**BEVAN BRTTAN LLP**

# RESPONSE TO THE MINISTRY OF JUSTICE'S CALL FOR EVIDENCE IN THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

**24 OCTOBER 2020**

## INTRODUCTION

Bevan Brittan LLP

Bevan Brittan LLP is a UK Top 100 commercial law firm and a market-leader within local government, health and social care and housing.

We have a team of expert lawyers who specialise in administrative and public law. We act for many public sector bodies as well as those entities who interact with public sector, which means that our work in this field sits at the heart of many of the firm's practice areas. Our administrative and public law team advise a range of clients including:

•local authorities;

•NHS commissioners and providers;

•ombudsmen;

•financial services clients;

•higher education institutions;

•police and crime commissioners;

•fire and rescue authorities;

•regulators; and

•housing associations.

We regularly represent clients in defending judicial review challenges and, less often, we act for clients seeking to bring a challenge. However, a greater portion of our work involves advising clients on mitigating the risk of judicial review and the early resolution of a potential or threatened challenge.

## INITIAL OBSERVATIONS

As an introductory point, we consider the terms of reference and the remit of the panel to be extremely broad. This, together with the format of the call for evidence (i.e. very open questions without any concrete proposals for reform), makes it difficult to respond in a meaningful and informed way. We would expect the IRAL to consult again when the proposals are at a more formative stage, to allow proper engagement with any alternatives proposed to the current regime.

As a general comment, we note that reforms to judicial review (including many of the areas currently under consideration) were consulted upon by the government in 2012[1] and in 2013.[2] To the extent that proposals were not taken forward following those consultations, it is unclear what has changed to mean that they should be taken forward now. It is important not to re-invent the wheel in this review. Many excellent resources exist from the 2012 and 2013 consultations about the advantages and disadvantages of different options for reforming judicial review. In particular, we note the Bingham Centre for the Rule of Law's report *Streamlining Judicial Review in a Manner Consistent with the Rule of Law.* To the extent the recommendations from this report have not been implemented, we would suggest they are considered now. The report is available at: https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistant_with_the_rule_of_law.pdf

Overall, it is our position that the current judicial review regime is fit for purpose. Many of the public authorities we represent would agree that judicial review, or simply the threat of judicial review, leads to better decision-making overall. It is a question of good governance, which is in everyone's best interests.

It is also worth noting that despite the apparent concerns about the ability of the executive and local authorities to carry out their business, in our experience it is not easy for claimants to successfully challenge the decisions of public authorities; it is usually only when something has gone very wrong with the decision making process that the courts will be willing to nullify a decision that is the subject of challenge. As such, in our view there can be no suggestion that judicial review constitutes an unnecessary interference by the court in the conduct and decision making of public bodies. Any attempt to further narrow the scope or ability of claimants to bring a judicial review challenge should be approached with caution, bearing in mind the important role of judicial review in ensuring that the state does what it is required to do and does not do what the law prohibits it from doing.

**RESPONSE TO THE CALL FOR EVIDENCE AND TERMS OF REFERENCE**

1. **QUESTIONNAIRE TO GOVERNMENT DEPARTMENTS**

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

1.1 We are concerned about the leading nature of the questions in the questionnaire and the fact that questions of this nature are only asked of government departments, with no corresponding invitation to local government, other public authorities susceptible to judicial review or claimant organisations.

1.2 The effective discharge of government functions is not the only consideration when evaluating judicial review. It does not take precedence over access to justice, the rule of law, separation of powers or the ability of citizens to hold the government to account under our constitution (and in any democracy). The balance promised in the IRAL terms of reference between "*the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts*" and "*the role of the executive to govern effectively under the law*" seems to have been forgotten in this section, which only emphasises the latter.

[1] Ministry of Justice Consultation Paper CP25/2012 Judicial Review: Proposals for reform
[2] Ministry of Justice Consultation Paper CM 8703 Judicial Review: Proposals for further reform

***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)?***

1.3 Bevan Brittan believes the law of judicial review could be strengthened by:

(a) Allowing parties to agree an extension to the three month time limit for submitting claims, to allow proper pre-action engagement in every case.

