Baker McKenzie response to the call for evidence produced by the Independent Review of Administrative Law Panel

Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?

20 October 2020

Baker & McKenzie LLP

100 New Bridge Street
London EC4V 6JA
United Kingdom

Tel: +44 (0)20 7919 1000
Fax: +44 (0)20 7919 1999
DX: 233 Chancery Lane
www.bakermckenzie.com

1. Introduction

1.1 This document contains Baker McKenzie's response to the call for evidence produced by the Independent Review of Administrative Law ("**IRAL**") Panel, entitled "*Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?*" (the "**Call for Evidence**"). Our response is structured as follows:

(a) First, in section 2 below, we provide an overview of the IRAL's review (the "**Review**"), including our views on: (i) the constitutional significance of judicial review; (ii) the impact we think it has on decision makers; and (iii) the framing of the Review.

(b) Second, in section 3 below, we provide our responses to the questionnaire contained in pages 6 to 8 of the Call for Evidence (the "**Questionnaire**").

(c) Finally, in section 4 below, we provide our comments on the terms of reference of the IRAL (the "**Terms of Reference**").

1.2 Baker McKenzie is the world's largest law firm and has 77 offices in 46 countries around the world. The firm was founded in Chicago in 1949 and London is now its largest office, with more than 400 legal professionals. London is a full service office and its practice areas cover all those that might be expected of a major law firm.

1.3 The Regulatory, Public Law and Media Practice Group is recognised by legal directories as one of the leading public law practices in the UK. Our lawyers advise clients on both contentious and non-contentious public law matters arising under English and EU law. We act for Governments and regulators, as well as those seeking to challenge decisions made by public authorities, including some of the largest multinational corporations in the world. We also act for non-governmental organisations such as the United Nations High Commissioner for Refugees (UNHCR). Some of our international offices, in both common law and civil law jurisdictions, also have extensive experience in the field of public law and have contributed to this response.

2. Overview

2.1 Before providing our comments on both the Questionnaire and the Terms of Reference contained in the Call for Evidence, we set out in this section our views on: (i) the constitutional significance of judicial review; (ii) the impact we think it has on decision makers; and (iii) the framing of the Review.

2.2 The law of judicial review sets the legal framework within which decisions of public authorities which affect the rights, interests and legitimate expectations of individuals and corporations, are taken. Allowing claimants to challenge these decisions by subjecting them to an independent review of lawfulness is an essential mechanism for holding the executive branch of government to account, particularly in the context of a country with no written constitution. As Lord Dyson observed in *R (Cart) v Upper Tribunal*[1], "*There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review*". These are difficult and sensitive issues, which go to the heart of the separation of powers. Any potential options for reform need to be carefully considered in this context.

[1] [2011] UKSC 2

2.3 Challenges may sometimes slow the pace of decision making. The Government should, however, consider this to be a small price to pay for upholding the rule of law. Public authorities may not always welcome judicial scrutiny, but in our experience judicial review exerts a positive effect on decision makers, and many decision makers recognise this. By requiring decisions to be made legally, procedurally fairly and rationally, judicial review ultimately improves decision makers' behaviour and operations and, as a result, the quality of their decision making, as well as ensuring outcomes that fulfil the purpose intended by parliament when it conferred the power on the decision maker.

2.4 We note that the title of the Review asks whether the current law of judicial review strikes the right 'balance' between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government. Framing the Review in this way encourages two assumptions: first, that there is good governance; and second, that judicial review impedes good governance. In our view, the term 'balance' deliberately encourages such supposition, which is without foundation. As we explained in paragraph 2.3 above, we consider that judicial review - and threatened judicial review - in fact encourage better decision making.

2.5 Overall, we consider the current judicial review regime to be fit for purpose. Notwithstanding, we recognise that some options for reform may be justified, but it is essential that any reforms arising from the Review do not undermine the courts' capacity to discharge their constitutional functions. We note that neither the Terms and Reference nor the Call for Evidence contain any proposals for reform, and we are concerned that this does not facilitate respondents' ability to comment in an informed way about potential reforms. We would expect the IRAL to consult again when any proposals for reform are at a more formative stage to allow proper engagement with these issues.

3. The Questionnaire

Section 1 - Questionnaire to Government Departments

1. Are there any comments you would like to make, in response to the questions asked in the questionnaire for government departments and other public bodies?

