RESPONSE TO IRAL CONSULTATION SAUBMITTED BY LGA ON BEHALF OF LOCAL AUTHORITIES 26.10.2020

#	Local Authority	Name/Position	Comments
1.	Islington Council	Peter Fehler Acting Director of Law and Governance Monitoring Officer	Thank you very much indeed for your email. The response on behalf of Islington Council is as follows: The focus of the Call for Evidence is on the policies and decision making of "the Government" (capitalised and undefined): it is unclear whether "Government" includes local authorities. Although the first sentence refers to "the role of the executive in carrying on the business of government, both locally and centrally", the Terms of Reference appear to relate to JR against executive decisions by Central Government, and non-interference by the courts against those decisions. The same rules should apply to respondents equally across the board. Unlike local government, Central Government has prerogative and common law powers, and does not have to establish vires by reference to a statutory source of power. There is no justification for giving Central Government preferential treatment over local government in respect of judicial review. On the other hand, it may well be that authorities will want to consider judicial review cases where they have felt hard done by due to perceived systemic substantive and/or procedural weaknesses, and to see whether there some common themes that would support a LGA submission.
2.	North Norfolk District Council Eastlaw	Noel Doran Principal Lawyer	Thank you for your e-mail of 10 September seeking input into a response to the IRAL call for evidence on judicial review. Please see, below, some comments on the questions raised, which I hope will be of some assistance: **Section 1 – Judicial Review and Government Decisions** **Q1:** 1. 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? a. judicial review for mistake of law b. judicial review for mistake of fact c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing) d. judicial review for disappointing someone's legitimate expectations e. judicial review for *Wednesbury* unreasonableness f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account g. any other ground of judicial review h. the remedies that are available when an application for judicial review is successful i. rules on who may make an application for judicial review j. rules on the time limits within which an application for judicial review must be made k. the time it takes to mount defences to applications for judicial review The principal aspects of judicial review impeding effective discharge of central or local government functions are the time limits for bringing proceedings and the time to mount a defence. For example, the 6-week time limit in planning JRs means that there is little time to obtain proper advice, undertake a meaningful pre-action protocol with "engagement" with the claimant/respondent and any other interested

			parties. In particular, initial pre-claim correspondence is normally issued some way in to the 6-week time limit. It is not possible to predict when or where credible JR threats may arise but when they do, significant resource has to be directed to consideration, seeking advice and defending where appropriate. By necessity, that resource is taken from resources that would otherwise be carrying out the day-to-day tasks of central or local government, inevitably detracting from their performance in an unpredictable and unmanageable way. **Q2:** 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? In general, the background prospect of judicial review provides a useful reminder that there are checks and balances in the system and that the consequences of not adhering to proper procedure can be significant. To that extent, it does improve the way in which decisions are taken and, through practice and experience, the ability to take those decisions. **Q3:** 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? JR is only meant to be possible on limited procedural grounds (which may be a potential weakness of the system). However, JRs are used, far more often than not, to raise issues which at least overlap with merits arguments. The necessity to deal with a wider scope than legally intended has an impact on the practical functioning of government. **Section 2 – Codification and Clarity** **Q4:** 4. 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? There is no obvious reason why statutory intervention would add any greater certainty or clarity to judicial review than already exists. Such intervention has the potential to inadvertently limit the current scope of JR proceedings. **Q5:** 5. 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? The decisions and powers that are potentially subject to JR are reasonably well known and understood. JR is an important check on public decision making and there is no obvious reason to limit the scope of the decisions that can be challenged in this way. **Q6:** 6. 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? It is probably not clear to lay people, but practitioners are generally suitably well versed for the process to be reasonably clear and understood. However, the processes and the limitations on the issues that can properly be subject to judicial review are complicated and greater clarity would be of benefit. **Section 3 - Process and Procedure**

