UNISON's response to the 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

October 2020

1. UNISON is the UK's largest union with 1.3 million members. Our members are people working in the public services; for private contractors providing public services; and in the essential utilities. They include frontline staff and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

2. Judicial Review has existed as an effective remedy to challenges of decisions of public bodies. Its existence is essential and important to UNISON's members as an integral part of the UK's constitution to ensure that public powers are exercised fairly and lawfully. This was shown when UNISON challenged the Lord Chancellor in Judicial Review proceedings under *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 where the Supreme Court held that the constitutional right of access to the courts, which is essential to the rule of law and is guaranteed by Magna Carta, was breached by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) ("Fees Order"). Essentially, the Fees Order was found to be an unlawful interference with the common law right of access to justice; as well as it being unlawful for failing to provide an effective remedy for breaches of rights granted by EU law and being indirectly discriminatory against women in its application. In a fully functioning democracy, Governments of every hue should not be afraid of their decisions being challenged within the judicial system.

3. UNISON makes it submission and commentary on three separate themes identified within the Independent Review of Administrative Law ('IRAL') namely:
   a) Codification: Whether any of the law of judicial review should be codified;
   b) Justiciability: What administrative decisions or action should be justiciable; and
   c) Procedure: Judicial Review procedure.

4. UNISON's comments make specific reference to the questions and terms of reference on the IRAL where appropriate. Where there are overlapping or repeated requests for evidence and comments in the terms of reference and /or the questions, UNISON has cross-referenced responses to avoid repetition.

CODIFICATION

5. UNISON makes general responses and comments to clause 1 in the Terms of Reference of the IRAL. Answers to Section 2, questions 3-5 are below this section.

1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.

6. As some expert commentators have noted[1], there appears to be an agenda by the Government to limit the courts' existing powers in order to shield public authorities from legal scrutiny on their decisions. UNISON considers that such an agenda calls into question how the Rule of Law[2] might apply and requests IRAL makes clear its views on this point of principle in its response to this consultation.

7. Logically, the first issue for IRAL to scrutinise is this: what codification already exists?

8. The modern starting point is Part 54 of the Civil Procedure Rules and Practice Direction 54A. There is also a comprehensive Pre-Action Protocol for judicial review. In combination, these provide a comprehensive framework to be followed for all parties to judicial review proceedings, practitioners and the courts. These are supplemented by other relevant statutory provisions. In particular: ss.31 and 31A the Senior Courts Act 1981, ss.15-21 Tribunals, Courts and Enforcement Act 2007 and ss.86-90 Criminal Justice and Courts Act 2015.

9. It is also important, in the context of access to justice, that applications for judicial review may now be brought in different locations where the Administrative Court of England and Wales sits, namely: London, Bristol, Cardiff, Leeds and Manchester.

10. Of course, these modern provisions for access to justice follow much older legal powers as judicial review is a creature of the common law. For example: *habeas corpus, certiorari, mandamus* and *quo warranto* all provide bases through which the modern law on judicial review has developed. Similarly, the principle of challenging a statutory power exercised *ultra vires* has applied for centuries.

11. Therefore, a legitimate question arises on why different codification is in fact necessary? No Government (or public authority) is ever likely to call for greater powers of scrutiny against

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[1] For example, see Mark Elliot's posts on www.publiclawforeveryone.com

[2] *"Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably"* - 'The Rule of Law' by Tom Bingham, published by Penguin Books Ltd [2010] – see pp.60-65 on judicial review.

their decisions, but the power is nevertheless an integral part of the UK's constitutional controls. As Tom Bingham put it (in 2010): '*this is the inescapable consequence of living in a state governed by the rule of law*.'[3] However, as recent events have shown, there are very deep concerns that UNISON notes have been made about the current Government's commitment to the Rule of Law[4] which has sought (we say unreasonably) to criticise 'activist lawyers'[5].