3.1 The Call for Evidence contains a copy of a questionnaire that is "*to be sent to Government Departments* [2] ", which is based on the Terms of Reference (the "**Government Department Questionnaire**"). The Terms of Reference make clear in the introductory paragraph that the Review "*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*[3]" (our emphasis).

3.2 In light of this objective, it is striking that the IRAL does not appear to have prepared any form of corresponding questionnaire to be sent to judicial review claimants such as charities or membership organisations. It is also unclear whether or not the Government Department Questionnaire was sent to other judicial review defendants, such as regulators or public bodies.

3.3 Seeking input at the very outset from one type of judicial review defendant cannot elicit a fair and balanced response to the complex issues under consideration by the IRAL. The leading nature of the questions asked of the government departments is an additional obstacle. In such circumstances, it is difficult to understand how the Review can expect to achieve the balance promised in the Terms of

[2] Section 1 of the Questionnaire, p. 6 of the Call for Evidence
[3] p. 11 of the Call for Evidence

Reference between the rights and interests of citizens being able to challenge executive action, on the one hand, against the role of the executive to govern effectively, on the other.

3.4 In relation to the content of the Government Department Questionnaire itself, we refer to our comments at paragraphs 2.2 to 2.4 above which contain our views on (i) the constitutional significance of judicial review, (ii) the role of judicial review in improving decision making for public authorities and (iii) the framing of the Review.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

3.5 As noted in our introductory comments, overall we believe the current judicial review regime is fit for purpose. We note that potential reforms to the law of judicial review were considered by, and consulted upon, by the Government in 2012[4] and 2013[5]. When considering potential "improvements" to the law of judicial review, it is therefore important that the IRAL does not re-invent the wheel and takes account of work done previously, both by the Government and by respondents in respect of those proposals. In this respect we note that in its 2014 report entitled "*Streamlining Judicial Review in a Manner Consistent with the Rule of Law*"[6] (the "**2014 Bingham Centre Report**"), the Bingham Centre for the Rule of Law put forward a number of specific recommendations which could be pursued in the interests of streamlining judicial review and saving public funds, in a manner consistent with the rule of law. To the extent that these recommendations were not implemented, we suggest that they be considered now.

3.6 Notwithstanding the above, we consider that law of judicial review could be strengthened by:

(a) allowing parties to agree an extension to the three month time limit for submitting claims, to allow proper pre-action engagement in every case (we discuss our experience of time limits in paragraphs 3.23 to 3.25 below); and

(b) clarifying the scope and extent of the duty on public bodies to give reasons.

Section 2 - Codification and Clarity

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?

3.7 Whether or not to codify certain aspects of the law of judicial review depends on the purpose of such codification, and what the Government is ultimately trying to achieve. Depending on the ultimate form it might take, codification could lead to a number of different outcomes, which we consider in the paragraphs that follow.

3.8 In addition to considerations of certainty and clarity, the notes to paragraph 1 of the Terms of Reference ask whether legislation to place substantive public law on a statutory footing would "*promote…accessibility of the law and increase public trust and confidence*" in judicial review. It is certainly important to consider whether codification is the right way to achieve these aims, and ultimately the answer to this question depends on what approach the Government were to take:

[4] Ministry of Justice Consultation Paper CP25/2012 Judicial Review: Proposals for reform
[5] Ministry of Justice Consultation Paper CM 8703 Judicial Review: Proposals for further reform
[6] M Fordham, M Chamberlain, I Steele & Z Al-Rikabi, Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre Report 2014/01): https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistant_with_the_rule_of_law.pdf

(a) A 'high level' approach to codification i.e. setting out the amenability of public law decisions to judicial review and the grounds of judicial review as a form of high level principles, is unlikely to give any greater clarity and would miss out a wealth of nuanced grounds of judicial review. This could give more scope to the courts to fill the gaps left by the legislation, which would, in our view, ultimately reduce certainty.

(b) A 'detailed' approach to codification i.e. an attempt to set down in statute the amenability of public law decisions to judicial review and the grounds of judicial review in a meaningful amount of detail, initially seems more suited to promoting clarity and accessibility than the 'high-level' approach. This approach would, in theory, enable an individual to properly inform him or herself about the law of judicial review without having to resort to a review of the case law. That said, our concern with this approach is that the legislation that would be required to capture the current state of the law would likely be so lengthy, detailed and complex as to render it unwieldy and therefore inaccessible to individuals with no experience of judicial review. We note, in this respect, that even the Questionnaire to Government Departments contains a provision for "*any other ground of judicial review*[7]", thus recognising the difficulty in setting out an exhaustive list of the grounds. This more 'detailed' approach could also increase the risk of satellite litigation in order to interpret the provisions of the legislation.

