

Independent Review of Administrative Law: Call for Evidence

ClientEarth submission

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Introduction

1. ClientEarth is an environmental law charity with offices in London, Brussels, Warsaw, Berlin, Madrid, Beijing, Luxembourg and Los Angeles. We adopt a unique approach to our work, using the law to fight climate change, tackle pollution, defend wildlife and protect people and planet.
2. ClientEarth has extensive experience in domestic, international and EU environmental law as well as cross cutting issues such as human rights. Since its inception in 2007, ClientEarth has engaged in significant environmental litigation in the English courts. To date, we have filed eight judicial reviews in the courts of England and Wales. Of these cases, four were successful in establishing important legal precedents; one was issued protectively to allow the defendant additional time to respond to the pre-action correspondence and was withdrawn shortly after filing by agreement (and with no order as to costs); two were determined at the permission stage; and one will be heard in the Court of Appeal in November 2020. Perhaps most notably, we have commenced and won three cases against the UK government regarding its compliance with air quality laws.¹ In addition, we joined RSPB and Friends of the Earth in proceedings regarding reforms to the Aarhus costs rules.² We will draw on these cases and our experiences in this submission.
3. As an environmental NGO, our focus is on environmental cases, which are mostly captured by UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus Convention'). However, we will also comment more broadly on our experience of bringing judicial review challenges.
4. This response consists of three parts:
 - 4.1. Section I – an opening statement;
 - 4.2. Section II – main body of our evidence organised by key priority topic;
 - 4.3. Section III – responses to the Independent Review of Administrative Law ('IRAL' or the 'Review') Call for Evidence questions.

Section I – Opening statement

Breadth and timing of the Review

5. The scope of the IRAL is extraordinarily broad. It will provide a “comprehensive look” at judicial review.³ In answering the question “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?”, many varied, complex and interrelated issues will need to be considered. These include matters that go to the heart of jurisprudential theory and the foundations of constitutional law as well as questions about the practicalities of the judicial review process and the exercise of executive power. Further, in order to understand the notable trends in judicial review over

¹ *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 ('ClientEarth No.1'); *R (ClientEarth (No.2)) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 ('ClientEarth No.2') and *R (ClientEarth (No.3)) v Secretary of State for the Environment, Food and Rural Affairs and others* [2018] EWHC 315 (Admin) ('ClientEarth No.3').

² *RSPB and others v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

³ IRAL Secretariat, '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? Call for Evidence' (7 September 2020) ('Call for Evidence') 4.

the last thirty to forty years, the Panel must consider how government and public authority decision-making has also changed over this time frame including the resources available to decision-makers (financial, time, training, technology and documentation volume and retention). The Panel's task is therefore immense.

6. The Review's Terms of Reference⁴ note that the Review should undertake the expansive task of considering whether any "unintended consequences"⁵ might result from the changes proposed. In this regard, the Panel must be particularly alive to the risk that barriers to access to justice could inadvertently be created through a handful of small tweaks in a few separate areas that then go on to have a significant cumulative impact. In addition, the Terms of Reference note that the position in other common law jurisdictions "will be considered."⁶
7. Whilst we agree that these are essential aspects of any endeavour considering change to judicial review, we note that they are complex and will require extensive research, analysis and thought. To deliver these aspects comprehensively and satisfactorily will require time.
8. However, the timelines of the Review are very accelerated. The Call for Evidence is open for only six weeks (belatedly extended by one week) and the Panel is to report back "later this year".⁷ The squeezed period for evidence-gathering; assessment and analysis; and reporting to government is concerning. As the Panel appears to have recognised, any changes to how judicial review works must be founded in analysis developed upon "a strong evidence base"⁸ but it is not clear that the anticipated timeframes will enable the necessary thorough review and space for detailed consideration. Any hastily-determined reform of judicial review risks severe consequences for our constitution and administrative accountability. Further, the UK is already facing huge constitutional and legal change as a result of its departure from the EU and administrative pressure as a result of Covid-19. Rather than increasing this instability, it is clearly sensible to pause any reform of judicial review at least until other aspects of administrative law are re-settled post-Brexit.
9. In addition, the Terms of Reference and Call for Evidence – both individually and taken together – lead to some uncertainty. For instance, the content of the two documents are not entirely consistent with one another – they differ in focus and scope. This makes responding to the Call for Evidence more difficult and risks leading to an incomplete and misdirected evidence base.
10. Finally, many of the questions in the Call for Evidence are framed in unhelpful and often loaded terms. Several questions lack balance or include follow-up questions that assume the respondent's answer to the initial question. This gives the impression that the Government's desired outcome of the Review is at least partially pre-determined and that the role of evidence submitted in response to this Call will be limited. This could undermine the Panel's findings and recommendations. The Panel must therefore ensure that each of its recommendations for change is supported by robust evidence.

Targeted respondents

11. Judicial review provides a mechanism for ensuring the accountability of those delivering public functions. Under existing standing requirements, it is essentially a process available to anyone with a sufficient interest in the matter. Given this, the Review should seek evidence from claimants themselves⁹ – in addition to those who provide services to parties. There is a risk that any narrowing

⁴ Ministry of Justice, 'Terms of Reference for the Independent Review of Administrative Law' (31 July 2020) ('Terms of Reference')

⁵ *ibid* 1.

⁶ *ibid*.

⁷ Ministry of Justice, '[Government launches independent panel to look at judicial review](#)' (31 July 2020).

⁸ Letter from Lord Faulks (7 September 2020).

⁹ This may include companies and public authorities as well as individuals and NGOs.

of the respondent base¹⁰ will result in evidence that is unrepresentative, incomplete and insufficient to substantiate any recommendations for change.

Further consultation

12. Our understanding is that the IRAL and this Call for Evidence, which forms a part of the Review, are initial elements of any process to reform aspects of administrative law. To clarify, our view is that this exercise should come prior to, and is distinct from, a formal public consultation of the proposals, which will also be required once the Government's proposals (if any) are settled. The Aarhus Convention contains provisions regarding the need for public participation in the preparation of rules that may have a significant effect on the environment.¹¹ The Convention sets out specific steps that should be taken including that "draft rules should be published or otherwise made publicly available; and ... the public should be given the opportunity to comment, directly or through representative consultative bodies".¹²
13. Any significant changes to judicial review that have the potential effect of reducing administrative accountability for decisions and actions with an environmental nexus should be developed with adequate scope for public participation as required by these provisions. Given this, the Call for Evidence must not be the only and final opportunity for public engagement on these matters prior to implementation of any proposals, particularly in relation to those that will impact the environment and access to justice in environmental matters.
14. As such, it is anticipated that there will be further scope for public engagement in due course.