(b) Clarity on how CPR 54.5 and the time limits for filing a claim form operate in practice and, in particular, whether time starts to run from the date of the final decision or the date of an internal review of that final decision, in circumstances where the approach varies between public authorities.

(c) Creating a clear, stand-alone ground of judicial review for breach of the equal treatment principle.

(d) Pinning down the extent and scope of the duty on public bodies to give reasons.

(e) Extending proportionality review to other cases.

## 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?***

2.1 To summarise, we are not convinced that a legislative provision setting out the grounds of judicial review[3] would provide any greater clarity than the current common law position. Indeed, a statutory provision would risk losing a wealth of nuance from the common law.

2.2 Whilst we acknowledge that there may be some merit in codifying the law on judicial review in statute as this may create an impression of accessibility for litigants in person who are looking to understand whether or not they can have grounds for judicial review, there is a risk that codification can present an oversimplified view to litigants in person and that the principles held in case law against which their claim will be assessed, will still have effect and as such will need to be accessed by claimants to present a persuasive case.

2.3 We should add that public law practitioners have no need for clarification in legislation – the grounds of judicial review are already well-understood - and so whilst codification might help litigants in person, it is likely a legislative provision would either have to be so high level as not to be useful in understanding the tests actually applied, or so detailed as not to be comprehensible to litigants in person. A related point is that if codification were to proceed, we believe judges would still supplement the statutory grounds with existing principles from the common law.

2.4 The IRAL questionnaire to government departments itself shows that it is hard to produce a short list of all possible grounds of judicial review, of the type that would be required in

[3] For example, a statutory provision setting out Lord Diplock's three grounds (illegality, irrationality and procedural impropriety) from *Council of Civil Service Unions and Others Appellants v Minister for the Civil Service Respondent* [1985] A.C. 374

legislation. The list in the government questionnaire includes "*any other ground of review*" thus recognising that the preceding list does not capture all grounds. It is impossible to think of a short list that would capture all grounds. Producing a list at a particular point in time also risks ossification, and legislation not developing in line with evolving tests in the common law.

2.5 There is an implication in footnote E of the IRAL Terms of Reference 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. In our view, this distinction between review of the scope and the exercise of government power appears to be a fallacy. There is no evidence to sustain the argument that only issues that went to scope were reviewable, even then. There are well known cases considerably older than 40 years old in which the courts considered exercise of government powers. For example:

- In *Short v Poole Corporation* [1926] Ch. 66 (94 years ago) the court found that if a statutory power was exercised on alien or irrelevant grounds, the decision could be quashed.
- In *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K.B.223 (72 years ago), the court established the principle that the exercise of a power can be challenged on grounds such as bad faith, jurisdictional error, breach of natural justice and irrelevant considerations.
- In *Anisminic* [1969] 2 AC 147 (51 years ago), the court established the "collateral fact doctrine" that any error of law made by a public body will make its decision a nullity.

2.6 Regardless of whether or not the alleged distinction exists, it is our view that judicial review should be a check and balance of both the scope and exercise of executive power.

2.7 Also relevant is the question: what is the purpose of codification? We consider that any codification of the judicial review process <u>to clarify</u> the existing grounds of judicial review would be likely to cause more confusion for the reasons above. We would strongly object to any codification to <u>restrict or limit</u> the existing grounds of judicial review.

2.8 If the review does decide to proceed with codification, we would note that in the majority of civil law regimes the code relating to judicial review is limited to administrative procedure rather than substantive grounds of judicial review, and we would suggest the same limitation here. Substantive public law does not appear appropriate for codification in the UK.

***4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?***

<u>(The first section addresses ToR question 2: "Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government"):</u>

2.9 We consider that it is generally clear which subject matters are liable to be seen by the courts as non-justiciable, although each case is considered on an individual basis and the common law develops as it goes along. The fact that the executive and the judiciary have clashed recently on justiciability (for example, in the *Miller* cases) does not appear to us to suggest that the system is broken, but rather that our constitutional system of checks and balances is working as intended.

