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Dear Panel,

1. Please accept these comments on the matters raised in the consultation documents.

2. In summary, a codification of judicial review would be both inflexible and unpredictable. The rule of law requires judicial flexibility to deal with the ingenuity of modern policies which can adapt to the surrounding world. Any restrictions on judicial review are currently adequate to filter weak claims. The cost of such claims is insufficient to warrant greater barriers. If further restrictions were relied on, injustice would occur. That is because without supervision by the Courts in a flexible way (led by the Courts), unnecessary, arid distinctions from the past will re-emerge.

3. For an example of arid distinctions I am currently facing, a defendant is arguing whether my client seeks a public or private law remedy. The term 'public law' and 'private law' is imprecise, and misunderstood in the law of England and Wales, where a formal division is not recognised, and where predominately, the law fixates on remedies.

4. I worked for the Government Legal Department between 2015 and 2020, the Home Office for six years, and in private practice as a solicitor. I have worked on over 2500 immigration and public law matters, with just under a third of this being judicial review.

## Important background principles

5. You are traversing familiar ground. In O'Reilly and Others Appellants v Mackman and Others Respondents [1983] 2 A.C. 237, the Court considered section 31 of the then Supreme (now Senior) Courts Act 1983 'a lion'. The Court considered how the permission stage of judicial review was a procedural safeguard against abuse. The trend at the time, funded by legal aid, was to bring private law actions. Lord Diplock said:

*[237].....Now that judicial review is available to give every kind of remedy, I think it should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty...*

*[258]... In the light of these observations, I make this suggestion: that wherever there is available a remedy by judicial review under section 31 of the Supreme Court Act 1981 , that remedy should be the normal remedy to be taken by an applicant. If a plaintiff should bring an action - instead of judicial review - and the defendant feels that leave would never have been granted under R.S.C., Ord. 53 , then he can apply to the court to strike it out as being an abuse of the process of the courts. It is an abuse to go back to the old machinery instead of using the new streamlined machinery. It is an abuse to go by action when he would never have been granted leave to go for judicial review.*

*[260]... So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty.*

6. In Davy v Spelbourne [1983] 1 AC 262, Lord Fraser considered access to the court of choice should only be denied by prescription of statute or rules:

   *[276] The expressions "private law" and "public law" have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies. The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression "public law" can be used to deny a subject a right of action in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules. We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove.*

7. There are various examples of how parties engaged in procedural wrangling increase delay, increase cost and harm the overriding objective. One example is contained in R v Reading Justices and Others, ex parte South West Meat Limited - (1992) 156 JP 728, where the Defendant Board was ordered to file affidavits within 56 days. On day 55, a 'notion of motion' filed asked the court to Order that the judicial review continue 'as if begun by writ' (a different process). This was considered novel, unattractive, and designed to obstruct any substantive hearing taking place. In particular, Lord Justice Watkins said:

   *If it became the intention of the Board not to comply with the order of Pill J as to affidavits, then there were ways of indicating that intention, either by returning to the Judge and asking for a revision of his order, or in coming here and asking that the order be set aside or something of that kind. But instead of that, they have so moved in order that this court should give them all these advantages namely: (1) of never filing affidavits in these proceedings; (2) of having these proceedings stayed; and (3) seeing that there are criminal proceedings afoot, of ensuring that these proceedings will never be heard in any shape or form. I will have none of that.*

   ....

*This is an unheard of application in my experience. Once leave to move to apply for judicial review is given it has never been the practice of anyone to come to this court to make a pre-emptive strike against the day of the hearing of the application in order to ensure that that day shall never dawn. It is a most inappropriate and, I venture to think, a wholly wrong thing to do and one which this court should not permit. The time to make an application of this kind passed when no submissions of the kind made here were made to Pill J. The time may properly arise again for such submissions, if they are to be repeated, on the day late in November when the applicants' application is to be heard. I should add that I do not accept that it would necessarily be embarrassing in any sense for these proceedings to be heard prior to any criminal proceedings which may take place eventually.*

8. There will no doubt be many other examples of procedural arguments that do not move either party towards resolution of their dispute. Codifying a flexible area will lead to rigidity and procedural hardship. It will lead to marginal advantages being sought.

**Observed Trends**

9. I have observed, on all sides, the misuses of judicial review. Two recent examples are provided below.

Judicial Review forces proper examination of Government Example 1 – Abuse of statutory powers

XY is detained in prison. At the end of his criminal sentence he is not released. XY engages a lawyer to discover what is going on. The lawyer contacts the right government department and finds (i) a decision to detain (not shared); (ii) the wrong power used; and (iii) errors of fact. The government department refuses to change its mind when written to. The Tribunal refuses to grant bail and finds for the government department. The High Court, on paper, finds the claim strongly arguable but detention maintained on the 'facts' as presented. At oral hearing, facts conceded by the government department, bail granted. This took an oral hearing to flush out the true position. One party used its strength to try to exclude XY. Codification may increase this.

Judicial Review forces proper examination of Government Example 2 – interpretation of policy

Policy says a decision that someone must leave the UK 'not normally made' if five years has passed. A decision for client AB says they must leave the UK, even though over eight years has passed. Government Department says they know what policy means. Law says it is for the Courts to interpret. The use of judicial review here is to adjudicate on the meaning of a policy. Both parties share the process to determine the meaning of policy. Codification won't adequately provide for this. The Rules do not adequately provide for this shared interest.

## Comments on the questions for Government Departments

10. Question 1 is unlikely to be effective for your purpose. Judicial review, in practice, does not neatly delineate between the grounds in this way. Certain errors span multiple grounds. You will get a mixed response, which will not really identify the leading ground in relation to 'serious impediment' or 'effective discharge' of government function.

