



Public Law Project

Submission to the Independent Review of Administrative Law

October 2020

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Executive summary

On 31 July 2020, the Lord Chancellor announced a panel of experts (the Panel) to review administrative law and consider options for reform (the Review).¹ The Terms of Reference and the subsequent Call for Evidence set out the scope of the Review in greater detail.² The central focus of the Review is whether judicial review “strike[s] the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government”.³

Judicial review is an essential part of a just and well-functioning democracy. It helps ensure that people are treated fairly and in accordance with law. It gives effect to parliamentary sovereignty, by supervising the duties imposed and powers conferred by Parliament. And it promotes good governance, by enabling the courts and the executive to work together to identify errors in decision-making and clarify the operation of statutory schemes.

There is no robust evidence that judicial review is unduly hampering government decision-making. Official statistics and empirical research indicate that there are relatively few judicial reviews overall, unmeritorious cases are filtered out at an early stage, the threat or commencement of judicial review proceedings itself causes public authorities to identify unlawful decisions and compromise claims, and many of the cases which proceed ultimately uncover unlawful decision-making.

What is required are positive reforms to ensure that judicial review is accessible to ordinary people and effective in practice. We discuss some potential reforms below, such as protecting claimants from the risk of adverse costs, increasing access to legal aid for judicial reviews, and strengthening the duty of candour. As with any proposal to reform judicial review, these potential positive reforms must be underpinned by rigorous empirical research and careful consultation.

Our views on the specific questions posed in the Call for Evidence are set out below.

About PLP

The Public Law Project (PLP) is an independent national legal charity which was set up to ensure those marginalised through poverty, discrimination or disadvantage have access to public law remedies and can hold the state to account. Our vision is a world in which individual rights are respected and public bodies act fairly and lawfully. Our mission is to improve public decision making and facilitate access to justice. PLP undertakes research, policy initiatives, casework and

¹ Ministry of Justice, [‘Government launches independent panel to look at judicial review’](#) (31 July 2020).

² Ministry of Justice, [‘Terms of Reference for the Independent Review of Administrative Law’](#) (31 July 2020) (Terms of Reference); IRAL Secretariat, [‘Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government? Call for Evidence’](#) (7 September 2020) (Call for Evidence).

³ Call for Evidence 1.

training in order to achieve its charitable objectives. More information about PLP's work, including our research into judicial review, is available on our website at www.publiclawproject.org.uk

PLP's response is informed by our practical experience and expertise as practising public lawyers and researchers, and by discussions with other practitioners, including those with experience of acting for both claimants and defendants. We have also hosted a series of three Judicial Review Roundtables, bringing together a number of practitioners, academics, policy experts and former judges, with experience or expertise in issues relating to public law and judicial review. A list of attendees is included in Annex A together with a description of the process. We also convened a private roundtable of former government lawyers. PLP is very grateful to the contributions of those who participated in the Roundtables which have informed our response to the call for evidence. However, responsibility for the content of this submission to the Call for Evidence is solely that of PLP and it should not be assumed to represent the views, individually or collectively, of those who participated the Roundtables.

Question 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?

We have sought to focus this submission on the specific information sought by the Panel. We have commented separately on questions of scale, timing and methodology.⁴

We set out below the importance of judicial review and its role, and the dynamics of judicial review. Judicial review is an essential precondition for both the vindication of individual rights and the effective business of Government.

The importance of judicial review

Judicial review is an essential part of a just and well-functioning democracy. In judicial review, the courts and the executive are “engaged in a common enterprise”, a “partnership based on a common aim”: “the maintenance of the highest standards of public administration” and “the public interest in upholding the rule of law.”⁵

Judicial review serves at least three constitutional purposes. First, it helps ensure that people are treated fairly and in accordance with law. As the Ministry of Justice noted in a consultation paper on legal aid in November 2010:

In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.⁶

Second, judicial review is “central to the rule of law.”⁷ In a judicial review, the court supervises “the parameters of the duties imposed and powers bestowed by Parliament.”⁸ Judicial review thus gives effect to parliamentary sovereignty, by ensuring that “Parliament’s statutes are always effective” with respect to the executive.⁹ It also ensures that the executive complies with long standing common law principles, such as rationality and procedural fairness.

⁴ <https://publiclawproject.org.uk/resources/statement-on-the-independent-review-of-the-administrative-law-process/>

⁵ *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945; *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at [20].

⁶ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Consultation Paper CP12/10, November 2010) [4.16], quoted in Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (July 2017) 126.

⁷ Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (July 2017) 126.

⁸ Judiciary of England and Wales, *Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’* (1 November 2013) [3].

⁹ *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) at [37]–[39]. We note that the Terms of Reference and the Call for Evidence omit any reference to Parliament or parliamentary sovereignty. These documents

Third, judicial review promotes good governance. It ensures that the government is accountable, which means more efficient, higher quality decision-making. The express purpose of the Government's judicial review guide for civil servants, *The judge over your shoulder*, is not just "to explain the legal issues that you are most likely to encounter in your work, but also to help improve policy development and decision making in government".¹⁰ The existence of judicial review serves an important function in motivating government decision makers at all levels to ensure that their decisions, policies and procedures are lawful, even if a particular decision, policy or procedure is never in fact the subject of judicial review proceedings. The principles drawn from the caselaw provide a framework for decision makers to ensure that their decisions are reached in a lawful and fair manner, compliant with the principles of good administration. Understanding and applying this framework gives decision makers the confidence that their decisions can be defended if judicial review proceedings do eventuate.

The link between judicial review and good governance is evident when judicial reviews result in courts identifying and remedying serious errors in government decision-making processes. Numerous such examples can be given:

1. **Public tenders:** In 2012, the Government scrapped its decision to award the £5.5bn West Coast Main Line passenger train franchise, after one of the unsuccessful bidders brought a judicial review. In preparing for the proceedings, the Government uncovered critical flaws in its decision-making, which were subsequently confirmed by an independent inquiry.¹¹ The Government later acknowledged that, without the judicial review, it would not have uncovered these errors.¹²
2. **Healthcare:** In 2013, the High Court found that an NHS Committee's decision to authorise the closure of several children's heart surgery centres was fundamentally flawed and should be set aside.¹³ The Committee had failed to carry out a proper consultation, and its decision to keep certain commissioned reports secret raised doubts about the fairness of the process. It also failed to consider the findings of an Independent Assessment Panel which it had commissioned to assess each of the centres.

make frequent reference to "carry[ing] on the business of government", "the proper and effective discharge of central or local governmental functions", "effective government", and "the functioning of government". But the executive is the "junior partner" to Parliament in the constitutional enterprise of governing: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [90]. The executive has no entitlement to "carry on the business of government" independently of or beyond the laws laid down by Parliament, together with the common law as developed by the courts.

¹⁰ Government Legal Department, *The judge over your shoulder – a guide to good decision making* (18 July 2016) 4.

¹¹ See Sam Laidlaw, *Report of the Laidlaw Inquiry: Inquiry into the lessons learned for the Department for Transport from the Intercity West Coast Competition* (HC 809, 6 December 2012).

¹² House of Commons Committee of Public Accounts, *Department for Transport: Lessons from cancelling the InterCity West Coast franchise competition* (HC 813, 4 February 2013) Ev 15.

¹³ *R (Save Our Surgery) v Joint Committee of Primary Care Trusts* [2013] EWHC 439 (Admin).

3. **Parole:** In 2018, the High Court overturned the Parole Board's decision to release a serious sex offender from his indeterminate prison sentence.¹⁴ The Court held that the Parole Board had not properly considered certain wider evidence relating to the seriousness and extent of his behaviour, and what this would mean for the safety of the public. After re-considering its decision, the Board decided that he ought to remain in prison.

Where judicial reviews are allowed, they provide government departments and other public bodies with the opportunity to reflect on the lawfulness of their decisions, and valuable guidance on how to improve their processes into the future. Empirical research has shown that the outcomes of such claims are often correlated with better quality public services.¹⁵

Judicial review can promote effective government even when the public authority successfully defends its decision. It enables courts to provide guidance on the meaning and operation of statutory powers and duties in various circumstances, and to "fill gaps to render the legislation more efficacious."¹⁶ This gives public bodies greater certainty and clarity about how best to perform their functions. Lawyers we spoke to with experience of advising government told us that they had experience of public bodies welcoming judicial review for this reason. For example, where there was genuine room for doubt about whether a particular policy or decision was lawful, it was helpful to have the court adjudicate. They also told us that it can be helpful on politically controversial questions to have the court act as a neutral arbiter which is guided by questions of legality rather than politics. Their experience of the positive impact of judicial review on government decision making did not significantly vary dependent on the ground of review. Nor did they consider that the costs, actual or potential, of judicial review make a significant difference to decision-making.

Judicial review can also bring to light legitimate grievances, thereby enabling public bodies to alter policies or decisions of their own accord. Empirical research by Varda Bondy, Lucinda Platt, and Maurice Sunkin provides several such examples:

In one community care case, for example, engagement in the JR process, led the defendant public body to reconsider its policy to reduce respite care for disabled people. While the challenge to the reduction in services was unsuccessful the council nonetheless altered its approach as a result of the challenge and continued to provide the services. The claimant solicitor reported that:

None of the clients who remained at home were reassessed, so the level of respite care remained as it was ... [the council] seem to have accepted that this [i.e. their previous decision to reduce respite care] was the wrong approach...

¹⁴ *R (DSD) v Parole Board for England and Wales* [2018] EWHC 694 (Admin).

¹⁵ Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 *Journal of Public Administration Research and Theory* 243. See also Richard Kirkham, 'Judicial review, litigation effects and the ombudsman' (2018) 40 *Journal of Social Welfare and Family Law* 110.