2.10 Our concern is that attempting to clarify areas of non-justiciability further than they are clarified in the common law would be liable to run up against the same problems discussed above in relation to codification generally. In addition, it is not clear that expanding the heads of non-justiciability would be effective. If the route were to insert a clause into a particular statute rendering it non-justiciable, the courts would be likely to hold the clause ineffective (*Anisminic, Privacy International*). It is not clear that even Parliament could force the courts to apply a clause ousting their jurisdiction. Many believe that the rule of law provides the courts with an inherent jurisdiction to decide cases, which even Parliament could not overturn. Any attempt to force the courts to apply new areas of non-justiciability could result in a constitutional crisis if judges failed to comply.

2.11 The terms of reference of the IRAL seem to suggest at footnote E that in the past, the exercise of public power was non-justiciable, and only the scope of public power was justiciable. This distinction is said to have been "blurred" over the course of the last 40 years. As already mentioned, this distinction appears to be a fallacy as there are well known cases much more than 40 years old in which the courts considered exercise of government powers.

2.12 In our view, the justiciability of the exercise of public powers is a crucial check and balance on the government, and it would be an access to justice issue if the justiciability of this area of law were removed. The review's terms of reference note the balance that must be struck between "the citizen being able to challenge the lawfulness of executive action through the courts" and "the role of the executive to govern effectively under the law". Rendering the exercise of public powers non-justiciable would not strike the right balance between citizen and government, and it would be liable to undermine the rule of law. Access to justice is regarded as a fundamental constitutional right in this country (*Unison*). Any attempt to undermine it by rendering the exercise of public powers non-justiciable would require Parliament to squarely confront what it was doing under the principle of legality, and might even prompt the courts not to apply legislation compromising fundamental rights at all, which would lead to a constitutional crisis, as discussed above.

2.13 We act for many public authorities and consider that many of our clients would agree that judicial review – and the threat of judicial review - leads to better decision-making and governance overall. Lessons are learnt from judicial review about how to ensure mistakes do not happen again. Public bodies are not forced into time-consuming litigation, since with good advice they will often review decisions themselves and look at them afresh rather than defending challenges that are meritorious.

2.14 Of course, there are judicial reviews that are frivolous, and these add to the burden of public authorities. For example, some judicial reviews are brought simply because claimants are unhappy with a public body decision. However, frivolous cases occur in all areas of litigation, and judicial review has the advantage of a permission stage, where such cases are usually knocked out. In 2015 the changes brought about by the Criminal Courts and Justice Act 2015 also introduced the ability of the Court to determine a claim as 'totally without merit', thereby preventing claimants with frivolous claims from being able to request a renewal hearing.

2.15 Moreover, it has not been our experience that frivolous claims are brought by solicitors on behalf of their clients, but usually they are brought by litigants in person whose knowledge of public law is, understandably, incomplete. It follows that the most likely reason for the increase in litigants in person in the Administrative Court is the cuts to legal aid funding

which prevents people from being able to access legal advice. The reduction in legal aid is paradoxically likely to have resulted in public bodies having to defend unmeritorious claims.

(The second section addresses ToR question 3: "Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful"):

2.16 Question 3 from the Terms of Reference (above), does not appear in the call for evidence after the question about justiciability. Nonetheless, we answer it here, since in our view priority should be accorded to the original Ministry of Justice Terms of Reference.

2.17 In our view the existing grounds of judicial review are well-established and well-understood and there is no good reason to reduce them. No argument has been provided by the government about why any of the existing grounds of judicial review should be removed. Our starting position is that unless the government provides a well-reasoned case for reducing the grounds of judicial review, they should remain as they are.

2.18 We can, however, see an argument for increasing the grounds of judicial review. We believe that proportionality review could be useful in a wider range of contexts, a clear ground of failure to provide reasons could be useful, and that the equal treatment principle should be a free-standing ground of judicial review, rather than a sub-set of rationality review.

2.19 The existing grounds already depend on the nature and subject matter of the power to some extent. This is not always the case - an error of law is an error of law – but context does play an important role in fine-tuning rationality and proportionality review and the jurisprudence makes it clear that context is important.