12. UNISON has considerable experience of judicial review proceedings with fundamental importance to the Rule of Law and Access to Justice. Most notably, UNISON was the claimant that challenged the lawfulness of the Fees Order imposed by the Lord Chancellor for proceedings in the employment tribunals and employment appeal tribunals. The UK Supreme Court held[6] the fees were unlawful *ab initio* because of their chilling effects on access to justice.

13. The lengthy procedural history of the multiple hearings and ways in which the ET Fees case developed in the years from when it was issued to the final hearing[7] highlight a simple fact: a narrower statutory codification on judicial review could have prevented (or deterred) the UK Supreme Court from reaching its seminal conclusions on the right of access to justice for UNISON on behalf of its members.

14. Alternatively, Lord Reed considered the statutory interpretation of the Fees Order on two constitutional principles which were based on common law: the right of access to justice and that statutory rights, determined by parliament, should not be cut down by subordinate legislation. It was these considerations that led the Supreme Court to determined that access to justice had been prevented. If it is the intention of codification to restrict judicial review, it will be up to the courts that determine what the words in the enabling legislation mean.

15. With this in mind, UNISON has legitimate concerns about the potential impact of an overt attempt to restrict the current rights for an applicant to lodge a judicial review.

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[3] Ibid - See n.1, at p65
[4] For example, see https://www.lawgazette.co.uk/law/rule-of-law-under-attack-says-law-society/5105633.article
[5] For example, see https://www.lawgazette.co.uk/news/home-office-accuses-activist-lawyers-of-abusing-immigration-rules/5105437.article and https://www.lawgazette.co.uk/news/lawyers-at-risk-of-physical-attack-after-patel-speech-says-law-society/5105879.article
[6] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51
[7] Ibid, §60-64

16. In summary, our main concerns are as follows:

A. Narrow codification of judicial review law is likely to reduce the rights of UNISON and its members seeking access to justice. Such an issue is likely to interfere with domestic and international human rights law that protect freedom of assembly and association.

B. Any material restriction to the modern law on judicial review is likely to create greater legal uncertainty. For example, currently there is a presumption that the decision under challenge has been made lawfully unless one of just four grounds[8] can be proved. Numerous decisions of the UK Supreme Court (or previously the House of Lords) support how these principles must be applied in all manner of concerns about enforcing the compliance of public authorities to the law, so as well as legitimate concerns about erosion to the Rule of Law, it also seems inescapable that any future codification seeking to restrict these principles might create greater legal uncertainty than currently exists.

C. The Government made extensive and far-reaching changes to judicial review in 2013 and further changes are unnecessary. There are more important ways for the Government to improve administrative law than repeated consultations on restricting the modern law of judicial review due to political ideology. In particular, to follow recommendations that might improve long-standing problems with the time at which the defendant's duty of candour and co-operation applies[9]. Such an approach, in combination with existing provisions to consider alternative remedies, might be more likely to address any perceived problem with decisions of public authorities that are otherwise vulnerable to challenge.

D. Following the *UNISON* case, it is unlikely that any amount of codification could actually limit fundamental rights or reduce the Court's powers in common law.

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[8] Illegality; irrationality; procedural unfairness; and, legitimate expectation. Although separate considerations apply to how these intersect with requirements under domestic and international human rights law.

[9] For example, see the 2016 discussion paper on the topic commissioned by the (then) Lord Chief Justice: https://www.judiciary.uk/wp-content/uploads/2016/04/consultation-duty-of-candour-april-2016.pdf. See also: *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 where Singh LJ summarises the modern principles relevant to the duty of candour and co-operation at §105-106.

SECTION 2

Answers to specific IRAL Questions:

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?

17. No, for the reasons set out above, we do not consider there is a case for statutory intervention in the judicial review process because of concerns about certainty and clarity, particularly if the underlying intention is to substantially narrow the scope of what may be subject to Judicial Review.

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?

18. Yes, the existing procedural and legislative bases, as well as jurisprudence, make clear what may (or may not) be subject to Judicial Review. Please also see paragraphs 7-16 above.

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?

