info@centreforwomensjustice.org.uk
Oxford House, Derbyshire Street,
London, E2 6HG
DX 40901 Bethnal Green
020 7092 1807
centreforwomensjustice.org.uk
Charity No: 1169213

**Our ref:** DD/IRAL response
**Date:** 26 October 2020

**Independent Review of Administrative Law Panel**

By email only: iral@justice.gov.uk

Dear Sir/Madam

**CWJ's submissions to the Independent Review of Administrative Law panel**

1. Please accept this letter as Centre for Women's Justice's response to the Independent Review of Administrative Law Panel's call for evidence.

**About us**

2. Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination by the State against women within all aspects of the criminal justice system, particularly where women and girls have been victims of crime. CWJ aims to help women and girls who are subject to male violence access legal remedies to defend and enhance their rights. Women, as victims, defendants, and witnesses suffer very significant structural disadvantage within the criminal justice system.

3. We conduct strategic litigation and provide training to frontline women's services across England and Wales on legal remedies available to victims of male violence. We also work closely with women's sector groups, providing advice and assistance to frontline services, including advising them where judicial review could provide their clients with a potential remedy and finding them lawyers to assist them with the process.

4. Between them, our lawyers have decades of experience acting for claimants in judicial reviews. While the work at CWJ is presently focused on acting for victims of domestic and/or sexual violence, for example relating to decisions not to prosecute their assailants or challenges to wider policy decisions that affect the client group as a whole, our lawyers all have a background in private practice bringing public law claims on wider issues. This

response therefore draws on our experiences of the process as a whole, but focuses on the issues which particularly affect CWJ's client group.

## Introduction

5. Judicial review is an essential process for our clients in seeking justice and accountability. This client group comprises women and girls who are victims of domestic abuse, sexual violence, rape, grooming, trafficking and child abuse. It is a remedy of vital importance to this group, who may need to use public law not only to challenge unlawful State decisions for themselves, but in an attempt to ensure decision-making by those public authorities better aligns with the legal duties that they should abide by. Thus, as well as providing individual remedies for victims of criminal justice failings, public law challenges can help ensure that future victims will not suffer similar injustices.

6. The panel should note that like all claimants, our client group use judicial review only as a last resort, within the very restricted circumstances in which judicial review is appropriate and possible. For example, while a number of victims approach us seeking to judicially review decisions by either the police or the Crown Prosecution Service (CPS) not to prosecute their assailants, it is in rare circumstances we advise they proceed with a challenge given the already restrictive approach taken by the Administrative Court, where judges have long applied a "self-denying ordinance" in challenges to prosecutorial decisions (see *L v DPP* [2013] EWHC 1752 (Admin).

7. However, for those clients where it is apparent that the decisions taken are unlawful, it is vital that judicial review is accessible to enable them to seek justice. In our view this not only assists our clients, but society as a whole given the importance of ensuring wider public safety through the prosecution of serious offenders.

8. To that end, we are deeply troubled at any potential limitation that might be recommended or imposed on accessing judicial review by claimants. We have considered the terms of reference for the panel's review and note with concern that the manner in which it is framed implies that the rights of citizens to challenge the lawfulness of executive action is not properly balanced with the ability of the executive to govern, and/or that judicial review imposes an improper burden on state agencies such that there are circumstances in which it would be appropriate to disapply citizens' rights to bring a challenge or to limit disclosure or the duty of candour for defendants. There is a suggestion in the terms of reference that the process as a whole hinders rather than seeks to ensure good governance. We strongly reject this to be the case and are disappointed to find it framed in this manner.

9. In our view the very existence of judicial review likely ensures more lawful decisions are taken than would be the case if decisions could be made without the possibility they could be challenged. Public bodies, mindful of their obligations under the law and aware that unlawful decisions could result in legal challenge, are plainly more likely to make more careful, lawful, decisions. In our work, many public law challenges secure a positive outcome for the claimant without the need to issue proceedings or go to a full hearing. The process of judicial review is thus a powerful, and relatively inexpensive, tool where a single pre-action protocol letter can be sufficient to alert the legal department of the public body to unlawful decisions being made by others and focus minds and secure resolution, where otherwise written representations would be ignored or refused. It would be remiss of the panel not to recognise this, and to recognise that the cases which are actually issued or even go to a final hearing are not representative of judicial review proceedings as a whole.

10. We strongly submit that it should never be the case that a public authority can make unlawful decisions with impunity. Where, despite the possibility of challenge, unlawful decisions are made, access to judicial review both in terms of what grounds can be raised and the three-stage process (pre-action steps, application for permission, a full hearing) is already sufficient to filter weaker claims and limit incorrect challenges being brought.

11. Ultimately, it is fundamental to the very values of democracy, accountability and the rule of law that the State should not be entitled to wield absolute and unchallengeable authority where their decisions impact on citizens, either as individuals or as a class. Any changes made to the system of public law which would allow the government of the day, regardless of their political sensibilities, to wield such power is antithetical to the principles on which our society is founded. Indeed, it strikes against the principles of parliamentary sovereignty; public bodies must comply with the laws set out by Parliament and where they do not, they should be open to challenge.

12. In preparing our response, we have had the opportunity to read in detail the response to the panel by Public Law Project (PLP), an organisation we consider to be the most authoritative on all issues arising in public law. We understand that in preparing their response they have not only drawn on their own research and experience, but have consulted widely with experts, academics and practitioners. As such, we have no hesitation in endorsing and adopting their submissions. To that end, please consider our submissions to have adopted all of those of PLP. The purpose of these submissions is to highlight the particular experience of the significant client group we work with, namely women and girls subject to male violence.

