

Summary of Government Submissions to the Independent Review of Administrative Law

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Introduction

1. Fourteen Government Departments responded to the call for evidence which the Independent Review of Administrative Law ('The Review') conducted from 7 September to 26 October 2020. This document provides a summary of those responses, organised into the main themes on which Departments raised points. Ministers must be able to freely and frankly exchange their views as part of the policy making process, of which the Government Departments' submissions are a part. This is also true in respect to collective Cabinet agreement – the views Ministers put forward in their submissions form part of that collective agreement process, the integrity of which must be preserved. This means that this summary cannot necessarily cover every aspect of each of the Government Departments' responses to the Review Panel's call for evidence.
2. In this summary 'Department' (in reference to the submissions received by the Review) is used as a general term to capture the views espoused by officials and Ministers, in said submissions. Not every Department made comments on every issue. Where there was unanimous coverage that is indicated. Where there was not, the terms 'Departments' or 'Some Departments' are used.
3. In their general remarks, all Departments emphasised to the Panel that the rule of law and the check on Executive power that Judicial Review provides are valuable parts of a democratic society. They said that it is right that citizens can challenge decisions or the actions of public bodies in circumstances where that decision or policy may not have been taken or made in accordance with the law.
4. Some Departments noted several areas where there could be room for improvements in procedure. Some also raised concerns about the perceived direction of travel of Judicial Review in relation to some specific topics, that is, that the courts are reducing areas of non-justiciability or applying more substantive standards of Review. They concluded that a review of Judicial Review was a worthwhile undertaking, and pointed out that various elements of Judicial Review merited further consideration and might be improved by reform.

Codification

5. Codification, if done well, could have advantages in terms of providing clarity and certainty, particularly in supporting the demarcation of institutional competence and underlining the separation of powers. However, Departments also noted it may have the opposite effects.
6. All Departments acknowledged that Judicial Review is generally well understood, and that this could make codification unnecessary in terms of providing clarity. In fact, some Departments made the point that the attempt to codify could of itself reduce clarity as satellite litigation would grow around the statute, as has been the case in countries which have codified Judicial Review.
7. The discretionary powers available to the courts under Judicial Review were in some instances felt by Departments to be helpful, something which allowed a useful degree of flexibility given that no two Judicial Reviews are the same. It was noted that any question of placing Judicial Review on a statutory footing would depend on the quality of the legislation produced, with just as much possibility of complicating rather than clarifying the process.

Justiciability

8. Government Departments submitted detailed considerations regarding justiciability, framing the issue in terms of recent trends and the evolution of the court's role. Departments agreed with the premise that Judicial Review can improve the quality of decision making in government. It can be a useful "check and balance" – one of several in our system – including for example the scrutiny afforded by Parliament or the public being able to vote a government out of office. These checks and balances ensure there is a clear demarcation of institutional competence. Departments raised how there is a constant question as to how the court's role is evolving, and whether it may prevent those democratically best placed to take decisions in the public interest from doing so.
9. In general, Departments were of the view that modern approach to justiciability was set out by the Supreme Court in *Shergill v Khaira*.¹ The court referred to two categories of non-justiciable issues: (i) cases where the issue is beyond the constitutional competence assigned to the courts under the separation of powers (whether as regards the executive or Parliament); (ii) cases with no domestic law basis. Cases which fall under (i) are, said the court, rare (because the court will then decline to adjudicate).
10. Non-justiciable cases in the second category will very often include questions of international relations.² However, the courts will proceed to determine issues in the second category if there is a "domestic foothold", even if that involves adjudicating on a question of international relations or public international law. This is most obviously so where a right under the European Convention on Human Rights is engaged, though it may also arise in respect of common law rights, or other domestic legal principles.
11. In many court decisions relating to questions of international relations or national security, the courts have shown that they are alive to the need to show restraint. There remains however, a degree of uncertainty as to what areas remain non-justiciable, and what approach a court will take which might serve to blur institutional competences and undermine the doctrine of the separation of powers. This can cause difficulties from both an operational and a bilateral perspective.

¹ [2014] UKSC 33. For a discussion of the case and the approach of the courts to questions of foreign relations, see Lord Mance's lecture on justiciability, given on 27 November 2017: <https://www.supremecourt.uk/docs/speech-171127.pdf>.