19. Yes, we consider that these processes are currently clear.

JUSTICIABILITY

20. UNISON makes general responses and comments on the following clauses in the Terms of Reference of the IRAL:

2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.

3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.

A. ***Scope of the Review: (1) The review should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers. (2) The review will consider whether there might be possible unintended consequences from any changes suggested.***

B. ***Experience in other common law jurisdictions outside the UK. The position in other common law jurisdictions, especially Australia (given the legislative changes made there), will be considered.***

E. Paras 2 and 3: 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"). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?

21. The starting point is that the Court's supervisory jurisdiction is an essential part of the UK constitution. The Courts are the judicial arm of government; essential to maintaining our democratic system by ensuring that the executive arm of government does not exceed its powers. This includes a check on excesses of powers as set out in legislation, under the prerogative powers, the common law and the constitution.

22. The High Court's supervisory jurisdiction in judicial review is where two arms of government come into contact and this will inevitably lead to tension. The High Court has however, set its own boundaries on judicial review and UNISON sees no need for these limits to be modified.

Any attempt to do so will have the consequence of interfering with the balance between the arms of government necessary to ensuring the democratic system of government in the UK perseveres.

23. The High Court has determined the extent of its own ability to intervene in the area of what is justiciable. UNISON does not consider that the nature of the power (i.e. legislative, prerogative, constitutional or common law) should determine the extent to which the High Court maintains its supervisory jurisdiction. If the executive falls into error in the exercise of its powers, it matters not what the source of that power was. It is the error of law that should be the focus of the Court's enquiry, subject to the well-established limits to judicial power. UNISON says that the Courts have been cautious in extending its powers and has well defined boundaries on the extent to which it will intervene (no private law jurisdiction; national security, no determination on the merits of decisions; exercise of broad policy discretion). It is accepted that the extent to which a Court will intervene in executive decision-making has expanded over time, but so too has the range and scope of executive power.

24. As a single error of law, regardless of how clear, could give rise to a claim; the essential mischief to be overcome in judicial review is fairness, reasonableness and errors of law. To some extent this necessarily involves a cross-over between grounds of review (for example, fairness procedure, irrationality, pure error of law) and the nature of the power being exercised. The approach taken by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9 (the *GCHQ* case) case clearly shows that the Courts are best placed to assess this and weigh up the competing factors. The claimants had a legitimate expectation that as employees they had the right to have their trade union negotiate and bargain collectively on their behalf. Their legitimate expectations and claim for a judicial review were defeated, not on the basis of the source of the power, but by the self-imposed limits on the Court's jurisdiction. The nature of the power being exercised to some extent determines the extent or type of complaint, but the legal enquiry is essentially the same: an enquiry into whether or not the decision was infected with ANY errors of law.

25. An example of a jurisdiction where there has been a successful integration of the various grounds into a single legal standard is New Zealand. Perhaps the most articulate expression of this merged doctrine of error of law is found in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129. There, in order to determine if a decision of an inferior tribunal was subject to judicial review, the New Zealand Court of Appeal effectively dispensed with the need to determine if that tribunal had determined a jurisdictional fact or otherwise. The Court of Appeal instead found that, except in "special circumstances affecting a particular case", every question of law determined by an inferior court of tribunal will be subject to judicial review notwithstanding the existence of any privative or ouster clauses purporting to prevent this.

26. This concept of "error of law" as a basis for judicial review was taken further in *Peters v Davison* [1999] NZLR 164 when the Court of Appeal held that "the essential purpose [of judicial review] is to ensure that public bodies comply with the law." New Zealand, like the UK, has a largely unwritten Constitution and there any no other complicating circumstances

limiting the High Court's jurisdiction in judicial review. The subject matters of judicial review in New Zealand, save for those concerning the rights of the indigenous Maori, largely replicate those in the UK. The New Zealand Bill of Rights Act 1990 contains rights similar to those European Convention rights preserved by the Human Rights Act 1998 (UK) and have a similar influence on judicial decision-making though the remedies differ somewhat.

