JUDICIAL REVIEW CALL FOR EVIDENCE

WRITTEN RESPONSE FROM LAWYERS IN LOCAL GOVERNMENT TO THE CALL FOR EVIDENCE BY THE MINISTRY OF JUSTICE'S INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

October 2020

Lawyers in Local Government (LLG) is a not for profit membership company which represents local authority lawyers, monitoring officers and governance officers across England and Wales.

As the leading organisation in the local government legal sector, we provide an extensive member network with active grass root involvement and participation. We produce guidance, training, and commentary in the field of local authority law, governance and practice. We are also supported by a number of corporate law firms who focus upon public law in partnership with us.

LLG held a roundtable at the start of October following individual discussions to discuss the predominate areas within the call for evidence.

LLG supports the need for sustained accountability, transparency, and openness. Our membership are the arbiters of good governance. We consider strongly that there is a positive case for the ongoing scrutiny of public decision making and, as such, we broadly consider that the current judicial review regime is fit for purpose.

It enables effective advice to be given within local government to engender robust and lawful decision making, whilst protecting access to justice. The system remains of profound importance in ensuring that the judiciary is separate from the executive within the constitution. With that in mind, LLG would expect to see further consultation incorporating a high level of detail on any proposals for change before significant alterations are made to the process..

CALL FOR EVIDENCE

Section 1

1. In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?

a. judicial review for mistake of law

b. judicial review for mistake of fact

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

d. judicial review for disappointing someone's legitimate expectations

e. judicial review for Wednesbury

f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account

g. any other ground of judicial review

h. the remedies that are available when an application for judicial review is successful

i. rules on who may make an application for judicial review

j. rules on the time limits within which an application for judicial review must be made k. the time it takes to mount defences to applications for judicial review

2. In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?

The availability of Judicial Review ensures that local authorities act and use their powers upon receipt of legal advice. It provides a focus on communities to ensure accountability, effective consultation and equalities impacts. It is an important safeguard and provides fundamental access to justice. In that sense, the process improves decision making, transparency and accountability.

3. Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention? From this, we would appreciate your response to the following questions:

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?

On balance, any perceived 'inconvenience' or 'irritation' some judicial reviews might be perceived to create is wholly outweighed by the rule of law, access to justice and accountability. It remains at the very core of our democracy that decision makers can be held to account by the public which they serve. The questions posed here sit uncomfortably with the 'importance of maintaining the rule of law'.

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)?

- Creating a clear, stand-alone ground of judicial review for breach of the equal treatment principle.
- Defining the extent and scope of the duty on public bodies to give reasons.
- Extending proportionality review to other cases.
- Allowing parties to agree an extension to the three-month time limit for submitting claims, to allow proper pre-action engagement in every case.

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?

In order to substantially answer this question, one would need to understand the purpose and intention of codification. Practitioners already have a solid grasp of the grounds of judicial review (illegality, irrationality, and procedural impropriety) under common law at present. Codification through statute might result in some rigidity, devoid of flexibility to accommodate changing systems.

The level of detail required within a statue to avoid judicial interpretation (if that is the aim here) would be so substantive as to affect access to justice for the majority of citizens who would be unable to grasp the provisions. Further, it would be likely to hinder the evolution of

common law through decided cases, as occurs at present. Codification therefore is unlikely to assist in bringing benefits to the process and should, if proceeded upon, limit itself to administrative procedure. It would be challenging in the extreme to attempt to codify all possible grounds for review and LLG would not wish to see it being used to remove existing grounds or to curtail them. To that end, we refute any notion or inference that " judicial review of the exercise of government power (as opposed to the scope) is a new development in the last 40 years, and that the former should not be subject to judicial review", and would point toward *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K.B.223 to rebut this.

Notwithstanding the above, LLG does consider that there might be two distinct areas which might benefit from review: that relating homelessness and social care decision making.

The majority of homelessness decision making is outside the scope of judicial review and subject instead to a specific statutory appeal process in the county court. But there are some types of homelessness decisions which are not within the scope of this process and therefore are subject to judicial review. Such cases rarely go beyond the interim relief stage and are usually settled. There might be an argument for extending the scope of the statutory appeal procedure to include homelessness decisions not already within its scope to avoid the use of judicial review.

A similar observation with respect to judicial scrutiny of social care decision making arises. Challenges are often focused on the complex and iterative process of assessment that rely on a wide range of complaints (irrationality, procedural impropriety, illegality, unfairness and so on). The applications are then subject to varying and unpredictable levels of judicial scrutiny. It follows that it is often difficult to confidently assess the merits of many of these cases. It is recognised amongst practitioners that the outcome in many of these cases can vary substantially. This is undesirable from the point of view of legal certainty and is a strong disincentive to defend challenges to decisions that are not obviously wrong or unfair. Looking at matters in the round, we do question whether any of these disputes are best managed within the framework of the Administrational Court, not least because these are almost always arguments about what services are required rather than the formal considerations. For that reason, some form of codification for this type of specific case be desirable (albeit difficult to achieve for the reasons set out above).