13. This letter seeks to respond to the questions set by the panel. The questions do not relate to any possible policy amendments. We wish to make clear that should any amendments to the system be proposed, we believe it is vital that the panel consult on those specific

recommendations/proposals as there may be evidence and issues arising which the response to this more general call for evidence, may not have addressed.

14. Where the panel's questions are not within our experience and/or expertise, we have not responded. Where we have responded, we both adopt PLP's submissions and have added further information that is within our experience and/or expertise. For ease of reference, we have set out the question to which we are responding in bold and italics, keeping the panel's own numbering.

15. Finally, please note that where possible we have provided examples of cases or types of cases to illustrate our assertions. Some of these are reported cases, and the full title is provided. Some of these are not reported because they are either ongoing or have concluded (usually in the claimant's favour) prior to a full hearing. Given the nature of our work, our cases are extremely sensitive and many of our client group are entitled to lifelong anonymity in accordance with s1 Sexual Offences (Amendment) Act 1992, as they are victims of sexual offences. To that end, unless named in the proceedings, we will provide information on these cases anonymously to prevent the identification of the claimants.

## Our response

### *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?***

***And***

***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)?***

16. The call for evidence asks government departments whether judicial review "seriously impedes" the function of their work and sets out a series of questions regarding various aspects of judicial review. We start by making the point that it should be evident that if public bodies made lawful, reasonable decisions which were correct in law, fact and procedure, there would simply be no, or at least very few, judicial reviews. Therefore, the first step to limit the use of judicial review, is to ensure that decisions by public bodies are lawful.

17. We believe that judicial reviews can assist in ensuring lawful decisions are made more often and thus improve the function of government departments and other public bodies rather than impede them. By way of example, we ask the panel to consider the work we have done acting for victims of serious sexual crimes in challenging the decisions of the Parole Board either in moving them to open conditions or recommending them for release.

18. The panel will no doubt be aware of *R (DSD and NBV) v Parole Board for England and Wales and the Secretary of State for Justice [2018] EWHC 694 (Admin*) a judicial review of the decision of the Parole Board to release serial rapist John Worboys and against the Secretary of State for Justice in respect of the lack of open justice in Parole Board hearings. Our director, Ms Harriet Wistrich acted for the claimants, who were two of John Worboys' victims. The claims were successful, and brought into the light the way that some Parole Board decisions were being taken and their failure to fully consider all relevant evidence, including known wider offending by the perpetrator and the views of victims. (The panel should take note that without the disclosure duty within the judicial review process, the claimants would not have been aware of the flawed basis for the Parole Board's decision.)

19. Following the successful judicial review, the specific matter was remitted to the Parole Board which then took into account all of the evidence it had failed to previously consider and thus recognised that John Worboys continues to pose a danger to women and should not be released at this time. Significantly, the judicial review also led to a wider review by the State as to how Parole Board cases are heard. It has already resulted in a change to the rules such that victims of serious offenders are entitled to be notified of potential release decisions and make representations for the Parole Board to consider, improving the quality of decision-making. Further, an appeal process has now been applied without the need for victims to undertake a judicial review in the first instance, thereby streamlining the process. We understand the Parole Board and the government have welcomed these changes. It was even announced on 20 October 2020 that further improvements to decision-making are being considered, such as the potential to hold some parole hearings in public, a change which many of our client group would welcome and which will improve transparency for all.

20. CWJ have been involved in two other matters on behalf of victims challenging Parole Board decisions, which highlight the importance of the judicial review process in ensuring victims' rights are taken into account. In *XY v Parole Board and Secretary of State for Justice* a victim of a serial rapist sought to judicially review the Parole Board's decision to recommend that he be moved to an open prison. After an anonymity order was granted, together with an order for expedition, the Secretary of State confirmed that he would be rejecting the Parole Board's recommendation and keeping the perpetrator in closed prison conditions.

21. It was further revealed in that case (and confirmed in a second, where the decision was withdrawn following a pre-action protocol letter) that the Parole Board were often failing to inform victims that their attacker was due to be released or moved. Now that these claims have been brought it is hoped that these failures will be avoided in the future. The panel should note that these cases are also a good example of the very process of judicial review being sufficient to improve decision-making; it was not necessary for the matters to proceed to a full hearing for the defendant to recognise it had acted unlawfully, and remedy the situation.

22. Another example from our casework which we consider illustrates the assistance that judicial review can provide to State bodies in improving their decision-making is *R (XN & XD) -v- National Police Chiefs' Committee, Director of Public Prosecutions & the College of Policing* [CO/2990/2019] which relates to a judicial review of the 'digital downloads policy' in rape cases. Two CWJ clients, both complainants of serious sexual offences, applied for judicial review of a 'digital data extraction notice and information sheet' launched by the National Police Chiefs' Council and others in 2019 for use in police investigations where data from a victim's or witness' mobile phone is sought. The notice and information sheet have also colloquially been referred to as 'consent forms', in that victims or witnesses to a police investigation whose digital device is requested are asked to read the forms and 'consent' to the surrender and download of data from their device on the basis set out.

