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

The Council is obliged to lodge a JR claim against itself at a cost for cases where an administration error has been made eg in the planning application decision notice. Whilst no harm has been caused to a third party or a grievance has not been raised, the time and expense of dealing with a JR claim seems disproportionate to address the error.

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

On occasions complainants and litigants have a variety of routes to challenge local authorities in a number of areas. Eg, for planning applications, applicants and/or other interested third parties can appeal the planning decision through planning appeals to the Planning Inspectorate and by way of JR. This causes significant costs for local authorities.

Consultation – the statutory process for making and adopting Local Plans may have been followed by local authorities but local authorities are required to respond to JR challenges in addition to addressing challenges through the Town and Country Planning Act 1990 most of which is found to be without merit but the Council is obliged to incur significant costs in responding to these JR claims.

d. judicial review for disappointing someone's legitimate expectations

Usually not a main ground utilised by applicants; but the ground may be relied on in isolation or in addition to other grounds.

e. judicial review for *Wednesbury* unreasonableness

There has been an increase on relying on this ground over the decades as a result of more public engagement with LAs, more access to information and transparency generally. There is also the wider social issue of easier sharing of information by objectors etc. via websites/ social media and easier co-ordination of actions by local groups. The public generally appear to be more litigious, particularly as more contentious issues arise locally. This applies to most local authority functions to include planning, compulsory purchase and any general decision made by a local authority.

The main issues for LAs fall into 3 areas.

Issue of proceedings – where proceedings are obviously out of time, demonstrate no grounds for issue and do not follow procedure they are still issued and cause LAs expense and time in responding. A basic filter by the Courts and rejection in appropriate circumstances would save costs.

This also applies to issue where there are specific alternative procedures for the matter e.g. county court appeals on housing matters, tribunals for Council Tax matters resulting in duplication in the avenues that can be used to challenge local authority decisions.

Time – either times for issue or response being too short to allow for consideration by Committees, planning committees, interest groups within their usual meeting schedules and insufficient time for local authorities to liaise with their specialist advisers (to include Counsel. Urgent meetings and urgent advice is required to consolidate the response to the JR, thereby incurring significant additional cost.

Steps within proceedings taking considerable amounts of time due to Court delays, this causes additional costs in some circumstances e.g. provision of temporary housing pending JR outcome.

Awaiting Court decisions on ancillary/interim applications where consent between parties is not permitted. Undue delay by parties could be dealt with by directions.

Costs – Where costs caps are involved in Aarhus matters the levels of £5K and £10K do not provide sufficient levels to cover even basic costs to LAs and are no disincentive to continued actions where the Courts have indicated at the first stages leave is refused. In the few cases I have dealt with where a higher cap has been sought due to the level of assets of the applicant the Court has not been receptive to the application for a higher cap.

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

See above.

k. the time it takes to mount defences to applications for judicial review

See above.

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?

Yes agreed.

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?

N/A

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?

Potentially. But it would depend on the drafting of the statute. The process is explained clearly in the Practice Directions and Judicial Guidance from the Administrative Court. These are settled and generally understood. There may be scope to address the anomalies raised under section 1.

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?

Time – either times for issue or response being too short to allow for consideration by Committees, planning committees, interest groups within their usual meeting schedules and insufficient time for local authorities to liaise with their specialist advisers (to include Counsel. Urgent meetings and urgent advice is required to consolidate the response to the JR, thereby local authorities incurring significant additional cost.

JR applications often have to be prioritised as input is required from a number of sources.

Steps within proceedings taking considerable amounts of time due to Court delays, this causes additional costs in some circumstances e.g. provision of temporary housing pending JR outcome.

Awaiting Court decisions on ancillary / interim applications where consent between parties is not permitted. Undue delay by parties could be dealt with by directions.

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

Costs – Where costs caps are involved in Aarhus matters the levels of £5K and £10K do not provide sufficient levels to cover even basic costs to LAs and are no disincentive to continued actions where the Courts have indicated at the first stages leave is refused. In the limited number of cases where a higher cap has been sought due to the level of assets of the applicant, the Court has not been receptive to the application for a higher cap even where the evidence shows that the applicant has the resources. In such cases, local authorities should be able to recover the full costs where the JR application is unsuccessful.

Also, on occasion, it has seemed unfair that the Council were unable to claim costs as an interested party. In the recent JR we have been awarded costs when the claimant lost the oral renewal hearing. However, the Order is clear this is unusual. Save for their own costs (perhaps not even a consideration for a litigant in person) and a slim risk of being made to pay the defendant's costs if you lose the oral renewal – there seems little to deter a claimant from seeking an oral renewal hearing.

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?

See 7 and 8 above. Where the Court finds lack of merit, caps such as Aarhus caps should be removed and Local authorities should be able to recover full costs from applicants.

Further, it is expensive, but it is difficult to comment on proportionality, but generally this can only be assessed on a case-by-case basis. Whilst the Council were awarded costs at both the permission and oral renewal stages in a recent JR, the costs awarded do not cover the defendant's full costs in responding to the claim. Only Counsel's fee was awarded therefore defending an unmeritorious claim remains a cost to the council (public purse). The Council has experienced the same issue in past JR's, Counsel's fees are paid, but the Court is reluctant to pay the Council's direct costs.

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?

The Civil Procedure Rules and PDs provide that where a statement of case or application is struck out or dismissed and is totally without merit, the court order must specify that fact and the court must consider whether to make a civil restraint order. The consideration should be an automatic follow on, yet in our in our experience, the Council will need to make an application (before or after the event) in respect of future protection by way of CRO – which takes further time (including, additional court time) and further costs being incurred.

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

Pre-Action letters should be sent promptly to enable careful consideration prior to the deadline for issuing.

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?

More often the case is not issued if there has been a robust response to a pre-action letter or the claim is dismissed at permission stage. This happens on occasions.

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?

Potentially mediation with Counsel, but the cost of this may exceed the costs involved in a case being dismissed at permission stage. Further, mediation is generally better suited to a compromise situation. Illegality/maladministration are not really areas where you can compromise.

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?

No.

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