² For example, *R (Al Haq) v SoS for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (military equipment to Israel); *R (Khan) v SoS for Foreign and Commonwealth Affairs* [2014] EWCA 24 (alleged involvement of UK officials in US drone strikes leading to death of applicant's son).

12. The complexity of the inter-related issues outlined above indicates how difficult any statutory intervention would be, and the risk of unintended consequences.
Departments noted that care would have to be taken not to narrow the scope of the executive's ability to act in these areas, and to ensure that any outcome (at least) reflected the caution the courts have generally shown in the cases.
13. Consideration was given to certain examples of cases which involved Executive power in which the courts had made judgments which limited the exercise of such power, e.g. *R (Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 and *Evans v Attorney General* [2015] UKSC 21..
14. Some Departments pointed out that comments, even obiter comments, by the courts which push the boundaries between the separation of powers affect the law or the reality of government and demonstrate the direction in which the theory of Judicial Review is evolving. The courts have shown a willingness to make strong *obiter* pronouncements not just on matters of high politics but also in areas where acute ethical judgments are at play, such as the legality of assisted suicide in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; or on the issue of abortion in *Re an application by the NIHRC for Judicial Review (NI)* [2018] UKSC 27).
15. Departments discussed the impact of *Miller (No 1) v Secretary of State for Exiting the European Union* [2017] UKSC 5. The decision in that case, in which the Supreme Court found that statute had made the EU treaties justiciable in the UK, was contrary to the government's position that the exercise of the treaty-making (and withdrawal) power was not justiciable in domestic courts. Departments took the view that this was an unorthodox extension of the law into the treaty-making prerogative. They noted the arguments of Professor Richard Ekins, and others: 'The judgment intervenes in the relationship between the Houses of Parliament and the government in a way unsupported by law' (see also, for example, the strong criticism put forward by Professors Timothy Endicott and John Finnis). To quote Lord Reed's dissent: 'the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary' (at [240]).
16. It is commonplace in other common law jurisdictions for treaty-making powers to reside with the executive. That is the case in Canada, Australia and New Zealand. Each of these jurisdictions has some degree of legislative oversight of treaty ratification (that is, treaty-making), but withdrawal from treaties is entirely a matter for the Executive. A challenge to the royal prerogative to withdraw from treaties failed in Canada for that reason (*Turp v Minister of Justice & Attorney General of Canada*,

2012 FC 893). Even in the USA, where treaty ratification is subject to Senate approval by a two-thirds majority, the power to withdraw from treaties vests exclusively in the executive³.

17. The prerogative is generally to be regarded as "*a part of sovereignty; which Parliament chose to leave in [the Government's] hands*"⁴. That is particularly so in the case of the foreign affairs prerogative, the continued exercise of which was specifically recognised by Parliament in the Bill of Rights⁵. In the case of the conduct of foreign affairs the dynamism and flexibility afforded by the use of prerogative powers, without the need for extensive legislative approval, is essential to good administration. The foreign affairs prerogative is a leading example of a "*power to act according to discretion for the public good*"⁶.

³ See *the Restatement (Third) of Foreign Relations Law* at para 339; *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191

⁴ Per Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 100)

⁵ See *McWhirter v Attorney-General* [1972] CMLR 882, paras 6 and 8

⁶ Per Viscount Radcliffe in *Burmah Oil*, at 118, quoting John Locke's "*True End of Civil Government*"

Grounds for Review

18. Generally, Departments contended that Judicial Review could be seen as a tool used by some outside government to attempt to drive or influence government policy and public debate, rather than to raise legitimate concerns about the legality of a particular government decision.
19. It has also been noted that there are instances where claimants have been unclear about the grounds for review, or changed them at a late stage. For example, there have been cases where courts have allowed the grounds of challenge to change during hearings, which makes it difficult for the decision maker to respond appropriately, e.g. in *R (on the application of TP) v SSWP* [2018] EWHC 1474.