¹⁶ Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 *University of Queensland Law Journal* 355, 367.

Indeed, in that case, an appeal was withdrawn by the claimant following the introduction of a new policy.

In another successfully defended challenge to cuts in a local authority's community care budget the defendant authority nevertheless decided not to proceed with some aspects of the cuts and to revise its process. The local authority told us:

Despite the fact that this challenge was unjustified and unsuccessful, it made us alive to the fact that this sort of challenge wasn't going to go away so we sat back and looked at the procedure again. We revised the equality analysis template, provided bespoke training to decision-makers and to those drafting the reports and updated the guidance going out to offices. We'd rather go too far and do too much than be accused of wasting resources. The procedure prior to the case wasn't bad, as shown by the fact that we won the case, but we got a better toolkit to address issues as a result. Previously the focus was on decision making. Now we developed other aspects to help managers deliver services, to assess if there are better ways to deliver in the spirit of the legislation, help measure and analyse the process, so it now works better.¹⁷

Moreover, the judicial review process provides other opportunities for public authorities to identify and respond to legal and procedural flaws in their decision-making processes which are less visible than those cases which reach a final court determination. This dynamic, a result of the opportunities within the procedure for public authorities to reconsider and to compromise, is explored further in the next section.

How judicial review operates

The Call for Evidence suggests that there is a trade-off or “balance” between enabling individuals to challenge the lawfulness of government action and promoting effective government.¹⁸ As we have explained above, judicial review is in fact an essential precondition for both of these broader objectives. Furthermore, there is no robust evidence that judicial review is unduly hampering government decision-making. Indeed, the evidence suggests a different picture.

First, the overall number of judicial review applications is very low. The number of applications is “infinitesimal” when set against the overall scale of government decision-making.¹⁹ The current annual number of judicial review applications is low compared to previous years, and is going down steadily. In 2017, the number of applications lodged with the Administrative Court dropped below 4,200 for the first time since 2000. This number further declined in 2018 (3,595 applications), 2019 (3,383 applications) and the first half of 2020 (1,448 applications).²⁰ In the Upper Tribunal, 5,679 applications for judicial review were lodged in 2019/20, the lowest figure

¹⁷ Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, University of Essex and London School of Economics, 2015) 32–3.

¹⁸ Call for Evidence 1.

¹⁹ Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 2009) 712.

²⁰ Ministry of Justice, *Civil Justice Statistics Quarterly: April to June 2020* (3 September 2020) Tables 2.1 and 2.2.

since the Tribunal began its work in 2013.²¹ Judicial review must also be seen in light of other avenues of redress. Around 500,000 complaints are made to ombudsmen in any given year, for example, and whilst judicial review of ombudsmen actions is possible, these are very rare in practice.²²

Second, while there is no readily available statistical data, research and the experience of PLP and other practitioners is that a significant number of public law disputes are resolved at the pre-action stage.²³ The Pre-Action Protocol, requiring the sending of a properly formulated letter before claim and a reasonable time for the public body to respond, allows the identification and resolution of errors in the decision-making process without resort to litigation. Although not easy to quantify, a significant proportion of cases—up to 60%—are settled prior to formal commencement of proceedings.²⁴ A significant proportion of these settlements appear to favour the claimant.²⁵ This procedure can be more effective than other forms of dispute resolution, such as complaints mechanisms, in part because it is backed by the prospect of litigation.²⁶

Third, there is a high rate of settlement of judicial review cases. In 2019, 25% of applications lodged with the Administrative Court were withdrawn before reaching the permission stage, either because the case was settled or for other reasons.²⁷ Even after being granted permission, a significant number of applicants ‘drop out’, usually due to receiving settlement offers, with as many as 30% of cases being withdrawn at this stage.²⁸ Again, empirical research indicates that, in a substantial proportion of settlements, the claimant achieves “at least what they would have achieved had the judicial review proceedings been successful at final hearing”.²⁹ Varda Bondy and Maurice Sunkin analysed a sample of 77 cases that were withdrawn by consent pre-permission or after the grant of permission. In 59 cases (77%), the defendant agreed to reconsider

²¹ Ministry of Justice, *Tribunal Statistics Quarterly: January to March 2020* (11 June 2020) Tables UIA_1, UIA_2 and UIA_3.

²² Richard Kirkham, ‘Judicial review, litigation effects and the ombudsman’ (2018) 40(1) *Journal of Social Welfare and Family Law* 110.

²³ Although practitioners told us that this depends on the nature of the dispute, and to some extent on the public authority concerned. For example, Pre-Action Protocol letters were anecdotally thought less likely to resolve immigration disputes with the Home Office than in social security matters with the Department for Work and Pensions.

²⁴ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009).

²⁵ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 30 (“Our overall impression is that the majority of threats were resolved when the public authorities accepted the claim made in the [letter before claim] and a minority were abandoned when it was demonstrated that the claims lacked merit”).

²⁶ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 25–7.

²⁷ Ministry of Justice, *Civil Justice Statistics Quarterly: April to June 2020* (3 September 2020) Tables 2.1 and 2.2.

²⁸ Robert Thomas, ‘Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis’ [2015] *Public Law* 652.

²⁹ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 39.

the earlier decision, carry through a decision-making process they had previously failed to complete, or provide the substantive service or benefit in dispute.³⁰

Fourth, the existing judicial review procedure is very good at filtering out unmeritorious cases. Of those applications which are not settled beforehand, a majority are rejected at the permission stage. In 2019, for example, around 20% of applications before the Administrative Court were granted permission to proceed,³¹ a figure roughly in line with previous years.³² The professional duties of lawyers and regulation of the profession also serve to deter unmeritorious cases being brought.

Fifth, when an application does reach judgment, a claimant's prospects of success are good. Varda Bondy, Lucinda Platt and Maurice Sunkin found that 44% of judicial review cases arising for final determination in their representative dataset were decided in favour of the claimant.³³ Official figures show a similar pattern. Of the judicial review applications lodged with the Administrative Court in 2019, 189 cases have reached judgment. The Court has found for the claimant in 46% of these cases.³⁴

Critics of judicial review sometimes compare present-day case numbers with those from the 1980s and earlier.³⁵ But these comparisons are virtually meaningless, due to the dramatic changes in court procedures, public administration, and statutory frameworks in the intervening period.³⁶

Similarly, great care must be taken with any claim that the courts have expanded the scope of judicial review in recent decades and "blurred" its boundaries.³⁷ There have undoubtedly been procedural and substantive changes in judicial review over time. But these changes reflect a wide range of developments, including significant changes in the executive's legal powers and duties,³⁸

³⁰ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 39–47.

³¹ Ministry of Justice, *Civil Justice Statistics Quarterly: April to June 2020* (3 September 2020) Tables 2.1 and 2.2.

³² Varda Bondy and Maurice Sunkin, 'Accessing judicial review' [2008] *Public Law* 647.

³³ Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, University of Essex and London School of Economics, 2015).

³⁴ Ministry of Justice, *Civil Justice Statistics Quarterly: April to June 2020* (3 September 2020) Tables 2.1 and 2.2.

³⁵ See, e.g., Ministry of Justice and the Rt Hon Chris Grayling MP, '[Judicial Review consultation](#)' (13 December 2012).

³⁶ Varda Bondy and Maurice Sunkin, '[Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse](#)' (UK Constitutional Law Association Blog, 10 January 2013).

³⁷ See, e.g., Terms of Reference, Note E.

³⁸ These changes include new coercive or intrusive legislation schemes (e.g. Regulation of Investigatory Powers Act 2000; Data Retention and Investigatory Powers Act 2014; Investigatory Powers Act 2016; Terrorism Act 2000; Anti-Terrorism, Crime and Security Act 2001; Terrorism Act 2006; Counter Terrorism Act 2008; Terrorist Asset-Freezing etc. Act 2010; Terrorism Prevention and Investigations Measures Act 2011; Counter Terrorism and Security Act 2015), increases in the length and complexity of existing legislative schemes (e.g., Law Commission, *Simplification of the Immigration Rules: Consultation Paper*

and significant changes in the available mechanisms for redress for poor or unlawful government decisions.

The courts are very careful when considering whether to develop the common law of judicial review. In *Gallaher*, the Supreme Court refused to recognise ‘equal treatment’ as a general ground of judicial review.³⁹ In *Keyu*, the Court rejected arguments that the principle of ‘proportionality’ should operate as a ground of review, either as a replacement for the well-established irrationality ground or as a distinct ground.⁴⁰ The courts have also recognised various limits on their powers when conducting judicial review, and have emphasised the importance of respecting the decisions of expert bodies and democratic institutions. In *Cart*, the Supreme Court held that the decisions of the Upper Tribunal could be judicially reviewed in only a limited range of cases.⁴¹ In *AXA*, the court held that devolved government legislation is subject to review on only a limited range of grounds.⁴² The judiciary is acutely aware of the significance of judicial review, the dangers of expansion, and takes a principled and careful approach to its application in practice.

(Consultation Paper No 242, 21 January 2019), and new legislative schemes for the regulation of privatised services and infrastructure.

³⁹ *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25 at [24] and see, similarly, the discussion of ‘fairness’ at [31].

⁴⁰ *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [131]–[133].

⁴¹ *R (Cart) v Upper Tribunal* [2011] UKSC 28.

⁴² *AXA General Insurance v Lord Advocate* [2011] UKSC 46.

Question 2: In light of the Review’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?

In our view, positive reforms are required to ensure that judicial review can realise the constitutional purposes discussed above. We discuss some potential reform proposals below, and throughout our response to this call for evidence. In short, there are six areas where PLP considers that there may be a case for positive reform.

