SUBMISSION TO
THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

39 ESSEX CHAMBERS

Introduction

1. This short submission is provided on behalf of 39 Essex Chambers.[1] 39 Essex Chambers is a barristers chambers comprising 148 self-employed practitioners of whom a significant number practice entirely or in part in the field of Administrative Law. Further some 27 members of chambers are members of the Attorney General's panels of junior counsel to the Crown (seven "A"; ten "B"; and ten "C" panellists) many of whom routinely act for government departments in judicial review claims.

2. The submission in structured so as to provide succinct consideration of each of the four particular areas listed in the Terms of Reference.

Question 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.

3. This question needs to be unpacked before it can be usefully addressed.

4. First it raises two issues (i) whether the amenability of public law decisions to judicial review by the Courts should be codified in statute? And (ii) whether the grounds of public law illegality should be codified in statute? Second both

[1] The contents of this response are strictly the views of the authors, this document does not express a corporate or collective view of the practitioners at 39 Essex Chambers.

of these questions are poorly formulated and require clarification before they can be answered. We will address each in turn:

Amenability

5. The first question can be read as asking whether the amenability of public law decisions *by the Courts* should be codified in statute. Presumably an answer to this question would refer by way of analogy to section 15 of the Tribunals, Courts and Enforcement Act 2007 which extends judicial review powers to the Upper Tribunal. However, given that that the High Court's judicial review jurisdiction is beyond doubt, we think it is unlikely that this is what the framers of the present consultation wished to address.

6. An alternative reading of the first question is whether the *amenability of public law decisions* to judicial review should be codified in statute. However, again, it seems to us to be so obvious both that public law decisions should be amenable to judicial review and that there would be no purpose in codifying such a basic proposition that we do not think that this is what the framers of this question could have been asking.

7. The question, then, appears to be: should *the kinds* of public law decisions that are amenable to judicial review be codified in statute? In our view, the answer is "no". Doing so could at best serve no useful purpose and would at worst act as a kind of undifferentiated ouster clause. Such an ouster would require judges to innovate in order to ensure maintenance of the rule of law and, insofar as we understand them, that would not be consistent with the policy objectives driving this consultation.

8. First it is plainly not possible for Parliament to enumerate all the types of decision amenable to judicial review: judicial review is an extremely flexible

mechanism, it is used in the widest range of contexts, and those contexts are continually developing. Further, it is important to note that judicial review is not only concerned with *decisions* but also concerns certain *actions* and, indeed the *failure* to act or make a decision. Any codification would therefore need to be on the basis of general principles.

9. Second in our view any codification of such general principles would suffer from one of two defects:

   a. It would be so abstract as to leave the work to be done by judges and the common law. See for example CPR 54.1(2)(a)(ii) which defines a claim for judicial review as claim to review the lawfulness of a "*a decision, action or failure to act in relation to the exercise of a public function*". Codification of this sort would do no harm, but it would also serve no useful purpose.

   b. Alternatively "codification" would necessitate the creation of highly complex and rigid system that, if it were to do any work, would render certain classes of action/decision making exempt from judicial consideration without reference to the underlying facts or circumstances. In our view such an approach would not be consistent with the rule of law.

10. Third in our view neither of these issues would be solved by instead specifying the kinds of decision/action that would *not* be amenable to judicial review. Precisely the same points arise: either the excluded categories would be so obvious that listing them would serve no purpose or their exclusion would carry the risk of ousting a jurisdiction that the Court currently enjoys. And, for all the reasons set out above, we do not consider it to be appropriate for Parliament to legislate for ouster clauses under cover of what purports to be a reform of judicial review.

11. Fourth We can see no practical need for codification in this area. Courts and legal professionals are well versed in deciding whether or not a particular decision is the kind of decision that is amenable to judicial review and it is very rare for this to be an issue in cases before the Administrative Court. Those rare cases in which amenability to judicial review is a live issue usually call for nuanced judgments on the facts and are precisely the kinds of cases least suited to a broad-brush approach.

12. Finally, in our experience Courts exercise their judicial review jurisdiction with considerable restraint and are responsive to submissions that permission for judicial review should not be granted as e.g. parties have alternative remedies available or that matters are academic. Placing the kinds of decisions that are amenable to judicial review on a statutory footing risks disturbing this balance.

13. In sum: we can see no need and much potential harm in seeking to define/limit the kinds of decision amenable to judicial review by statute.

Grounds

14. The second part of the consultation question also requires clarification. As framed the question appears to focus on whether the grounds of public law *illegality* should be codified in statute (as opposed to the grounds of *irrationality* and *procedural impropriety* - see Lord Diplock's classic statement of that tripartite division in Council Of Civil Service Unions And Others v Minister For The Civil Service [1985] AC 374). However, as we understand it, the question is rather whether all of the grounds of public law unlawfulness should be codified in statute.