Irrationality

20. The ground of review which drew most comment from Departments in their submissions was that of irrationality. The courts have developed the approach put forward first by Lord Pannick in *R v Ministry of Defence ex parte Smith* [1996] QB 517, that “*the more substantial the interference with human rights, the more the court would require by way of justification under the reasonableness test*”. Some Departments argued that this approach leaves a wide scope for judicial discretion.
21. This approach was confirmed by the Court of Appeal in *R v Department of Education ex parte Begbie* [1999] EWCA Civ 2100, defining Wednesbury unreasonableness as “*a sliding scale of review more or less intrusive according to the nature and gravity of what is at stake*” (at para 78). The standard of review has also been relaxed significantly in the past 30 years. Despite the overtures in *Smith* and earlier in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 that the only standard for review of public law action in England and Wales is irrationality, the courts have continued to amend that standard. This variance increases uncertainty and limits proper consideration of where the limits of Judicial Review should be.

Remedies

22. All Departments agreed that a central tenet of a Judicial Review is to encourage good decision making and undo wrong decision-making. It follows that the appropriate remedy is often the quashing of a decision found to be unlawful or wrong, and in respect to giving other remedies the courts generally have a sensible degree of discretion.
23. However, some Departments considered that it would be appropriate for judges to have greater opportunity to consider the broader public interest when considering what remedies to apply, for instance where quashing a decision based on imperfections in a consultation process may in fact have detrimental effects.
24. Departments were also concerned about questions of legal certainty and that individuals who rely upon statutory instruments (which are subject to Judicial Review) should not be penalised if the statutory instrument is subsequently quashed. This gave cause for Departments to consider whether more flexibility was required in these cases.
25. Therefore some Departments argued that consideration should be given to creating a discretion or presumption, subject to specified exceptions, that remedies granted in successful Judicial Review claims, in relation to secondary legislation where the decision maker was found not to have followed the requirements set out by Parliament - (as opposed to cases where the Department has acted ultra vires), are prospective only.
26. Departments also considered that remedies sought by claimants or recognised by the courts in certain cases impact upon the constitutional boundaries of what should properly fall to the courts, and what is properly a matter for Parliament or the Executive to decide; for example see *O'Donnell v Department for Communities* [2020] NICA 36 and *the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2016] NICA 53.

Impact on Decision Making

27. Government departments emphasised that an effective decision making process must be one which considers the lawfulness of that decision. And some believed the pressures brought by the prospect of Judicial Review has the potential to create a chilling impact on how officials frame their advice to Ministers, veering on the side of caution. Some departments commented that the threat of Judicial Review could prevent a department from acting in new and innovative ways.
28. Departments also noted how the cost, resources and time required to respond to a Judicial Review, even when they are successfully resisted, may lead to over-cautious advice and decision making. Departments further noted that the outcomes of challenges are often so uncertain, and so frequently subject to challenge themselves, that even though most challenges are not successful it can constrain the Government's ability to act quickly, for example by engaging in consultations which go beyond that which is necessary.
29. But Departments also noted that the prospect of Judicial Review does ensure that care is taken to ensure that decisions are robust. This is of particular importance with contentious planning decisions and funding decisions where the risk of challenge is high or where large amounts of money are at stake. This process adds time to decision making but improves the decision and results in a high number of decisions either not being challenged or a challenge being unsuccessful.

Costs proportionality

30. The litigation costs for Departments of individual cases – which even in simple, fact specific challenges can run to almost £100,000 if the case goes to substantive hearing – means that departments have to carefully consider whether to defend a lawful decision once permission is granted. The costs are often not proportionate to the issue at stake and would not be justified in other areas of civil litigation.
31. The difficulty is compounded in that departments are rarely able to recover their costs if successful, even if awarded by the courts, as most applicants do not have sufficient resources to do so. This has an arguably perverse impact on behaviour.
32. For example, the Home Office spent over £75m in 2019/20 defending Immigration & Asylum Judicial Reviews and related damages claims. The Home Office recovered approximately £4m of its own costs, much of which will be written off in future years given the difficulty in recovering debts from those who bring such challenges.
33. Departments regularly drive down claimant litigation cost bills through negotiation, in some cases by over 40%, suggesting that in many cases there is inflation of costs. There appears to be little disadvantage to legal firms in inflating bills and going to costs assessment (they are awarded costs of doing so even if the final sum ordered by the court is closer to the Department's last offer than theirs). Departments noted that there is a trend of the courts awarding full costs to the claimant, even in cases where a department settles on a pragmatic basis after new evidence or amended grounds have been lodged. This again incentivises poor claimant behaviour and penalises departments for acting pragmatically. The current cost system is not always to the benefit of the Department and the taxpayer.