Positive reforms

1. Cost

Costs of judicial review proceedings are a significant barrier to access to justice. In our responses to questions 7 and 8, below, we set out the need for evidence-based reform.⁴³ We echo Lord Justice Jackson’s view that “[c]ontrolling the costs of litigation and providing clarity as to each party’s financial commitment are vital elements in achieving access to justice.”

2. Legal aid

Because of the constitutional significance of judicial review, legal aid is still available for meritorious claims. However, as Lord Justice Jackson noted in his supplementary report on civil costs, the “financial limits ... are strict and many deserving claimants of modest means do not qualify for assistance.” Research commissioned by the Law Society in 2018⁴⁴ found that the means testing of legal aid is set at a level that requires many people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living. In PLP’s view, extensive reform to the civil legal aid means test is needed to ensure that judicial review is accessible as a mechanism for people to challenge the lawfulness of executive action.

3. Statutory duty of candour

The duty of candour needs to be strengthened. As set out below and in our response to question 10, public authorities hold far more material information than claimants. If public bodies complied with their duty of candour it would enable both parties to make fully informed decisions about whether to proceed with litigation. This would likely save public authorities time and money in defending claims, and potentially reduce the need to provide extensive disclosure. PLP considers that further research is required to establish whether a statutory duty of candour would promote compliance and increase the efficacy of judicial review.

⁴³ Further material setting out PLP’s position on the need for reform in this area is available in the resources linked on our website here: <https://publiclawproject.org.uk/uncategorized/the-cost-of-access-to-jr/>.

⁴⁴ Donald Hirsch, ‘[Priced out of Justice? Means testing legal aid and making ends meet](#)’ (Loughborough University, March 2018).

4. Time limits

In appropriate cases, allowing the parties to agree an extension of the time limit for commencing proceedings may avoid cases proceeding.⁴⁵ For example, an extension might be agreed to allow the public body defendant adequate time to respond to a letter before action or to provide pre-action disclosure, for the proposed claimant to review their case in light of the response or disclosure, or for the parties to engage in negotiations or ADR.

There should also be a presumption that delay in obtaining legal aid is a good reason for an extension of time, at least where the application has been made promptly.

5. Crowdfunding

There is a growing expectation by courts that a claimant seeking costs protection should attempt to crowdfund. However, PLP is concerned that only “popular” cases appear to secure funding, and that crowdfunding platforms are unregulated. PLP considers that further research is required to establish whether the absence of regulation of crowdfunding for judicial review leads to unmeritorious but “popular” claims being pursued, creating unnecessary costs for public authorities.

6. Provision for a reply

There is currently no formal provision for claimants to file a reply to the Summary Grounds of Resistance before permission is considered. A succinct reply can assist the permission judge and reduce the likelihood that arguable claims will wrongly be refused permission on the papers, thus reducing the number of claims that are renewed to an oral permission hearing.⁴⁶

Candour and disclosure

Although this is not the subject of any specific questions in the Call for Evidence, the Terms of Reference identifies “the burden and effect of disclosure in particular in relation to “policy decisions” in Government” and “the duty of candour, particularly as it affects Government” as areas for potential reform in order to streamline the process of judicial review.

We do not consider that any reduction in the scope of public authority disclosure duties, nor the duty of candour, is warranted. On the contrary, we consider that there is a case for reinforcing the importance of the duty of candour, perhaps by putting it on a statutory footing.

Candour on the part of public bodies defending judicial review proceedings is vital for ensuring justice, fair administration, and compliance with the rule of law. It is an aspect of the relationship

⁴⁵ See Michael Fordham QC and others, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre for the Rule of Law, Report 2014/01, February 2014) [2.6].

⁴⁶ See Michael Fordham QC and others, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre for the Rule of Law, Report 2014/01, February 2014) [3.3].

between public authorities and the court, often described as one of partnership, “based on a common aim, namely the maintenance of the highest standards of public administration”.⁴⁷ If a public authority wishes to defend a claim for judicial review, then the law requires that it do so “with all the cards face upwards on the table”, and recognising that it will hold most of the cards.⁴⁸ The duty of candour entails “a duty to the court to cooperate and to make candid disclosure, by way of [witness statement], of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings”.⁴⁹ The existence, and importance, of the duty of candour is one of the reasons why the ordinary rules of disclosure do not apply in public law proceedings. As Singh LJ explained recently in his authoritative summary of the applicable principles:

19. One important aspect of the duty of candour and co-operation which should be emphasised and is not always fully appreciated is that it may tend in a different direction from what usually happens when disclosure is required or ordered in the sense of disclosure of documents. Simple disclosure of documents might suggest that all that the public authority has to do is give a lot of documents to the claimant's representatives but this may, in truth, overwhelm them and obfuscate what the true issues are.

20. The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the “needle in the haystack”. It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal put it at the hearing before us, to identify “the good, the bad and the ugly”. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.⁵⁰

PLP has experienced public authority defendants providing disclosure in precisely the manner described by Singh LJ in these passages, without filing any witness evidence to explain their decision making or the effect of the documents.⁵¹ Practitioners at our roundtables and with whom we have discussed this response told us that they had similar experiences. This approach to the duty of candour increases the costs and complexity of litigation, causes delay and hampers the court's evaluation of the material.

⁴⁷ *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941.

⁴⁸ *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941. See also *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244 at [53]

⁴⁹ *Belize Alliance Conservation of Non-governmental Organisations [BACONGO] v Department of the Environment* [2004] UKPC 6 at [86].

⁵⁰ *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin).

⁵¹ See, e.g., *R (Medical Justice) v Secretary of State for the Home Department* [2019] EWHC 2391 (Admin) at [175] where Freedman J observed that the manner and timing of the disclosure had caused difficulties for the parties and the court and that it was “regrettable that the SSHD did not provide the information which it did provide in witness statement form”.

The most obvious justification for the requirement of parties to disclose relevant material before the court is that it ensures ‘equality of arms’ between them and, ultimately, a fair trial. However, the principle is even more important in the context of judicial review proceedings. It is a fundamental tenet of the rule of law and separation of powers that public bodies should ultimately be accountable to both Parliament and, through judicial review, the court. The duty of candour operates to ensure that the decisions of public bodies are set out fully and transparently so that they can be assessed and scrutinised effectively. Public bodies should not be able to hide materials which reveal that they acted in an unlawful manner, especially when the decision affects vulnerable people.⁵² Indeed, in a number of cases, the details of unlawful policies only came to light following disclosure; but for that disclosure, the unlawful policies could not have been challenged.⁵³ Practitioners at our Judicial Review Roundtables echoed the importance of disclosure obligations, relaying that in their experience disclosure had been “crucial” for the determination of cases they brought, at times changing the whole course of the case and making a real difference to the outcome.

It is important to note that disclosure duties are limited in nature, and not always particularly onerous on public authorities. Not only are public law disclosure duties limited compared to the much more all-encompassing duties operating in private law cases, but they are also much more narrow in scope compared to those in a number of civil law jurisdictions, where claimants in administrative cases can rely on a general right to “access the file”, mandating disclosure of all non-sensitive materials.⁵⁴ The approach in domestic judicial review cases, by comparison, is much more context-sensitive. It is well-established that disclosure will be required by public authorities only where this is necessary on the facts of the case; in conducting this assessment, judges bear in mind the wider context, including the sensitivity of the matter and the difficulty obtaining and publicising the information sought.⁵⁵ Indeed, even where it is considered that disclosure would be useful for claimants, requests for disclosure are often rejected.⁵⁶ Judicial discretion already operates as an effective ‘safety valve’ to prevent disclosure which would be overly onerous or particularly detrimental to the public body’s affairs.

Compliance with the duty of candour requires public authorities to be able to explain their decision making fully. Good record keeping practices and systems will facilitate compliance with the duty of candour and the provision of disclosure. Sound record keeping is also a feature of good government more generally. If and to the extent that public authorities find compliance with the duty of candour unduly burdensome, a good starting point would be to consider how they can adopt better systems for keeping records about their decision making.

⁵² *R (KL) v London Borough of Brent* [2018] EWHC 1068 (Admin) at [14].

⁵³ *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin).

⁵⁴ See Charter of Fundamental Rights of the European Union art 41(2)(b).

⁵⁵ *Tweed v Parades Commission* [2006] UKHL 53 at [32] (Lord Carswell). Disclosure of information will not be ordered where it is impossible or particularly difficult for the public authority to do this, but this reticence will not be applied if disclosure would prove to be a mere “inconvenience”: *R (KL) v London Borough of Brent* [2018] EWHC 1068 (Admin) at [15].

⁵⁶ *E.g. R (AA) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2292 (Admin); *Sky Blue Sports v Coventry City Council* [2013] EWHC 3366 (Admin).

The final point is that disclosure duties need not be seen as “unduly burdensome” on defendants. Early disclosure of materials and proper compliance with the duty of candour may be useful for discouraging unmeritorious or hopeless applications, and can encourage early settlement, which is generally beneficial for both claimants and defendants. Again, this was something echoed by practitioners and former judges at our Judicial Review Roundtables, who gave examples of disclosure leading to a situation where applications were settled or dropped rather than proceeding to full review. Further, from the perspective of the defendant, disclosure may be of benefit during the review proceedings themselves; failure to disclose information can lead to the court drawing adverse inferences from this omission, and it may impute that no reasons exist behind a challenged decision at all.⁵⁷

In summary: disclosure duties are vital for ensuring justice and fairness in the administrative system; current practices ensure that disclosure is not disproportionately onerous upon public bodies and will only be ordered where necessary; and disclosure has incidental benefits to public bodies which should not be ignored. For these reasons, it would be unwise to alter the law on disclosure and candour in the judicial review setting.

⁵⁷ In extreme situations, where a failure to provide any reasons at all undermines the very basis of the decision itself, a court may quash that decision: *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416.