23. The wording of the forms, however, fell well below the standards that would be expected of consent forms in other contexts where personal data (including sensitive personal data) is furnished to a data controller, under the GDPR/Data Protection Regulations 2018. They appeared to indicate, too, that a blanket approach would typically be taken to accessing and retaining victim/witnesses' data in any circumstances where the police wanted to look at the owner's device, in other words that full, or very extensive, downloads of personal data held on a device would be the norm, regardless of its relevance to the investigation. The forms did not appear to contain any safeguards to ensure that searches and downloads undertaken on a victim/witness' device were strictly necessary and proportionate.

24. The claimants brought the legal challenge because they themselves had been provided with (earlier iterations of) these consent forms and had been asked to agree to a 'full data download' of their devices after they reported the serious sexual offences to which they had been subject. They were concerned that the new iterations of the consent forms were no better and would deter other victims from pursuing their complaints.

25. The claim was settled by the defendants in the claimants' favour after similar concerns were raised in a separate criminal matter and following the UK Information Commissioner's concerns. As part of the remedy, the defendants not only agreed to revise the consent forms but to allow the claimants the opportunity to input into the drafting of

them. As a result, the new forms are much more sensitive to the rights and needs of victims. As part of the settlement process the policing body also agreed to introduce new forms and guidance to officers immediately on an interim basis, rather than continue use of the existing forms pending a lengthy review.

26. This case is a good example of a judicial review making a systemic improvement that will serve much wider interests than just those of the claimants and the importance and flexibility of the process. Indeed, following the issuing of the digital data extraction forms that were the subject of the judicial review, there was a public outcry with questions raised in parliament. While the bodies responsible for the reform agreed to consult relevant stakeholders, it was ultimately only the legal proceedings which led to the withdrawal and immediate replacement of the forms.

27. We consider that it is of vital importance for the panel to recognise that even judicial reviews which do not go on to a full hearing can clarify the law and assist decision-makers in future similar matters. The example above is a case in point.

*28.* Moreover, the process of judicial review can clarify the law, improve decision-making and have important outcomes for the claimant, even where a particular public law challenge is ultimately dismissed. For example, *R (Monica) v DPP* [2018] EWHC 3508 (QB) was a challenge brought by CWJ's Director, on behalf of one of the victims of undercover police who was deceived into a relationship with an undercover officer. The case sought to test and clarify the law on what forms of deception can amount to a vitiation of consent in rape/sexual assault cases. This issue is one of interpretation and finely balanced; and as in this matter, legal challenges can help clarify legal understanding further and assist decision-making on charging decisions or provide the basis for legal reform to bring a statute up to date.

29. Another example from our work is that of *R (Tracey John-Baptiste) v DPP* [2019] EWHC 1130 (Admin), which was a challenge to the CPS' decision not to bring a prosecution in connection with the claimant's daughter's death. Our client applied for judicial review of the CPS' decision not to prosecute her daughter's ex-partner - who had an alleged history of domestic violence - and was the prime suspect in the police investigation. The police treated the death as a domestic homicide and considered that there was sufficient evidence to at least demonstrate that the suspect was guilty of manslaughter.

30. The judicial review, while unsuccessful overall given the very high threshold for overturning a prosecutorial decision, did bring to light that key evidential aspects of the case had apparently been overlooked. This has now allowed the deceased's mother to better understand all the evidence considered concerning responsibility for her daughter's death and consider any further potential action against the suspect, even if the criminal standard for proof may not be met. Moreover, the Divisional Court (who

eventually decided that permission to proceed should be granted since it was refused at first instance) specifically noted that they were very concerned that some key evidential aspects of the case had arguably been overlooked. They found that there was a clear interest in ensuring the case progress to a full hearing, given not only the seriousness of the case and its importance for the deceased's family, but also because it might have implications for other victims of domestic violence. It is hoped that those comments will have been recognised and acted upon by the DPP, in decision-making in future cases.

31. In response to these questions, we also wish to highlight that, as the panel is no doubt aware, judicial reviews cannot be brought merely because a claimant is unhappy with a decision. As claimant lawyers we always advise negatively where there are no legal grounds to proceed. While this is not always immediately obvious (such advice must be given prior to disclosure) it is often necessary for us to advise clients not to threaten or bring judicial review, even where a decision seems wrong or unfair as the threshold tests are not met. Where proceedings are started and we consequently receive disclosure which demonstrates the public body has acted lawfully, again we advise and assist the claimant to withdraw. The earlier that disclosure is provided, the earlier such claims will be discontinued. For claims funded by way of legal aid, the panel should note that there are even greater barriers to weaker claims proceeding: not only does the Legal Aid Agency (LAA) consider the merits themselves, but the position is scrutinised at each stage of the process and Counsel are also involved to advise on prospects of success as well as to act for the claimant. Both solicitors and barristers have a duty to the LAA to set out the merits or otherwise of a potential judicial review claim.

32. On the issues of disclosure and the duty of candour, we strongly submit that the panel should not recommend interfering with the current rules and seek to limit the defendant's duty of candour or disclosure obligations. If anything, we would suggest that these be strengthened to ensure early settlement of claims, as we have experience of documents being disclosed too late in judicial reviews where early disclosure may have settled proceedings, resulting in a waste of time and costs for all parties. The process of disclosure and the attendant duty of candour thus should play a vital role in limiting the so-called "burden" of judicial review on public bodies.

33. Further, the duty of candour plays an important role in ensuring suitable transparency, justice, and accountability. For example, we acted in the matter *of* [redacted]

[redacted]

34. The procedural aspect of the judicial review challenge was substantially based on the failure by the Attorney General to disclose material on which he had relied in reaching his decision. The claimant repeatedly requested a copy of the material but was refused.