Section II – Key points and priority topics

Role and value of judicial review: constitutional importance

15. Judicial review performs many important functions. Perhaps most importantly, it comprises a critical part of the UK's overall structure of governance. It is an essential mechanism by which individuals may hold the government and public authorities to account to ensure that they have the necessary power when making decisions and that they are doing so lawfully. Judicial review is a critical constitutional component for the healthy functioning of relationships between Parliament, the executive and the courts. Parliamentary mandates must be exercised in accordance with the law and judicial review is the means we have for ensuring this.
16. Judicial review also plays a special role as an effective and independent check on the exercise of executive power – whether exercised by central government, local government or an executive agency. Importantly, the existence of judicial review is quietly influential in public decision-making even before a challenge is launched. This is evidenced by the 'Judge Over Your Shoulder' guidance ('JOYS') issued by the Government Legal Department to civil servants.¹³ As the Preface to the most recent edition notes "[t]he purpose of this guidance continues to be to inform and improve the quality of administrative decision making."¹⁴

¹⁰ IRAL Secretariat (n 3) 4: "[t]he panel would like to hear from people who have direct experience in judicial review cases, including those who provide services to claimants and defendants involved in such cases, from professionals who practice in this area of law, as well as observers of, and commentators on, the process."

¹¹ Article 8 Aarhus Convention.

¹² Articles 8(a) and (b) Aarhus Convention.

¹³ Government Legal Department, 'The judge over your shoulder – a guide to good decision making' (October 2018).

¹⁴ *ibid* 5.

17. We are familiar with this particular role of judicial review in the context of our air quality litigation. Following our cases, the air quality plan-making process has been accompanied by a narrative from both central and local government that urgent action to reduce pollution is a legal necessity. The risk of further legal challenge has also been regularly cited as key driver for the adoption of ambitious proposals to protect people's health.
18. The Questionnaire to Government Departments seems to assume that the effect of judicial review on public functions is to "seriously impede" their delivery. This is a troubling starting point. It is completely at odds with the spirit of the JOYS guidance and the approach to public decision-making that ought to be adopted in the public interest. Judicial review challenges are hugely varied – they come in many different forms and are brought by, among others, individuals, community groups, NGOs, companies, financial institutions, and public authorities. This is important to bear in mind when considering potential changes. The current rules may not be perfect for each and every case but they do broadly accommodate the wide range of claimants, defendants and issues that can be involved in a case, and provide an independent means of redress for the most vulnerable in our society and for those who wish to bring a claim in the public interest.
19. In this way, judicial review forms a core aspect of the rule of law – it is central to the proper organisation and functioning of society. Indeed, the Supreme Court has held that there "is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions."¹⁵

Role and value of judicial review: legal certainty

20. Judicial review also performs a critical role in enabling transparent clarification of the law, allowing for greater legal certainty. It allows the courts to elaborate on Parliament's legislative intentions, providing guidance on complex legal issues. This is hugely valuable for providing greater certainty to, amongst others, government and businesses facilitating evaluation and management of their responsibilities and compliance.
21. We have first-hand experience of judicial review usefully delivering this. Our air quality cases have been critical in ensuring that authorities are aware of their legal obligations – and of the potential legal consequences of failing to comply with them. For instance, the ruling in *ClientEarth (No. 1)* clarified that plans to deliver compliance with legal limits on air pollution were a legal necessity, and that it was for the domestic courts to step in to mandate action where the relevant obligations were not being satisfied. Again, the ruling in *ClientEarth (No.2)* played an integral role in determining (a) exactly what modelling should underpin the air quality plans and (b) that the strict test of proportionality that must be applied in identifying the measures necessary to achieve compliance with legal pollution limits in the shortest possible time. The court clarified that, when drawing up air quality plans, authorities cannot discount measures assessed as being the most effective at quickly reducing pollution on account of their cost. This decision was crucial in clarifying the nature and meaning of the government's statutory air quality obligations in this context. In recognition of the serious and ongoing threat to public health caused by non-compliance, the clear tests laid out by the court highlighted that people's health should be prioritised.
22. A further example: ClientEarth recently challenged the exercise of executive power in the context of statutory instruments (SIs).¹⁶ The secondary legislation programme required to facilitate the UK's departure from the EU continues to be extensive and an increased number of SIs are being laid.¹⁷ One

¹⁵ *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69, [127].

¹⁶ *R (oao ClientEarth and Marine Conservation Society) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2682 (Admin). Permission decision [published here](#) with permission of Mrs Justice Lieven DBE.

¹⁷ Institute for Government, '[Secondary Legislation](#)' which notes: "...Brexit meant that the number of SIs laid in the 2017–19 session was higher than the two preceding sessions, with an average of 5.7 SIs laid per sitting day during

such SI, made under the European Union (Withdrawal) Act 2018, granted ministers new powers, which we were concerned could be used to alter and/or reduce standards for protected sites contrary to the provision of the Act. ClientEarth, working with the Marine Conservation Society ('MCS'), sought to challenge the most concerning parts of the SI. The Defendant's response in pre-action correspondence and in its summary grounds of reply failed to fully and properly address our concerns as to their interpretation of the amendments made to the relevant EU Directive. Whilst permission was refused on the basis that the Secretary of State had not yet used the powers we were concerned about, the case secured important clarifications for how these regulations may lawfully be used in compliance with the Act, which was in line with our interpretation and the confirmation we had sought from the Defendant in pre-action correspondence.

Role and value of judicial review: real world impact

23. Judicial review enables the identification, and facilitates the correction, of unlawfully made administrative decisions. In addition to the legal and constitutional significance of this mechanism, it also has real, practical importance. The decisions reviewed and the issues they encompass often have tangible implications including for people's lives and the quality of the natural environment. For instance, it is estimated that the equivalent of 40,000 premature deaths in the UK are attributable to outdoor air pollution, and the annual costs to individuals and society add up to more than £20 billion.¹⁸ Ensuring that government complies with its legal obligations in this area matters.
24. The outcomes of, and government's responses to, our air quality litigation demonstrate the beneficial results that judicial review can have. As part of the air quality plan produced by government in 2017 in response to the order of the court in *ClientEarth (No.2)*, a number of local authorities have committed to introduce Clean Air Zones ('CAZs') to restrict the most polluting vehicles from the most polluted parts of towns and cities. Birmingham and Bath have confirmed that they will introduce CAZs in 2021, with Greater Manchester, Bristol, Sheffield, and Newcastle set to follow suit. As part of the government's approach to delivering compliance, over £880 million of additional central government funding has been allocated to support the delivery of local air quality plans in England and associated measures to support people and businesses to move to cleaner forms of transport. Whilst there remains a long way to go to delivering compliance with legal limits, in total, the government has cited its 2017 air quality plan as being supported by a £3.5 billion investment into air quality and cleaner transport over 2010 to 2021.
25. The ruling in *ClientEarth (No.3)* resulted in the extension of air quality plan-making requirements to an additional 33 local authorities. These authorities had effectively been excluded from the scope of previous proposals. They include Leicester, Portsmouth and Bradford – each of which now also plans to introduce a CAZ to reduce pollution in their respective areas. This case also led to the publication of the first air quality plan for Wales in October 2018. The Welsh Government had previously failed to deliver on its commitments – our litigation shone a light on this unlawfulness, ensuring accountability. The new plan for Wales includes a £21m plan for a bus retrofitting programme as well as public transport, cycling and walking infrastructure improvements in Cardiff.
26. Further tangible results flowing from our litigation include:
- 26.1. Local grant and/or loan funding has been provided to help people and businesses do away with the most polluting vehicles and upgrade to cleaner alternatives;

the 2017–19 session, up from 4.8 in 2015–16 and 5.1 in 2016–17. This was slightly lower than during the last two-year session (2010–2012), during which 6.2 SIs were laid per sitting day."