Question 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 origins of judicial review—the procedure, the grounds of review, the remedies—lie in the common law.⁵⁸ Against this common law backdrop, statute can perform two broad functions:

1. It can **codify** the common law, with the aim of resolving areas of uncertainty and making the law more accessible but not, so far as is possible, changing it. This seems to be the focus of the Review.⁵⁹
2. It can **change** the common law, by changing the existing rights, powers or privileges of individuals, public bodies or the courts in connection with judicial review. Such changes might pursue any number of aims: e.g. increasing or decreasing people’s rights to challenge government action, the duties of public bodies to provide reasons or other information regarding their decisions; the powers of courts, etc.

Significant areas of the judicial review process are already codified in statute or rules of court. The powers and procedures of a court or tribunal on a judicial review are governed by, among other things, CPR 54, the Senior Courts Act 1981,⁶⁰ the Criminal Justice and Courts Act 2015,⁶¹ and the Tribunals, Courts and Enforcement Act 2007.⁶²

We consider below whether statute should be used to codify the law of judicial review further or more comprehensively, focusing on amenability of decisions to review and grounds of review. We then briefly consider how statute might be used to change judicial review for the better.

Codifying the law of judicial review

There are two broad potential approaches to codification:

1. A simple code would concisely set out the existing common law rules, without attempting to exhaustively describe or explain how they apply. For example, Australia’s Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) sets out a list of grounds of review: “that a breach of the rules of natural justice occurred in connection with the making of the decision”, “that procedures that were required by law to be observed in connection with the making of the decision were not observed”, and so on.⁶³

⁵⁸ *Michalak v General Medical Council* [2017] 1 WLR 4193 at [32].

⁵⁹ Terms of Reference, 1 and Note C.

⁶⁰ Senior Courts Act 1981 ss.31, 31A.

⁶¹ Criminal Justice and Courts Act 2015 ss.86–90.

⁶² Tribunals, Courts and Enforcement Act 2007 ss.15–21.

⁶³ ADJR Act s.5.

2. A comprehensive code would attempt to provide an exhaustive statement of the existing common law rules. For example, rather than merely including “a breach of the rules of natural justice” as a ground of review, a comprehensive code would refer specifically to the bias rule and the hearing rule, explain the content of each of those rules, describe their application in different contexts, note the key exceptions, and so on.

Neither of these options would promote certainty and accessibility in the law of judicial review:

1. A simple code would, on its face, make the law clearer. But it would be necessarily incomplete. It would be impossible to understand the code—its references to “natural justice”, “relevant considerations”, “irrationality”, and so on—without the case law explaining its meaning and operation. This has been the experience in Australia under the ADJR Act.⁶⁴ The High Court has held that the ADJR Act is “a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law” and “therefore to be read in the light of the common law”.⁶⁵
2. A comprehensive code might avoid some of the problems discussed above, but only by sacrificing any potential gains in clarity and accessibility. As Mark Elliott has noted, the code “would likely be so lengthy, detailed and technical as to make it far from clear and accessible to the average individual”.⁶⁶

More fundamentally, most judicial reviews turn on the interpretation and application of particular statutes, rather than common law doctrines or constitutional principles viewed in isolation.⁶⁷ This has two consequences for any proposed codification. The first is that, because most of the relevant legal limits on government powers are contained in specific statutes, it would be impossible to codify those limits in a single document. The second consequence is that it makes little sense to codify the common law of judicial review in isolation from the relevant statutory context for a particular case. Many of the grounds of review cannot be meaningfully expressed and understood in the abstract, “because they interact with – and fully acquire shape and meaning only in relation to – the statutory framework that defines the powers whose exercise is under review in any given case”.⁶⁸

⁶⁴ See, e.g., Greg Weeks, ‘ADJR at 40: In its prime or a disappointment to its parents?’ (2018) 92 *AIAL Forum* 103, 106 (“the grounds of judicial review [in the ADJR Act] mean little at best ... and, at worst, are actively misleading”).

⁶⁵ *Kioa v West* (1985) 159 CLR 550 at 576. See also at 566–7 and 625. For example, there is some debate in the authorities over whether and to what extent the ADJR Act incorporates modern developments in review for legal unreasonableness. See *SZVCP v Cho* [2017] FCA 310 at [30]–[44].

⁶⁶ Mark Elliott, ‘The Judicial Review Review II: Codifying Judicial Review - Clarification or Evisceration?’ (10 August 2020) <<https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration>>.

⁶⁷ See Sarah Nason, *Reconstructing Judicial Review* (Hart, 2016) chs 6–7.

⁶⁸ Mark Elliott, ‘The Judicial Review Review II: Codifying Judicial Review - Clarification or Evisceration?’ (10 August 2020) <<https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration>>.

Codification would likely create other problems:

1. It would create—rather than remove—**uncertainty** in the law of judicial review: over the legal meaning of the specific language used in the code and whether and to what extent it was intended to reflect or alter the common law.
2. This would in turn lead to **satellite litigation**, as parties, lawyers and judges spent time and resources getting to grips with the new legislation.
3. Finally, codification might lead to **distortions in the law of judicial review**. Depending on its terms, codification might stultify the incremental, principled development of administrative law. A code would inevitably provide merely a snapshot of administrative law at a particular time. Judges would be bound to give effect to the code in its terms, including any potentially arbitrary, perverse or unprincipled implications it might have into the future.

Again, these problems are evident in Australia's experience with the ADJR Act.⁶⁹ The ADJR Act established a new test for whether a decision was amenable to judicial review. It provides for judicial review of any 'decision of an administrative character made ... under an enactment', as well as 'conduct engaged in for the purpose of making [such] a decision.'⁷⁰ This new test created significant uncertainty. What was a 'decision'? When would it have 'an administrative character'? What did it mean for a decision to be made 'under an enactment'? These questions generated 'years of confusion' and significant litigation.⁷¹ The resulting jurisprudence has arguably 'resuscitated the very kind of technicalities that the ADJR Act was intended to remove.'⁷² And the ADJR Act's test has become outdated and anomalous. For example, the test continues to exclude vice-regal decisions from review, reflecting a common law immunity which was abolished in Australia in the 1980s. As Matthew Groves notes, '[i]t is clearly contradictory that a statute designed to provide a simpler alternative to the common law maintains an arcane exception that has disappeared from the common law itself.'⁷³

Other attempts around the world to codify administrative law have run into similar problems. In a recent cross-jurisdictional analysis, Cora Hoexter concluded that, while codification may hold out

⁶⁹ See generally Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79.

⁷⁰ ADJR Act ss.3(1), 5(1), 6(1).

⁷¹ Greg Weeks, 'ADJR at 40: In its prime or a disappointment to its parents?' (2018) 92 *AIAL Forum* 103, 108. In the leading case of *Griffith University v Tang* (2005) 221 CLR 99, Gummow, Callinan and Heydon JJ noted at [29] that "[t]he resultant uncertainties generated by the case law on the ADJR Act have continued for more than 25 years."

⁷² Matthew Groves, 'Should We Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 747, citing Michael Taggart, 'Australian Exceptionalism' in *Judicial Review* (2008) 36 *Federal Law Review* 1, 6.

⁷³ Matthew Groves, 'Should We Follow the Gospel of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 751.

certain advantages, “they are more limited than is often supposed and are all too easily outweighed by the many potential disadvantages of giving judge-made law statutory form.”⁷⁴

Making the law of judicial review more accessible

If the Government is committed to making the law of judicial review more accessible, several options would be much more effective than codification. The Government could fund public legal education about administrative law. Various charities, including PLP, provide training on public law and judicial review. But research indicates that few people understand their rights sufficiently to deal with the legal problems they face.⁷⁵ The Government could also provide funding for people to obtain legal advice on their rights to challenge government action at an early stage. The current rules on legal aid for judicial review are very restrictive.⁷⁶ Ultimately, as with any area of law or regulation, people are best able to navigate their rights under administrative law with the assistance of an expert adviser. The best way for the Government to make the law of judicial review more accessible would be to make it easier for ordinary people to get legal advice on public law issues. In light of the constitutional purposes of judicial review, discussed above, public legal education and legal aid in this area is of constitutional importance.

Changing the law of judicial review for the better

Moving beyond codification, the Call for Evidence also asks ‘[t]o what other ends could statute be used?’ Statutory changes to the law of judicial review could pursue any number of aims. For example, the ADJR Act introduced a statutory right to reasons for an administrative decision, which has been described as its ‘most enduring reform’.⁷⁷

In our view, statute can and should be used to ensure that judicial review fulfils its animating purposes: protecting individual rights and interests, furthering the rule of law, and promoting good governance. We have discussed some possible positive reforms above.

⁷⁴ Cora Hoexter, ‘Administrative Justice and Codification’ in Joe Tomlinson, Marc Hertogh, Robert Thomas, and Richard Kirkham (eds), *The Oxford Handbook of Administrative Justice* (Oxford University Press, 2020) (forthcoming).

⁷⁵ See Lisa Wintersteiger, *Legal Needs, Legal Capability and the Role of Public Legal Education* (Law for Life, 2015); Bach Commission, *The Right to Justice* (September 2017) 40–1.

⁷⁶ See Joe Tomlinson and Alison Pickup, ‘Reforming Judicial Review Costs Rules in an Age of Austerity’ in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (Oxford University Press, 2020) (forthcoming).

⁷⁷ Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2004) 15 *Public Law Review* 202, 213.

Question 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?

