectively and this is then attempted.

    (3) The Court of Appeal held in *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286 that delays securing Legal Aid are not a good reason for delay in issuing judicial review claims. This impacts particularly harshly on vulnerable people who may be referred to lawyers some time into the three month longstop period and then have difficulty securing legal aid quickly. As the Public Law Project argues, there should be a presumption that, if Legal Aid is sought as quickly as possible and claims issued promptly once funded, time should be extended to accommodate delays on the Legal Aid Agency's part.

Example 23: the timing of the Gurkha case

We acted for a group of ex-Gurkha serviceman in respect of changes made to their pensions. Due to difficulties in obtaining legal aid and the complexity of the matter for the Defendants, we were forced to file outline proceedings within the three month period but before we had either had a pre-action response or obtaining full Legal Aid (being in the midst of an appeal against a refusal). The parties cooperated to agree a stay on proceedings while pre-action correspondence was concluded and then to allow ADR to take place. Legal Aid was ultimately granted and the parties held a roundtable meeting in which the Claimants were able to explain their concerns and correct some misconceptions about what they were seeking in conversation direct with the decision-makers. This led to the claim being conceded and withdrawn. Had there been greater flexibility over the time limits, significant costs could have been avoided.

G. Costs (Call for Evidence, Questions 7 and 8)

52. Question 7 asks:

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

53. No. The usual rule, as in civil proceedings generally, is that the loser pays the reasonable costs of the winner. Only in very exceptional circumstances is a winning party not awarded its costs (for instance, the Courts declined to award any costs in *R (Keyu) v Secretary of State for the Foreign and Commonwealth Office and another* [2015] UKSC 69, [2014] EWCA Civ 312 and [2012] EWHC 2445 (Admin) (Example 4)), recognising the importance of the claim being litigated.

54. However, the effect of the default rule on would be and actual litigants is unduly harsh and creates a serious access to justice problem recognised by Lord Justice Jackson in both his costs reviews. Our view is as follows.

55. In his 2010 Final Report Lord Justice Jackson came to the conclusion that costs reform in judicial review is needed and that *"qualified one way costs shifting is the right way forward"* (Part 5, Chapter 30, paragraph 4.1). He proposed that one way costs shifting should be *"qualified"* by reference to the rule that a losing claimant should be ordered to pay a sum which it is a *"reasonable"* for him or her to pay having regard to the financial resources of all the parties to the proceedings and their conduct in connection with the dispute to which the proceedings will relate. Subject to this qualification, defendants would meet their own costs, regardless of the outcome of the claim. Unmeritorious claims would be filtered out at permission stage, as now; claimants with properly arguable ones should not be deterred by the very considerable financial risks of losing. This was not in the public interest, Lord Justice Jackson concluded.

56. Subject to two caveats, we agreed with these conclusions.

57. The first caveat was, the assessment of what it is *"reasonable"* for a losing claimant to pay having regard to all the circumstances, the parties' resources and conduct would need to be made early on if the deterrent effect of the cost risk is to be mitigated meaningfully and it was difficult to see how this could be done. There is very little case law on the application of the legal aid cost shield, despite its vintage, making it difficult for would be claimants' representatives to advise on the risk at the critical time when a decision on whether to litigate is being made. It might be assumed that a client who has income and capital just above the legal aid eligibility threshold would end up paying very little, given that those who are eligible are very rarely ordered to pay anything towards opponents' costs, but what would it be "reasonable" for a person with UK average earnings (£26,500) to pay towards the costs of losing against a range of defendants with a very small regulator at one end of the spectrum and a Secretary of State at the other?

58. For this reason, we agreed with what was proposed in the Supplemental Report: that a fixed cap be set for those opting into the protective regime.

59. Secondly, there are cases, typically commercial judicial reviews brought by large companies and some planning cases, where the claimants are not deterred by the very considerable financial risks of losing because they plainly have adequate resources to litigate despite those risks and regardless of the outcome. It is not in the public interest for the state to bear the costs of eliminating a deterrent that does not actually exist for this small sub-set of litigants. There should be a mechanism allowing defendants to apply for qualified one way cost shifting to be disapplied to such cases by the permission stage judge. It might be appropriate for exempted cases of this kind to be subject to cost budgeting. However, it would be wrong to extend this exception to classes of case e.g. those where commercial interests are being litigated because that would maintain the present costs deterrent on small businesses and self-employed people pursuing meritorious claims.