2.20 On remedies, the Criminal Courts and Justice Act 2015, which brought in a "no substantial difference" test (the court should refuse permission for judicial review if it appears highly likely that the outcome for the applicant would not have been substantially different for the claimant if the conduct complained of had not occurred, and must refuse to grant relief in these circumstances) has already reduced the availability of relief in favour of defendants. That section is used a lot (in over 150 cases) and claimants often lose on these grounds.

2.21 It does not appear to be appropriate to further restrict remedies at this point, and certainly not in respect of some grounds more than others, as appears to be implied by the question in the Terms of Reference.

2.22 In our experience, the most common remedy in judicial review is the quashing order, which quashes the original decision and requires it to be retaken, but without imposing particular conditions or requirements on the new decision. This remedy is not seen as draconian by public bodies in our experience. Such orders usually allow authorities plenty of latitude to retake the same decision in a lawful way.

2.23 To the extent the panel is considering replacing quashing orders with a wider use of declarations of incompatibility (as seen in the human rights context), we are against such a development. In our view any judgment that does not annul the original decision poses problems for the receiving public authority. Having an unlawful decision on the books poses a variety of problems – for example, when the public body is audited. If the review is trying

to promote certainty and clarity in judicial review the use of declarations of incompatibility will not assist.

***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?***

2.24 In our view, the judicial review process is clear and we have defended a wide range of judicial review claims, without any confusion. Similarly, the process for appealing a case to the Court of Appeal or Supreme Court is quite clear.

Appeals

2.25 In relation to appeals (which are a particular focus in the IRAL Terms of Reference), we refer to the reforms brought in following the Government's last consultations on reforming judicial review. These included the removal of the right to oral consideration where a judge has certified the claim as "totally without merit" and the introduction of a £215 fee for such oral renewals as are still permitted. In addition, the Criminal Justice and Courts Act 2015 made the scope of "leapfrog appeals" wider and appeals can now bypass the Court of Appeal and go straight to the Supreme Court where the appeal raises issues of national importance; the result is of particular significance; or the benefit of early consideration by the Supreme Court outweighs the benefit of consideration by the Court of Appeal.

2.26 In our view, the first two of these reforms ("totally without merit" cases and a fee for oral renewals) already address any concern about a growth in judicial review cases and appeals, and there is no case for further restricting appeals. Further restricting appeals could have serious constitutional implications and undermine the impact of the judicial review process, meaning that fewer cases raising potentially important issues reach the Court of Appeal and the Supreme Court. The Supreme Court in particular has a unique position at the top of our judicial system and is able to more fearlessly hold the Government to account than the High Court or Court of Appeal.

2.27 Public bodies welcomed the "totally without merit" reforms, and following their introduction we believe the courts strike the right balance between allowing arguable claims and disposing of genuinely spurious claims. We are not convinced that any further reforms are required.

2.28 If restrictions were placed on appeals of permission decisions - for example restrictions on a Claimant's ability to request that the decision be reconsidered at an oral hearing - this too could have serious implications. Oral advocacy is a powerful tool and it is often the case that judges can be persuaded on hearing arguments in person that are lost when a case is considered on the papers alone.

Duty of candour

2.29 We note the duty of candour is mentioned in the Terms of Reference, but not in the questions in the call for evidence themselves.

2.30 We believe the duty of candour is the right approach to disclosure in judicial review, given the constitutional purpose of judicial review to examine public wrongs. The fact is that the defendant is likely to have the most information in their hands.

2.31 We recognise that the duty of candour can be an onerous responsibility for defendants in some circumstances. It is a broad duty, and looking for evidence to explain the decision-making process followed can take up considerable resource particularly in terms of staff time. Nevertheless, we consider this to be appropriate - the government has a duty to enhance the rule of law by coming to litigation with its cards up on the table to enhance the evidence. Further, it is not clear how the duty of candour could be reduced in scope without undermining the purpose of the judicial review process as a whole to review public wrongs effectively.

2.32 It is also likely that the duty of candour incentivises public authorities to keep a comprehensive audit trail in respect of its decision making. Indeed, we regularly advise our clients that having an audit trail in place evidencing the decision making process and the supporting evidence and reasons for the decision is key to being able to respond robustly to a threatened challenge and head it off at an early stage.