(c) Finally, it is possible that the Government might consider another approach to codification, by limiting or narrowing the current grounds of judicial review in some way. For the reasons we explain in paragraph 2.2 above (where we set out our view on the constitutional importance of judicial review), we would be concerned at any attempt to limit or constrain the judicial review function through a more limited approach to codification. This would also be inconsistent with the interpretive nature of judicial review.

3.9 On balance, we do not consider that codification would ultimately lead to greater clarity or accessibility for practitioners or litigants in person. Adopting either a 'high level' or a more 'detailed' approach risks creating greater uncertainty, either because the statute would be so high level as to be positively unhelpful, or because it would be so complex that it would be hard to interpret, risking the triggering of additional litigation.

3.10 We have also drawn on the expertise of colleagues in other jurisdictions where judicial review is codified, as their experiences may be instructive:

(a) In Australia, codification has included a list of grounds of judicial review, flexible remedies for judicial review, the right to request a written statement of reasons for a decision, and clear rules on standing. They have found that, overall, this has improved accountability and access to justice, but has also therefore led to an increase in the number of claims against administrative law decisions. The attempt to codify what matters should be justiciable has also led to confusion and further legislation (see also our response to Question 4 below on this issue).

(b) In other countries where codification has occurred, such as New Zealand, it still co-exists with case law, rather than overriding or limiting the common law, and therefore is not overly prescriptive. In particular, judicial grounds for review are not set out in the New Zealand legislation, to ensure that the grounds for challenge are sufficiently broad, and will allow for a wide range of avenues for articulating the underlying concerns, and remain a dynamic process.

[7] 1(g) of the Questionnaire to Government Departments, p. 6 of the Call for Evidence

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

3.11 The issue of justiciability was recently considered in *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland*[8]. We consider that the current state of the law following *Miller II / Cherry* is clear in so far as the notion that a given power is non justiciable, such that no exercise of it will ever be capable of attracting judicial review, has given way to a much more nuanced approach. That is to say, the courts are now concerned with whether a particular exercise of a given power is suitable for judicial scrutiny on a particular ground.

3.12 In our view, the idea that a decision or power is wholly off limits to the courts as a matter of abstract principle could have serious implications for both the rule of law and the separation of powers. Moreover, placing certain subjects or areas beyond judicial review could lead to surprising consequences. If, for example, the circumstances of *Miller II / Cherry* had been different and the Prime Minister had advised the Queen to prorogue Parliament for a year, such a decision would have been immune from challenge had the approach of the Divisional Court in *Miller II* been followed (it held that, because the decision to prorogue Parliament is inherently political, it was necessarily non-justiciable). Certainly, it is more difficult to determine the boundaries of prerogative powers compared to statutory powers, but that does not mean that no such boundaries exist.

3.13 We accept that, in practice, a small number of given powers will remain non-justiciable. However, this will not be because the power in question is in principle absolutely non-justiciable. Rather, it will be because that power is highly unlikely to be successfully judicially reviewed. By way of a possible example, in respect of a decision taken under the prerogative power to declare war, it may in practice be difficult to identify a relevant ground of judicial review that could be successfully pleaded, as a court may be more hesitant to conclude that such a decision has been irrational.

3.14 In responding to this question we have also had regard to paragraph 2 and footnote E of the Terms of Reference[9]. Footnote E suggests that judicial review of the exercise of government power - as well as the scope – is a recent, and potentially unwelcome, development over the last 40 years. This appears to be a reference to the decision in the *Anisminic*[10] case, which was considered by the Supreme Court last year in *Privacy International*[11]. The upshot of these decisions is that, even if Parliament can in theory oust the judicial review, it is difficult to do so in practice because the courts are reluctant to take these clauses at face value.

3.15 In light of the extraordinary complexity and constitutional sensitivity of the issues discussed above, and their recent consideration by the Supreme Court, we have concerns regarding (i) their aptness for consideration as part of the Review and (ii) the IRAL's ability to properly consider them given the tight timescales involved.