11. There will be little statistical or empirical evidence. There might be comments on volume and overall costs, but the impact will not be broken into the categories selected by IRAL.

12. There is likely to be a positive response in answer to Question 2, which will be important to assess against practice. Many judicial review matters return for reconsideration. There will therefore be the chance for a 'new decision making process' without the previous errors. This must improve effective decision making. I would say cost has little impact for most decisions. Decisions which are made for 'political purposes' do not weigh costs in the remaking of the decision. Budgets might be examined regularly in large scale litigation, but cost updates in individual cases infrequently influence outcomes.

13. In relation to Question 3, this is a highly political question for a neutral civil service. It will be interesting to see which Departments have analysed 'the impact' in a specific and measurable way. Most officials have little experience, or understanding, of the specifics of judicial review. If a case has a significant impact, it would form part of a new policy to be applied by decision makers. As a function, that is no different to how decision makers react to political decisions (i.e with a policy to help apply the law in practice). The question will probably give rise to the first analysis by a department, who might not have otherwise considered the wider questions.

## Improvements to the law on judicial review

14. It remains a remedy of last resort. Yet, in some areas, such as immigration, the removal of appeal rights (where roughly 60% of appeals succeeded) is bound to lead to a rise in challenges elsewhere. In planning, where Statute determines the avenue for challenge, it is the 'only' resort for those dissatisfied by a decision.

15. The biggest improvement to judicial review would be by changing the appeal landscape around it. If a decision has a right of appeal elsewhere, there will be no need for a judicial review. This would reduce volume, and challenges which are solely 'merits based'.

16. A further improvement to judicial review would be to remove the fallacy of 'precedent fact[1]' decision making. Where it is necessary for the court to make fact finding decisions, it should have that included as a power within the Senior Courts Act 1981. Or, if such facts require determination, there could be some hybrid whereby a party could have a determination (in the County Court, Tribunal, or some other Independent venue), and revise the need to apply for judicial review.

**Response to Section 2 – Codification and Clarity**

17. There are better texts on the powers of the High Court. In relation to statutory intervention, I've not understood the High Court to be a creature of statute, although the power for some of its remedies now has a statutory basis. It retains an 'inherent jurisdiction' partially from those historically held powers and partially from its role to prove a means of dispute resolution where no other solution is provided. Therefore, the problem with statutory intervention is that if it attempts to infringe that jurisdiction, it is unlikely to be successful.

18. It is rare for a challenge to a decision which is found to be not subject to judicial review. Appeal rights are generally clear. Therefore, any decision to be excluded from judicial review should have an alternative remedy.

19. The process for making a claim could be simpler. The necessity to select a regional or London court as a venue should be determined electronically, and not by the parties. It is an allocation question. Filing a claim should be capable of being done online, with uploads of any size available for the court. Time for making a claim should be extended from three months to six, to take account of continuing decisions.

20. My experience of responding to a claim for judicial review is that (i) the default easiest position is to simply oppose the claim, leaving the court to bear the burden of a decision. Most recent examples are filing an 'academic aos' which appears to save the cost of filing a consent order.

21. The relationship between the duty of candour and disclosure continues to be confusing and confused by most parties. A better process is required for confirmation that candour has been complied with. Either disclosure of material held should be the norm, or disclosure by list. Currently, in judicial review matters, candour and disclosure are usually best met in the form of subject access requests. They

[1] See R v SSHD, ex parte Khawaja [1984] AC 74 and R (A) v Croydon LBC [2009] UKSC 8. Where a fact needs to be established to exercise a power, the court will inquire into whether the factual circumstance exists. In Khawaja, whether the person was a 'illegal entrant', in A, whether the person was a child.

inform the prospects of success. But this exercise costs time and money, and where judgement calls are necessary, sometimes they go wrong: See Babbage, R (on the application of) v Secretary of State for the Home Department [2016] EWHC 148 – para 13: *I confess to having been extremely concerned about the attitude of the Secretary of State, or alternatively her advisers, towards the supply of documents necessary for the resolution of this case. The Secretary of State, through her officials or advisers, was under a duty to disclose this material of their own volition. They did not do so. They were prompted to supply it by the solicitors for the Claimant. They did not provide them. They were ordered to provide it by Collins J. They failed properly to comply with that order. They were then ordered to provide specific, identified material, or an explanation of why they could not do so, by Picken J. They failed to comply with that order too.*

22. Appeal routes could be clearer. For example, the refusal of interim relief in the HC has no clear appeal route unless you add up CPR 52 and 54. That is a CPR issue.

**Response to Section 3 – Process and Procedure**

23. On the whole, judicial review strikes the right balance. Improvements can always be made. Filing a claim should all be online, without the need to find your way to an office for a stamp. 21 days for a Government response is probably quite short, and so an extension might better reflect volume. That extension could easily be automatic, depending on volumes. An algorithm could determine the number of claims against a department in any given month and increase the time from 21 to 28 or 35 automatically. Automation, in favour of the most flexible process, should take over.

24. Costs come at the end of hard fought substantive arguments. The tail should never wag the dog. Assessment is very rough, and might be made by a judge who never practiced in the jurisdiction. Proportionality should continue to be applied. The winner should get a fair recovery. Greater caps should be routinely set, based on benchmarking of claims over the course of a year. Any hurdle based on costs will reduce access to justice.

25. Most JR claims answer the remaining questions in their own way, specific to the case. Few cases settle on matters of principle. Standing rarely arises and would simply be another hurdle. Reducing judicial review is easy: have an alternative remedy. Departments who remove remedies are faced with the highest number of judicial reviews.

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