27. The "special circumstances of a particular case" encompass the same limits on the extent of judicial review as the UK, including national security, high policy discretion and deference to statute law). New Zealand has not seen an expansion of judicial intervention into merits review and its concepts of what is justiciable remain as confined as, and heavily influenced by, the UK cases.

28. UNISON suggests that the existing law of judicial review in the UK should be left to determine its own jurisdictional boundaries unfettered by new legislation – see our comments above on codification. To this extent, and for the reasons given we do not consider that the legal principle of non-justiciability requires clarification. It is clear what decisions/powers are subject to Judicial Review and which are not. The *GCHQ* case clearly shows that it is preferable for the Courts to be given autonomy to determine the limits of their powers to intervene. *R v London Borough of Hammersmith and Fulham, ex p NALGO and others* [1991] IRLR 249, further clarified that whilst it was a factor in its decision making, not every policy decision taken by a public authority affecting its employees was a matter for judicial review.

29. It is worth pointing out the majority of employment matters brought by employees against public bodies will not be justiciable in judicial review proceedings. The two thresholds of a sufficient public law element in the case and the presence of alternative remedies mean that it is only in exceptional cases that employment law related judicial review proceedings are justiciable.

30. This is how effective democracies exist, notwithstanding the inevitable tensions that this has always created between the different branches of government. For the reasons we have set out this tension is a desirable consequence of a functioning democracy.

31. UNISON is not advocating a separate system of judicial oversight on the merits of decision-making as is the case in Australia and some of its States. The Australian system of government is quite different from the UK. It has a federal Constitution that clearly defines the powers of the executive, the legislature and the Court. The remedies available to the High Court are likewise prescribed in the Constitution. The Constitution was created at the time of the creation of Australia and makes reference to the various common law writs that were available in the Courts at this time: "mandamus, prohibition or injunction … against an officer of the [Australian Government] (section 75(v), Constitution).

32. Partly as a means of liberating the courts from these archaic forms of relief and ensuring that the necessary checks on executive action were preserved at the Federal level, the Administrative Appeals Tribunal (AAT) was created in 1975 to provide judicial oversight of a

broad range of administrative decision making. The High Court preserved its jurisdiction to hear and determine judicial reviews under the powers contained in section 75(v) but the bulk of the complaints about administrative decisions were determined in the Tribunal. This separate body was in part borne out of the limited means of redress under the Constitution and the growing need for some form of judicial oversight. Importantly the AAT had jurisdiction to enquire into the merits of administrative decisions; powers not replicated in the Hight Court's original jurisdiction or in UK law.

33. Coincidentally, since Australia adopted its highly restrictive immigration regime, resulting in many asylum seekers being refused entry or being removed to offshore islands, the numbers of judicial reviews being lodged directly with the High Court of Australia (and not at the AAT or lower courts) has dramatically increased.

34. Also, Australia's attempted codification of the substantive law of judicial review, Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) has created its own problems. This codification did not affect the High Court of Australia's inherent jurisdiction in judicial review under section 75(v) of the Constitution. The ADJR Act sets out a list of grounds of review and has established a test for whether a decision was amenable to judicial review. It provides for judicial review of any 'decision of an administrative character made … under an enactment', as well as 'conduct engaged in for the purpose of making [such] a decision. This new test created significant uncertainty about which decision fell within the definitions, and what amounted to a decision of 'an administrative character'. These questions generated significant satellite litigation, thus creating further confusion in the law of judicial review. And the ADJR Act's test has become outdated and anomalous. For example, the test continues to exclude vice-regal decisions from review, reflecting a common law immunity which was abolished in Australia in the 1980s. This statutory prohibition was motivated by an infamous incident in Australian Constitutional history, the dismissal of the government of Prime Minister Gough Whitlam by the Governor-General in 1974.