15. In our view, and for much the same reasons as set out above, we do not. Such codification would either be so general as to have no effect (save perhaps to

create unnecessary and technical pressure points in the development of administrative law over time) or would require an unwieldy system of such complexity as to be unworkable in practice and be almost certain to impact on the Courts' ability to address defective decision making in unforeseen ways.

16. Put another way: what is the mischief that statutory codification of the grounds of judicial review would be seeking to address? While the relevant law can be fairly complex, there is, in our view, no general confusion in the legal profession or the judiciary as to what constitutes a legitimate ground of judicial review. Unnecessary codification risks distorting this situation and leading to round upon round of litigation as the Courts are asked to settle the meaning of the new provisions.

17. Further, should Parliament legislate to *restrict* the grounds which can be advanced in a claim for judicial review, we consider it to be overwhelmingly likely that lawyers would simply recast claims under the still available grounds of review. In our view, far from increasing "clarity", this would only add complexity and render judicial review more opaque to non-professionals.

18. Finally, should principles of judicial review be codified, care would need be taken to ensure that that did not undermine of efficacy of the many statutory review procedures parasitic on judicial review principles. (See for example section 9(2) of the Terrorism Prevention and Investigation Measures Act 2011 which explicitly draws on judicial review principles. Any codification of judicial review principles would need to ensure that they remained sufficiently robust to allow for an HRA compliant review in this context).

Question 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.

19. Generally, it would appear that the principles of non-justiciability are broadly understood. Codification is unlikely to resolve any real problems with judicial review. Further it would be difficult to crystallise a coherent justiciability regime in statutory form.

Question 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.

20. The answer to this question is that the available grounds of judicial review and the available remedies when one or more of these grounds succeed should be entirely a matter for the court.

21. In a political system where the executive exercises very significant influence over the legislature, it is fundamentally objectionable for the legislature to seek to determine the grounds on which the executive can be held to have acted unlawfully, or the ways in which the court can seek to put matters right.

22. The full reasons for this are set out in the response of October 2020 from the Administrative Law Bar Association (ALBA) to the IRAL. As the ALBA response states at para 18: 'It has hitherto always been left to the courts, as the guardians of the standards of legality to which this constitutional role is entrusted, to develop and apply the principles of judicial review as part of the common law.' This remains the appropriate approach. There is no good reason to change the centuries old process by which the common law evolves new public law principles. As the ALBA response highlights at para 19 'it has long been recognised that the common law of judicial review has evolved over time "to preserve the integrity of the rule of law despite changes in the social

structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities".' The citation for this principle is the foundational case of R v IRC, ex parte National Federation of the Self-Employed [1982] AC 617, 639-640 per Lord Diplock.

23. On this specific issue, the ALBA response states at para 42 'The courts' role is to act as a check on executive power and, in a Westminster system in which the executive plays a significant role in the legislative process, legislative power. The danger is that by seeking to limit, by statute, the courts' ability to check executive power, the executive and legislative branches of government would thwart the very function of the courts in a democracy.' For this reason, neither the grounds for judicial review nor the available remedies should be determined by anyone other than the judges of the Administrative Court and the appellate courts.

24. Specifically on issue (ii) above, there is no principled basis on which certain grounds of judicial review could be excluded depending on the nature and subject matter of the relevant power (or duty) in question. Judges are already extremely astute to the need to apply public law principles flexibly to take appropriate account of the context. See for example the 'hands off' approaches adopted by the Administrative Court in challenges to executive action during the current Covid-19 pandemic in cases such as R (Adiatu) v HM Treasury [2020] EWHC 1554 (Admin) and R (Shaw) v Secretary of State for Education [2020] EWHC 2216 (Admin). For example, in Shaw at [119] Kerr J stated: "The duty of enquiry is part of the duty to make decisions that are rational. To be rational, they must be sufficiently informed. It is for the decision maker to determine, within the bounds of rationality, what degree of enquiry is called for and what specific enquiries need to be made (R (Balajigari) v. Secretary of State for the Home Department [2019] 1 WLR 4647 , per Underhill LJ (judgment

of the court) at [70]; and see in the context of the current pandemic R (Christian Concern) v. Secretary of State for Health and Social Care [2020] EWHC 1546 (Admin) in Singh LJ's judgment of the court at [66])." See further [154]; "The absence of the usual 21 days for parliamentary scrutiny must be viewed in the light of the pandemic and the destruction it was wreaking at the end of April and the beginning of May 2020." There is no need for certain grounds of review to be excluded from public law challenges in particular policy areas, when the Court can simply factor the context in to its approach to the application of those grounds to the facts of the case.