3.16 We also note that, where other countries have excluded certain decisions from being justiciable under judicial review procedures, there is a written constitution that still provides an avenue for a claimant to challenge that decision, which is not the case in this jurisdiction. Given that the UK does not have a written constitution, this safeguard would not exist and there would be a tangible threat to the rule of

[8] [2019] UKSC 41, [2019] WLR 589
[9] pages 11 and 12 of the Call for Evidence
[10] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147
[11] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219

law. By removing the courts' jurisdiction to review certain decisions, there is a risk that the legislature may exclude the judiciary from its fundamental role of interpreting the law.

3.17 It is also worth noting that codification of justiciability does not prevent the courts having to consider the issue. Even in jurisdictions where non-justiciability is codified, such as France, case law is still relevant to determine whether particular cases fall in scope or not. Equally, in Australia, the legislature originally sought to exclude a number of areas of decision-making from judicial review. Over time, some of those areas have been re-introduced within the scope of judicial review under separate legislation, due to legal challenges, which has led to a confusing split system. This highlights a potential concern in legislating for judicial review, in that uncertainty in drafting can lead to uncertainty in application which otherwise may not have arisen.

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?

3.18 Baker McKenzie has been involved in judicial review claims in the Administrative Court, Court of Appeal and in the Supreme Court and in our view the process is generally clear.

3.19 In relation to appeals, we note that rights of appeal are mentioned specifically in the Terms of Reference and that reforms on appeals were brought into effect following the Government's consultations in 2012 and 2013 on reforming judicial review. For example:

(a) The removal of the right to oral consideration where a judge has certified the claim as totally without merit and the introduction of a fee for such oral renewals as are still permitted were introduced following the Government's 2012 proposals for reform in response to, amongst other things, a perceived growth at the time in judicial review; and

(b) Under the Criminal Justice and Courts Act 2015, the scope of 'leapfrog' appeals was widened, such that they can now bypass the Court of Appeal and go straight to the Supreme Court where the appeal raises issues of national importance; the result is of particular significance; or the benefit of early consideration by the Supreme Court outweighs the benefit of consideration by the Court of Appeal.

3.20 We do not consider that further restrictions on rights of appeal are either necessary or appropriate at this time. In our view, the reforms referred to in paragraph 3.19(a) above already address any concern about a growth in judicial review cases, and allow the courts to strike an appropriate balance between allowing arguable claims and disposing of genuinely spurious ones.

3.21 If restrictions were placed on appeals of decisions refusing permission to bring judicial review - for example restrictions on a Claimant's ability to request that the decision be reconsidered at an oral hearing - this could restrict access to justice and undermine the constitutional impact of the judicial review process. Oral advocacy is a powerful tool and it is often the case that judges can be persuaded on hearing arguments in person that are lost when a case is considered on the papers alone. In our view, therefore, retaining the ability to have a permission stage dealt with at a hearing is very important, since it gives a more adequate forum for the parties to explain and advocate their respective positions, as well as the opportunity for the judge to ask questions. In other jurisdictions, such as Singapore, they are currently considering whether to combine the leave stage with the merits stage, to reflect actual practice. Hong Kong has also seen an increased trend of ordering rolled-up hearings, in order to simplify the two-step leave and substantive application and shorten the judicial process. Increasing the number of rolled-up hearings may, therefore, be worth considering as a way of ensuring that oral consideration of permission

arguments is retained, whilst ensuring that some cases are dealt with more efficiently and with less costs to the public purse.

3.22 An additional risk of implementing further restrictions on rights of appeal is that fewer cases raising potentially important issues would reach the Court of Appeal and the Supreme Court. The Supreme Court in particular has a unique position at the top of our judicial system and is able to more fearlessly fulfil its constitutional function in holding the executive to account than the High Court or the Court of Appeal.

Section 3 - Process and Procedure

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?

3.23 We appreciate that a balance has to be struck between giving claimants sufficient time to lodge a claim, and also ensuring effective governance, but our view is that longer time frames would be preferable and that parties should be allowed to agree an extension to the three month time limit for submitting claims. We also note that the framing of this question encourages an assumption of good governance, but where this is not the case, and there is a lack of cooperation by the public body in question, these issues are ultimately exacerbated by a short limitation period.