¹⁸ Royal College of Physicians and Royal College of Paediatrics and Child Health, 'Every breath we take: the lifelong impact of air pollution' (25 February 2016).

26.2. In London, the Ultra Low Emission Zone ('ULEZ') came into force a year earlier than previously planned in April 2019, and is due to be expanded in October 2021. A recent report has shown that within its first year the ULEZ has resulted in roadside concentrations of nitrogen dioxide (NO₂) that are 36% lower than they would have been without the scheme in place;¹⁹ and

26.3. Analysis suggests that between 2016 and 2019, average NO₂ concentrations reduced by 20% across London; the number of people living in areas exceeding the annual mean limit value fell from 2 million to 119,000; and the number of schools and nurseries in locations above the legal limit fell from 793 to 34.

Lack of evidence of a problem

27. In spite of its title – which refers to *administrative law* – the Panel's remit encompasses only judicial review, which is just one element of administrative law. The thrust of the Review is assessment of "how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government...".²⁰ However, it is not yet apparent that an imbalance has been established.²¹ As a preliminary matter, the IRAL must establish whether this is in fact the case. Further, consideration must be given as to the cause of any issue identified. It would be wrong to assume that any problems result solely from the judicial review process. The other side of the balance – i.e. the quality, quantity and effectiveness of executive decision-making – must also be assessed on the basis of robust evidence. Unsubstantiated, incomplete or anecdotal statements by public authorities or government will not be sufficient.

28. In order to comprehensively and fairly evaluate and form views on the topics identified in the Terms of Reference and Call for Evidence, the Panel must also investigate the many forms of executive decision-making itself – the catalyst for judicial review challenges.

29. We find it difficult to identify problems of the kind the government is apparently concerned exist in the current regime. We highlight aspects of the recent decision in *R (oao Christopher Packham) v Secretary of State for Transport and the Prime Minister*,²² which demonstrates the thoughtful approach adopted by the Court of Appeal determining the limits of its own jurisdiction; the appropriate intensity of its review; and the appropriate margin of discretion to afford to the decision-maker. In finding that a "light touch" review was in order²³ and that "the Cabinet, as effective decision-maker, was entitled to a broad margin of discretion",²⁴ the Court noted as relevant: "the decision...was taken at the very highest level of Government. It was largely a matter of political judgment."²⁵ The Court lists various factors that "[a]ll...in one way or another, manifest the essentially political quality of the decision under challenge and the need for the Government, as decision-maker, to be accorded a wide margin of discretion."²⁶ This is a clear example of judges' nuanced and balanced approach to their role and its interaction with the will of Parliament.

30. Finally, we draw attention to the great economic cost of failing to properly implement and enforce environmental law. Implicit in the Terms of Reference and Call for Evidence is an assumption that judicial review – i.e. a check on whether public authorities have acted legally – serves as a burden

¹⁹ Greater London Authority, 'Central London Ultra Low Emission Zone – six month report' (October 2019).

²⁰ IRAL Secretariat (n 3) 4.

²¹ For instance, see the Questionnaire to Government Departments, which suggests that evidence-gathering on this issue continues.

²² [2020] EWCA Civ 1004.

²³ *ibid* [48]-[49].

²⁴ *ibid* [52].

²⁵ *ibid*.

²⁶ *ibid* [53].

(financial and otherwise) on public decision-making. However, complying with the law in the first place will often be the most effective and efficient approach. A recent EU study found that the cost and foregone benefits of not achieving environmental targets across various policy areas amounted to EUR 55 billion per year.²⁷ In assessing the costs and constraints created by judicial review, the Panel might also consider the financial advantages of complying with environmental law: not only through avoided litigation costs but through, for instance, increased value of natural amenities and reduced health issues associated with poor environmental quality.

31. Overall, we are concerned this Review could lead to fundamental judicial review reforms, catalysed by a knee-jerk political reaction to recent judgments that were critical of the government – even though such reforms may not be in the public interest and could damage the reputation of the UK's legal system. Judicial review reform is certainly not a new political priority²⁸ but change must be grounded in clear evidence of a systemic problem – evidence we are not convinced currently exists.

Environmental cases are in a special category

32. Reform of the judicial review process could severely affect environmental litigation that is brought in the public interest. Such litigation has a particular quality because claims tend not to assert the claimants' personal interests' but instead relate to general issues of public interest that matter to the whole of society.
33. In the evocative words of Lord Hope: "[t]he osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf."²⁹ Indeed, the environment cannot speak for itself. Only by allowing members of the public to make the case for clean air, unpolluted rivers and the protection of biodiversity, can these interests be protected. It is often members of the public who have the proximity, awareness and concern to identify public authorities' failures to fulfil their duties. It is critical that people can then use this information to seek to improve compliance through legal redress – by acting on behalf of the environment. This kind of redress is at the heart of a mature democracy.
34. The special nature of environmental cases is reflected in the Aarhus Convention. The UK ratified the Convention in 2005. The Convention grew out of the recognition by many countries of the need to advance citizens' rights to protect environmental interests and to facilitate their role as guardians of the common good. The purpose of the Convention was to give members of the public (and groups of individuals who form environmental charities and other associations including NGOs) procedural rights in environmental matters. Its three pillars give members of the public rights to: access to information; participation in decision-making; and access to justice, all regarding environmental matters. That is its purpose. Its primary focus is to empower individuals and NGOs to be able to defend the public's rights to, and interest in, a healthy environment.
35. The Aarhus Convention enshrines the right to access justice in environmental cases as an integral component of the "right of every person of present and future generations to live in an environment adequate to his or her health and well-being".³⁰ This is consistent with recent developments in

²⁷ European Commission, 'Study: The costs of not implementing EU environmental law' (March 2019).

²⁸ See, for instance, Ministry of Justice, 'Judicial Review: Proposal for further reform' (September 2013) the Foreword of which notes: 'But the use of judicial review has expanded massively in recent years and it is open to abuse'.