35. Adopting any measure that confines or restricts the natural development of the law of judicial review will inevitably lead to certain aspects of the law being "ossified" and fixed at a particular point in time. This may have consequences, unintended or otherwise that the courts essential role in upholding the rule of law is compromised. The Australian experience is an example of how this might happen. Satellite litigation on the boundaries of the statutory intervention will be almost inevitable as will further confusion about the law and extent of the Courts essential powers. This will inevitably lead to an undermining of the rule of law and confidence in the system of Government.

36. The UK Constitution does not have the same constitutional constraints on the extent of judicial power as exists in the Australian Constitution. The concept of justiciability in the UK has developed free of the constraints imposed by a written constitution. That is not to say the UK Constitution creates no limits to judicial power; it does. The limits on judicial power can perhaps best be observed in the *GCHQ* case. Whilst the House of Lords for the first time held

that the executive's prerogative powers were subject to judicial review, this stopped short of interfering with the exercise of those powers because of the need to protect national security.

37. Likewise, the remedies available in judicial review are limited. The restricted nature of remedies available to litigants in judicial review proceedings acts as a check on the numbers of claims brought. Litigants often make application for judicial review because they simply disagree with the decision and want it reversed permanently. The Courts are, rightly, extremely reluctant to substitute their own decisions for that of the decision-maker being challenged. This again is a sensible and necessary check on the extent of judicial power.

38. The Court will only quash a decision in circumstances where it is plainly made in error. This does not necessarily defeat the public authority or government's action or policy. It just simply requires them to do it in a way the in accordance with law. Courts have been rightly reluctant to interfere with executive decision-making which in part explains why the success rate for judicial review is incredibly low. Judicial intervention where unlawful action has been taken should therefore be seen as beneficial to good government, not at odds with it.

39. Obviously, the powers of the Court to intervene will be more limited in the case of secondary legislation; these powers having been made under the authority of an empowering statute and subject to less democratic scrutiny. Often, judicial review will be the sole avenue for complaint about excesses of administrative power. The common law protects this important right and access to judicial review to supervise the exercise of executive power is protected at common law.

40. The foundations and importance of the need to protect access to judicial review is perhaps best illustrated in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 where the Supreme Court held:

41. *68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other*.

42. The democratic check that parliament provides is often largely absent from the promulgation of secondary legislation, subject only to the supervision of the Courts. Despite this lack of parliamentary oversight, secondary legislation (and other types of legal bases) can have a

profound impact on society and can bestow broad and wide-ranging administrative powers. By way of a recent example, the Treasury Directions made under s.76 of the Coronavirus Act 2020 introduced the Coronavirus Job Retention Scheme. Parliament is obviously bound by prerogative powers and those powers are to be exercised in accordance with the common law.

43. The right of Parliament to provide that democratic check on executive power is likewise open to abuse and errors of law, and as such ought also to be subject to judicial supervision. If the Courts cannot supervise the parliamentary process, then there will be nothing stopping any errors in the exercise of the prerogative powers. The consequence of this may well be an abrogation of the common law right to access to the courts articulated in the UNISON case and a degradation of the rule of law and trust and confidence in the executive.

PROCESS AND PROCEDURE

44. UNISON makes general responses and comments on the following clauses in the Terms of Refence of the IRAL. Answers to Section 3, questions 6-14 are below this section:

Terms of Reference Clause 4: Whether procedural reforms to judicial review are necessary, in general to "streamline the process"

45. The Judicial Review process is governed by the Civil Procedure Rules (at Part 54 and Part 52 (appeals)), and UNISON's view is that procedural reforms to judicial review are not necessary. Specific responses to the questions have been set out below.

46. Should procedural reforms be proposed, UNISON wishes to point out that any attempts to alter the Judicial Review through statutory powers must not restrict fundamental rights, including the common law right of access to justice, and that any such alteration must be read as being subject to a requirement of proportionality: see *R v Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 at §§118-119 *per* Lord Reed.

47. In addition, Convention rights and EU law require that judicial protection be *"real and effective" (Marshall v Southampton and South West Area Health Authority II* (Case C271/91) [1993] ECR 1-4367, §022-24). In determining whether any procedural rule restricting access to a court is consistent with the requirements of EU law, and is proportionate, regard will be had *"to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances",* in which context *"it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings" (Tele2 Telecommunication GmbH*(Case C-426/05) [2008] ECR 1-685, §55[10].