60. For these reasons, we welcomed the *"modest"* proposals for an opt-in Aarhus costs regime in judicial review set out in the Supplemental Report (paras 3.1 to 3.6). We found the reasons given by the Government for not taking this forward perverse. It said in the 2019 consultation paper *Extending Fixed Recoverable Costs in Civil Cases, Implementing Sir Rupert Jackson's proposals*:

> *"As both costs capping orders and legal aid are available for JRs (as well as the 'Aarhus' rules for environmental claims), we do not consider there to be an access to justice issue in respect of non-Aarhus JRs. Extending cost capping increases the risk of less meritorious JRs coming forward with increased costs to the government and other public-sector defendants. We therefore do not propose to extend costs capping in this way, and are not seeking views on this proposal."*

61. Consultees were not invited to respond to these assertions. They are wrong for several reasons:

(1) There is an access to justice problem. Most weeks we advise people with potentially strong cases that it is likely to be impractical to pursue them, given the cost risk (and for a useful discussion of the wider problem see Tom Hickman, *Public Law's Disgrace* https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/).

(2) Costs capping orders and Legal Aid are available but only subject to tight criteria. Cost capping orders can only be sought in public interest litigation and even then are problematic as they can only be granted post-permission after a significant cost risk has arisen. Legal Aid is subject to a strict means test.

(3) Extending cost capping would not alter the normal rules on permission, manifestly without foundation applications, standing or time limits. There is no reason to think unmeritorious cases would rise disproportionately. There would be more judicial reviews, but that would be the benefit of increasing access to justice in this way.

62. We urge the Review Panel to endorse Lord Justice Jackson's revised recommendations and to recommend proper monitoring and research to see how they work in practice.

63. Question 8 asks:

> *"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?"*

64. Yes, judicial review costs are generally reasonable and proportionate. Lord Justice Jackson concluded as much in both his reviews having considered extensive evidence over several years and 400 consultation responses.

65. This is reinforced by our experience in practice. Very few judicial review bills end up subject to detailed assessment and being seriously disputed and we can recall only two significant costs disputes in the last 18 years. Most claims for cost are settled in negotiations. That said, costs do vary enormously making it impractical to fashion a fixed costs model, even were that appropriate in principle.

66. Judicial review claims are already subject to a number of special controls on costs that are not applicable to other forms of litigation and there is no need for further restrictive reform. In particular:

(1) Legal Aid for judicial review is only available subject to strict means and merits tests (and we agree with the Bach Commission that they are too strict);

(2) if a judicial review is refused permission, absent exceptional circumstances, the practitioners who have brought it will be paid nothing;

(3) cases that are 'wholly without merit' can be certified as such and will not progress to run up significant costs;

(4) cases that are not arguable, or are not brought without promptly, can be refused permission, preventing them from progressing and running up costs;

(5) there are restrictions on appealing permission refusal to the Court of Appeal; and

(6) interveners face adverse cost orders unless strict criteria are met.

H. Remedies (Call for Evidence, Question 9)

67. Question 9 asks:

> *"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?"*

68. Remedies are flexible and, in our experience, carefully tailored to meet the circumstances of the case.

69. By far the most common remedy is a quashing order which, combined with the judgment and sometimes a declaration enables the public authority to decide on the proper course – as in Example 3, *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36. Sometimes the Court will simply make a declaration on the legal position - see Example 21: *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 ('Miller 1') Example 22: *R (Wightman) v Secretary of State for Exiting the EU* [2018] 3 WLR 1965 (CJEU) and [2018] CSOH 61 (Court of Session). In this way, the proper division between the responsibilities of the Court and Government is maintained.