²⁹ *Walton v the Scottish Ministers* [2012] UKSC 44 [152].

³⁰ Article 9 in conjunction with Article 1 Aarhus Convention.

international human rights law regarding the right to a healthy environment.³¹ A core aspect of the Aarhus rights is the ability to access the courts.

36. The Convention is a critically important piece of international environmental law that the UK should entirely comply with. However, the UK has repeatedly been found to be in breach of certain aspects of the Aarhus Convention.³² Particular areas of concern include: costs rules; time limits for issuing claims and the 'promptness' requirement; interveners and cross-undertakings. As reflected in its most recent progress report, the UK appears to value the Convention and says it is seeking to improve this.³³
37. There is a real risk that fundamental or inadequately considered changes to judicial review could result in further non-compliance with the Convention as well as undermining both the rule of law and the critical role that individuals and NGOs play in protecting the environment.

Codification of grounds

38. The IRAL is considering whether "substantive public law should be placed on a statutory footing"³⁴ and, in particular, "whether such legislation [would] promote clarity and accessibility in the law and increase public trust and confidence in JR".³⁵
39. It is worth considering first the feasibility and potential value of this proposal. Whilst the IRAL Terms of Reference refer to the codification of the "grounds of public law illegality", there is no clarity about exactly which grounds it is envisaged would be reflected in statute – or how. And this is perhaps not surprising given the amorphous nature of the grounds. Traditionally, the grounds of judicial review are considered under three high-level headings: i) illegality; ii) procedural unfairness and iii) irrationality. This categorisation is well-established through the case-law. It is clear and it is well-known – or readily discoverable through a quick internet search for "grounds of judicial review". It is difficult to see what value simply repeating these labels in primary legislation would add.
40. These three high-level principles provide a pithy and helpful summary of judicial review grounds. However, they mask a complex and varied range of reasons for which judicial review may be sought. The list at 1a-f of the 'Questionnaire to Government Departments' begins to capture more realistically the diversity and number of judicial review grounds that sit below the three top-level heads of review. Considering 'the grounds of judicial review' in this way, it becomes clear that they are not set in stone, not always distinct from one another and not necessarily exhaustive. As Mark Elliott (Professor of Public Law & Chair of the Faculty of Law, University of Cambridge) has written, any attempt to capture in legislation the grounds of judicial review more comprehensively than just repeating the well-known heads would require legislation "so lengthy, detailed and technical as to make it far from clear and accessible to the average individual."³⁶
41. So this proposal faces at least two fundamental obstacles: first, the difficulty of delineating what is meant by the 'grounds of judicial review' for the purpose of reflecting them in legislation. Second, the tricky task of drafting legislation that clearly and accessibly expounds those grounds in a way that

³¹ See, for instance, John H. Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles' (January 24, 2018).

³² Aarhus Convention Compliance Committee ('ACCC'), Decision VI/8k (14 September 2017).

³³ UK 3rd Progress Report on Aarhus Convention Decision VI/8k (30 September 2020).

³⁴ Ministry of Justice (n 5).

³⁵ *ibid.*

³⁶ Professor Mark Elliott, 'The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration?' (10 August 2020).

avoids the very real risk of making the entire process of judicial review much less accessible and possible than it actually is.

42. Even if, in spite of this, it is feasible to codify the grounds of judicial review, it would not necessarily be desirable to do so. Whilst some aspects of judicial review have more recently been reflected in legislation,³⁷ judicial review is predominantly a court-led process that, in England and Wales, is – and should continue to be – developed and shaped through the common law. Any alteration of this approach would be hugely significant and possibly destabilising. Writing the grounds into statute risks locking in law the meanings attributed to them on the day of Royal Assent, restricting scope for developing and adding nuance to the grounds. An unintended consequence is that this may result in stagnation – leaving public authorities unable to meet new and evolving challenges that will arise over time and citizens without recourse. This is likely to undermine the rule of law in the UK. The current position of allowing the common law to develop at its own pace achieves a fairer balance and ensures judicial independence. Nonetheless, Parliament remains supreme and may legislate to correct specific non-desired outcomes.
43. Codifying the grounds of review is likely to result in the opposite of what the IRAL is seeking: increased uncertainty about the scope of the judicial review grounds and reduced accessibility to justice. This will lead to complexities, lack of clarity and, inevitably, satellite litigation.

Justiciability

44. The IRAL is considering the principle of non-justiciability and whether it requires clarification and / or amendment.
45. This topic is politically sensitive and important. The language adopted in the Call for Evidence is more general than in the Terms of Reference, asking whether it is clear what powers are subject to judicial review and whether certain decisions should not be subject to it. In our experience, the decisions that are judicially reviewable are very clear. This is at least in part aided by the Aarhus Convention which requires that “any decision, act or omission” related to the permitting of certain specified activities, or unspecified activities “which may have a significant effect on the environment” can be challenged by certain members of the “public concerned”,³⁸ and that other acts and omissions by private persons and public authorities that contravene national environmental law can also be challenged through administrative or judicial procedures.³⁹ These categories of challengeable actions are broad and correctly so.
46. Given the central role of judicial review in underpinning our constitution and maintaining the rule of law, the category of matters that judges a priori will refuse to involve themselves in must be very narrow. As such, the current approach is appropriate, whereby the courts adopt a pragmatic approach to determining what decisions should be amenable to judicial review. As noted in JOYS, “[t]here remains a class of decision where the Court accepts that, because of the subject matter of the decision, the decision maker is better qualified than the Court to make a judgment.”⁴⁰ The Court’s approach is rational, thoughtful and, perhaps most importantly, ensures that no decision is entirely above the law.

³⁷ For instance, s. 31(2A) Senior Courts Act 1981 (‘SCA 1981’) (as amended by s. 84 Criminal Justice and Courts Act 2015 (‘CJCA 2015’)) which provides that the High Court must refuse to grant relief on a judicial review application where it is apparent that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

³⁸ Article 9(2) Aarhus Convention.

³⁹ Article 9(3) Aarhus Convention.

⁴⁰ Government Legal Department (n 13) para 2.63.