(a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government:

48. This question considers the unqualified effect on Government of disclosure, but does not consider whether or not such disclosure is consistent with the overriding object contained in Part 1 of the Civil Procedure Rules that requires that courts deal "with cases justly and at proportionate costs so far as is practicable – ensuring that parities are on equal footing; saving expense…" etc .

49. UNISON makes the following points:

[10] see also e.g. *Cofidis* (Case C-473/00) [2002] ECR 1-10875, §37 and *Duarte Hueros v Autociba SA* (Case C-32/12) [2014] 1 CMLR 53, §34).

a. In judicial review, there is no duty of standard disclosure under the Civil Procedure Rule 31. A defendant, whose decision or action is challenged by way of judicial review, owes a duty of candour and co-operation to give a true and comprehensive account of the decision-making process (*Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409) and, as a matter of good practice, a public authority will ordinarily exhibit a document that is significant to its decision as the primary evidence.

b) Orders for disclosure in judicial review cases are not automatic but will depend on whether it is necessary to resolve the matter fairly and justly. Disclosure may be refused to protect individuals from harm or to avoid a miscarriage of justice in a future trial.

c) In many judicial review cases there will very often be nothing to disclose beyond the documents the claimant already has e.g. any relevant guidance or policy, materials provided by the claimant and the decision. The standard letter before claim contained in the Judicial Review pre-action protocol includes details of any documents that are considered relevant and necessary.

d) Orders are normally for specific disclosure and tend to be made where information before the court suggests that a statement is inaccurate, inconsistent or incomplete in a material respect (see *Tweed v Parades Commission for Northern Ireland [2006] UKHL 53*). The test will always be whether, in a given case, disclosure appears to be necessary in order to resolve the matter fairly and justly. The Court has been clear that where a request that involves a disproportionate amount of work, that it is unlikely to be granted (see Dingemans J in *Bredenkamp v Secretary of State for Foreign and Commonwealth Affairs [2013] EWHC 2480 (Admin)*)

50. The principle of open justice means that the discretion should be exercised presumptively in favour of disclosure, and this is especially the case where the issue is of public importance. The guiding principle of the courts is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle.

(b) in relation to the duty of candour, particularly as it affects Government;

51. In judicial review cases, both parties have an obligation to disclose certain information and must make full and frank disclosure and conduct judicial review proceedings with "all their cards face up on the table", having regard to the fact that "the vast majority of the cards will start in the [public] authority's hands" (*R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 941*). Unlike other litigation proceedings, the facts in a judicial review are not in issue and the decision that is challenged is being reviewed for its legality and not for its merits.

52. The duty of candour *and co-operation* helps ensure 'equality of arms' as set out in the Overriding Objective (Rule 1 CPR). Each person affected by state decisions should be able to know which factors played a part in it. This allows them to make an effective challenge to that decision.

53. In UNISON's experience, compliance with the 'duty of candour' resulted in the disclosure of crucial evidence, such as early details of numbers of claims to the Employment Tribunals or the remission of fees for those with financial difficulties (see *R (on the application of UNISON) v the Lord Chancellor* [2017] UKSC 51).

54. It should be made clear that whilst this Call for Evidence places a lot of emphasis on the effects of Judicial Review on government, it should also focus on the individuals and organisations seeking to challenge what they have deemed to be an unlawful decision.

55. As no Government is above the law, there must be a level of transparency, accountability and fairness, that the duty of candour affords. It is worth making the point that that judicial review will only succeed if the government has acted unlawfully.

(c) on possible amendments to the law of standing;

56. UNISON considers that the law of standing in judicial review is already robust and narrowly applied. For example, in *R (UNISON) v. NHS Shared Business Services Limited* [2012] EWHC 624 (Admin) it was held that UNISON did not have sufficient standing to challenge a procurement process which led to 10 primary care trusts entering into contracts to outsource certain services.