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?

It is a well-regarded principle that the rule of law provides the courts with an inherent jurisdiction to decide cases. The majority of cases clearly demonstrate whether or not they are non-justiciable. The common law serves to support that. An attempt to curtail in statute non-justiciable cases is likely to face the same challenges as those set out above with respect to codification. Likewise, removal of 'challenges to government power' on the basis

that this is a new development is not accepted. It is fundamental premise of access to justice and legality that the exercise of public powers, both at central and local government level are capable of being challenged. This serves to encourage robust decision making and open governance. Across the spectrum of litigation there will inevitably be a small number of flippant or superficial cases, but on balance, these should not serve within judicial review to undermine the important relationship between public authorities and citizens. We can see merit however in the equal treatment principle being a ground of review in and of itself, as opposed to sitting within the rationality review.

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?

LLG considers the judicial review process to be clear and that the courts strike the right balance between progressing arguable cases and disposing of frivolous ones. We do not consider reform of the process is necessary following the governments previous reforms around 'totally without merit' cases and fees for oral renewals.

In respect of the duty of candour (raised within the terms of reference), whilst the administrational burden can be high on a public body, it serves an important purpose to ensure openness in how decisions have been made which underpins transparency in the democratic process. If the duty were restricted, it would risk undermining the purpose of judicial review. It is also worth noting that the duty is not as wide as disclosure obligations found in other parts of the CPR. Indeed, public authorities are already bound by public disclosure in respect of the Freedom of Information Act and various other regulations (such as the Local Government (Transparency Requirements) (England) Regulations 2015)

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?

The standard 3-month time limit strikes a good balance between the need to get on with government business whilst allowing sufficient time for proper scrutiny and challenge. Time limits have already been reduced in respect of some planning and procurement matters. Shortening that time-period further across the board would make it more difficult for local government to engage properly with legitimate concerns, making it less likely that ADR could be carried out pre-action, increasing the number of protective claims. It could also affect access to justice where citizens attempt to engage with the authority to resolve the issue at

hand and are in consequence curtailed from seeking formal redress through the judicial review regime.

LLG would, however, welcome a provision enabling an agreed extension between the parties to the three-month time limit to comply fully with the pre-action protocol which currently, can be refused by the courts. The pre-action protocol is a useful set of provisions which aides both parties in the proceedings.

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

There exist established principles within case law to the application of costs and judges are well practised in apply rules in the exercise of their judicial discretion. In a planning context, costs are often limited by the 'Aarhus' convention principals.

LLG consider that there is merit in continuing the usual practice of Defendants bearing their own costs of defending a successful rebuttal at the permission stage. Transferring the burden to citizens would reduce access to justice and impact their ability to hold the government (both national and local) to account. Further, judgements at permission stage can prove useful in providing a commentary on the legality of actions and decisions. Oral hearings tend to award costs to successful defendants in any event.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

See above.

LLG do not consider that standing should be a consideration in respect of costs.

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?

The courts already possess discretion and five different remedies with sufficient flexibility at its disposal. LLG do not identify undesirable consequences within the regime as a result. Administrative law should not be about an award of damages.

The 'no substantial 'difference test' relied upon successfully by many defendants already restricts relief and LLG considers it imperative that the 'highly likely' threshold is retained.

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

See response to question 6. Embedding an extension by agreement to the three- month time limit would increase the likelihood of resolution prior to the issue of proceedings and improve the chances of early settlement.

Whilst there appears to be a perception that there is somehow an excessive use of judicial review, the Bar council reported that applications for judicial review fell 44% between 2015-2019.

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?

This is not something recognised within local government. It is our members experience that if parties are going to settle it is usually identifiable and clear from the outset. Normally by the time of full trial, parties are fairly entrenched in their position and both clear as to the merits. Settlements 'at the door of the court' are therefore exceptionally rare.

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?

Judicial review is distinct from the ordinary course of civil litigation. It is mostly pursued on a 'principle' basis. Whilst there is some merit to ADR in particular cases and flexibility within the process, in vires disputes a claimant is often seeking a different outcome which cannot meaningfully be changed. ADR can also attract significant costs for claimants (in some forms), in meeting half the costs which may prohibit consideration of its use and of course, some decisions require a particular quashing order. ADR however can, however, narrow down the issues.

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?

LLG considers that the current rules already ensure that the most appropriate person is given the standing to bring the case and that the courts exercise appropriate consideration of inappropriate parties. Should public interest standing be restricted further, (and LLG understands the statistical prevalence of this type of claimant is extremely low in any event) it could result in some cases simply having no one eligible to bring them. A fundamental right of administrative law is the ability to hold decision makers to account and 'right wrongs'. It is

important that entities with the means and understanding are not precluded from challenging wrongdoing. Access to justice must remain a primary concern in any future proposals for change.

Lawyers in Local Government

For further comment please contact Helen McGrath, Head of Public Affairs at [redacted]

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