Procedural reforms

Standing

47. We support the existing standing test, which requires that claimants have a “sufficient interest” in the matter.⁴¹
48. As noted above at paragraphs 32-33, broad and flexible standing rules are particularly important in the context of environmental litigation. As we noted in our third party submission to the European Court of Human Rights in *Di Caprio and others v Italy*:⁴² “In view of the complexity of environmental matters, and the expertise required to grapple with environmental issues, national, EU and international jurisdictions recognise the privileged status and standing of environmental NGOs, because of their valuable “watchdog” function. NGOs are essential to give a voice to individuals affected by environmental pollution who do not necessarily have the technical, financial or legal capacity to protect their rights.”⁴³
49. This reality is recognised in the Aarhus Convention pursuant to which NGOs promoting environmental protection “shall be deemed to have an interest” and so must be given standing to challenge certain decisions affecting the environment⁴⁴ and other violations of environmental law.⁴⁵ The Convention specifically references the “objective of giving the public concerned wide access to justice”⁴⁶ and its broad definition of the “public concerned” moreover ensures that all those (potentially) affected by, or having an interest in, a given activity are accorded standing.
50. ClientEarth’s work to improve government compliance with air quality legislation is reliant on the existing approach to standing and ability of NGOs to satisfy the sufficient interest test. Through judicial review challenges, we have been able to provide the courts with expert knowledge regarding technical aspects of air quality modelling. In *ClientEarth (No.2)*, the specialist scrutiny we provided was valuable for the court in considering the extent to which government had complied with the law. The court’s assessment relied on our expertise and knowledge to identify these technical failings in the first instance and then our ability to collate expert evidence to support the position that those failings represented plain and serious errors in the approach taken. The merit in these efforts was acknowledged by Mr Justice Garnham who noted that whilst “[he did] not doubt the government’s good faith... the history of this litigation demonstrates that good faith, hard work and sincere promises are not enough.”⁴⁷ ClientEarth had “acted as a valuable monitor of the government’s efforts to improve air quality...”⁴⁸ This is corroborated by Michael Gove’s (then Secretary of State for the Environment, Food and Rural Affairs) comments at an Environmental Audit Committee session: the government “should not have been in a position where ClientEarth had to take us to Court”.⁴⁹ ClientEarth’s ability to hold government to account may not have been possible had tighter standing requirements been in place.
51. Having said this, it is worth noting that the approach taken to standing in England and Wales is not the most liberal example worldwide. The South African constitution, for instance, provides that any of the

⁴¹ SCA 1981, s. 31(3).

⁴² no. 39742/14.

⁴³ *Di Caprio and others v Italy*, ClientEarth’s written comments (September 2019).

⁴⁴ Article 9(2) in conjunction with article 2(5) Aarhus Convention.

⁴⁵ Article 9(3) in conjunction with article 2(4) Aarhus Convention.

⁴⁶ Article 9(2) Aarhus Convention.

⁴⁷ *R(ClientEarth (No 3)) v (1) Secretary of State for Environment, Food And Rural Affairs (2) The Secretary of State for Transport and (3) Welsh Ministers* [2018] EWHC 398 (Admin), [13].

⁴⁸ *ibid*, [14].

⁴⁹ Environmental Audit Committee evidence session (18 April 2018). Transcript not available but recording is [here](#).

following people has the right to allege an infringement or threat to a right protected by the Bill of Rights – as such, it is not necessary to demonstrate a personal connection with the allegedly infringed right:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.⁵⁰

52. Judicial review functions as a check on administrative action – it is designed to improve the overall quality of public decision-making. And, arguably, everybody has an interest in achieving this end – supporting the notion that standing rights ought to be broad. As Professor Mark Elliott has written: “...everyone, whether or not they are *directly* affected by an unlawful government decision, has an interest in securing administrative adherence to those rule-of-law principles. On this view, the legal standards upheld via judicial review ultimately constitute not *rights* enjoyed by *individuals*, but *duties* owed by government to the *public*.”⁵¹

Duty of candour and disclosure

53. The defendant’s duty of candour and co-operation is an extremely important element of judicial review proceedings. This duty – and its distinction from the disclosure process applicable in other forms of litigation – is crucial to the effective functioning of judicial review. The reasons for this are well-expounded in case law and government guidance:

- 53.1. “A public authority’s objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration...”⁵²
- 53.2. “[Judicial review] has created a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration...”⁵³
- 53.3. “It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why...”⁵⁴
- 53.4. “[Judicial review] is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority’s hands.”⁵⁵
- 53.5. “It is the function of the public authority itself to draw the court’s attention to relevant matters... This is because the underlying principle is that public authorities are not engaged in ordinary

⁵⁰ The Constitution of the Republic of South Africa (1996), s. 38 (Enforcement of rights).

⁵¹ Professor Mark Elliott, ‘Standing, judicial review and the rule of law: why we all have a “direct interest” in government according to law’ (29 July 2013).

⁵² Treasury Solicitor’s Department, Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings (2010), 1.

⁵³ *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941, [945].

⁵⁴ *ibid.*

⁵⁵ *ibid.*

litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”⁵⁶

54. It is worth noting that the duty of candour and co-operation applies to both parties – not just the defendant – and proper compliance with it is critical to the effectiveness of judicial review. As indicated in the quotations above, its existence reflects the fact that judicial review proceedings are not like other forms of litigation. Judicial review exists to improve the quality of public decision-making. In order to do this, it is imperative that the court is cognisant of all of the relevant information. As noted by the Lord Chief Justice, “[t]he underlying concept, however, is that the courts need to be placed in a position where they can carry out their role of ensuring the lawfulness of the decision under challenge, itself an element of the maintenance of the rule of law.”⁵⁷
55. The duty of candour differs from the system of disclosure used in civil litigation.⁵⁸ Compliance with the duty of candour is generally cheaper and more straightforward. A change in approach risks requiring a more onerous and expensive exercise, whilst undermining the value of judicial review as a means of holding public authorities to account.

Time limits

56. We recognise the need for time limits for the filing of judicial review claims. However, the six week deadline for planning cases is far too short and should be extended. It does not provide sufficient time for full assessment of issues and correspondence with the defendant to properly understand their position. This results in the very real risk that claimants are forced to issue claims before hearing back from the defendant. This front-loading of cases is resource-consuming and inconsistent with the general spirit of alternative dispute resolution.
57. The time limit for other judicial review claims is subject to the requirement of being filed “promptly” and “in any event not later than 3 months after the grounds to make the claim first arose.”⁵⁹ The requirement of promptness leads to uncertainty as confirmed by the findings of the ACCC.⁶⁰
58. As noted at paragraph 18 above, there is not a single ‘type’ of judicial review claimant. As such, most will need to take expert advice before deciding whether or not to proceed with a claim. This can take time and there should be flexibility and scope within the time limits rules to enable all claimants the time and space for comprehensive consideration of the merits (or otherwise) of launching judicial review proceedings.
59. In our view, a clear time limit of 3 months, where the court has discretion to extend the time for bringing a claim in appropriate cases, and the parties are able to agree an extension of the time limit to allow for pre-issue negotiations, is reasonable and fair to all parties. This approach would also reduce costs in cases that are capable of resolution as the claimant will not be compelled to issue proceedings to protect limitation. It would also ease the burden on the court in having to issue and manage cases that are capable of settlement.