The CPR provides that a claim for judicial review in the Administrative Court can challenge the lawfulness of “an enactment” or “a decision, action or failure to act in relation to the exercise of a public function”.⁷⁸ But a claim may be non-justiciable—not suitable for judicial resolution—in two main ways.⁷⁹

First, the claim might focus solely on an issue that is not a “reviewable question of public law”.⁸⁰ This includes claims focused solely on whether private persons acting in their private capacity have acted lawfully,⁸¹ or whether the government has complied with international law.⁸² The courts are also careful to ensure that claims have a *legal* basis; mere disagreement with a government decision is not enough to trigger judicial review. As the High Court recently stated: “judicial review is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and, in a democratic society, must be a matter for the elected government alone.”⁸³

Second, the claim might require the court to determine an issue that is “beyond the constitutional competence assigned to the courts under our conception of the separation of powers”.⁸⁴ For example, the common law principle of parliamentary sovereignty and article 9 of the Bill of Rights 1688 preclude the courts from reviewing proceedings in Parliament.⁸⁵ Some executive decisions also give rise to issues that are outside the courts’ constitutional competence. In *Abbasi*, for example, the Court of Appeal held that it could not examine the question of whether the Foreign Secretary had acted properly in refusing to request the claimant’s release from Guantanamo Bay.⁸⁶ The courts consider a range of factors in determining whether an issue is justiciable in this sense: whether it requires expertise or information which judges lack; whether it is properly the preserve of democratic institutions; whether judicial procedures, particularly regarding evidence, are not suited to its resolution.⁸⁷

⁷⁸ CPR 54.1(2)(a). See also Senior Courts Act 1981 s.31. We refer solely to ‘decisions’ in what follows, for the sake of brevity.

⁷⁹ *Shergill v Khaira* [2014] UKSC 33 at [41]–[44].

⁸⁰ *Shergill v Khaira* [2014] UKSC 33 at [43].

⁸¹ See, e.g., *R (Holmcroft Properties Ltd) v KPMG LLP* [2018] EWCA Civ 2093.

⁸² See, e.g., *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin).

⁸³ *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [326].

⁸⁴ *Shergill v Khaira* [2014] UKSC 33 at [42].

⁸⁵ *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [43]; *R (Miller) v Prime Minister* [2019] UKSC 41 at [63]–[69].

⁸⁶ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

⁸⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

Justiciability is a feature of particular questions, not whole decisions or powers.⁸⁸ The contrary position would be crude and formalistic.⁸⁹ Virtually any power, regardless of its source or subject matter, can raise questions that are suitable for judicial resolution. Consider, for example, the prerogative of mercy.⁹⁰ If the government's refusal to pardon someone is challenged on its merits (e.g. because the government ostensibly weighed the different considerations wrongly), this would be clearly non-justiciable. But if the refusal is challenged on the basis that the government accepted a bribe, for example, this would be clearly amenable to judicial resolution, and there would be ample reason for the courts to enforce the law as they would in any other judicial review. To do otherwise would frustrate the constitutional functions of judicial review discussed above.⁹¹

From our perspective as practising lawyers, the test for justiciability is sufficiently clear. There is no warrant for legislation excluding certain decisions or powers from the scope of judicial review.

First, completely removing certain decisions or powers from the ambit of judicial review is a very serious step. It would be antithetical to the rule of law. As discussed above, executive accountability lies at the heart of judicial review, which is essential for upholding the separation of powers and the maintenance of checks and balances inherent in the UK constitutional order. Any inroads into judicial review must therefore be considered with extreme caution. This is particularly so given that, as discussed above, virtually any power can raise questions suitable for judicial resolution. Rendering some decisions entirely non-justiciable would be a disproportionate response—using a sledgehammer to crack a nut. It would deprive individuals of the protection of law, and immunise executive power from legal scrutiny, with no justification.

Second, there are practical difficulties with cordoning off certain decisions or powers from the prospect of judicial review. Such an action is virtually unprecedented, so there is little by way of guidance as to how to perform this task effectively. The process would be fraught with difficulty. It would necessarily require, for example, categories of case to be drawn up, so as to distinguish cases which are non-justiciable from those that are not. If too narrow a definition were used, this would render the non-justiciability clause ineffective. If too wide a definition were used, this would 'catch' a number of other cases within the immunity. Either way, the process would give rise to significant uncertainty, in theory and in practice. The better approach is the orthodox one by which both the justiciability of each case and the intensity of review applied are determined according to the "subject matter and suitability in the particular case" rather than the category of case before it.⁹²

⁸⁸ Timothy Endicott, *Administrative Law* (2nd edition, Oxford University Press, 2011) 246–51.

⁸⁹ This has been recognised since at least *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

⁹⁰ See *Lewis v Attorney General of Jamaica* [2000] UKPC 35.

⁹¹ Lord Mance made observations to similar effect in a 2018 lecture on justiciability, regarding the possibility of judicial review where an honour had been secured by way of a bribe: "Usually, it will be possible and better to adopt a more refined approach, using conventional tools of judicial review, rather than the blanket approach of excluding all possibility of judicial review because of the subject matter." See Lord Mance, 'Justiciability' (40th Annual FA Mann Lecture, 27 November 2017).

⁹² *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at [85].

Finally, the courts already show significant deference to the government in areas where they lack the competence to decide particular questions, rendering further intervention otiose. The courts continue to regard certain issues as non-justiciable.⁹³ Even those matters which the courts consider technically justiciable are treated with extreme caution and deference to the executive where appropriate. As Lord Neuberger PSC put it in one case:

Judges must ...bear in mind that any decision of the executive has to be accorded respect - in general because the executive is the primary decision-maker, and in particular where the decision is based on an assessment which the executive is peculiarly well equipped to make and the judiciary is not.⁹⁴

As such, judges continue to show significant deference in cases where the decision under review is one in relation to which the executive has a traditionally strong role, such as in matters concerning foreign affairs⁹⁵ or sensitive political issues concerning the allocation of resources,⁹⁶ or where the decision in question carries a particular degree of democratic legitimacy.⁹⁷ This contextual deference is much more sophisticated than a blunt non-justiciability doctrine. It respects the legitimacy and efficacy of executive decision-making, without sacrificing the fundamental safeguards inherent in the judicial review process. As the then Deputy President of the Supreme Court, Lord Mance, observed in a lecture on justiciability in November 2018:

... for the most part, courts can and should adjudicate upon civil claims and public law claims, without it being necessary or appropriate to resort to a doctrine of non-justiciability. There are a few ad hoc situations where an international law principle, in the form of State immunity, or a domestic law principle, such as Article 9 of the Bill of Rights, debars the courts from fulfilling their ordinary function. But the nature of ordinary civil claims makes non-justiciability a very rare phenomenon. Judicial review can in contrast range wider, into areas which may potentially be thought to throw up problems of justiciability, but it is subject to other controls – such as standing, institutional competence, discretion – which commonly make it unnecessary to grasp at so blunt a response.⁹⁸

Prerogative powers

Note D to the Terms of Reference states that '[t]he Panel will focus its consideration of the justiciability of prerogative powers to the prerogative executive powers as defined in 3.34 of the Cabinet Manual.'

Two recent, high-profile decisions of the UK Supreme Court have involved judicial review of prerogative powers: *Miller I*⁹⁹ and *Miller II*.¹⁰⁰ In both cases, the Court considered the conditions under which the Prime Minister could deploy prerogative powers, firstly to trigger Article 50 of the

⁹³ *R (Abbas) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

⁹⁴ *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60 at [57].

⁹⁵ *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at [24].

⁹⁶ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [93].

⁹⁷ *AXA General Insurance v Lord Advocate* [2011] UKSC 46.

⁹⁸ Lord Mance, 'Justiciability' (40th Annual FA Mann Lecture, 27 November 2017).

⁹⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹⁰⁰ *R (Miller) v Prime Minister* [2019] UKSC 41.

Treaty of the European Union to initiate the procedure to leave the European Union (*Miller I*), and secondly to prorogue Parliament (*Miller II*). In both cases, the Supreme Court determined that, as a matter of law, the Prime Minister exercised the prerogative powers unlawfully in the circumstances of each case.

Although there are academic arguments both for and against the correctness of the *Miller* decisions,¹⁰¹ the judgments rightly place the twin values of parliamentary sovereignty and the rule of law at the centre of their reasoning. However, there are a number of reasons to avoid intervening in this area, regardless of what view is taken of these particular decisions. Fundamentally, the Panel seeks to undertake a reform of administrative law in practice. It would be a mistake to place too much weight on judgments such as *Miller I* and *II*, which do not represent the reality of judicial review in practice. Whilst those cases generated understandable academic and political excitement, both cases are truly exceptional. The Supreme Court described the situation in *Miller I* as ‘unique’,¹⁰² and *Miller II* as a ‘one off.’¹⁰³ Principled reform of judicial review as a whole should not be undertaken in response to two exceptional, unrepresentative cases.