3.24 Due to current time limits, claimants are often forced to issue proceedings at a stage when there has been little engagement from the public body, or responses to pre-action queries or requests under the Freedom of Information Act 2000 have not been received prior to the claimant's deadline. This leads to a number of undesirable consequences. Firstly, there is significant investment from the claimant up front, in preparing statements of facts and evidence, without having had the opportunity to finesse the issues between the parties, and limit the scope of the claim. There is also less opportunity for the parties to engage in alternative dispute resolution before the claimants have to issue proceedings, which may lead to unnecessary claims that could otherwise have been resolved. The claimants may also be less amenable to an out of court resolution by this stage, having expended significant costs and resources in preparing their claim.

3.25 Our experience in jurisdictions where statutory time limits are shorter (e.g. Hong Kong) is that the issues identified above are exacerbated, and the process becomes chaotic and unpractical for all parties. Equally, we note that there are other jurisdictions, like New Zealand, where there are no limitation periods for judicial review proceedings, given that judicial review operates as a critical check and balance, ensuring fair and lawful Government decisions. Other countries, like France, have time limits of up to a year.

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

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?

3.26 Our answers to questions 7 and 8 of the Call for Evidence, which relate to costs, are set out together below. In our view, rules on costs must necessarily be more nuanced in judicial review cases because generally they are claims focussing on a point of principle, rather than being primarily about financial

loss or gain. Overall, we consider that the current costs regime works well and we would not be in favour of changing it.

3.27 We note that question 7 appears to be asking whether claimants should face an increased costs penalty for bringing unsuccessful applications for permission for judicial review. We note that, currently, it is common for defendants to bear their own costs in defending a permission decision on the papers, even if the application for permission is ultimately refused. We would not be in favour of changing this approach, which could pose risk access to justice issues given that many judicial review claims are brought by members of the public who are unlikely to be able to pay the costs of public authorities. Nor would we be in favour of linking the recovery of costs to standing.

3.28 We recognise that costs for defendants are often front loaded, and that a great deal of work can go into defending a judicial review claim on the papers. However, even if a defendant public authority cannot usually recover the costs of a permission decision made on the papers, receiving a favourable permission decision is of use beyond the obvious function of dismissing a claim. Often these decisions give reasons which can help clarify a defendant's role or function, which is ultimately useful in improving decision-making in the longer term and reducing the risk of future judicial review claims.

3.29 In our experience, clients (both public authorities and commercial claimants) generally consider the costs of judicial review claims to be relatively proportionate compared to other civil litigation claims We also note that, if the permission decision is considered at an oral hearing, claimants are already often asked to pay the defendant's costs of the hearing.

3.30 In relation to the issue of costs and interveners, which is referred to in the Terms of Reference, we note that claimants and defendants are rarely asked to pay an intervenor's costs. In our view, this is both fair and appropriate given the work that intervenors undertake for the purposes of assisting the court. If the IRAL is concerned with spurious interventions (which is not clear), we consider that the current regime already addresses any risk in this regard. Intervenors require permission from the court to intervene, and even then the court can decide to confine an intervenor's participation to written submissions only. In our experience, third parties do not make the decision to intervene in a case lightly, and the court will only allow them to if they have evidence or expertise which will assist the court in considering the claim.

3.31 We have a long-standing partnership with UNHCR, which has been charged by the Statute of the Office of the United Nations High Commissioner for Refugees with supervising the application of the provisions of the Convention relating to the Status of Refugees 1951, and so has a unique role to play in commenting on the proper construction and application of that Convention. Accordingly, interventions by third parties can add value to the proceedings in ensuring that all of the relevant issues and evidence are before the court when it makes its decision. This may save the costs of further litigation in the future, had the relevant evidence or issues not been before the court at the time of the decision. Introducing a costs risk for intervenors could well have a chilling effect on their willingness to play this critical role.

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?

3.32 In our view, the remedies available in judicial review are not inflexible. The court currently has a wide discretion and a number of different remedies that can be imposed, including with conditions on them (such as an order with supervision by the court). It is unclear what extra discretion or flexibility would be needed, and why.

3.33 We also do not consider that the current remedies are excessively onerous, particularly given the protections provided to defendants by the 'no substantial difference' test (the court should refuse permission for judicial review if it appears highly likely that the outcome for the applicant would not have been substantially different for the claimant if the conduct complained of had not occurred, and must refuse to grant relief in these circumstances). This test has already reduced the availability of relief in favour of defendants in judicial review cases. It is relied upon a lot by defendants, and claimants often lose on these grounds. In these circumstances, it does not appear to us to be appropriate to further restrict remedies at this point.

