The Rt. Hon. The Lord Thomas of Cwmgiedd, P.C.

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The Rt Hon The Lord Faulks QC,
Chair of the Independent Review of Administrative Law

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Dear Lord Faulks,

May I thank you for your letter of 7 September and your call for evidence on the review that your panel is undertaking to consider options for reform to judicial review.

Although, as in any area of the law, minor reform or change is needed at almost any time, in my view such reform as may be necessary can be carried out by the same route by which judicial review was developed, namely by judicial decisions within the common law. It may be some adjustments are needed to the law of procedure (as you set out in numbered paragraph 4 of the terms of reference and in the call for evidence), but there are very clear routes for this to be done through the machinery of the Civil Procedure Rules Committee and Parliamentary approval, with the recently exercised powers the Secretary of State for Justice and Lord Chancellor has to intervene. When a senior judge, I played a small part in effecting several reforms which were successfully carried out by these routes.

The context in which you are asked to conduct this review is all important. The development of judicial review has been one of the great modern achievements of the common law in the United Kingdom and has probably had an influence worldwide comparable to the development of commercial law by Lord Mansfield and by those who followed him.

Within the United Kingdom, it has proved invaluable in very recent times, particularly with the growth of Executive power and the decline in the ability of Parliament to hold Ministers to account for the decisions of the Executive or to exercise sufficient legislative control over subordinate legislation. This last has become a far more serious problem over the past two years with the very significant growth in framework legislation and very recently in the numerous measures that have been taken to deal with the pandemic. Our society, our democratic government and the strength of the rule of law depends far more at present on the balance that currently exists between the Executive, the legislature and the judiciary with the present scope of judicial review.

Over recent years I have spoken worldwide not only on commercial law, but also on the position of the judiciary and the proper functioning of the constitution and the very positive example it has hitherto set. Over the past 3 years, I have had the privilege of seeing the functioning of our constitution through a different spectrum. Until very recently the UK set an

outstanding example to the rest of the world in the way in which judges held the Executive to account and upheld the balance of the constitution. This example was greatly admired and has been followed in many states. It is not necessary for me to spell out the effects of matters such as Part 5 of the UK Internal Market Bill (including the provisions in relation to judicial review) and the wrongful criticism of lawyers who defend citizens against the action of the Executive have had on the reputation and standing that the UK has previously enjoyed.

In my view, this context is critical. This is not the time for reform to judicial through statutory changes or to place the law relating to judicial review in a statutory code. Furthermore any attempt to set out principles of justiciability would be seen as inappropriate given the context for this review. An attempt to set out grounds for a finding of unlawfulness or to make them variable as between different types of decision or to circumscribe the types of remedy of judicial review would stifle the development of the law to meet changing circumstances and issues that might have hitherto been addressed in other ways. As I have made clear, such change as may be necessary to some aspects of the substantive law or of procedural law should be left to the means I described at the outset of this letter.

To do otherwise, would not only be damaging to the constitution of the UK and the rights and privileges of its citizens under the law, but would cause further serious short and long term damage to the United Kingdom, its reputation as probably the greatest exponent of the rule of law, to the example it sets many other nations and to its standing as an international centre of commercial dispute resolution.

If your panel wishes further assistance, I would be happy to try and help.

Yours sincerely