35. It was only after our client was forced to issue proceedings that the defendant fully considered his duty of candour and the material in question was disclosed. While the disclosure did not resolve our client's concerns regarding the Attorney General's decision, it did provide the claimant the opportunity to review crucial material underlying an adverse decision with his legal team, so he could receive appropriate legal advice. The judicial review litigation thus enabled information to be brought to light which would not otherwise have been seen, and should always have been seen by the father of the deceased, since it had been relied upon by the Attorney General and the CPS to justify concluding their inquiries into the circumstances of his daughter's death. If the duty of candour had been limited or removed, or indeed judicial review itself limited, this might not have been possible. The panel may also wish to note that on receipt of disclosure, the claim was withdrawn. Had the material been provided sooner, the proceedings may never have been started, or ended sooner, if provided at the pre-action stage.

36. We do recognise that some litigants in person may be bringing judicial reviews where there are no grounds to do so, due to their lack of understanding of the process. While these claims will likely fail at the permission stage, if the panel believes that the number of these being brought hinders the work of public bodies then the appropriate way to remedy this, rather than limiting everyone's ability to bring judicial review, is to increase access to legal advice. Successive and severe cuts to scope and payments in legal aid have reduced the accessibility to good quality, early, legal advice which would likely reduce incorrect claims being issued by litigants in person. While legal aid may not be of prime consideration to the panel, it would be imprudent for any conclusions to be drawn as to good governance being hindered by claims which from the outset have no reasonable prospects of success being put forward, without also considering whether the claimant had access to good quality, early, legal advice. The very low financial limits which entitle people to legal aid should be increased so that advice and assistance on whether there are good grounds for a claim can be more widely accessed and thus claims obviously without reasonable prospects of success are less likely to be brought in the first instance.

37. Indeed, in our view, the scope of legal aid should not just be extended at the judicial review stage but before, if the government is determined to lower the number of claims brought. Good quality, early, legal advice accessible to a significantly greater number of potential claimants is clearly required. An example from our own work is the removal of legal aid to assist victims of crime applying for criminal injuries compensation. While legal

aid exists at the judicial review stage, some of our practitioners have noted that if the victim had been granted legal aid to assist in the application itself, or at least at the appeal or Tribunal stage, a judicial review would not have been necessary because with advice and representation, the process in the lower stages of the application could be correctly applied and managed, thus negating the need for a later judicial review.

38. We hope that the panel will note that based on the above, it is evident that judicial review, while potentially inconvenient for defendants, does not "interfere" with the ability of the executive to govern, it simply ensures that they do so lawfully, which is to the advantage of all.

***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?***

***And***

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

39. For these questions we rely wholly on the response of PLP and adopt them here. We make only a few additional points.

40. With respect to codifying the judicial review process in statute we wish to add that we agree with PLP that it will create further uncertainty rather than improve it and this would particularly disadvantage our client group. Our clients are often suffering from some form of trauma following the crimes committed against them. For those clients it is of utmost importance that the process is as clear as possible and satellite litigation is unlikely to be required to clarify the processes further.

41. One of the really important functions that judicial review can play is directly linked to its flexibility. We fear that codification will limit this flexibility. Claimants can, where necessary, make urgent applications in very short time scales which can be considered by the Court in advance of imminent and irreversible events. This includes cases where defendants delay or fail to respond to representations. There is a concern that if the process is codified it may lose the flexibility and discretion in the way the Court deals such matters. We provide two examples which demonstrate how judicial review can provide a genuinely impactful remedy. The first involves the use of judicial review in ensuring that an elderly woman held in immigration detention did not have to be handcuffed at her daughter's funeral. An application for judicial review was considered at a permission

hearing just days before the funeral, where previously written representations had failed to elicit a positive response, and the matter was settled with the detaining authorities agreeing that handcuffing would be unnecessary. The second relates to a judicial review in which the claimant was the sister of a victim of sexual assault who died in a police station, seeking a jury in the inquest. The judicial review application was heard at a 'rolled-up' hearing, 3 working days before the start of the inquest, and was successful. The jury eventually provided a very detailed narrative setting out systemic failings and their causal connection to the death. We submit that strict codification may limit such essential and important applications.

42. With respect to the suggestion that there should be certain decisions not subject to judicial review we wish only to emphasise that it would be plainly improper to suggest that whole areas of decision-making should be removed from the system of potential judicial review. No public body should be above the law and providing unfettered power, even in seemingly limited circumstances, it is a dangerous proposition which undermines the principles of the rule of law and the very core of democracy. To interfere with this principle and suggest that some decisions be placed outside the scope of judicial review (which are currently justiciable) and therefore scrutiny and challenge, will later be subject to the whims and ideologies of changing governments. Any government that seeks to impose further limits on the rights of individuals, or bodies who act on behalf of groups of individuals, to challenge their decisions is setting an extremely dangerous precedent for future governments. While the current government has stated it is committed to improving the criminal justice system for victims of sexual and/or domestic violence, a future government may not. Thus, any moves to further limit the justiciability of whole departments or types of decisions will likely impact in ways that are not currently envisaged.

***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?***

43. From our perspective as practitioners in public law, in our view the process is sufficiently clear. We recognise that for those without access to a lawyer it may be more complex. As set out above, in our view the appropriate solution would be to improve access to good early legal advice by extending the scope and eligibility rules for legal aid.