Indeed, prerogative powers very rarely feature in judicial review litigation more generally. Excluding those cases related to the *Miller* litigation, fewer than 10 cases decided over the last eight years could reasonably be said to concern a challenge to the operation of prerogative powers.¹⁰⁴ In total, since 2013, the courts have ruled on: one case concerning the use of powers relating to information-sharing and mutual legal assistance with regard to foreign jurisdictions;¹⁰⁵ one case concerning the provision of consular assistance to a British citizen imprisoned abroad;¹⁰⁶ a group of cases relating to the revocation of passports;¹⁰⁷ one case concerning the decision to place an individual on an international terrorist list;¹⁰⁸ a single case relating to the power to modify economic agreements with Crown dependencies;¹⁰⁹ and a case relating to the Northern Ireland executive’s power to establish a redress scheme for compensating victims of historic abuse.¹¹⁰

¹⁰¹ On *Miller I*, see, e.g., Paul Craig, ‘Miller, structural constitutional review and the limits of prerogative power’ [2017] *Public Law* (Special Issue) 48; Mikolaj Barczentewicz, ‘Miller, statutory interpretation, and the true place of EU law in UK law’ [2017] *Public Law* (Special Issue) 10; Alison Young, ‘R (Miller) v Secretary of State for Exiting the European Union: thriller or vanilla?’ (2017) 42(2) *European Law Review* 280; David Feldman, ‘Pulling a Trigger or starting a Journey? Brexit in the Supreme Court’ (2017) 76(2) *Cambridge Law Journal* 217; Keith Ewing, ‘Brexit and Parliamentary Sovereignty’ (2017) 80(4) *Modern Law Review* 711. On *Miller II*, see Paul Craig, ‘The Supreme Court, prorogation and constitutional principle’ [2020] *Public Law* 248; Stefan Theil, ‘Unconstitutional prorogation of Parliament’ [2020] *Public Law* 529; Stephen Sedley, ‘In Court’, *London Review of Books*, 10 October 2019; Jacob Rowbottom, ‘Political Purposes and the Prorogation of Parliament’ (UK Constitutional Law Association Blog, 3 September 2019).

¹⁰² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [90]

¹⁰³ *R (Miller) v Prime Minister* [2019] UKSC 41 at [1].

¹⁰⁴ A search on *Westlaw*, a comprehensive legal database, for cases tagged with keywords ‘royal prerogative’ or ‘prerogative powers’ confirms this.

¹⁰⁵ *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10.

¹⁰⁶ *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44.

¹⁰⁷ *R (AS) v Secretary of State for the Home Department* [2018] EWHC 1792; *R (XH) v Secretary of State for the Home Department* [2017] EWCA Civ 41; *R (MR) v Secretary of State for the Home Department* [2016] EWHC 1622 (Admin).

¹⁰⁸ *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

¹⁰⁹ *R (Guernsey) v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1847 (Admin).

¹¹⁰ *Re JR80* [2019] NICA 58.

Moreover, a clear majority of this handful of cases was decided in favour of the government,¹¹¹ and the court confirmed the existence of a prerogative power in all cases where this was questioned.¹¹² In *Sandiford*, for example, the Supreme Court confirmed the existence of the government's prerogative power to assist British citizens imprisoned abroad, and accepted the government's argument that the no-fettering principle, which governs the exercise of statutory powers, does not apply to prerogative powers.¹¹³ Therefore, not only are challenges to the exercise of prerogative powers vanishingly rare in practice, but in those instances where a case was considered by the courts, they were overwhelmingly decided in favour of the government.

It is clear that neither the *Miller* cases, nor challenges to prerogative more generally, represent the 'average' judicial review claim. The 'bread and butter' judicial review cases are far more mundane, and far less controversial in their subject-matter. Research has shown that most judicial review cases lodged against central government authorities involve challenges to decisions relating to immigration, prisons and police.¹¹⁴ Judicial review of the decisions of local authorities, on the other hand, often feature challenges to decisions relating to housing, homelessness, benefits, education, planning and community care.¹¹⁵

In contrast to some popular narratives, the *Miller* litigation is a clear outlier in terms of judicial review. The prospect of judicial review of prerogative powers is neither as serious nor as problematic as some may fear. Those exceptional cases serve rather to indicate why the principle of non-justiciability is too blunt an instrument: in our constitutional settlement judicial review provides an important check on executive power and helps to ensure that the executive is accountable to Parliament (by requiring it have a say in the unmaking of a treaty with effects on rights and obligations it has conferred, and by preventing the misuse of the power of prorogation). The prerogative powers are by definition uncodified and without the possibility of judicial review their boundaries would be unconstrained.

In sum, given the confused foundation of the exercise, the exceptional nature and low frequency of controversial decisions relating to the prerogative, the practical difficulties involved in reform, the contextual nature of the judiciary's existing approach, and the danger in cutting off an aspect of executive decision-making from judicial oversight altogether, trying to exclude certain decisions

¹¹¹ According to Lord Carnwath, the exercise of prerogative powers is "an area in which the courts proceed with caution": *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at [24].

¹¹² *E.g.* the power to establish a redress scheme was confirmed in *Re JR80* [2019] NICA 58 and the power of the Home Secretary to revoke passports was confirmed in *R (XH) v Secretary of State for the Home Department* [2017] EWCA Civ 41, despite the fact that the same power had recently been prescribed by statute.

¹¹³ *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 at [61]–[65].

¹¹⁴ Robert Thomas, 'Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis' [2015] *Public Law* 652; Sarah Nason, *Reconstructing Judicial Review* (Hart, 2016).

¹¹⁵ Maurice Sunkin, Lucinda Platt, Todd Landman and Kerman Calvo, 'Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales' [2007] *Public Law* 545.

or powers (whether prerogative or otherwise) from the ambit of judicial review would be fruitless at best and dangerous at worst.

Grounds of review and consequences of unlawfulness

In relation to Terms of Reference 2 and 3, Note E states as follows:

Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between “scope” and “exercise” has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end (“scope”) to all of the conventional [JR] grounds and proportionality at the other (“exercise”). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?

This passage conflates two distinct issues.

First, the passage asserts that, around “forty years” ago, “the scope of a power (whether prerogative or statutory or in subordinate legislation)” was “subject to control (by JR) by the Court”, but “the manner of the exercise of a power within the permitted scope” was not. This is a claim about the grounds on which a decision can be subject to judicial review. It is incorrect as a matter of legal history. For centuries, the courts have supervised the ‘manner of exercise’ of public powers.¹¹⁶ In 1598, in *Rooke’s Case*, Coke CJ held that the decision of the Sewers Commissioners to charge one landowner for the repair of an entire section of bank was disproportionate and unlawful.¹¹⁷ In 1863, in *Cooper v Board of Works*, Mr Cooper successfully challenged the Wandsworth Board of Works’ exercise of its power to demolish his house, on the ground that it had failed to give him an opportunity to be heard.¹¹⁸ Examples can be multiplied.

An attempt today to preclude the courts from reviewing the ‘manner of exercise’ of public powers would be unthinkable. It would fatally undermine the constitutional purposes of judicial review discussed above. And in any case, the distinction between the ‘scope’ of a power and the ‘manner of its exercise’ is vague and unstable. Any attempt to enshrine it in law would create serious practical problems of the kind discussed above in relation to justiciability.

Second, the passage asserts that, currently, “any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity”. This is a claim about the consequences of establishing one of the grounds of review (*i.e.* whether it renders the decision a nullity). The passage appears to refer to *Anisminic*, which is traditionally taken to have

¹¹⁶ Assuming for present purposes that some meaningful content can be given to the ‘manner of exercise’ of a power, as distinct from its ‘scope’.

¹¹⁷ (1598) 5 Co Rep 99b.

¹¹⁸ (1863) 14 CB (NS) 180.

established that all errors of law render a decision ultra vires and a nullity.¹¹⁹ In fact, the modern approach is more sophisticated:

1. In general, the courts do not automatically treat an unlawful decision as a nullity for all purposes. They have always retained the discretion to craft an appropriate remedy for an unlawful decision where, for example, third parties have relied on it to their detriment.¹²⁰
2. In relation to ouster clauses in particular, the courts have moved beyond the analysis in *Anisminic*, which centred on the concept of nullity.¹²¹ Instead, the courts construe provisions which purport to oust or channel judicial review by reference to the specific statutory text and context, and “the constitutional principle of the rule of law (as affirmed by section 1 of the [Constitutional Reform Act 2005]”.¹²²

There is no warrant for any broad statutory intervention here. The modern approach is consistent with both parliamentary sovereignty and the rule of law, and it avoids the unnecessary and “esoteric” technicalities of ‘jurisdictional error’, ‘non-jurisdictional error’ and ‘nullity’.¹²³

¹¹⁹ *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6. See, e.g., Lord Diplock’s discussion in *In re Racal Communications Ltd* [1980] UKHL 5.

¹²⁰ See, e.g., *R (Corbett) v Restormel Borough Council* [2001] EWCA Civ 330.

¹²¹ In *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [129], Lord Carnwath (Lady Hale and Lord Kerr agreeing) described that analysis as “highly artificial”.

¹²² *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [131]–[132]. See also *R (Cart) v Upper Tribunal* [2011] UKSC 28.

¹²³ Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 2009) 510.

Question 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?

From our perspective as lawyers with experience of the system, the process of making a judicial review claim and appealing a judicial review decision to the Court of Appeal or Supreme Court is sufficiently clear. These rules are largely set out in the Civil Procedure Rules and the Senior Courts Act. Whilst we recognise that members of the public may not hold the same familiarity with these rules as public lawyers, we think, especially bearing in mind our response to question 3, that the solution to this lies in increasing public legal education and ensuring access to competent legal advice rather than a codification exercise.

Question 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?

Yes. Judicial reviews are subject to short time limits. Applications for judicial review must ordinarily be filed “promptly” and “in any event not later than 3 months after the grounds to make the claim first arose”.¹²⁴ Challenges to planning decisions must usually be brought within six weeks, and challenges to procurement decisions within 30 days.¹²⁵ There is no basis for further reducing these time limits, for the following reasons.

First, these limits are already short in comparison to limitation periods for other areas of civil litigation in England and Wales, such as contract (six years), deeds (12 years), personal injury (three years), defamation (one year) and other torts (six years).¹²⁶

Second and relatedly, the time limits for judicial review already recognise the “public interest in good administration”.¹²⁷ In other words, the significantly truncated time limits for judicial review already incorporate the need, at some stage, for finality in public administration.