2.33 As such, we consider the duty of candour aids good decision making - there is something helpful about the message that public authorities need to understand what information they hold and where the evidence lies and that they can be required to disclose that information. That simple message is important culturally in getting public bodies to make sound decisions. This perspective is shared between defendant lawyers, in-house lawyers at public bodies, and local government lawyers – the duty of candour is such an important safeguard that the benefits outweigh any negative concerns.

2.34 Narrowing the scope of the duty of candour might also be of little practical assistance in lessening the burden on public authorities, given that the duty sits alongside other regimes – such as Freedom of Information – and claimants might be pushed towards making wide FOIA requests if they could not access information using the duty of candour.

2.35 If the duty of candour were to be dispensed with, in our view the only thing that could replace it would be a more onerous harder-edged disclosure duty (more akin to disclosure under CPR Part 31), which we would not support. It is clear that some level of disclosure is necessary in judicial review as otherwise claimants won't know the factors that went into the decision, which is crucial. A harder-edged disclosure duty would dramatically increase the costs of judicial review. We note that comparatively, the UK rules on candour are at the limited end of the spectrum. In most civil law countries access to the file is available when the initial decision is taken, and at the litigation stage.

## 3. PROCESS AND PROCEDURE

Timescales for bringing a claim

***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?***

3.1 We note the focus in the IRAL Terms of Reference on time limits. In our view the current three month time limit (alongside the requirement that a judicial review claim be brought 'promptly') strikes the right balance between enabling time for a claimant to lodge a claim (and crucially, engage in pre-action correspondence with the defendant) and ensuring effective government and good administration without too many delays.

3.2 The government's 2012 and 2013 consultations on reforming judicial review did not result in a general shortening of JR time limits, although they did shorten some specific time limits (six weeks in certain planning cases and thirty days in certain procurement cases). We do not believe there is now a case for shortening time limits for judicial review more generally, and would not support reducing the time limits in judicial review generally to 30 days or 6 weeks. Shorter time limits for judicial review could paradoxically lead to more claims, as claimants are forced to issue to protect their position.

3.3 Shortening time limits would also cause access to justice issues and would hinder compliance with the pre-action protocol for judicial review, which is designed to ensure engagement between claimants and defendants to prevent the need for a claim to be issued at all. The pre-action protocol is very useful for clarifying and sometimes avoiding claims and we would not be in favour of reducing use of the protocol.

3.4 One improvement to the judicial review process that we would support is allowing parties to agree an extension to the three month time limit between themselves. Quite often public bodies get pre-action letters three weeks before the deadline for a claim. In such circumstances, it would be very helpful if they were allowed to agree an extension to allow the completion of pre-action correspondence. Whilst extensions can be agreed at the moment, the court does not have to approve them. In such circumstances, the lawyers for the claimant and defendant may try to get the court to approve a stay on proceedings in order to complete pre-action correspondence, and this is often approved. However, there is no requirement for the court to approve this course of action, and it can be risky.

3.5 Further, it might also be helpful if public bodies were required to make it clear – when publishing a decision – that claimants have three months (and must act promptly) to bring a challenge. This would ensure adequate time pressure, without hindering access to justice.

3.6 Also helpful would be clarity on whether time starts to run from the date of the final decision, or the date of an internal review of the decision by the public body, as in our experience public bodies adopt different approaches.

Costs

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

***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?***

3.7 We answer the two questions on costs together. Overall, we consider that the current costs regime works well, and we would not be in favour of reform.

3.8 Question 7 may be aimed at asking whether claimants should face a bigger costs penalty at the permission stage. Currently, it is not unusual for defendants to bear their own costs in defending a permission decision on the papers, even if they "win", but this is not always the case and in our experience it is common for successful defendants to be awarded their costs even when the claimant is an individual (although whether the costs are actually recovered or enforcement steps taken is another matter). In our view the current position,

where the court has a wide discretion is appropriate and it would be difficult to bring about reforms to make it easier for successful defendants to recover their costs without this having a detrimental effect on access to justice.