Example 24: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293

A compensation scheme was established for British nationals interned by the Japanese during WWII, but our client was excluded by criteria that required a UK 'bloodlink'. The scheme had already been challenged unsuccessfully ([2002] EWCA Civ 473), but we identified race discrimination and public sector equality duty ('PSED') arguments and prepared evidence analysing how the effects of the criteria depended on internees' race. The resulting claim succeeded on both bases. The Court simply made a declaration leaving it to the Secretary of State to devise a lawful scheme. He, in turn, removed the 'bloodlink' requirement, which extended the scheme to 1100 more people.

70. There are powerful arguments for damages to be available for public law breaches, but there are dangers this would distort what judicial review is fundamentally concerned with and 'monetise' Rule of Law compliance. Reform of this kind would need to be supported by an

evidence base showing clear benefits that outweighed these risks (as with any reform of judicial review).

I. Minimizing the need to proceed with judicial review, settlement and ADR (Call for Evidence, Questions 10, 11 and 12)

71. Question 10 asks:

> *"What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?"*

and question 12 adds:

> *"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?"*

72. It is helpful to deal with them together.

73. The first point is that in the cases where there is time to complete the steps the pre-action protocol recommends, there is a direct relationship between compliance with it and minimisation of judicial review. Properly drafted pre-action correspondence from specialist practitioner and engagement with it by properly advised defendants can often be the most efficient way of resolving judicial review claims. However, this only works if both parties are properly represented and there is full engagement. Some public authorities, notably the Home Office, can be slow to engage with pre-action letters and, when they do, can sometimes take an unhelpful and formulaic approach undermining the value of this part of the process.

Example 25: the 'R' community

We have acted for a minority religious community over many years. The community has a very important nine-day period of religious observance each year during which all members, including children, are expected to attend sermons and related events. As the period moves each year, it would often fall during term time and parents were faced with an invidious choice between allowing their children not to participate in the relevant religious activities or being fined due to a lack of flexibility in school attendance policies (contrary to the relevant legislation in our view). We accordingly sent a series of pre-action letters in respect of local authority policies, all of which resulted in an updating of those policies to include appropriate flexibility in accordance with the legislation. Without the possibility of judicial review, it is very likely that it would not have been possible to obtain such changes to the policies.

Example 26: children 'G' and 'H'

Earlier this year, we acted for two families with children with autism spectrum disorder who felt unable to go outside once a day due to the Government's guidance during the initial lockdown limiting exercise to once per day. Following a pre-action letter, the Government agreed to amend that guidance to provide an exception for those with mental health or similar needs.

Example 27: 'U'

Mr U applied for judicial review due to the very great delay in deciding his asylum application. He arrived in the UK in July 2014 and claimed asylum at the port. A convoluted series of decisions were made and then withdrawn. Despite repeated requests for a decision on the asylum claim, including repeated interventions by Mr U's MP, and despite dates for a decision being given, the application remained pending. Mr U began suffering from severe mental health problems and attempted suicide. A pre-action protocol letter challenging the delay in making the decision was sent in 2019. This was ignored and so an application for judicial review was lodged. Permission was granted at an oral hearing on 10 December 2019 on all four grounds put forward. The matter was then concluded by consent with a date agreed for a decision to be made, with a costs order in the applicants favour.

74. Any abridgement of the time limit for judicial review will reduce the scope for settlements of the kind in the first and second examples immediately above and spur litigation of the kind illustrated by the third example: see further para 51(1) above.

75. Public bodies are often reluctant to engage with ADR. We offer it – generally mediation or roundtable discussion - in almost every case where we act for principal parties in claims. Such offers are very rarely accepted by public authorities, but when ADR happens it is often beneficial.

Example 28: child 'S'

We acted for a child with Autism Spectrum Disorder seeking a particular intervention. Her local authority had a policy that such an intervention would not even be considered. We sent pre-action correspondence offering to engage in ADR, but the local authority refused even to consider it at that time, and we therefore had no choice but to file judicial review proceedings. Following a further offer of ADR, the local authority agreed to participate in a roundtable meeting. As a result of that meeting it was possible for the claim to be resolved and withdrawn. Had the Council engaged in ADR at an earlier stage, it is very likely that significant time and costs would have been avoided.