***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?***

44. Overall, CWJ considers that the current procedure does strike broadly the right balance. Where the balance is occasionally wrong, this is normally to the advantage of the defendant, not the claimant. In particular, this relates to the short time limit for filing a judicial review. The short time frame is to ensure that there are no substantial delays to the executive's actions, and it places a substantial burden on the claimant.

45. As the panel will no doubt be aware, judicial reviews must be brought 'promptly' and in any event no later than three months from the date of the decision. The three-month time limit is a long stop and the court has the power to strike out a claim on the basis that it is out of time, even if it has been issued within three months of the date of decision. Further, the time limit applies even where the claimant is unaware of the decision having been taken. While that can sometimes be a reason for extending the time limit beyond the long stop of three months, the defendant is entitled to challenge any such application for an extension on those grounds, and the courts are not bound to grant it.

46. Even for those claimants who are aware of the decision they seek to challenge shortly after it has been taken, the time limit is extremely short when considering the significant amount of work to be done in order to correctly put forward a claim. For our clients this will involve, at a minimum: taking detailed instructions; considering documentation (which can be substantial); advising the client; applying for legal aid (which can take a long time to be granted); complying with the pre-action protocol (which takes a minimum of 14 days but is often longer as we find defendants regularly request further time to respond); considering any response and pre-action disclosure and advising the client again; preparing the claim including instructing counsel to draft the grounds; and compiling and filing the permission bundle. We remind the panel that our clients are often suffering from some form of trauma as they are victims of various forms of abuse and this can elongate the process. If the time limits were further shortened, we fear that the work done on behalf of claimants would necessarily be less detailed and there would be a lesser chance to resolve the matter between the parties without having to issue a claim. Perversely, this may mean that weaker claims are issued and stronger claims not resolved at an earlier stage, increasing time and cost for all sides.

47. We submit that any further shortening of the time limit will particularly negatively impact our client group. Our enquiries team, which advises frontline domestic and sexual violence advocates is regularly approached about cases where women would have had potentially good claims for judicial review, but are out of time. Sometimes this is a result of their trauma – both from the original crime and following their treatment by the criminal justice system – such that they are not able to act swiftly while they attempt to come to terms with a decision which they do not themselves immediately recognise as unlawful.

48. Further, we have encountered numerous instances in which the police or CPS have not correctly informed victims of their rights to any form of challenge. For example, some victims are not informed that their case has been closed, some are not informed of the Victim's Right to Review (VRR) Scheme, and some are misinformed about how to challenge decisions. This can result in victims seeking advice too late, even where their claims have merit.

49. In our view, any shortening of the time limit will so negatively impact on our particular client group that it will in effect render judicial review outside the reach of many victims of sexual and/or domestic violence who have been failed by the criminal justice system. The panel should consider that the sorts of judicial review claims brought by our client group often relate to ensuring justice for crimes that have been committed against them. Where successful, and their assailants are successfully prosecuted, this has an impact for the public as a whole, as dangerous offenders are identified and may be imprisoned for public protection.

50. Finally, we wish make clear that the changes to time limits proposed by PLP in their response are agreed by us i.e. allowing the parties to agree an extension of time in some circumstances to allow for more detailed pre-action correspondence/negotiations to avoid the need to issue the claim, and creating a presumption that a delay in legal aid being granted is a good reason for an extension of time. We believe that this is not just for the benefit of claimants but for the benefit of the overall administration of justice. Given that we are regularly asked by defendants for more time to respond to pre-action protocol letters, we assume that this would be welcomed by public bodies.

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

51. We have seen no basis for suggesting that costs in judicial reviews are too lenient on unsuccessful parties, nor that they are applied too leniently by the Courts. The standard position is that costs are awarded against the unsuccessful party. In our experience, this is only departed from in unusual circumstances, for example due to the successful party having conducted the litigation in an unreasonable manner. One of our solicitors acted in a judicial review which had to be withdrawn on the day of the final hearing because the defendant disclosed a key document, which had been repeatedly sought, after close of business the day before the hearing. It emerged that the document had been in the defendant's possession throughout. Had it been disclosed earlier, the claimant would not have issued the claim in the first instance (if it had been provided during the pre-action process) or withdrawn the judicial review on receipt of it (if it had been provided after the claim had been issued). The parties were forced to attend court to explain the position and the claimant was, unusually, awarded costs because it was only a result of the

defendant's failure to provide key disclosure until the door of trial that meant the matter had proceeded so far. We hope the panel will recognise that this was a fair outcome, given the conduct of the defendant.

52. The fear of costs being awarded against them should their judicial review fail acts as a significant barrier to justice, which prevents even claimants with what appear to be meritorious claims from proceeding, where they are not entitled to legal aid. Given our particular client group this may mean that serious offenders are not prosecuted on the basis of unlawful decisions, simply because their victims cannot take the risk of costs being awarded against them. It is never possible, no matter how strong the claim appears, to advise that a judicial review will definitely succeed, and thus claimants in our field rarely feel able to risk having to pay costs to the very body which they believe has wronged them. In a recent case, a rape victim received positive advice from Counsel regarding a possible judicial review of a police refusal to pass her case to the CPS for charge. Due to her financial position, however, she will be unable to go forward with the case, meaning that her rapist will evade prosecution. In the circumstances, we strongly submit that there should not be any further costs risks attached to judicial review litigation, as it will increase the barrier to justice already in place.