Specific Judicial Review Topics

Immigration and Asylum

34. Legal challenges brought late in the removal process, despite often having had previous claims and issues dealt with by the First-tier Tribunal (Immigration and Asylum Chamber), continue to be a particular issue in immigration cases, with a high volume of cases brought by those in detention and awaiting removal. The legal challenges are often brought in the days or hours before the intended departure date, despite the person having been subject to removal or deportation action for some time – or having previously had claims for protection or appeals heard and dismissed by the courts.
35. Valuable judicial resources and Home Office resource should not be adversely impacted by the opportunity for individuals to deliberately frustrate the removals process through late and often repeat, legal action.
36. Some individuals will also make repeat Judicial Review claims in order to delay the process. Whilst it is recognised that the courts have in several instances given guidance to legal representatives emphasising the need to take steps to challenge removal as early as possible, it remains the case that current arrangements are used to resist, delay or frustrate action by the Department.

Cart

37. Departments argued that the courts have shown a tendency to undermine clear legislative wording and reduce legal certainty, particularly in circumstances where a specific court's role is limited by statute. This has prevented the Government and Parliament from modernising the courts and tribunals system and ensuring efficient use of the courts to strengthen access to justice and the rule of law. Departments take the view that the judgment in *Cart*⁷ was problematic in this respect. The Tribunals, Courts and Enforcement Act 2007 (2007 Act) provided for certain decisions of the Upper Tribunal to be unappealable. The system provided for by the 2007 Act created sufficient rights of appeal to an experienced panel, including qualified members of the judiciary. Parliament had agreed to that approach on the basis of a wide range of factors including appropriate allocation of economic resources. The issue of which court is appropriate for the consideration of a particular appeal is a matter on which Parliament clearly has the democratic legitimacy and

⁷ [2011] UKSC 28

expertise to opine. However, the Supreme Court held that permission to apply for Judicial Review of these decisions should be granted where there is an important point of principle or practice or some other compelling reason to review the case.

Procedural Reforms

38. Many Departments commented that there were strong arguments for certain procedural reforms. However, it was noted that the Judicial Review process in the main was clear and worked effectively.

Disclosure

39. The duty of candour is not the same as disclosure of documents. Civil Procedure Rules on disclosure of documents do not apply to Judicial Review. Paragraph 12.1 of Practice Direction 54A states that “disclosure is not required unless the court orders otherwise”. The Court may exceptionally order disclosure, as in *Tweed v Parades Commission for NI [2006] UKHL 53*. This means an application can be made in a Judicial Review for disclosure of specific documents or documents of a particular type and the Court may (under CPR 31.12(1)) order disclosure where this is necessary to deal fairly and justly with a particular issue⁸. But such orders remain rare.
40. Several Departments noted that there is potential for a blurring between disclosure and the duty of candour and that it is important that the distinction between the two remains.

Duty of Candour

41. The duty derives from case-law in which the courts have held that public authorities should “explain fully what they have done and why they have done it and not be partisan in their own defence”⁹. Departments referred to the Lord Chief Justice’s Discussion Paper “Defendants’ duty of candour and disclosure in Judicial Review proceedings - a Discussion Paper” (28th April 2016)¹⁰ which provides further discussion on the duty.
42. The interpretation of the duty by Departments was considered in light of the Treasury Solicitor’s “Guidance on Discharging the Duty of Candour and Disclosure in JR Proceedings” of January 2010¹¹ and it was noted that this guidance could benefit from updating to reflect developments in case law around the Civil Procedure Rules and in light of the Lord Chief Justice’s Discussion paper.