57. If there is an intention to limit the law of standing to reduce the opportunity of trade unions (and other expert groups) from challenging decisions of Government and public authorities, then this would seem in direct contradiction to what the Rule of Law requires. See our comments above regarding the ET fees case and judgment of Lord Reed in the UK Supreme Court.

58. See also response to Q13 below.

(d) on time limits for bringing claims,

59. Shortening the time limits for judicial review would make it harder for claimants and decision-makers to sort out their problems out of court. This ensures that matters are not tied up in courts and are resolved at an earlier stage.

60. Judicial review ensures the accountability of government, which means better standards of governance and more efficient, higher quality decision-making. The Panel's terms of reference and call for evidence falsely posit judicial review as opposed to good, effective Government.

(e) on the principles on which relief is granted in claims for judicial review,

61. The court's powers in terms of outcomes of judicial review cases are set out in legislation, in the Senior Courts Act 1981.

62. The court can do a number of things, including: set aside the challenged decision; make a formal declaration that the body acted unlawfully, sometimes with an explanation of how the law should have been applied; order the public body to take a particular action; order the public body to refrain from taking, or discontinue, a particular action.

63. The specific relief ordered in each case will depend on the circumstances in each instance and what is sought by the parties.

64. Most remedies imposed by the courts ensure that the decision-maker complies with the rules set out by Parliament. If the decision must be made again, the public authority remains the decision-maker i.e. and not the court. Remedies remain flexible to ensure that the correct solution is found.

(g) on costs and interveners.

65. UNISON has appeared as an intervener in many important cases involving the development of employment rights. We consider that our involvement has always been to promote public interest on the relevant issue under challenge.

66. In the context of judicial review, the current limitations on the role and costs of an intervener are clearly set out in s.87 CJCA 2015 and CPR 46.15. Except for truly exceptional circumstances, quite rightly, the accepted position for an intervener is that it will bear its own costs. This being in contrast to the right of an applicant claimant party that is at liberty to apply for a judicial review capped costs order if it successfully obtains permission on its application.

67. See also answers to Q7 below.

SPECIFIC IRAL QUESTIONS

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?

68. The time limits for making judicial review applications are already short as they must be brought "promptly", and in any case no more than 3 months after the initial decision is made. This time limit is much shorter than for example claims in tort or contract, where actions can be brought up to six years of the relevant act.

69. The Court can refuse permission to proceed with a judicial review claim on the papers, or at a hearing, even when it is brought within 3 months, if it decides it was not brought "promptly". Cases can be refused even when they are brought in time on the apparent merits. In UNISON's experience its ET fees case which was successful in the Supreme Court was initially rejected on the papers, and required an oral hearing for submission. Any further reduction risks excluding meritorious claims from the ambit of the courts, impeding access to justice. An ability to seek an oral hearing will further diminish access to justice and a right to a fair hearing under Article 6 of the Human Rights Act 1998.

70. These short time limits ensure that intrusion into "good government" is clearly time-limited to be minimal so that problems can be resolved quickly and effectively.

71. There is an uphill, front-loaded battle for Claimants to comply with the pre-action protocol where a letter before claim must be sent, and then a suitable period (normally 14 days) provided for a response. This also assumes that Claimants have time to instruct lawyers and seek legal aid (where appropriate), prepare their claims, including filing witness evidence and all relevant materials. For certain types of cases, an even shorter time limit already exists i.e. Planning (6 weeks); Procurement (30 days); judicial review of decisions of the Upper Tribunal ('Cart JRs') – (16 days). The time limits can only be extended by the court.

72. UNISON wishes to stress that it is important not to lose sight of the importance of a government which acts in a proper and lawful manner, which judicial review helps to ensure.

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

73. The requirement of an unsuccessful party having to pay their opponent's costs along with their own (which can easily amount to six figures) is a major barrier to claimants seeking to pursue judicial review. Such costs can operate as an unfair barrier to access to justice, as they are not related to the merits of a claim.