53. It may be worth the panel considering that Crowd Justice funding to cover costs is rarely possible or appropriate for our clients. The details of their cases are intensely personal and they are often suffering from trauma, such that they are unable to put the details of their cases into the public domain. To increase any costs burdens on claimants who lose their cases, would therefore increase barriers to access to justice in an unacceptable way.

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

54. Clearly, better training and awareness of the law for decision-makers acting for public bodies to ensure lawful decisions would be the best way to minimise the need to proceed with judicial review. However, realistically unlawful decisions will continue to be made even where good training and procedures are in place. In those circumstances we submit that the best way to minimise the need to proceed with judicial review lies with defendants fully complying with their duty of candour and disclosure obligations and effective pre-action processes. We have already provided examples elsewhere in this document, of matters where earlier disclosure/better compliance with the duty of candour could have prevented the need to proceed with judicial reviews. The strengthening of those duties, perhaps with costs penalties attached should a party not comply, would, in our experience, be the best way to minimise the need to proceed with judicial review.

**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?**

55. All our lawyers have experienced judicial reviews where there has been a settlement prior to trial; indeed the majority of the judicial review cases we have conducted over our careers have settled prior to trial. This includes: claims being conceded by the defendant following a pre-action protocol letter being sent; claims being conceded by the defendant after issue; claims being conceded by the defendant after permission is granted; and claims being conceded by the defendant "at the door of court". In our experience our clients generally do not want to proceed to a full hearing unless absolutely necessary; their preference is that the matter settles as early as possible, with a suitable outcome for all.

56. To assist the panel's consideration of this point we provide some examples of cases that settled before the final hearing below. In addition to providing a remedy for the individual client, some of these cases, despite settling before a hearing, nonetheless clarified the law, provided important guidance to public authorities, and hopefully improved future decision-making for victims.

57. A significant proportion of our work relates to challenging decisions not to prosecute our clients' assailants, and/or to close the criminal investigations altogether. Most of these cases have not had to go beyond the pre-action protocol letter stage. It seems that once the pre-action protocol letter is sent to the legal team at the relevant police or CPS area, the case is reviewed and the original decision reversed or the criminal investigation re-opened. The pre-action protocol letter is often sent after the independent sexual or domestic violence adviser who is assisting the claimant has been trying without success to get a proper response for some time. This also illustrates our earlier point that merely having judicial review as an available remedy can push public authorities to properly consider their legal obligations towards victims of crime.

58. Some recent cases where this approach has been successful are set out below to provide the panel with an idea of the types of claims we are referring to and the importance of judicial reviews to our client group, and the relatively quick and inexpensive ways in which they assist better decision-making.

59. Example 1 relates to a 16-year-old girl who reported a rape by her father. This was against a background of prolonged domestic abuse against the girl's mother, who also sought to report the assailant. The mother had successfully obtained a Non-Molestation Order on the basis of the father's violence. The police decided to take no further action in both

criminal cases after deciding there was insufficient evidence (despite several witness accounts) and after wrongly assessing the domestic abuse as common assault.

60. After an unsuccessful attempt to re-open the matter using the Victim's Right to Review (VRR), we advised that there had been an error of law and a pre-action letter was sent in the daughter's case. The police's lawyers, having considered the submissions in the pre-action protocol letter, agreed to re-open both investigations and noted that the decisions made had been 'concerning'.

61. Example 2 is that of a girl who was a victim of trafficking at the age of 12, held by her traffickers for the purposes of domestic servitude (modern slavery) who was also physically abused. At the age of 15 she was able to leave and reported the assaults to the police. She provided a detailed account of her living conditions which should have automatically been recognised that her account was that of modern slavery. However, the case was closed by the police who had failed to correctly apply the law on trafficking offences.

62. A request to re-open the police investigation was refused. A judicial review pre-action protocol letter was sent, setting out the errors of law by the officers and the duties arising under Art 4 ECHR. In response to the pre-action protocol letter the police force agreed to commence a fresh investigation with a new investigator who was part of a specialist trafficking unit.

63. Example 3 relates to a young woman with learning disabilities and cerebral palsy, whose parents were separated, and informed her mother that her father had sexually abused her while she was staying with him. Although she has disabilities which affect her speech, she was able to communicate reasonably well. Her mother immediately reported this to the police. A little over a year later the police informed her that they had decided to take no further action against the father. The mother applied for a review under the police's VRR scheme. This was unsuccessful however it was disclosed that the police interview with the daughter lasted only 4 minutes, and there was no intermediary present to assist with communication. The daughter had thus not given an account of the events to the police and this was a key factor in the police deciding to close the case.

64. In discussions with a support worker at a sexual violence service for people with learning disabilities, the daughter made clear that she did wish to provide a proper account. The service approached the police and requested that the investigation be re-opened. The police refused, stating that in the absence of any corroborating evidence there would be insufficient evidence in any event. This is an error of law on the need for corroboration, which had been abolished by Parliament in 1994. The police also appeared to be taking the view that due to her disabilities the daughter would never be accepted by a jury, an

approach that had been deemed to be discriminatory in another challenge to a prosecution decision on behalf of a victim of crime with a mental illness.

65. A pre-action protocol letter was sent on the basis of error of law, the investigative duties under Article 3 ECHR and the Equality Act. In response the police agreed to re-open the investigation and interview the daughter again, with an intermediary present.

