



Department for

Infrastructure

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Title: Ministry of Justice - Call for evidence

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Questionnaire

Section 1 – Questionnaire to Government Departments

Based on the Terms of Reference as set out in the Introduction, the IRAL has created the following questionnaire to be sent to Government Departments. The questions are as follows:

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

Content

b. judicial review for mistake of fact

Content

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

Content

d. judicial review for disappointing someone's legitimate expectations

Content

e. judicial review for Wednesbury unreasonableness

Content

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

It is important that those wishing to take a judicial review have already engaged in the process leading up to the decision they wish to challenge – this is important for planning decisions. It should not be acceptable to simply wait until the end of the process, keeping your grievance or potential challenge in your 'back pocket', and only then appear, take a JR and provide evidence to support your case at that point..

g. any other ground of judicial review

no comment

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

Important to have a range of remedies and flexibility to ensure courts have opportunity to adopt a reasonable and proportionate remedy.

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

Rules regarding on who can make an application should be more prescriptive and maybe even written in statute, as with (f) above it is important that those wishing to take a judicial review have already engaged in the process leading up to the decision – this is important for planning decisions. It should not be acceptable to simply wait until the end of the process, keeping your grievance or potential challenge in your 'back pocket', and only then appear, take a JR and provide evidence to support your case at that point.

j. rules on the time limits within which an application for judicial review must be made

Rules regarding time limits should be robust and consideration given to shortening time limits and putting them in statute

k. the time it takes to mount defences to applications for judicial review

The amount of time it takes to mount defences is considerable and it has major effect on normal business, particularly given most challenges (to the planning process in particular) involve extremely complex Environmental and European Law and require extensive time and resources.

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?

No - it definitely inhibits planning officers and makes them more risk averse to decision making which slows the process and increases uncertainty generally.

The fear of the extensive costs as a result of losing a JR, as well as the actual costs for legal support contributes to the above inhibitions and a slow decision making culture, particularly for limited budgets for both councils and central government.

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?

Sometimes obiter comments associated with the ruling can stray into other areas beyond case and can be unhelpful

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?

NONE

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)?

NONE

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?

The discretion afforded to judges regarding criteria and timings for leave and the speed of the overall process is wide ranging. Using statute to limit some areas of discretion would bring greater certainty and speed up the overall process.

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?

Consideration should be given to ensuring JR can only be brought at the appropriate stage of a development project. For example, a challenge on the principle of the development should be at plan or programme stage and not at later stages where the focus should be more on the details of the project.

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?

Worth considering statute to bring more clarity.

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?

As per section 1 question 2

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

The availability of Protective Costs Orders (or 'Costs Capping Orders'), whilst important to enable claimants to get justice, should be carefully controlled to ensure that they are not a licence for unelected guardians of the public interest to litigate on a risk free basis.

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?

Costs are very high. However, protective cost orders can encourage unmeritorious claims. This is a difficult balance to strike.

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?

As per section 1 (h) - It is important to have a range of remedies and flexibility to ensure courts have opportunity to adopt reasonable and proportionate remedies.

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

Consider additional mechanisms and opportunities for appeal. For example, introduce 3rd party rights of appeal to the planning system?

Robust procedures in places to ensure the applicant has fully engaged in the planning process before getting leave to appeal

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?

Yes. This can happen for a variety of reasons - potentially because of fear of court / judicial system, possible costs and judgement. The process of negotiations between barristers is not transparent.

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?

Yes. However, ADR could be delaying tactic it would only work if it was the only option available

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?

Yes. Sometimes standing is given without a good reason.