Thompsons Solicitors is the UK's largest firm of trade union solicitors and has since its foundation in 1921 acted only for claimants in personal injury proceedings and employment claims. As a matter of principle Thompsons will not act for defendants, insurers or employers.

The majority of Thompsons' instructions – personal injury and employment - come from the trade union movement. We also act for trade unions in group actions, industrial action matters and Judicial Review (JR).

In 2015 whilst representing the then government in a debate on increased court fees, Lord Faulks who chairs this review described litigation as 'very much an optional activity':

'It is also worth bearing in mind that litigation is very much an optional activity. Anybody who is deciding whether or not to sue will have all sorts of factors that they bear in mind. There are plenty of reasons for not bringing proceedings, one of which is uncertainty of outcome. Anyone advising a claimant will probably need to satisfy that claimant that there is at the very least a better than even—probably a 75%—chance of success before they commence proceedings. Another relevant factor is the solvency of the defendant or the likelihood of recovery. All those are matters that will inhibit somebody in deciding whether or not to sue. Of course, there is also the factor of the cost and extent of their lawyers' fees.'

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Unions exist to protect the rights of their members and for our clients JR is only 'optional' in the sense that the alternative is to accept that the injustice they identify and seek to challenge should be allowed to carry on prejudicing the rights of those they represent.

Is it, optional per Lord Keen or 'conducting politics by another means' per the Lord Chancellor in his comments accompanying the launch of this review if:

a. You are the Prison Officers Association (POA) and your members are subject to career ending violence from prisoners.

   We acted for the POA when members at HMP Bedford were subject to horrific violence – in July 2018, Officer [redacted] had his arm broken in four places; at the start of August 2018, Officer [redacted] was assaulted and risked losing his sight; On 28 August 2018 a prisoner put every CCTV camera on a wing out of action in preparation for an assault on staff; and on 3 September 2018 an officer was threatened and trapped by prisoners after he refused to return a mobile phone necessitating mobilisation of all available staff to resolve the situation.

The POA only turned to JR proceedings as a last resort (as is often the case) when internal proceedings failed to resolve matters and when letters to the relevant agencies led to no improvements or effective action.

In the end with their member's lives at stake a letter before claim in accordance with the pre action protocol citing breaches of articles 2&3 of the European Convention on Human Rights which impose a duty on states to take reasonable steps to protect an individual against a risk of death was sent and (as is also often the case) whilst the matter did not proceed to a hearing it did bring the parties round the table and matters to a head and the prison was put into special measures.

b. You are the Fire Brigades Union (FBU) and your members, who work for The Fire and Rescue Authority for South Yorkshire and risk their lives every day, are having their shift patterns changed without consultation and in contravention of the Working Time Directive (WTR) in a way that detracts from their ability to effectively carry out their vital public safety role.

The system known as Close Proximity Crewing (CPC) involved working 96 hours of continuous duty (with a period of compensatory rest if they were called out at night). Anyone who volunteered to work CPC shifts had to sign an opt-out from regulation 4 of the WTR, which states that a worker's maximum working week should not exceed an average of 48 hours.

Having previously brought and succeeded in a claim which found that the CPC system breached the WTR (a judgment that the authority did not appeal but did not comply with either) when the Fire Authority refused to exclude use of the CPC system, we were instructed to bring an application for JR.

We argued that the CPC shift system breached regulations 6 and 10 of the WTR and in finding for the FBU and their members the judge commented:

"I appreciate that the Authority is doing its best to promote public safety and cope with severe budget cuts … But I do not feel able to refuse relief where there is a conscious decision to commit a continuing and systematic breach of the law. You cannot perform one legal duty by breaching another."

c. You are UNISON and targeted austerity will see your members who are unfairly dismissed facing fees to access the only system that will enable them to get damages for the wrong they have suffered.

We are sure that those entrusted with this review will be as one with Lord Reed where he said (at paragraph 68 of the unanimous judgment – our emphasis):

'At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other'.

We welcome the comment of the Lord Chancellor that 'Judicial review will always be an essential part of our democratic constitution – protecting citizens from an overbearing state' but the JR examples we have given above are not in response to an *overbearing* state but rather an inefficient, uncaring state or one that has itself made political choices that have a profoundly negative impact on its citizens.

We have always viewed and advised our clients that JR is a last resort. It is a blunt (and costly) instrument with obstacles such as limited time frames to be wielded with caution where our union clients advise us that negotiations and discussions have unreasonably broken down. It is used where, despite the risks, there is no 'option' of doing nothing and where management, be that local or national government or government institutions, leave our clients with no other recourse if the injustice is not to continue.

Often there is no hearing and a resolution is found out of court but that only comes about because the option was available. The notion that a last resort when obduracy overrides safety or sense should be fettered by those it seeks to challenge goes against all that we understood the independence of the rule of law to represent.

For the state to respond to critical judicial decisions not by learning but by seeking to change the ground rules suggests to us either a desire to be above the law or a lack of conviction that the decisions made have the support of the people they seek to govern. The alternative is that the review is an attempt to subvert judicial independence a notion that sits hugely uncomfortably with British tradition.

This review comes just as we leave the European Union and the government's majority enables them to put their 2019 Conservative Manifesto into effect as they wish. That Manifesto

pledged to ‘restore public trust in government and politics’ and to look at ‘access to justice for ordinary people’ yet the government’s first moves are to remove the UK from an oversight court by ending the role of the European Court of Justice and, in this review, potentially limit access to JR and thereby the unfettered right of citizens to question the legality of decisions of the state.

In the centuries since the creation of the United Kingdom citizens have taken comfort when our judiciary has shown its independence and has spoken truth to power. Reacting to decisions reached by courts that are the envy of and a model for the world by shutting down citizen’s rights because they have reached decisions that are politically inconvenient is petulant, an insult to the independence of the judiciary and unworthy of our proud country.