66. Example 4 relates to a woman who reported a rape by a previous partner and was told by the police that the CPS had made a decision not to charge. Ordinarily the CPS send a letter explaining their reasons for a decision not to charge to the victim in a rape case. In this case she was given this information by the police and told that she could pursue the police Victim's Right to Review (VRR) scheme. In fact, as the charging decision had been a CPS decision, she was entitled to the more extensive and detailed CPS VRR scheme which has the benefit of having two further prosecutors consider the case, rather than one other police officer.

67. A pre-action protocol letter was sent setting out the procedural errors in the way in which the decision-making had been communicated and the appropriate VRR channels. In response, the CPS agreed to carry out a CPS review, and then decided to re-open the investigation and pursue further evidence.

68. Some cases go further than the pre-action protocol stage but still settle before a full hearing. Our case of *R (Emily Hunt) -v- Director of Public Prosecutions* [CO/2700/2019] was a challenge to a decision not to prosecute an offence of voyeurism on the basis that a woman who had just had a sexual encounter did not have a 'reasonable expectation of privacy' from the other party. The judicial review challenge turned on a relatively straightforward question of law/statutory interpretation: whether it is a criminal offence of voyeurism for a person to covertly photograph or film a sexual partner naked, even in circumstances where that sexual partner has consented to be 'seen' in a state of undress, but has plainly not consented to be photographed or filmed in that state.

69. Our client had brought a complaint of voyeurism against the perpetrator in particularly traumatic circumstances, as she also alleged that he had raped her. Although the police/CPS decided there was insufficient evidence to prosecute the perpetrator with rape, they discovered a video on his phone that had been taken of our client while she was naked and asleep. On the basis of this video she hoped at least that the perpetrator might be prosecuted with voyeurism, affording her some sense of justice and closure after this traumatic incident.

70. The defendant (CPS) refused to prosecute the perpetrator for voyeurism, and after the claimant exhausted the VRR process, her only mechanism to challenge the matter further was by applying for judicial review.

71. The claimant was granted permission to proceed, but shortly before the hearing was due to take place, she became aware that the Court of Appeal was to give judgment in parallel (Criminal Division) proceedings. While the case itself was not directly related to hers, it engaged the same point of law. Crucially, the claimant was granted permission to intervene in the Court of Appeal proceedings - by relying on her standing as a claimant in her judicial review proceedings. She was therefore able to ensure that her legal arguments were heard and taken into account by the Court of Appeal.

72. As the Court of Appeal judgment found her interpretation of the law to be correct, her own claim for judicial review promptly settled, in advance of trial, with the CPS agreeing to reconsider its decision not to prosecute the claimant's attacker. The CPS has since decided that it should have prosecuted the offender with voyeurism, and he has since pleaded guilty. His sentence includes registering the assailant as a sex offender, which is hoped will protect other women in the future. In addition, the case has clarified the law so that other offenders are brought to justice and victims are emboldened to come forward. This case therefore also serves as a good example of where judicial review assists a public body in its decision-making duties.

***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?***

73. As an organisation which conducts strategic litigation, the issue of standing has arisen in a number of our cases. We have seen no examples where the rules of public interest standing are treated too leniently by the courts; in our experience the rules are very strictly applied in favour of defendants even where this has resulted in unresolved issues.

74. We will set out in detail a clear example of the importance of standing for a voluntary sector organisation to bring a claim on behalf of its client group. We recently acted in a claim for a victim of rape and domestic violence who was afraid to report the offences committed against her to the police because her leave to remain in the UK had lapsed (largely as a result of her abusive husband failing to renew it for her so that her status could be a further tool of control for him), and was aware that the Metropolitan police had a policy of providing victims' details to the Home Office. The impact of deportation which would have left her shunned and destitute was of even greater fear than what her husband might do if he found her, even though he had threatened to kill her.

75. This claim was initially issued with the organisation Southall Black Sisters (SBS) as the claimant. This was because the policy had come to light through the press and for obvious reasons women who are too afraid to report serious offences against them to the police were also too afraid to bring a judicial review against the police. As an organisation that

regularly works with victims affected by the policy SBS decided to take the financial risk of acting as the claimant in order to challenge the lawfulness of the policy. Their standing was challenged by the defendant but the court agreed that SBS was an appropriate claimant. It was not until the claim had been issued that the individual claimant, a service user of SBS, sought to join the proceedings.

76. The policy was withdrawn by the Metropolitan Police Service, ending the claim in the claimants' favour. However, a new, extremely similar, policy was then issued such that all the previous concerns as to its legality remained. Judicial review proceedings were again issued and again SBS's standing was questioned by the defendant. This time the Court decided that SBS did not have standing, but the individual claimant's challenge could proceed.

77. This judicial review has been a matter of significant interest to the government. It is a matter in which the Home Secretary applied to intervene. The Home Office has repeatedly responded to the recommendation made by The Joint Committee on the Draft Domestic Abuse Bill that a firewall be established for victims of domestic abuse between the police and immigration enforcement to protect these particularly vulnerable women, by stating that it would consider this aspect following the conclusion of this judicial review. It appears that the Home Office was awaiting clarification from the court as to the legality of the policy to consider how to proceed.

78. However, shortly before the final hearing in this matter, which was listed nearly 2 years after the claim had first been issued, the individual claimant found an immigration lawyer to assist her and filed an application for leave to remain in the UK. To do so she had to provide her details to the Home Office. She was thus no longer affected by the Metropolitan Police's policy and her claim became academic. The claim had to be withdrawn. Notably, had the Court granted SBS standing, the matter could have proceeded and this important issue clarified for the victims who find themselves in the same position, and therefore remain at risk. We believe that this is a good illustration of where the too stringent application of what constitutes public interest standing and "victim status" for a challenge based under the Human Rights Act has potentially hampered good governance. The legality of the policy and overall principle remains unclear.