3.9 In our view, the onus should be on defendants to keep down costs at the permission stage, which experienced lawyers are usually able to do particularly in frivolous cases. We note that where an oral hearing is considered necessary at the permission stage, claimants are rarely ordered to pay the defendant's costs of the hearing on the basis that it is the defendant's decision whether to attend or not. Where a defendant does decide to attend and makes submissions that are helpful to the Court resulting in the refusal of permission being upheld, we consider that the default position should be that the defendant should be able to recover its reasonable costs unless the particular circumstances cause the court to consider otherwise.

3.10 On the question of costs and intervenors (in the IRAL Terms of Reference), we note the changes already brought in following the 2012/2013 consultations. If the concern with intervenors is about busy-bodies who do not add to the case, we do not understand the concern. Claimants and defendants are rarely asked to pay the intervenor's costs. If the intervenor does increase costs, it may be asked to pay the additional costs it has caused. This already acts to ensure intervenors only intervene if they have a real point to make.

3.11 The other point we wish to raise is the costs position in respect of claim that are funded by crowd-funding. Although we have no issue with crowd-funding per se, we consider that it is important to be able to identify the sources of funding to ascertain who is actually bringing the claim. This would enable the defendant public authority to properly respond to those individuals who are affected by the decision of the public body that is in dispute. There can also be practical difficulties in seeking costs orders against crowd-funded claimants, and Bevan Brittan would welcome some clarity on who is accountable for the costs of an unsuccessful claim where it has been crowd funded.

<u>Remedies</u>

***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?***

3.12 We do not believe the remedies available in judicial review are inflexible. The court has a wide discretion on remedies, and a number of options at its disposal – quashing orders, prohibiting orders, injunctions, mandatory orders and declarations. The court can also fine-tune these remedies, for example by putting conditions on them – see *Client Earth* for an example of this. It is not clear what extra discretion or flexibility the courts need.

3.13 The aftermath of the 2012 and 2013 consultations saw the introduction of the "no substantial difference" test in judicial review, explained above, which has already reduced the availability of relief in favour of defendants. This test is relied upon a lot by defendants, and claimants often lose on these grounds. It does not appear to be appropriate to further restrict remedies at this point. We certainly would not support the lowering of the "highly likely" threshold in the no substantial difference test, since the test only kicks in where there is a *prima facie* breach of the law. Lowering the threshold down to "likely" or "possible" would undermine the constitutional purpose of judicial review. However, without lowering

the "highly likely" threshold it is not clear how any extra discretion could be accorded to the courts on remedies.

3.14 If this question intends to imply the most commonly used remedy in judicial review (the quashing order) is too onerous, we do not agree. Quashing orders usually allow public bodies plenty of flexibility in the way they retake decisions in a lawful way, and they very often allow the same decision to be retaken lawfully.

3.15 As stated above, to the extent the panel is considering replacing quashing orders with the wider use of declarations of incompatibility (as seen in the human rights context), we are against such a development. In our view, any judicial decision that does not annul the original decision poses a problem for the receiving public authority.

3.16 To the extent the intention is to replace quashing orders with an award of damages, we note this has never been the constitutional function of judicial review. Judicial review is not about money – that would be a fundamental change to the way administrative law is understood in this jurisdiction and others. We would also be concerned that to increase the ability of the court to make an award of damages in judicial review may paradoxically increase the amount of judicial review claims issued with claimants seeking compensation for their grievances.

3.17 It is important to note that judicial review is a remedy of last resort. It is somewhat concerning that the focus of the questions in the call for evidence is only on judicial review, and not administrative law as a whole given that judicial review is intimately connected to administrative law as a whole. The review has the potential to change the rules of judicial review without properly considering the effect on administrative law as a whole – such an approach in our view would be flawed.

ADR

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

***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?***

***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?***

3.18 We answer questions 10, 11 and 12 together, as they all concern early settlement.

3.19 In our experience, early settlement is relatively common in judicial review proceedings particularly if this includes complaints that are resolved at the pre-action stage. On the other hand, settling at door of the court is rare. Unlike commercial disputes where the parties can chip away at a damages claim until a compromise is reached, judicial review is usually not a situation in which coming to a last-minute settlement figure will dispense with the need for a claim. As previously mentioned, judicial review is often not about money; it is usually about principles, and unless a practical solution can be found to the objections in principle with the

decision, it is unlikely the parties will settle. Where settlement solutions can be devised, they are usually agreed early (for example, at the pre-action stage), or they are not agreed at all.