⁸ *R v Secretary of State for the FCO, ex p WDM [1995] 1 WLR 386 at 396 – 397*

⁹ *R v Lancashire CC, ex p Huddleston [1986] 2 All ER 941*

¹⁰ <https://www.judiciary.uk/wp-content/uploads/2016/04/consultation-duty-of-candour-april-2016.pdf>

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1.pdf

43. Some Departments discussed how officials should be able to give frank advice in submissions to Ministers on a particular policy, and that to facilitate this, such advice should be protected from disclosure in litigation. This is because it is only the final decision which directly affects the claimant, together with the background facts and reasoning supporting that decision. Some Departments were of the view that requiring the disclosure of officials' advice inhibits candour between officials and Ministers. This carries the risk that important views, including opposing views setting out the disadvantages of a particular recommendation, will be omitted because of the fear that their disclosure would make the Government more vulnerable in a Judicial Review. Reference was made to some of the exemptions in the Freedom of Information Act 2000, for example sections 35 and 36, which in certain circumstances allow for information relating to the formulation or development of government policy to be exempt from disclosure under that Act. It was further noted that there is scope within Part 54 of the Civil Procedure Rules to further clarify the parameters of the duty of candour, by making it clear that the starting point is that this duty is limited to the provision of information, as distinct from the provision of documentation. And moreover, that the timescales for such provision are sensitive to the subject matter. It was argued that this should lead to improvements in the understanding of the duty of candour and; accordingly, result in a reduction in misconceived and speculative disclosure requests.

Standing:

44. The principle of 'standing' is designed to ensure that claims reaching the courts in Judicial Review are confined to the resolution of *personal* interests affected by executive action, and that the administrative court is not used as a forum to re-run public policy arguments that did not persuade Parliament.
45. Cases such as *R (on the application of Parkin) v Secretary of State for Work and Pensions* [2019] EWHC 2356 and *Adiatu v HM Treasury* [2020] EWHC 1554 show that it is perfectly proper for anyone to bring a case for judicial consideration which "spotlights" a matter of public interest, and that the courts may be happy to allow standing for these purposes where it is otherwise lacking. This can, however, be a cause for concern to Departments as Judicial Review is a mechanism to bring the court's attention to decisions which affect individuals' personal rights in their own particular circumstances, as opposed to re-examining hypothetically, the policy upon which Parliament has already spoken.

46. Departments argued that a claim for Judicial Review should not be permitted because of a potential public interest that the claimants do not themselves rely upon, as was the case with the *Plantagenet Alliance case* [2014] EWHC 1662, in which a Judicial Review was brought by distant relations of Richard III against a decision by the Secretary of State for Justice that the King's remains, if found, should be reinterred in Leicester.
47. Furthermore, the rules on prematurity have been interpreted flexibly so that theoretical issues can be considered by the courts. In *Wightman v Secretary of State for Exiting the European Union*¹² an application for a declaration as to whether notification under Article 50 TFEU to withdraw from the EU could be unilaterally withdrawn was heard, despite there being no political possibility of that notice being withdrawn.
48. There are concerns that some challenges to executive action are not brought out of concern about whether executive action complies with the law, but to impede lawful action because of disagreement over the public policy position of the Government or for other political motives. Responding to these challenges can be more difficult than responding to standard Judicial Reviews and incur unjustified cost to the taxpayer. Departments also contended that where challenges are made to lawful action based on disagreement over the direction of public policy, these can also sometimes have unintended negative consequences for the individual concerned or future users of a service. The courts should therefore continue to apply the principle of standing, and be rigorous in filtering out claims.

Limitation

49. The purpose of a limitation period in Judicial Review is to avoid the disruption, upheaval and costs associated with undoing administrative activity that has proceeded in good faith. This is why Judicial Review claims are required to be brought promptly and at least within three months. In general, courts have tended to approach limitation issues flexibly, with the result that in practice there is little point disputing a claim on the basis of it being brought out of time, even when it is out of time by a considerable period.
50. Some Departments felt that Government policy decisions may benefit from further clarity regarding the application and proper significance of the limitation provisions. This would include codification of what constitutes 'exceptional circumstances' for

¹² [2018] CSIH 62, 2019 SC 111

allowing cases to be heard which are out of time; particularly where they involve an issue on which Parliament has expressly indicated its intent. The ability for claims with limited prospects of success to proceed to a hearing years after a Parliamentary decision has been made can cause disruption to the proper functioning of Government, to the public detriment. The potential for reversal of policy decisions years after the fact, particularly those involving large sums of public money, risks undermining the proper functioning of Government, its financial planning and operational delivery of policies.