79. The above example is also illustrative of the fact that it is not always possible for challenges to unlawful policies to be brought by individual claimants. Although an individual claimant did eventually come forward, many others felt too afraid to be involved in the claim even though they were directly affected by the policy. There is good reason for a policy such as this to be reviewed by the courts and an organisation whose service users are affected is well placed to bring such a claim. There should be no further limitations placed on their ability to do so. This is not "politics by the back door"; this is

an appropriate and sensible use of the process on behalf of an entire group affected by a policy by an organisation which has the expertise, experience, and case studies to evidence how such a policy works in practice.

80. Another case in which we act where the issue of standing is of importance is *R (End Violence Against Women Coalition) -v- Director of Public Prosecutions* [CO/3753/2019 / C1/2020/0720], an ongoing challenge to CPS changes in guidance and training relating to rape and serious sexual offences. As the matter is ongoing, we are limited in what can be shared with the panel. However, in brief, in 2018 the End Violence Against Women Coalition (EVAW) became aware of reports in the women's sector, supported by sources within the CPS and the police, that the CPS had, without consultation or notification to those affected, changed the guidance that it was providing to prosecutors around decision-making in rape and serious sexual offence cases.

81. It was also reported that the new guidance and/or training included comments to the effect that prosecutors should be prosecuting fewer "weaker" cases and that if a certain number of rape cases ('350 cases') were dropped or 'taken out of the system', this would improve the CPS' published conviction rates. By 2018 there had been an unprecedented collapse in the numbers of rape prosecutions: a 44% drop in the volume of reported cases proceeding to prosecution.

82. Extensive efforts were made by EVAW and other organisations to lobby the CPS to reinstate the guidance or at least to engage in a consultation. Only after these efforts were unsuccessful was a judicial review applied for. The legal challenge is very much a last resort.

83. EVAW's claim is a good example of an organisation making use of the principles of 'standing' and using their expertise to represent the interests of an entire group of affected people to bring a challenge that, if successful, will change the system for the many, rather than just reverse the decision in a single person's case. Indeed there would be significant difficulties in bringing a challenge to the CPS' change in approach on behalf of any individual survivor, because the focus of the judicial review would necessarily rest on the specific circumstances of their case, rather than the policy as a whole. Where the defendant accepted the decision not to prosecute was incorrect, the claim would fall away, and the policy would remain unreviewed.

84. The panel should also be aware that this case is also a good illustration of some of the points we have raised in previous sections of our response. For example, even though the case is currently ongoing, we understand that it has already prompted improvements to decision-making at a systemic level. With the hearing still pending, the CPS has recently introduced new legal guidance which, although it does not fully reinstate the legal guidance previously removed, it cites heavily from the previous version and re-introduces

a note for prosecutors about the High Court judgment which first enforced the merits-based approach. We believe that the CPS would not have done this had it not been for the arguments surrounding the removal of that legal guidance which have been 'kept alive' by EVAW's legal challenge. This newer guidance will impact on thousands of victims of rape, and hopefully improve decision-making by the State in such cases.

85. Moreover, if EVAW go on to win their judicial review challenge it should result in, at a minimum, the full legal guidance being reinstated and re-incorporated into training materials for prosecutors, and possibly even a large number of individual cases being reviewed, with the chance of wrongful decisions being overturned and those prosecutions being reinstated. Without access to judicial review, and the important principles around standing, these potentially significant consequences would not even be a possibility.

86. We make one further point about this challenge, which relates to the claimant's route to being in this position. EVAW were initially refused permission on all 7 judicial review grounds at a hearing. They went on to appeal that refusal in the Court of Appeal - arguing that they should at least have been granted permission to argue 5 of those 7 grounds. The Court of Appeal agreed with the claimant on all 5 of the grounds that were the subject of the appeal, in other words an overwhelming rejection of the High Court's decision. The case is now proceeding to a full hearing. We set this out because we understand that the panel may be considering recommending that there not be a chance to appeal refusals of permission. This case illustrates that such an approach would be short sighted. Complex cases which seek to raise challenges like these to policies and which are based on extensive evidence sometimes require greater scrutiny by higher courts. To remove those rights of appeal will likely result in serious injustice.

87. With respect to standing we have one further significant experience that the panel should consider. In the judicial review of the Parole Board's decision to release John Worboys (outlined above at paragraphs 18 and 19) the present Mayor of London also applied for permission, predicated in large part on the statutory powers and duties of his role which include the Mayor's role in policing in London. The Court, while acknowledging the concerns were sincere, did not find that the Mayor had standing, despite his demonstrable interest. This is further evidence that the rules of standing are clearly robust enough and extremely carefully applied by the Courts.

## Conclusion

88. We hope that our submissions are of assistance to the panel in their deliberations and demonstrate the vital role public law plays in ensuring good decision-making, justice and accountability for our client group. As set out above and in the submissions of PLP, we

submit that it is clear that the process of, and outcomes for, judicial review are already carefully balanced between the rights of people seeking to ensure lawful decisions, and public authorities being able to function without undue difficulty, arguably favouring the latter. There already exist multiple barriers for people who wish to bring a public law claim even where they have good grounds to do so. Any further limitations or restrictions may place this crucial tool for justice and good governance outside the reach of even more.

Yours faithfully

**Centre for Women's Justice**