Remedies

⁵⁶ *R (Citizens UK) v Home Secretary* [2018] 4 WLR 123 [106].

⁵⁷ Lord Chief Justice of England and Wales, Defendant’s Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper (28 April 2016), 8.

⁵⁸ CPR Part 54A PD Rule 54.16 (Evidence) – “Disclosure is not required unless the court orders otherwise.”

⁵⁹ CPR Part 54.5(5)-(6).

⁶⁰ ACCC/C/2008/33 Findings of the ACCC adopted on 24 September 2010 [81].

60. The availability of adequate and effective remedies is critical to the value of judicial review. Without them, judicial review fails to play its role as a check against the unlawful exercise of executive power and access to justice is not secured.
61. The remedies currently available following a successful judicial review claim are relatively limited. They are helpfully and clearly set out in the Administrative Court Judicial Review Guide.⁶¹
62. The practical value of judicial review could be improved if the scope of the potential remedies was expanded to include more nuanced and constructive options such as the ability to modify a decision. A similar approach is adopted in Sweden where the administrative courts are able to replace a challenged decision with a new one.
63. In addition, the discretionary nature of public law remedies creates uncertainty and potentially undermines the role and function of judicial review. Currently, a finding that a decision was made unlawfully will not necessarily result in the grant of relief.⁶² This is confounded by s. 31(2A) SCA 1981 (as amended by s. 84 CJA 2015) which provides that the High Court must refuse to grant relief on a judicial review application where it is apparent that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Whilst we would welcome some extension to the scope of remedies, it is critical that a central tenet of the remedies regime should be that decisions found to be unlawful following a judicial review challenge should be subject to a formal remedy.

Costs

64. Judicial review must not be a process available only to those who can afford it. However, high legal fees continue to deter potential claimants from bringing cases. This is deeply unsatisfactory. It means that, even in environmental cases where the UK is under an obligation to ensure that claimants' costs are not prohibitively expensive, some would-be claimants still find themselves inhibited from bringing cases in the public interest because of the financial risk.
65. A brace of costs reforms for Aarhus claims were introduced in 2017, including the application of reciprocal costs caps. Whilst these changes – and subsequent clarification secured through litigation⁶³ – are welcome, further reforms to costs rules could be made to improve the situation even more. For instance, in his 2013 report, Lord Justice Jackson recommended the introduction of qualified one way costs shifting for judicial review cases.⁶⁴ If this was adopted, it would mean that, subject to qualifications regarding the reasonableness of the claim, “the claimant will not be required to pay the defendant’s costs if the claim is unsuccessful, but the defendant will be required to pay the claimant’s costs if it is successful.” This recommendation was not adopted in subsequent reforms but, as noted above, there is still a need to provide comfort to claimants on costs. As Advocate-General Kokott has commented “reciprocal protective costs orders have the potential to undermine the objective of costs protection.”⁶⁵
66. We are aware that recent changes to the costs capping regime and the costs rules for interveners have created a chilling effect. There is a risk of increased costs for all parties that, in practice, creates real obstacles to access to justice. For instance, the current rules enable the court to vary the amount of the cap.⁶⁶ This possibility leads to uncertainty about the level of cap that will actually be applied to the claimant – in practice for a claimant considering bringing an environmental claim in the public interest,

⁶¹ Judiciary for England and Wales, ‘[The Administrative Court Judicial Review Guide 2020](#)’ Section 11 – Remedies.

⁶² *R (Champion) v North Norfolk DC* [2015] UKSC 52 and s. 31(2A) SCA 1981.

⁶³ *RSPB, Friends of the Earth & ClientEarth v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

⁶⁴ Lord Justice Jackson, Review of Civil Litigation Costs: Final Report (December 2009), paras 2.6-2.7.

⁶⁵ *C-530/11 Commission v United Kingdom*, opinion of AG Kokott, para 70.

⁶⁶ CPR 45.44.

even the possibility of an increase in their cap can be chilling. Although helpful guidance was provided by Lord Justice Dove on the need to apply early to vary costs caps, the risk of variation remains problematic. As the ACCC has recognised, “the possibility of variation may also be contrary to the requirement in article 3(1) of the Convention to establish a clear, transparent and consistent framework to implement the Convention’s provisions”.⁶⁷

67. ClientEarth has recent experience of this. In *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy*⁶⁸ the High Court varied our costs cap from the £10,000 default to £25,000. As we have since conveyed to the ACCC: “ClientEarth did not feel able to appeal the costs order, as this required an application to the Court of Appeal, with the resulting increased uncertainty and costs at a time when ClientEarth’s in-house lawyers were focused on preparing the substantive case, which had been allocated a three-day hearing. In practice therefore, we were unable to challenge the costs capping order.”⁶⁹

68. Further reform in this area would be beneficial – for further detail, see paragraphs 86-89 below.

Interveners

69. The costs rules for interveners are harsh. Under the CJCA 2015, interveners cannot be awarded their own costs⁷⁰ and in certain cases *must* be ordered to pay others’ costs.⁷¹ The cases in which an intervener must be ordered to pay costs are very subjective – for instance, where “the intervener’s evidence and representations, taken as a whole, have not been of significant assistance to the court”.⁷² The financial burden and uncertainty engendered by this position is likely to be seriously discouraging for potential interveners.

70. This is unfortunate as interveners can play an important role in judicial review challenges. Instead, interveners should only be liable for their own costs. As the court controls which parties can intervene, there is arguably no need for a costs deterrent.

Rights of appeal

71. There is no basis for limiting any rights of appeal – including those which exist at the permission stage. Judicial review cases raise key points of public importance.

72. In addition, through existing procedure rules,⁷³ there are checks and timelines embedded in the process for seeking permission to appeal. In our view, these act as constraints on the volume and merit of cases that actually proceed to the appeal stage.

⁶⁷ ACCC, Second progress review of the implementation of decision VI/8k on compliance by the UK with its obligations under the Convention (6 March 2020), para 48.

⁶⁸ [2020] EWHC 1303 (Admin).

⁶⁹ ClientEarth to the Aarhus Convention Secretariat re: UK’s compliance with decision VI/8k (14 August 2020).

⁷⁰ Section 87(3).

⁷¹ Section 87(5).

⁷² Section 87(6)(b).

⁷³ CPR 52.8.

Section III – Call for Evidence questions

Section 1 – Questionnaire to Government Departments

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

73. This questionnaire – if completed fully and supported by robust evidence – could be a valuable source of the evidence the Panel is seeking and will need to rely on. However, there are four points we would like to raise in relation to it.

74. First, we would be grateful if the Panel could confirm whether the questionnaire was shared with government departments only or all potential judicial review defendants including public bodies and local authorities. This is not clear from the Call for Evidence.