Third, reducing the time for people to bring judicial reviews is likely to have perverse effects. It will increase pressure on potential claimants to file early, and reduce the time available for them to negotiate settlements with public bodies.¹²⁸ This is likely to threaten meaningful engagement by claimants and public bodies with the pre-action protocol.¹²⁹ It is also likely to increase both the number of weak and premature claims, and the burden on public bodies of responding to those claims.¹³⁰ Indeed, when the Government considered similar reforms in 2012, its own impact assessment acknowledged the risk that shorter time limits would have these effects.¹³¹

Fourth, the courts already carefully supervise the requirement that judicial review proceedings be brought promptly, even within the three-month limit established by the CPR.¹³² They are

¹²⁴ CPR 54.5(1).

¹²⁵ CPR 54.5(5)–(6).

¹²⁶ Limitation Act 1980.

¹²⁷ *O’Reilly v Mackman* [1983] 2 AC 237 at 280H–281A.

¹²⁸ Indeed, during our Judicial Review Roundtables, a number of participants admitted that when considering whether to lodge a judicial review claim, the short time limits involved acted as a significant impediment to seriously negotiating with the public body in order to obtain redress or pre-action settlement.

¹²⁹ See Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 18–9.

¹³⁰ Paul Craig, *Administrative Law* (4th ed, 1999) 794; Varda Bondy and Maurice Sunkin, ‘[Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse](#)’ (UK Constitutional Law Association Blog, 10 January 2013).

¹³¹ Ministry of Justice, *Judicial Review: Engagement Exercise* (Impact Assessment No 184, 6 December 2012) [2.29].

¹³² *R v ITC, ex parte TVNI Ltd* (Court of Appeal, unreported, 19 June 1991); *R v Swale Borough Council, ex parte Royal Society for the Protection of Birds* [1991] 1 PLR 6; *R v Secretary for Health, ex parte Furneaux* [1994] 2 All ER 652; *R v Avon County Council, ex parte Adams* [1994] Env LR 442.

particularly mindful of this requirement in cases affecting third parties and cases brought in the public interest.¹³³ The courts apply this standard based on all of the relevant circumstances in each case. By contrast, a crude restriction of the time limit by legislation is likely to produce arbitrary and unjust results.

Finally, the courts already have statutory powers to deal with undue delays that threaten good administration. Under the Senior Courts Act, where there has been undue delay in making an application for judicial review, the High Court may refuse to grant leave for the making of the application, or any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.¹³⁴

As discussed above, however, we consider that the government should consider the following changes to the time limits for judicial review:

1. Allowing the parties to agree an extension of the time limit in an appropriate case, particularly where this would allow the public body defendant adequate time to respond to a letter before action or to provide pre-action disclosure, or allow the parties to engage in negotiations, which might mean that the case does not proceed.¹³⁵
2. Establishing a presumption that delay in obtaining legal aid is a good reason for an extension of time, at least where the application has been made promptly.

¹³³ See, e.g., *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [1998] EWHC 2009 (Admin).

¹³⁴ Senior Courts Act s.31(6).

¹³⁵ See Michael Fordham QC and others, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre for the Rule of Law, Report 2014/01, February 2014) [2.6].

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

PLP is not aware of any evidence showing that the rules regarding costs in judicial reviews are too lenient on unsuccessful parties or applied too leniently in the courts.

The normal rule in CPR 44 applies as much in judicial review proceedings as it does in other forms of civil proceedings: costs follow the event and the unsuccessful party will normally be ordered to pay the costs of the successful party.

Lord Justice Jackson gave detailed consideration to costs in judicial review in both his 2009/2010 review of civil litigation costs and in the further review he carried out over an eight-month period in 2016/2017, leading to his Supplemental Report – Fixed Recoverable Costs in July 2017. The Supplemental Report made recommendations regarding changes to the rules on costs in judicial review which have not been implemented by the Government. PLP submitted evidence on costs in judicial review,¹³⁶ and also contributed to the work of the Westgate working group, whose report is appended to the Supplemental Report. Our position has not changed.

In general, we endorse the conclusions and recommendations set out in the Supplemental Report.¹³⁷ Following detailed consideration of the issues and available evidence, Lord Justice Jackson found that “[t]he costs of JR proceedings are generally more manageable than the costs of private law litigation” for reasons set out in his Preliminary Report (para 1.5). However, he rightly recognised that “many ... claimants are of modest means and are deterred from pursuing claims because of the adverse costs risk” (para 1.5). He concluded that (Chapter 10, para 2.7):

- (i) Even though many JR cases fall into a standard pattern, costs are too variable to permit the introduction of a grid of FRC.
- (ii) CCOs are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive. The criteria for granting CCOs are unacceptably wide and the outcome of any application must be uncertain. Also, that outcome will not be known until too late in the day.
- (iii) There would be merit in extending the Aarhus Rules, suitably amended, to all JR claims. The fact that most JR cases fall into a standard pattern makes it possible to set default figures as caps, even though it is not practicable to draw up a grid of FRC.
- (iv) The discipline of costs management should be available in larger JR claims, at the discretion of the court.

¹³⁶ Public Law Project, [The Public Law Project's submission to Lord Justice Jackson's review of fixed recoverable costs](#) (January 2017).

¹³⁷ Rt Hon Lord Justice Jackson, [Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs](#) (July 2017) ch 10.

He then set out detailed proposals for extending a modified form of the Aarhus Rules to all JRs (paras 3.1 to 3.6), describing this as a “modest proposal”.

Between 28 March 2019 and 6 June 2019, the government consulted on implementing the recommendations in Lord Justice Jackson’s report. The consultation did not seek views on Lord Justice Jackson’s proposal to extend the Aarhus regime to all JRs. Its main proposal in relation to judicial review was the introduction of costs budgeting for JRs in which costs are ‘likely to exceed £100,000’. PLP’s response to that consultation set out our position that:

1. While in principle costs budgeting might play a role in increasing access to judicial review, there is not sufficient evidence at present to support the proposal, or to determine whether the threshold of £100,000 is correct. Moreover, given the stage at which costs budgeting was proposed to be introduced, it is at least highly questionable whether the likely benefits would justify the added time and expense.
2. Before proceeding with the proposal, the Government should (i) undertake or commission further research, (ii) ask the Civil Procedure Rules Committee to prepare and consult on draft rules, and (iii) carry out a small scale pilot to better understand the costs and benefits.
3. It is essential that the Government consult on implementing Lord Justice Jackson’s recommendations to extend the Aarhus rules to all judicial reviews and/or his earlier recommendation to introduce a form of Qualified One Way Costs Shifting (QOCS) in judicial review. There is no clear evidence base for the view, expressed in the consultation paper, that because of the availability of legal aid and CCOs, there is “no access to justice issue in respect of non-Aarhus JRs”. This view was apparently based on a roundtable with Government lawyers. PLP subsequently discovered that there wasn’t even a minute of that discussion. In our consultation response we explained why the availability of CCOs and legal aid did not provide sufficient guarantees of access to justice:

CCOs are only available once permission is granted (so claimants have to already have committed to the risk of costs exposure). CCOs are only available in public interest cases. In addition, claimants must still be willing to take significant – albeit certain- financial risks (for example exposure up to £5,000 costs cap) which is prohibitive for many claimants. As noted in our submissions to Sir Rupert Jackson’s review, ATE insurance is generally not available in judicial review. Although there is very little research on crowdfunding, PLP notes that it is not suitable or viable in many cases e.g. if the issue will not attract popular interest, the claimant does not have the capacity or support to run a public funding campaign etc.

There are widespread difficulties with the availability of legal aid nationwide (including in the public law category), as well as serious, widespread and evidenced concerns that the means thresholds are so low that even poverty hit families do not qualify for legal aid. Those who have a claim for judicial review which does not satisfy the public interest test for a CCO, persons of modest means who are financially ineligible for legal aid or cannot find a legal aid lawyer to take on their case, and those with public interest cases but unable

to take a significant financial risk at the pre-permission stage before a CCO can be granted, do not currently have meaningful access to judicial review.¹³⁸

The government has not published a response following this consultation. PLP's position has not changed: there is a need for further research and consultation before cost management is introduced in judicial review proceedings, and the government should consult on implementing Lord Justice Jackson's proposals which are designed to address the real barrier which costs pose to access to justice in judicial review proceedings. In PLP's view, the Panel should avoid making any other recommendations in relation to reforming costs until the government has considered and published its response to this consultation exercise.

Interveners' costs

Although the Call for Evidence does not ask specifically about Interveners' costs, we note that the Terms of Reference invite the panel to consider whether reforms to streamline judicial review are necessary "in particular... (g) on costs and interveners".

The rules on interveners' costs in the High Court and Court of Appeal were the subject of reform as recently as 2015 when they were placed on a statutory footing.¹³⁹ They are now governed by s 87 of the Criminal Justice and Courts Act 2015 (CJCA). PLP, JUSTICE and the Bingham Centre for the Rule of Law published a report on the CJCA in October 2015.¹⁴⁰ Chapter 3 of the report contains a detailed consideration of the important role of interveners and the costs rules in s 87 of the CJCA.

In summary, s 87 of the CJCA provides that a court cannot order the parties to pay the interveners' costs other than in exceptional circumstances. If one of the parties applies for costs against an intervener, a court must order costs if one of four conditions applies, unless there are exceptional circumstances making it inappropriate.

Courts have appropriate case management powers in relation to (proposed) interveners, who always require the court's permission. If the application for permission to intervene indicated that the proposed intervener's evidence would be out of scope of the claim or would otherwise not assist a court, permission would likely be refused. When permission is granted, a court's order usually sets out the scope for the intervention. The order would also usually set out whether the intervener's submissions are limited to writing or grant a short period for oral submissions. As such, the court is able through its case management powers to control the involvement of

¹³⁸ Public Law Project, [The Public Law Project's submission to the Ministry of Justice's consultation 'Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals'](#) (June 2019).