Example 29: company 'Y'

Company Y provided educational services under funding and regulatory agreements with a government agency. The agency became concerned about irregularities with a cohort of claims and commissioned an audit which made inconclusive findings. It proposed to take regulatory and payment recovery action that would have been fatal to the company. We set out the legal errors in the decisions but proposed ADR in the form of a roundtable rather than proceeding with judicial review. After initially refusing, the agency agreed and series of constructive meetings took place resulting in a mutually satisfactory settlement under a detailed agreement.

Example 30: ongoing public interest litigation

We are currently engaged in a (confidential) ADR process on a significant public interest case that affects over a million people, many of whom have issued private law claims stayed behind a judicial review. The outcome is uncertain and the case may well proceed to trial, but given the stakes attempting ADR is plainly worthwhile for all parties.

76. In the first judicial review judgement to discuss ADR, *Cowl and Others v Plymouth City Council* EWCA Civ 1935, Lord Woolf stressed the overriding importance of parties to seek to avoid litigation wherever possible adding that a court might of its own initiative, hold an inter partes hearing for the parties to explain what they had done to resolve the dispute without involving the courts in an appropriate case. We can see real value in the parties to judicial review examining in the Claim Form and Notice of Acknowledgement of Service:

    (1) if ADR was offered and if not, why not;

    (2) if it was offered but rejected, why that was; and

    (3) to confirm if it occurred, that it was unsuccessful.

77. This information would empower the Court to intervene in appropriate cases and also to take a view on whether there ought to be a cost sanction for a party's refusal to engage in ADR in an appropriate case. Of course, for ADR to be effective, parties must have the benefit of appropriately funded representation and proceedings should not be delayed in a way that prejudices either party.

78. Question 11 asks:

"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?"

79. Settlement pre- issue occurs in 70-80% of the cases we handle and post-issue in approximately 40% of cases, typically soon after issue or permission being granted. Settlement 'at the door of court' is very uncommon. The position of the parties tends to be fairly fixed by that point. Example 19 above is a rare exception.

J. Standing and public interest litigants (Call for Evidence, Questions 13)

80. Question 13 asks:

"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? The standing *rules do not need revision"*

81. Standing issues are uncommon. Example 5 is the only instance anyone at the firm can recall in which a claimant's standing has been questioned in a case we have brought. Even then as is typical in most judicial reviews, the claim needed to be resolved because others were involved who were directly affected. Our impression is that the courts police standing well and are mindful of the 'busybody' test. No reform is called for.

82. Further, the most efficient, responsibly handled cases are often cases brought by representative bodies and sufficiently interested public interest litigators – see Examples 14, 14, 15, 17, 20, 21 and 22. If there is an issue that properly needs resolution by the Court, it is helpful lf that to happen quickly, rather than have resolution delayed while slightly more directly affected claimants are identified and funding arrangements put in place. Further, where a claim is brought by a representative body, the prospects of public authorities recovering costs are significantly greater.

K. Conclusion and offer of further assistance to the Review Panel

83. There would be some irony if this Government chose to proceed with drastic reform to cut back on judicial review: its Prime Minister himself brought, and won, a judicial review claim to deal with a prosecution the Divisional Court held had been wrongly brought against him (*R (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin)); and one of his predecessors, Sir John Major, intervened in a judicial review against him to argue that Parliament's prorogation in the circumstances it had occurred was wrong (*R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41). More importantly, though, there is no need for such reform. Judicial review claims impact on a tiny proportion of administrative decisions and the impact is overall positive with many cases being positively settled or won. Judicial review as an available remedy spurs public authorities to make sound decisions in the first place and to reconsider and settle quickly in the majority of those where things go wrong. It is a very efficient system, overall. If endorsement of Lord Justice Jackson's recommendations on costs and some streamlining can come out of the Review, it will be worthwhile. Going further,

however, is unwarranted and risks undermining the primary *"way of ensuring that state power is exercised responsibly"* and the "*check to ensure lawful public administration"* that the Government itself has repeatedly recognised as being "*crucial"* in our democracy.

84. We would be happy to answer any questions the Review Panel has about this response, or our experience more generally. The Panel's work is important and if we can help in any constructive way, we will.

Bindmans LLP, 26 October 2020