75. Second, responses to the questionnaire should be published. It is not currently clear what weight the Panel will attach to responses, how the evidence will be evaluated and tested, or whether the questionnaire will lead to further engagement with respondents. However, being able to read, review and understand responses would provide valuable transparency and help to inform future conversations and engagement with this Review.

76. Third, this questionnaire seems to be an additional route for government engagement with the Review. We would welcome the Panel's reassurance that the views of claimants – including individual court users, not just practitioners – are actively being sought. See paragraph 11 above.

77. Finally, we note that many of the questions are premised on assumptions the Panel is yet to evaluate. For instance, question one asks whether various aspects of judicial review “seriously impede the proper or effective discharge of [public] functions”. If framed in more neutral terms, this question may have led to a different, more nuanced and more comprehensive set of answers. The implied assumption in this question is unfortunately inconsistent with how judicial review ought to be viewed by civil servants: rather than an irritating nuisance or an obstacle to be avoided, its existence and spectre should serve to improve the quality of administrative decision-making.⁷⁴

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)?*

78. ClientEarth has identified several changes to the judicial review process that would significantly help to improve access to environmental justice; improve the quality of administrative decision-making; facilitate more effective protection of the environment and support the ability of citizens to actively engage in the governance of this country.

79. **Early procedural steps:** Reforms to the early procedural stages of judicial review cases could prove beneficial in reducing the number of cases that need to actually proceed to substantive hearing. In their 2014 report for the Bingham Centre for the Rule of Law, Michael Fordham QC, Martin Chamberlain QC (as they then were), Iain Steele and Zahra Al-Rikabi proposed several valuable recommendations in this regard.⁷⁵ For instance, the Civil Procedure Rules ('CPR') should be amended to allow parties to agree an extension of time for filing a claim,⁷⁶ which would help to reduce the need

⁷⁴ See paras 16 (and the JOYS guidance referred to therein) 54 above.

⁷⁵ M Fordham, M16 Chamberlain, I Steele & Z Al-Rikabi, '[Streamlining Judicial Review in a Manner Consistent with the Rule of Law \(Bingham Centre Report 2014/01\)](#)', Bingham Centre for the Rule of Law, BICL, London, February 2014.

⁷⁶ *ibid* para 2.6.

for claimants to issue protective claims. By allowing more time for initial assessment of the issue, the parties will be better informed about the matters and their positions in relation to them.

80. In addition, we discuss the importance of full compliance with the duty of candour above at paragraphs 53-55. The duty is intended to ensure that the parties are on a level playing field regarding their awareness of the context and content of a challenged decision. Ensuring that parties understand this is necessary to facilitate informed decision-making about whether and how to progress a case. However, in spite of clear guidance regarding the scope and content, defendants sometimes fail to comply. To improve this, Fordham et al. suggest requiring defendants' legal representatives to certify compliance with the duty on the Acknowledgement of Service.⁷⁷ We support this recommendation.
81. Finally, there is a need to discourage what Fordham et al. term "routine resistance of permission".⁷⁸ As explored above, judicial review is a crucial component of ensuring executive accountability. Its purpose – to improve and ensure the lawfulness of public decision-making – is special and parties should interact with proceedings within this in mind. In this way, defendants should not approach judicial review in the same way a defendant might respond to a civil litigation claim – with a resist 'at all costs' mentality. Fordham et al. suggest including prompt-boxes on the Acknowledgement of Service, which require a defendant to indicate whether they oppose permission.
82. **Intensity of review:** The standard of review typically adopted by courts in England and Wales when assessing the reasonableness of a public authority's action is guided by the *Wednesbury* principle. This creates a very high threshold for a finding of irrationality and, as a result, a very low intensity of judicial review. The intensity of review a court will apply is case specific.⁷⁹
83. Our view is that in order to secure proper access to environmental justice, a more intensive standard of review should be the norm for environmental cases. This would appear to be consistent with the established 'sliding scale' conception of *Wednesbury* irrationality.
84. One way of facilitating this might be the inclusion of specialist judges on the bench. These specialist judges could include non-legal experts whose role it is to (help to) determine cases brought on very technical areas of policy such as industrial discharges and chemical pollution. By bringing their technical expertise to bear, the specialist judges would help fellow legal judges in understanding the thorny technicality of matters before them and bolster their confidence, enabling more thorough review. A similar approach has been adopted in the New South Wales Land and Environment Court. That Court includes 'Commissioners' – most of whom are not lawyers but are technical experts in specified non-legal areas including environmental science, natural resources and land rights for Aborigines. Although Commissioners do not comprise the Court, they do have a merits review function in certain classes of case and are able to assist legal judges in their merits reviews. The value of multidisciplinary decision-making in the context of environmental cases is widely recognised.⁸⁰
85. The Aarhus Convention requires that people have access to procedures through which they can challenge the substantive – as well as procedural – legality of certain administrative environmental decisions. In response to a Communication submitted by ClientEarth, MCS and Robert Latimer, the ACCC expressed concern regarding the availability in England and Wales of appropriate procedures which enable review of the substantive legality of decisions, acts or omissions within the scope of the Convention⁸¹ and noted favourably that "the application of a 'proportionality principle'...could provide

⁷⁷ M Fordham, M Chamberlain, I Steele & Z Al-Rikabi (n 75) para 4.3.

⁷⁸ M Fordham, M Chamberlain, I Steele & Z Al-Rikabi (n 75) para 4.1.

⁷⁹ See, for instance, *R v Department for Education and Employment Ex parte Begbie* [2000] 1 WLR 115 in which Laws LJ noted that "It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake", para 78.

⁸⁰ See, for instance, Pring & Pring, 'Environmental Courts & Tribunals: A Guide for Policy Makers' (2016).

⁸¹ ACCC/C/2008/33 Findings of the ACCC adopted on 24 September 2010, para 127.

an adequate standard of review in cases within the scope of the Aarhus Convention.”⁸² Whether the UK’s current approach delivers this is the subject of a complaint currently before the ACCC.⁸³

86. **Costs reforms:** To ensure greater accessibility to judicial review and reduce the risk of potential costs implications deterring would-be claimants, reform of the costs regime should be revisited. Lord Justice Jackson recommended the introduction of a system of qualified one-way costs shifting (‘QOCS’) for various forms of litigation including judicial review in his 2009 Review of Civil Litigation Costs Report.⁸⁴ In his more recent report Supplemental Report,⁸⁵ Jackson LJ was still supportive of this system – although his expectations of it being introduced were tempered.⁸⁶ Under this proposal, where a claim is successful, the defendant would pay the claimant’s costs. Where a claim is unsuccessful, the claimant does not usually pay the defendant’s costs. Whilst Jackson LJ’s proposal was for ‘qualified’ shifting,⁸⁷ our view is that absolute one-way shifting under which successful claimants can recover, but defendants cannot – even when successful is appropriate in public interest judicial reviews, and especially so in environmental cases.
87. One of Jackson LJ’s principal reasons for his recommendation was that it “is the simplest and most obvious way to comply with the UK’s obligations under the Aarhus Convention...”⁸⁸
88. We recognise that the bespoke costs rules applicable to environmental cases⁸⁹ do, to an extent, represent a more favourable costs regime than that applicable in other judicial review cases. But this has not protected the environmental costs regime from subsequent undermining through amendments to the CPR.⁹⁰
89. A clearer, more consistent approach would be to adopt one-way costs shifting in favour of the claimant across all public interest judicial review cases. This would result in greater certainty for claimants about their total financial liability at the outset. It would also remove the need for significant time and resource to be invested in arguments over the appropriate level of cost caps.