3.34 In relation to alternative remedies, we consider that there could be greater scope for claimants to seek damages in judicial review proceedings. Although judicial review claims traditionally concern points of principle rather than financial loss or gain, there is often some element of detriment to the claimant that could be quantified. In some circumstances, this may be a more cost effective solution overall for a public authority compared with retaking its decision pursuant to a more commonly used quashing order.

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

3.35 We consider that proper engagement in the pre-action stage by both parties is the best way of maximising settlement opportunities. In our experience, where settlement solutions can be devised, they are usually agreed early, or they are not agreed at all.

3.36 For this reason, one improvement to the judicial review process that we suggest in paragraph 3.6 above is allowing the parties to agree an extension to the three month time limit between themselves. If a public authority receives a letter before claim only a few weeks before the deadline for a claim, it does not always allow for sufficient time to complete pre action correspondence, for the defendant to produce evidence pursuant to the duty of candour, for the claimant to fully evaluate the evidence and the merits, and for both parties to give proper consideration to potential settlement options. Whilst extensions can be agreed currently, the court does not have to approve them. In such circumstances, the lawyers for the claimant and defendant may try to get the court to approve a stay of proceedings in order to complete pre-action correspondence, and this is often approved. However, there is no guarantee that the court will approve a party-agreed extension, and it is therefore a considerable risk for the claimant to take..

3.37 It might also be helpful if public bodies were required to make it clear – when publishing a decision – that claimants have three months (and must act promptly) to bring a challenge. This would ensure adequate time pressure, without hindering access to justice.

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?

3.38 In our experience, it is rare for settlement to occur at late stage, due to the nature of judicial review proceedings, and that proceedings do not generally relate to financial compensation. Furthermore, the duty of candour requires parties to bring issues and evidence to the fore at the outset, meaning that the time frame for settlement is generally at an early stage in the process. Parties are generally incentivised to engage early, to ascertain whether there is scope to resolve the issue, or fix an error in the process.

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?

3.39 Judicial review proceedings are a measure of last resort, and typically they do not reflect a situation where parties can negotiate a commercial settlement, particularly as the process of revising a decision for a public body is not always simple. Rather, the role of ADR in judicial review proceedings is to encourage parties to share information about the claimant's concerns at the outset, in order to ascertain whether there was an issue, or the matter can be resolved between the parties. Our experience is that potential claimants generally raise concerns during the process, to ensure that the public body can consider the complaint before it is too late to do so. Once that complaint has crystallised, and a decision has been made, the main problem for claimants is that the time limits for judicial review are so short that there is rarely the opportunity to fully engage with ADR at that stage prior to issuing a claim. Furthermore, the costs of a formal mediation may dissuade parties from pursuing this option, particularly if a without prejudice meeting between the parties could suffice.

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?

3.40 We have extensive experience of judicial review where issues of standing have arisen. We consider that the current rules on standing are fit for purpose and already have sufficient scope so as to empower the court to refuse standing to complainants that are motivated by improper purposes.

3.41 We note that the Government consulted on tightening the rules on standing in 2013, by preventing those with a theoretical or political interest, such as campaigning groups, from bringing claims. Based on strong objections to this course of action, the government decided not to proceed with the introduction of an additional form of standing requirement for judicial review. It is not clear that anything has changed since 2013.

3.42 In our experience, the rules of public interest standing are not treated too leniently by the courts. Organisations such as charities and representative groups cannot challenge the merits of political decisions. They must have a legal argument, like any other claimant, and it is already open to decision-makers to challenge standing on grounds that a judicial review claim is not brought out of genuine concern but in order to pursue some wider objective.

3.43 It is an established principle of the current law on standing that the court will consider whether the applicant is prompted by an "*ill motive*" or is a "*mere busy body or a trouble maker*"[12]. It is also established that, if an applicant has no sufficient private interest to support a claim to standing, he should not be accorded standing merely because he raised an issue in which objectively there is a public interest and that, if the real reason why a claimant wished to challenge a decision in which there was an objective public interest was not that he had a genuine concern about the decision but for some other reason, then that was material to the question whether he should be accorded standing[13].