Amendments to pleadings

51. Departments felt that amendments to pleadings should be permitted only in certain specified circumstances. Where claims are amended during proceedings, Defendants should have a full opportunity to respond and provide evidence (including the right to seek an adjournment for these purposes). The permission for evolving grounds of challenge in Judicial Review claims, or the practice of judges reformulating badly made claims during proceedings, means that counsel for defendants are often presented at hearing with arguments for which they have not been made aware of in advance. Departments argued that this is contrary to the basic principles of natural justice in the conduct of proceedings.

Pre-action protocol

52. Departments agreed that the pre-action protocol (PAP) process for potential Judicial Review challenges is a very useful process which weeds out unmeritorious claims – and in cases where a challenge proceeds, it enables the issues to be identified more clearly. Departments agree that where PAP letters are used appropriately in pursuit of a matter for which alternative routes have been exhausted there is benefit for both parties.
53. There would be benefit in clarifying the role of the PAP in the Judicial Review process. In process terms, Departments' experience is that applicants frequently see the PAP process as a requirement they must fulfil before formally issuing proceedings, rather than using it as intended – as an early dispute resolution mechanism enabling the Department to consider the challenge and provide a response. It is often the case that claimants issue their formal proceedings before the Defendant has had the requisite 14 days to respond to a PAP letter.
54. Departments note that there is also an emerging trend for legal advisers to write to the Department at a "pre-PAP" stage. It is not clear what the legal standing of this

approach is, and they add another resource challenge for the Department in responding.

55. Departments are aware of campaigning organisations that have published pre-action protocol letter templates, and take the view that this pro-forma approach invites an abuse of the process. The increasing use of PAP letters in this way suggests either a deep-rooted misunderstanding of the proper purpose of PAPs as a precursor to Judicial Review – suggesting that legislative clarity on the purpose of Judicial Review is required – or an intention to use them inappropriately for reasons beyond their intended purpose. Whilst the majority of these letters are unsuccessful, this does not negate the need for Departments to expend significant resource and act quickly to gather information from across policy, operational and legal colleagues within the Department in order to provide a response.
56. Reform might clarify that PAP is to be used as a means of resolving a dispute that is genuinely amenable to Judicial Review following the exhaustion of other administrative remedies, in order to prevent it being used inappropriately as a tactical tool. Where there exists an alternative remedy, such as an internal complaints or appeals process, or statutory appeal mechanism, Government defendants should have the legal right (without facing a penalty on costs) to refer pre-action correspondence to be dealt with in that context. This would address the use of PAP letters as a means of putting pressure on Departments or trying to force consideration of a case ahead of others in the administrative queue, allowing for fair and orderly processing of all appeals.

Statistics

Caveats

- a. Departmental submissions included recent data, some of which is not usually captured in the Civil Justice Statistics.
 - b. Departmental data was captured from a variety of sources, including internal case management systems, Departments did not generally specify the source of the data and therefore should not be taken to be directly comparable to each other or other datasets.
 - c. Departments also presented data from different time periods, as laid out below.
57. **Home Office:** In the financial year 2019/20 the Government Legal Department (GLD) dealt with 9,258 cases against the Home Office, 7,145 being Judicial Reviews relating to immigration and asylum decisions. The Home Office successfully defended around 68% of Judicial Reviews recorded as opened in that year. In many cases the Department settles Judicial Reviews on a pragmatic basis because the costs of fighting them, even if successful, are not sustainable. Of the Judicial Reviews determined on paper in 2019/20, some 825 (15%) were judged to be totally without merit.
58. **Ministry of Housing Communities and Local Government:** On average each year, MHCLG and the Planning Inspectorate receive around 200 legal challenges in respect of planning matters and a small number in respect of non-planning matters. In planning challenges, the Department opposes over 80% of cases received and, of the cases defended, succeed in about 75% on average – either through a final order by the Court following a hearing or because the claim is ultimately withdrawn by the claimant prior to a hearing. MHCLG each year defends a relatively small number of Judicial Reviews to its policies (both planning and non-planning).
59. **Department of Health and Social Care:** Of 41 Public Law Judicial Reviews concluded, in which the Department was the defendant over the past three years, over half were withdrawn, and 14 won by the Department. “Won” cases comprise those won at permission stage, and following a substantive hearing. “Settled” cases are those where an agreement is reached outside court, often involving a monetary negotiation. For the past three years, DHSC has not lost a substantive Judicial Review.