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?*

90. We cannot see any case for the type of statutory intervention envisaged in the Terms of Reference and the Call for Evidence. See paragraphs 38-43 above for further details.

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?*

⁸² *ibid* para 126.

⁸³ Communication ACCC/C/2017/156. This issue has been raised in a further pending Communication – ACCC/C/2013/90.

⁸⁴ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Final Report’ (December 2009) – Chapter 30 (Judicial review).

⁸⁵ Lord Justice Jackson, ‘Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs’ (July 2017).

⁸⁶ *ibid* chapter 10, para 3.2: “*In my view, if QOCS in JR is not acceptable, the Aarhus Rules should be extended to all JR claims*” (emphasis added).

⁸⁷ Meaning that that in certain circumstances (including relating to the parties’ available resources), the costs could shift from the defendant to the claimant in the event of an unsuccessful claim.

⁸⁸ Lord Justice Jackson (n 84) chapter 30, para 4.1.

⁸⁹ Civil Procedure (Amendment) Rules 2013 (SI 2013/262).

⁹⁰ Civil Procedure (Amendment) Rules 2017 (SI 2017/95) – for instance, CPR 45.44 provides that the Aarhus costs cap can be varied up or down – or completely removed – in the light of a party’s financial resources.

91. It is clear which decisions and powers can be subject to judicial review. Given the importance of judicial review as a process for the public to keep in check the lawfulness of public authorities' actions, it is critical that judicial review is available for every administrative decision and action.

92. See paragraphs 44-46 above for further details

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?*

93. The clarity of the judicial review process is an important issue that goes to the heart of access to justice matters. Whilst we recognise the inevitability of some of the complexities – procedural or otherwise – embedded within the judicial review process, we emphasise that these should be minimised as far as possible.

94. Indeed, this is more a case of ensuring that the public being able to access good legal advice and information rather than requiring radical reform of the existing process.

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?*

95. Please see paragraphs 56-59 and 79 above for detail on our views on time limits for issuing judicial review proceedings specifically.

96. More generally, we recommend that in assessing issues related to delay, the Panel seek statistics on the number of times public authorities have requested extensions of time in order to meet CPR time limits or court ordered directions.

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

97. In our view, the Aarhus costs capping regime is neither too lenient nor applied particularly leniently by the Courts. To the contrary, the risk of high costs liability and the uncertainty embedded in the existing regime continue to be inhibiting factors for some potential claimants.

98. See also: paragraphs 64-67 on variability of costs caps and paragraphs 86-89 above where we discuss one-way costs shifting as an alternative model for judicial review costs.

8. *For clarity, we have split these questions into separate sub-questions and deal with them individually:*

(a) *Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved?*

99. Under the Aarhus Convention, the procedures in place to deliver access to environmental justice must not be "prohibitively expensive".⁹¹ However, in our experience environmental judicial review costs are not proportionate. It can be incredibly expensive for a claimant even when they win a claim.

⁹¹ Article 9(4) Aarhus Convention.

100. See also: paragraphs 64-67 on variability of costs caps and paragraphs 86-89 above where we discuss one-way costs shifting as an alternative model for judicial review costs.

(b) Should standing be a consideration for the panel?

101. We do not consider that standing is an issue requiring review or reform, and therefore in our view should not be a matter for the Panel. If a claimant does not have standing and nevertheless issues a claim, this will be caught at the permission stage and the matter can be addressed in costs. See paragraphs 47-52 above for further details.

(c) How are unmeritorious claims currently treated? Should they be treated differently?

102. It is not clear to us whether this question is asking about cases deemed ‘totally without merit’ at the permission stage or whether it is referring to the considerably lower threshold of ‘unsuccessful cases’. Presuming the latter – the former do not get permission to proceed – a costs penalty can be appropriate in certain circumstances. Beyond this, it is difficult to identify the rationale for any further differing treatment.

103. In order to reduce the number of ‘totally without merit’ cases that end up at permission stage, it is vital that potential claimants have access to good legal advice at an early stage, including through legal aid where necessary or the services offered by NGOs.

104. It is also worth noting that the ‘totally without merit’ stamp should be used only sparingly. We are familiar with at least one case initially considered ‘totally without merit’ which was subsequently granted a favourable permission decision by the Court of Appeal.⁹²

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?

105. See paragraphs 60-63 above where we discuss judicial review remedies and make proposals to improve the existing inflexibility.

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

106. This is relevant to our comments at paragraph 27 above. Judicial review is only one side of the balance. To minimise reliance on it, the public needs to be confident in the quality of public decision-making. If the number of judicial review claims is rising, this could be related to increasing public mistrust and lack of prior consultation, public participation and transparency in public authorities’ exercise of their administrative powers or insufficiently trained and resourced decision-makers.

107. More practically, the need to proceed with judicial review claims could be tempered by better pre-action co-operation between the parties. The ability to extend the time-limit for filing; better compliance with the duty of candour and active engagement in pre-action correspondence should be standard – see our discussion and recommendations at paragraphs 53-59 and 79-81.

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?

⁹² *Cheshire East Council v Secretary of State for Communities and Local Government* [2018] EWHC 1524 (Admin).

108. We have some experience of settlement through negotiation following the issue of a claim but prior to the permission decision and also through the proper engagement by both parties with the pre-action protocol procedure.
109. One reason that settlement might occur late in the day is that the claim issue time limits do not provide scope for adequate discussion prior to issuing. Following this, the tone can change and make settlement a less appetising prospect for defensive defendants.
110. There is a need to ensure that settlement is not permitted to be a quiet way out for a public authority. Settlement agreements should be publicly available in line with the open justice and transparent spirit of the judicial review 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?

111. There is a role for ADR – it could be a helpful tool for achieving resolution in appropriate cases. However, in line with our comments in paragraph 110 above, there is a need to ensure that the outcome of ADR processes are published. In line with the principle of open justice, the public authority decision-maker must be transparent for everybody – not just the claimant.

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?

112. We have no experience where our standing was in issue. We do however comment on the issue of standing at paragraphs 47-52 and 101 above.

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