3.44 It is important that the current approach be preserved so that those without a direct interest, but who are nonetheless genuinely concerned as to whether public power has been exercised lawfully, are able to mount challenges. The ability to claim judicial oversight should be in the hands of all with a constitutional interest in the decision regardless of whether they are directly affected by the outcome of

[12] per Sedley J (as he then was) in *R v Somerset County Council, Ex p Dixon* [1997] JPL 1030
[13] *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546

the decision - not least because in some cases those with a direct interest in a decision may not be in a position or have the resources to challenge matters of genuine public concern.

3.45 In our view, it therefore should continue to be the case that it is for the court to determine on the facts before it whether a person without a direct personal interest in a matter should be granted or denied standing to bring a claim. If the rules on standing were tightened, there would be some decisions that could not be challenged at all, which would hinder the ability of the courts to perform their constitutional supervisory function.

4. The Terms of Reference

4.1 In this section we make any additional comments, to the extent that they are not covered in the responses to the Questionnaire above, on the issues raised by the IRAL's Terms of Reference.

Scope of the Review

"The Review should examine trends in judicial review of executive action, 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."

4.2 The scope of the Review is incredibly broad and could have potentially far-reaching consequences on complex and sensitive issues. Moreover, the timeframe for consideration by both respondents to the Call for Evidence and for the IRAL is very limited. We note that no specific proposals have been put forward for consultation at this stage in terms of reforming the law of judicial review and, as noted above at paragraph 2.5, we are concerned that this does not facilitate respondents' ability to comment in an informed way about potential reforms on such important issues. We repeat that we would expect the IRAL to consult again when any proposals for reform are at a more formative stage to allow proper engagement with these issues.

4.3 More generally, we refer to and repeat our views on the constitutional importance of judicial review, its impact on improving decision making, and the framing of the Review made in paragraphs 2.2 to 2.4 above.

Codification

Para 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.

4.4 We refer to, and repeat our comments at paragraphs 3.7 to 3.10 above.

Non-justiciability

Para 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.

4.5 We refer to, and repeat our comments at paragraphs 3.11 to 3.17 above.

Para 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.

4.6 We refer to, and repeat our comments at paragraphs 3.11 to 3.17 above in relation to the issue of justiciability.

4.7 In relation to grounds of judicial review, we consider that the existing grounds are both well established and well understood. We see no case at present to change them, and note that the Government has not put forward any case to the contrary. In particular, we note that no argument has been put forward by the Government in relation to amending the grounds of judicial review based on the nature and subject matter of the power. We note, in this respect, that the existing grounds already depend to some extent on the nature and subject matter of the power being challenged.

4.8 In relation to remedies, we refer to and repeat our comments at paragraphs 3.32 to 3.34 above.

Procedural reform

Para 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.

4.9 In relation to streamlining the process of judicial review, we refer to and repeat our comments in paragraph 3.5 above. In particular, we refer to the recommendations put forward in the 2014 Bingham Centre Report. We suggest that these are considered by the IRAL in the context of reviewing what procedural reforms to judicial review are necessary.

4.10 In respect of the issues set out in sub paragraphs (a) and (b) above, disclosure and candour, we note that the duty of candour is not as wide as the disclosure obligation in other civil litigation claims. In our view, the duty of candour is the right approach, and we see no basis for limiting it. Indeed, to do so would risk not only undermining the purpose of the judicial review process as a whole, but it would also have a detrimental effect on decision making in practical terms. We recognise that the duty of candour can be an onerous responsibility on defendants in some circumstances, but it is ultimately defendants who are likely to have the most information to hand. Ultimately, the duty of candour is an important safeguard which, in our experience, helps to promote a culture of compliance and better decision making. In any event, narrowing the scope of the duty of candour might also be of little practical assistance in lessening the burden on public authorities, given that the duty sits alongside other regimes – such as Freedom of Information. Claimants might be pushed towards making wider requests under those alternative regimes if they cannot access information using the duty of candour.

4.11 Our views in respect of the issues set out in sub paragraphs (c) to (f) above, that is - we have already set out our views on standing, time limits, remedies, rights of appeal and costs and intervenors in our answers to the Questionnaire in section 3 above.

5. Conclusion

5.1 We hope that our comments above are helpful. If you have any questions or if we can be of further assistance, please contact Joanna Ludlam [redacted] Laura Carlisle [redacted] or Sarah West [redacted]