60. **Department for Transport:** Since the start of 2016/17 the Department has received correspondence threatening to bring Judicial Review proceedings on between 70-80 occasions. Of these, 35-45 resulted either in no claim ever being brought or the claim that was brought was dropped before trial, the Government won 12, lost 2, and settled 1. Of the remaining 29, a number are still ongoing, and for some DFT are still investigating the outcome.
61. **Attorney General's Office:** In the 2018/19 financial year: 10 new Judicial Review cases were filed against the Attorney General. 18 Judicial Review cases against the Attorney General were concluded (this figure includes cases that were already ongoing at the beginning of the 2018/19 financial year). Of the 18 that were concluded, the Attorney General won 8, lost 1, settled 2, and 7 were withdrawn.
62. **Department for Digital, Culture, Media and Sport:** From 2018, the Department dealt with only 12 Judicial Review cases. Of these, one is still ongoing, seven did not progress beyond the pre-action stage, and four were given permission and progressed to a full hearing on the merits, in which only one was partially successful.
63. **Department for Work and Pensions:** Since 2018-19 the Department has concluded 111 Judicial Review cases. 73 of these cases were concluded following a substantive hearing. The court found in favour of the Department in the overwhelming majority of these cases (68 won, 5 lost). 31 cases were withdrawn and 5 cases were settled.
64. **Department for Environment, Food and Rural Affairs:** Defra has been successful in 67 of 90 JR cases (just under 75%).
65. **Department for Education:** 105 cases were opened between 2018 and October 2020 against the Department. Over the last three years, the Department has closed 73 JRs, of these: Lost 3, Settled 9, Withdrawn (by claimant) 45, Won 16.
66. **Department for Business Energy and Industrial Strategy:** Of the Judicial Reviews brought against the Department, at the time of submission to the Panel 10 had been won (either as a result of permission being denied, or won at a final hearing), and 9 had been withdrawn during proceedings before the court reached a decision. The Department settled 2 Judicial Reviews outside of court and made agreements with other claimants as part of a withdrawal of a claim. An additional 6 Judicial Review cases were currently ongoing.
67. **Foreign Commonwealth and Development Office:** Of the 66 substantive Judicial Reviews between 1981 and 2020, 46 were wholly unsuccessful, 11 were successful in part, and 9 were wholly successful. In the 38 final substantive decisions, the

applicant was wholly unsuccessful in 26 cases, partially successful in 9 cases and wholly successful in only 3 cases.

Costs:

68. **Department for Education:** Of the Judicial Reviews closed in the last three years, the Department resisted 36 Judicial Reviews that cost between £0 and £5k, 22 JRs that cost over £5k, but less than £15k, 15 Judicial Reviews that cost more than £15k.
69. **Department for Environment, Food and Rural Affairs:** Costs covering Judicial Review cases since 2016 are estimated to be more than £2 million. This does not take into account the amount of policy official and departmental lawyer resource which is devoted to addressing legal challenges, with entire new teams sometimes having to be created in response to challenges.
70. **Department for Digital, Culture, Media and Sport:** For the 12 cases since 2018, the department has incurred £350,415 of legal fees.
71. **Attorney General's Office:** The Government Legal Department carries out significant work across Government and the AG is the Minister responsible. As set out in its Annual Report and Accounts 2019-20, its total operating income (excluding disbursement income) for that year was £216.7m (2018-19: £195.6m). The majority of are legal fees charged and charges to central government departments. This does not include costs that departments might have to pay to other parties to proceedings, nor a department's internal cost of dealing with Judicial Review proceedings.
72. **Department of Health and Social Care:** Since 2018/19, the costs of Judicial Review to the Department were £2,496,175 excluding staffing and opportunity costs of DHSC civil servant time spent on Judicial Reviews.
73. **Home Office:** The Department spent over £75m in (2019/20) resisting Immigration & Asylum Judicial Reviews and related damages claims. The Department only recovered approximately £4m in terms of its own costs, much of which will be written off in future years given the difficulty in recovering debts from those who bring such challenges.