74. There is some limited scope for legal aid, or certain financial arrangements, such as conditional fee ('no win, no fee') agreements, or schemes that 'cap' the costs recoverable in cases. Legal aid can act as an essential lifeline for many claimants.

75. Current eligibility rules mean that many people who cannot afford to take the risk of being ordered to pay their opponents' costs are not eligible for legal aid.

76. There is no evidence that the rules on costs in judicial review are in any way too lenient on unsuccessful party. On the contrary, a democratic society should allow effective access to justice to challenge decisions affecting them, where such claims are meritorious. Excluding claims where Claimants do not have the means is a barrier to access to justice.

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? Are costs in JR proportionate?

77. See answer to Question 7.

(a) Should standing be considered by the panel?

78. See above and answer to Question 13.

(b) Should unmeritorious claims be treated differently?

79. The courts consider the merits of claims, through the sift process. Where claims do not make the sift, there is a possibility of an oral application for permission. If after these processes, a claim gets through, it is unlikely to be identified as "unmeritorious" (see para 59). Currently, only around 20% of cases which reach the permission stage are approved to move to a full hearing[11].

80. Lawyers will also advise against pursuing unmeritorious claims, and wider access to good legal advice (through legal aid) at the outset is likely to result in fewer unmeritorious claims reaching the courts.

81. Often, the lack of a "duty of candour and cooperation" may mean that certain information has not been disclosed to Claimants showing that such early disclosure can avoid the parties proceeding to litigation. See our comments about this above.

82. Arbitrary filtering mechanisms could act in a discriminatory, manner especially if there is no right of appeal.

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?

83. The court's powers in terms of outcomes of judicial review cases are set out in legislation, in the Senior Courts Act 1981.

84. The court can do a number of things, including: set aside the challenged decision; make a formal declaration that the body acted unlawfully, sometimes with an explanation of how the

[11] https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020

law should have been applied; order the public body to take a particular action; order the public body to refrain from taking, or discontinue, a particular action.

85. The specific relief ordered in each case will depend on the circumstances in each instance and what is sought by the parties.

86. Most remedies imposed by the courts ensure that the decision-maker complies with the rules set out by Parliament. If the decision must be made again, the public authority remains the decision-maker i.e. and not the court. Remedies remain flexible to ensure that the correct solution is found.

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

87. It is important that public bodies pay more attention to grievances being aired, especially through effective complaints and administrative systems, as this would reduce the need for judicial review.

88. The parties are presently able to pause the judicial process to pursue settlement.

89. Judicial review ensures the accountability of government, which means better standards of governance and more efficient, higher quality decision-making.

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?

90. As mentioned in answer to Q.10, it is important that public bodies pay more attention to grievances being aired, especially through effective complaints and administrative systems, as this would reduce the need for judicial review and promote settlement.

91. Judicial review ensures the accountability of government, which means better standards of governance and more efficient, higher quality decision-making.

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?

92. The current Pre-Action Protocol for Judicial Review requires both parties to consider ADR and to include ADR proposals in pre-action correspondence. It warns parties that they may be required to explain any failure to engage in ADR and may be penalised in costs for an unreasonable failure.

93. However, given the short time limits within which to bring claims, meaningful and effective mediation or conciliation is not often possible. In addition, public authorities do not always have the authority to settle matters.

94. ADR are more suitable for settlements of judicial review proceedings involving individuals. Disputes about questions of law can only ultimately be resolved by the court.

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?

95. The majority of judicial review cases involve individual victims, and the courts are careful to limit the standing of inappropriate parties.

96. To ensure access to justice, it is important that someone is able to challenge a decision and actions of public bodies. "Public interest standing" may be granted in those circumstances to organisations, companies and charities, but this is usually only done where no individual victim or more appropriate claimant can be identified.

97. Public interest claims can also be a more efficient use of the court's resources allowing a single claim challenging an unlawful policy or practice which will reduce the need for multiple individual, or several experts bringing claims.

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