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			Q7: 7. 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? The current 6 week time limit is too short. It rules out the possibility of meaningful attempts to secure resolution otherwise than through the Courts. The previous (up to) 3 month time limit possibly had some detrimental impact on effective government and good administration, undoubtedly causing delays when threatened because of the uncertainty caused, but the longer time enabled relative positions to be clarified and understood before formal proceedings commenced. **Q8:** 8. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the courts? Costs are a significant issue in JR proceedings. The imposition of caps can place unfair burdens on parties. More clarity/guidance on legitimate costs and greater scrutiny of claims made would assist the process. **Q9:** 9. 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? The costs of JR are dependent on the practitioners appointed, rather than on the Court. Greater proportionality could probably be achieved through simplification of the grounds upon which JR can be taken. Standing is relevant to costs, but it is difficult to see how that can be properly and reasonably controlled. The public interest is in the decisions of government being subject to public scrutiny as and when appropriate. Currently, it seems that the threshold for leave to proceed is not very high and a review of the permission stage to more effectively screen out claims without legitimate merit would be of benefit. **Q10:** 10. 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? A greater range of remedies would be of benefit. **Q11:** 11. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review? Greater emphasis should be placed on the pre-application protocol to explore potential options for settlement without trial. **Q12:** 12. 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? No, if a claim is commenced it generally proceeds to hearing. **Q13:** 13. 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? Any option with the potential to secure resolution without formal litigation should be pursued. Mediation could be a good option for exploring whether any kind of settlement may actually be possible. **Q14:**

			14. 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 rules of public interest standing are an important part of the effectiveness of JR as a tool to challenge public decisions.
3.	Three Rivers District Council	Jessima Sweeney (Mrs) Principal Solicitor – Litigation	Please see following general comments from TRDC based on recent experiences of judicial review threats and cases: 1. The legal costs of defending many judicial review applications are excessive resulting in considerable waste of taxpayers' money. A simpler or fast-tracked process to hear judicial review cases is required to avoid the time wasters and wholly inappropriate cases that are not thrown out from the outset. 2. The legal costs do effect decision making in some cases, e.g. threat of a JR in Housing related cases for instance often lead to unwarranted compromise as costs far outweigh defending a case. Legal costs in housing/homelessness cases mean that cheaper to house than fight a case. 3. In some areas, such as homelessness JR claims, it would be more costs effective to overhaul legislation completely and to provide for a Housing expert to make a decision on paper rather than waste money on legal costs and Court time – many decisions could be made without lengthy trials. Simplified process of a submission of a case by both sides and then decision. Same could be said of County Court homelessness cases too. 4. Statute could usefully be used to limit JR cases to those of fundamental law rather than individuals with axe to grind. 5. Also, the JR process can be too biased towards the litigant in person – allowing late issue (if late, then strike out); late service of papers; appeals allowed too readily etc; and not making effective costs orders against a litigant in person. 6. Some JR cases could be given faster process. E.g. Homelessness/Housing cases should be dealt with in a fast-tracked system – JR is too slow a procedure through the Courts to be effective in such cases. It can take many months for cases to get to Court. 7. Too many JR claims are brought by claimants who are not punished on costs when they lose. Councils never fully recover costs incurred when successful. 8. An initial review of merits should be undertaken on issue by a Court Officer/Judge to sieve and throw out unwarranted/vexatious/weak cases more readily, and avoid costs immediately – an appeal of this paper process could be made only when proof that case has adequate list of merits provided etc. 9. ADR might be used but, in a time, limited fashion with centrally appointed mediator/ombudsman. 10. JR should be limited to fundamental issues. Too many threats of JR are made to seek settlement as costs of JR so expensive.
4.	Arun District Council	Louise Greene Legal Services Manager Solicitor & Deputy Monitoring Officer	Please find attached comments for your consideration; comments are based on limited experience of judicial reviews against planning decisions. IRAL Call for Evidence (001) Arun D **Introduction**

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			The Independent Review of Administrative Law (IRAL) panel invites the submission of 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. The panel would like 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, from professionals who practice in this area of law; as well as from observers of, and commentators on, the process. The panel are particularly interested in receiving evidence around any observed trends in judicial review, how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by judicial review. In accordance with the Terms of Reference, the IRAL are considering public law control of all UK Wide and England and Wales powers only. The panel are therefore interested in receiving evidence in relation to judicial review in its application to reserved, and not devolved, matters: • The Panel of experts will not consider any changes to devolved policy. Instead, the Panel will look at judicial review in relation to UK-wide policy, and England and Wales policy. Any wider implications for the devolved administrations will be carefully thought through and we will continue to engage at all stages of the process, as appropriate. • In addition to recommending changes to UK-wide powers, the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies. Any such recommendation would follow careful consideration of any relevant devolved law and devolution matters arising, and engagement with the Devolved Governments and courts. • The Lord Chancellor has asked the Panel of experts to look at these issues as part of a comprehensive look at Judicial Review. As you will see, we have an experienced Scottish law academic on the Panel who will be able to give us their expert view and ensure the Panel remains within the scope of the Terms of Reference. The terms of reference for the IRAL have identified the following specific areas for inquiry: • 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. • 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. • 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.

- Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.

The full Terms of Reference are included on page 11 of this document.

Questionnaire

The IRAL welcomes evidence under the terms of reference and seeks comments and evidence against the following questions. Given the scope of the review, these questions are addressed to UK government departments and not the devolved administrations, however, should devolved administrations wish to provide a response, it should be made clear which jurisdiction the response is referring to.

Section 1 – Judicial Review and Government Decisions

1. 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?

    a. judicial review for mistake of law
    b. judicial review for mistake of fact
    c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)
    d. judicial review for disappointing someone's legitimate expectations
    e. judicial review for *Wednesbury* unreasonableness
    f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account
    g. any other ground of judicial review
    h. the remedies that are available when an application for judicial review is successful
    i. rules on who may make an application for judicial review
    j. rules on the time limits within which an application for judicial review must be made
    k. the time it takes to mount defences to applications for judicial review

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?

			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? **Section 2 – Codification and Clarity** 4. 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? 5. 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? 6. 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? **Section 3 - Process and Procedure** 7. 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? 8. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the courts? 9. 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? 10. 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? 11. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review? 12. 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? 13. 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? 14. 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?

Next Steps

The call for evidence will close at **12:00 noon on 19 October 2020**. Following the call for evidence, and in line with the Terms of Reference, Government then intends to publish a response to the IRAL's report.

Contact details/How to respond

Please send your response by to IRAL@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the following address:

Ministry of Justice
102 Petty France
London
SW1H 9AJ

As well as this, you should also send your complaint and/or comments to IRAL@justice.gov.uk.

Extra copies

Alternative format versions of this publication can be requested from IRAL@justice.gov.uk.

Publication of response

The responses to this call for evidence will feed into the final report by the Independent Review of Administrative Law, which will be published online at www.gov.uk.

Representative groups

Where relevant, representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this call for evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the General Data Protection Regulations (GDPR), and the Environmental Information Regulations 2004).

The Ministry will process any personal data in accordance with the GDPR.

Consultation principles

			For more information on the principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles: https://www.gov.uk/government/publications/consultation-principles-guidance **Terms of Reference for the IRAL** *Published on 31st July 2020 at https://www.gov.uk/government/news/governmentlaunches-independent-panel-to-look-at-judicial-review* The Review should examine trends in judicial review of executive action, ("JR"), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law. It should consider data and evidence on the development of JR and of judicial decision-making and consider what (if any) options for reforms might be justified. The review should consider in particular: 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. 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. 4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners. **NOTES:** 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.

			C. Para 1. In GMC v Michalak [2017] 1 WLR 4193 the Supreme Court noted that substantive public law is all judge made and would continue to exist, even if for example, the procedural provisions of the Senior Courts Act permitting JR were to be repealed. Should substantive public law be placed on a statutory footing? Would such legislation promote clarity and accessibility in the law and increase public trust and confidence in JR? D. The Panel will focus its consideration of the justiciability of prerogative powers to the prerogative executive powers as defined in 3.34 of the Cabinet Manual. 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? F. Paras 1-3: These issues affect all cases involving public law decision making, and not simply JRs, since they would modify substantive law. So, they would apply, for example, to the tenant raising as a defence in private law housing proceedings the illegality of a rent increase by the council as in Wandsworth LBC v Winder [1985] AC 461. G. Para 4: There are a number of procedural issues of possible concern that have been raised over the years. As part of this comprehensive assessment of Judicial Review, this is the time to conduct a review of the machinery of JR generally. The panel will issue the report to the Lord Chancellor who will work with interested departments to determine the publication timelines as well as the Government response
5.	Maidstone, Swale and Tunbridge Wells Councils	Patricia Narebor| Head of Legal Partnership | Mid Kent Legal Services	Please find attached the response to the independent review of administrative law on behalf of Maidstone, Swale and Tunbridge Wells Councils. IRAL SECRETARIAT - LGA - MB SBC TW Bc