25. Specifically on issue (iii), the courts are already astute to ensure that appropriate remedies are tailored to the facts of the individual case. For example, the jurisdiction to make mandatory orders compelling specific action by the executive is generally only exercised when there is only one lawful action which could be taken; R. v Ealing LBC Ex p. Parkinson (1997) 29 H.L.R. 179 per Laws J (as he then was). The default position when unlawfulness is identified is that the decision will be quashed, allowing the executive to retake it lawfully in whichever terms are considered appropriate. It would be impossible to predict in advance which remedies are appropriate in relation to specific grounds of review, as the question indicates. The determining factor in relation to the appropriate remedy is unlikely to be the specific ground of unlawfulness, but rather the wider context of the case, for example the detriment to third parties which might be caused by a very late quashing order.

26. Once specific area which may warrant codification to some extent is that which is discussed in the report of the Independent Review of the Mental Health Act 1983 which reported in December 2018: (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778897/Modernising_the_Mental_Health_Act_-

_increasing_choice__reducing_compulsion.pdf), and, in particular, page 76, in which the Report Chair outlined that:

> "At the moment the only way for a patient to challenge the decision of the [Responsible Clinician] and [Second Opinion Appointed Doctor] is a right to appeal treatment by way of Judicial Review, but we have reached a firm conclusion that it is simply inaccessible. It is both too difficult and too expensive."

27. The Chair, Sir Simon Wessely, and his Vice-Chairs recommended, in consequence, that "there should be a route of challenge to a single judge of the Tribunal, supported by non-means tested legal aid." The White Paper responding to the Review is anticipated. However, it is suggested that this serves as an example of a situation where (1) ECHR rights (in this case those contained within Article 8) mandate access to a court as part of the necessary procedural guarantees; and (2) the State has a choice as to whether to codify that route or let it lie to courts by way of judicial review. In such a situation, problems will arise where the route of judicial review is ineffective in practice, and it is therefore suggested that there is a choice as to whether to render the route effective or to provide another route to provide the necessary guarantees.

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.

28. The duty of candour is clear, and the Attorney General's panel counsel are able to advise clearly on what it requires. No reform or dilution is necessary to this principle. While it might not always be palatable to clients, it is appreciated to be the correct principle that material which arguably supports the claimant's claim or undermines the government's position must be disclosed. Panel counsel and GLD cannot act if this is not complied with.

29. While it can be time consuming to comply with the principle, it is not disproportionate and can usually be dealt with in an administrable manner. The clarity of the principles enables panel counsel and GLD to give clear advice, which they regularly do. As noted in the ALBA response at paragraph 96 the quality of record-keeping and maintenance of institutional knowledge varies considerably between departments and organisations. Those organisations which keep good records are able quickly and with very limited resource cost, to comply with the duty of candour. Those organisations whose practices are lacking, by contrast, may need to engage in more detailed and searching disclosure exercises.

30. The solicitors and parties who tend to struggle to a greater extent with understanding the duty of candour duties tend to be external law firms or contractors (both consultants and service providers). In litigation where the duty of candour has not been complied with by third party contractors to whom the culture and understanding of candour is not well embedded issues can arise. Where government has used contractors, it can be more time consuming and complicated to ensure the duty of candour is discharged by a government defendant. This however does not mean that reform or a more detailed set of disclosure rules is required.

31. In judicial review (unlike under Part 7 CPR or the Employment Tribunal's procedures) it is not usual to have case management hearings at which disclosure issues are litigated before the hearing. The clarity of the principles in this area, and that the duty lies with GLD and panel counsel, helps ensure that observation of the duty of candour runs smoothly, and does not require additional (potentially time consuming) hearings in advance of the full merits hearing. It is helpful to government that not many disclosure orders are made by judges. Fighting disclosure/ candour issues tends to affect the Court's trust and confidence in government.

32. The fact that judicial review hearings tend to be 1-2 days at most (unless exceedingly complicated or requiring multiple defendants) is a strength of the Administrative Court process, not a defect. It is not unusual under Part 7 CPR for ½ or even the first day of trial to be taken up with issues arising from disclosure. This rarely occurs in judicial review hearings involving central government.

33. As to standing, whilst it is apparent that there has been a relaxation of the requirements of standing over the passage of time the present position strikes the correct balance. Section 31 of the Senior Courts Act 1981 requires a claimant to demonstrate a "sufficient interest in the matter to which the application relates". An overly narrow approach to standing could interfere with the performance of the court's constitutional function. It is however important the standing rules exist to preclude the profusion of unmeritorious judicial review claims.

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