3.20 For this reason, traditional ADR will not always be appropriate in judicial review, although it is available (it is listed on the judicial review pre-action response template), and it is occasionally used. Taking mediation as an example, one issue is that it is very expensive (particularly in the context of judicial review as opposed to a Part 7 claim), and claimants are not usually in a position to pay for half the costs of a mediator, and defendants are unlikely to agree to bear the costs alone. To the extent the review wishes to encourage the use of more formal ADR options in judicial review, it would be necessary for this to be introduced on a funded pilot basis to encourage take up.

3.21 However, less formal methods of ADR (for example roundtable meetings in which claimant and defendant speak freely and directly to one another; or public engagement events following a controversial decision to find practical solutions to public objections) are more likely to be helpful in minimising the need to proceed with judicial review, by allowing parties the time to discuss what has gone wrong and what would help the claimant become comfortable with the defendant's decision. This can work more effectively in procedural fairness cases, although early resolution can be difficult for substantive claims, where a different decision could be seen as irrational by a different claimant.

3.22 As a final point we note there is an apparent tension between widening the use of ADR and reducing the time limits for bringing a judicial review claim. It is not clear that a meaningful ADR process could be engaged with if time limits were reduced.

Standing

***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?***

3.23 We do not believe that the rules of public interest standing are treated too leniently by the courts. The courts are careful to limit the standing of inappropriate parties and the vast majority of judicial review cases involve individual victims. For example, in *DSD* (the case involving a challenge to the Parole Board's decision to release John Worboys) the Court accepted that the victim's family had standing to bring the case, but rejected the standing claim of the Mayor of London.

3.24 In our view, restricting public interest standing cases would be unlikely to significantly reduce the number of judicial review cases before the courts, or the number of cases being defended by government. Public interest standing cases do not represent a statistically significant number of judicial review cases - in a survey of 283 judicial review judgments from the Administrative Court in 2017, there were just 18 cases (6%) where a public interest group was the main party.

3.25 We do not believe that charities and representative organisations are treated too leniently when it comes to standing. These organisations cannot challenge the merits of political decisions. They must have a legal argument, just like any individual claimant. Moreover, they are usually only granted "public interest standing" where no individual victim or more appropriate claimant can be identified

3.26 If the rules on standing were tightened, there would be some decisions that could not be challenged at all, which would hinder the ability of the courts to perform their constitutional supervisory function. Judicial review is about public wrongs, the existence of which are identified by applying the democratic standards of fairness and reasonableness which lie at the heart of judicial review. The identity of the claimant is not the point - judicial review is about the duties owed by government to the public and not about rights enjoyed by a particular individual.

3.27 The government consulted on tightening the rules on standing in 2013, by preventing those with a theoretical or political interest, such as campaigning groups, from bringing claims. Based on strong objections to this course of action, the government decided not to proceed with the introduction of an additional form of standing requirement for judicial review. It is not clear that anything has changed since 2013. Certainly the constitutional function of judicial review to review public wrongs has not changed. There appears to be no argument for restricting standing now. Indeed, limiting standing would be a real access to justice issue, and would pose the real risk that no-one would have the knowledge, access, or funds to bring an important claim about a public wrong.

3.28 We would also make the point that in our experience claims brought by public interest groups have a higher success rate than claims brought by individuals; such cases are better prepared and save time and money by presenting the issues to the court in one case rather than through a series of individual challenges.

3.29 In our view, the emphasis of the court should be whether one of the grounds of judicial review is made out, not on the identity of the party bringing the claim. We trust the court to decide whether a case should be heard and would not usually wish to oust a claim on the basis of standing, but rather on the basis that there was no case to answer.

3.30 In our view, the current standing rules are fit for purpose and ensure that the most appropriate party is allowed to challenge a decision.

**Bevan Brittan LLP**

**24 October 2020**