¹³⁹ Different rules apply in the Supreme Court. Supreme Court rule 46(3) provides that "orders for costs will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so...".

¹⁴⁰ Bingham Centre for the Rule of Law, Public Law Project and JUSTICE, [Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4](#) (22 October 2015).

interveners, backed up by the prospect of a costs order under s 87 of the CJCA if the intervention exceeds the scope of what is of assistance to the court.

PLP is unaware of any empirical evidence or data on the impact of s 87 of the CJCA. In particular, we are not aware of any evidence that the courts' approach to ordering costs against interveners is unduly lenient and nor are we aware of any cases in which a party has applied for costs against an intervener under s 87 and the court has refused to make such an order. In PLP's view, given how recently these reforms were made, in the absence of such evidence there is no case for further reform.

Moreover, in our experience as an intervener, and as lawyers for (prospective) interveners, the current rules on interveners' costs have a considerable chilling effect. Many charities that could provide valuable evidence to assist the Court are deterred from applying to intervene because of the adverse cost risk. Increasing the cost risk for interveners would further deter prospective interveners who could assist the Court.

Question 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?

As with our answer to question 7, we have already submitted evidence on costs in our response to the Jackson Review, and our position has not changed.¹⁴¹ We will address issues of standing in response to question 13, below. On the proportionality of costs in JR, we concluded that:

In general, we do not consider there is any evidence to suggest that the level of our recoverable costs are disproportionate to the work we undertake or the outcomes we achieve, particularly in cases in which there is often a public interest element. Equally, and despite our active presence in the UK administrative justice research arena, we are not aware of any empirical data suggesting that the level of recoverable claimant costs in judicial review are disproportionate and/or impeding access to justice more generally; nor are we aware of any data which indicates that the costs of assessing costs in judicial review is problematic. On the contrary, our understanding is that the current availability of recoverable costs (uncapped save for the powerful assessment principles of necessity, reasonableness and proportionality) actively enable claimant practitioners to continue to undertake high quality work on behalf those of no or limited means.

Lord Justice Jackson received over 400 responses to his review and to our knowledge that is the most extensive recent evidence base on the costs of judicial review. As noted above, he did not consider that the evidence showed that the costs of JR were unmanageable. In the absence of further empirical research there is no basis for concluding that the costs of JR are disproportionate.

Judicial review is unlike other litigation

Judicial review proceedings are different to other forms of civil litigation. The nature of the relief ordinarily sought in judicial review proceedings means that it is not possible to identify the complexity of the cases from the remedies obtained or the value of damages (if any) awarded, and it would be inappropriate to try. As Lord Justice Jackson identified in his final report, “even though many JR cases fall into a standard pattern, costs are too variable to permit the introduction of a grid of [Fixed Costs Recovery].”

Similarly, it is inappropriate to engage in a pure cost-benefit analysis when determining what costs are appropriate for judicial review proceedings. Damages are usually a subsidiary aspect of the relief sought. The primary relief rarely has financial value, for example, a declaration that a public authority has violated an individual’s rights. A considered approach to proportionality, rather than

¹⁴¹ Public Law Project, [The Public Law Project’s submission to the Ministry of Justice’s consultation ‘Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s Proposals’](#) (June 2019). See in particular the section headed ‘Judicial Review – PLP Evidence on Costs and Costs of Costs’ at 19-20.

a simple ‘weighing’ exercise, is required as the benefit of relief includes upholding the rule of law and acting as a check on executive power.

Fragility of the public law supplier base

Any proposals to reform costs for judicial review must be cognisant of the fragility of the claimant public law supplier base. There are areas of the country where the lack of public law solicitors represents a significant barrier to individuals accessing judicial review. There has also been a significant contraction in the public law legal aid supplier base following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Before making any recommendations regarding the “proportionality” of costs, there needs to be detailed empirical research regarding the sustainability of the public law supplier base to ensure that any reforms are evidence-based, and improve rather than undermine access to justice.

Question 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?

In general, we consider that the existing judicial review remedies are sufficiently flexible. Judicial review remedies are discretionary.¹⁴² A claimant who establishes that a public body has acted unlawfully is not necessarily entitled to any particular relief. This enables the court to ensure that judicial review remedies are appropriate to the circumstances of the particular case:

1. The court **must refuse to grant relief** if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.¹⁴³
2. The court **may refuse to grant relief** in the exercise of its discretion.¹⁴⁴ For example, if the claimant has unduly delayed in making their application for judicial review, the court can decline to grant relief where it would be “likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”.¹⁴⁵
3. The court **can tailor the specific relief granted** where it might have significant adverse consequences for public administration or for the general public. In *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills*, for example, the High Court declined to quash regulations made in breach of the public sector equality duty.¹⁴⁶ Quashing the relevant regulations “would cause administrative chaos, and would inevitably have significant economic implications”, and there had been “very substantial compliance in fact” with the Secretary of State’s statutory duties.¹⁴⁷ Instead, the Court made a declaration to the effect that the Secretary of State had breached the law.¹⁴⁸ In a range of other circumstances, courts have similarly opted to grant declaratory relief over quashing orders.¹⁴⁹

¹⁴² *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 656 (“the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary”). See also Timothy Endicott, *Administrative Law* (2nd edition, Oxford University Press, 2011) 384 (“The court’s powers in judicial review proceedings are extremely flexible”).

¹⁴³ Senior Courts Act 1981 s.31(2A). See *Berkeley v Secretary of State for the Environment* [2000] UKHL 36 for an exercise of remedial discretion at common law on similar grounds.

¹⁴⁴ See, e.g., *R (English Speaking Board (International) Ltd) v Secretary of State for the Home Department* [2011] EWHC 1788 (Admin).

¹⁴⁵ Senior Courts Act 1981 s.31(6). See, e.g., *R v Dairy Produce Quota Tribunal, ex parte Caswell* [1990] 2 AC 738.

¹⁴⁶ [2012] EWHC 201 (Admin).

¹⁴⁷ [2012] EWHC 201 (Admin) at [97].

¹⁴⁸ [2012] EWHC 201 (Admin) at [100].

¹⁴⁹ See, e.g., *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1; *R (South West Care Homes Ltd) v Devon County Council* [2012] EWHC 1867 (Admin); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin); *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438; *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778.

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

PLP is unaware of any empirical evidence regarding causes of unnecessary judicial reviews. Here, PLP highlights two possible areas for further research:

First, the level of substantive engagement with pre-action correspondence appears to vary between public authorities. If a public authority does not properly engage with a proposed claim for judicial review at the pre-action stage, it is possible that they will not recognise a clearly unlawful decision at an early stage in proceedings, and judicial review claims will proceed unnecessarily when the authority should have conceded.¹⁵⁰

Second, the level of compliance by public authorities with their duties of candour appears to vary considerably. There is an imbalance in knowledge between a claimant and a public authority when a claim for judicial review is initiated. If a public authority rigorously complies with its duty of candour and requests for disclosure, a claimant may be able to recognise when a claim no longer has merit and can discontinue it at an earlier stage. For example, whether there has been a breach of the public sector equality duty under s 149 of the Equality Act 2010 is often contingent on whether an Equality Impact Assessment (EIA) (or other document that evidences their compliance with the duty) has been completed. If the EIA is not in the public domain, and the public authority does not disclose it, the claimant may continue with a claim for judicial review unnecessarily.

¹⁵⁰ See Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation, 1 July 2019) 77–9.

Question 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?

Settlement is very common in judicial review cases.¹⁵¹ Although not easy to quantify, a significant proportion of cases—up to 60%—are settled prior to formal commencement of proceedings.¹⁵² In 2019, 25% of applications lodged with the Administrative Court were withdrawn before reaching the permission stage, either because the case was settled or for other reasons.¹⁵³ Even after being granted permission, a significant number of applicants ‘drop out’, usually due to receiving settlement offers, with as many as 30% of cases being withdrawn at this stage.¹⁵⁴

The majority of settlement offers are made by the government. Whilst sometimes they are made in order to save time or money, research suggests that a significant portion of such offers are made because government lawyers recognise the merits of the claim.¹⁵⁵ Often, settlement offers are made when ‘obvious’ errors such as ‘copy and paste’ decisions are drawn to the attention of public authorities.¹⁵⁶ For claimants, settlement usually provides a satisfactory result.

It is artificial to view settlement as operating outside of the judicial review system itself. As Lord Reed JSC noted in a different context, negotiation and settlement “can only work fairly and properly if they are back up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail.”¹⁵⁷ Whilst settlement obviously differs from having a claim formally determined by a court, it still resolves a grievance in practice. It is often only through the lodging of a judicial review claim that an issue is brought to the attention of the government and its lawyers. Lodging a complaint before the Administrative Court may compel a timely response from public bodies, which is especially important for certain claimants in positions of vulnerability. Indeed, it is estimated that more than half of all homelessness and asylum cases lodged before the Administrative Court are settled by the government in a manner which favours the claimant.¹⁵⁸ Settlement offers an avenue for effective and speedy resolution of grievances, benefitting both claimants and public bodies.

¹⁵¹ See also text accompanying n 23 to 30 above.

¹⁵² Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009).

¹⁵³ Ministry of Justice, *Civil Justice Statistics Quarterly: April to June 2020* (3 September 2020) Tables 2.1 and 2.2.

¹⁵⁴ Robert Thomas, ‘Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis’ [2015] *Public Law* 652.

¹⁵⁵ Varda Bondy and Maurice Sunkin, ‘Settlement in Judicial Review Proceedings’ [2009] *Public Law* 237.

¹⁵⁶ Robert Thomas, ‘Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis’ [2015] *Public Law* 652.

¹⁵⁷ *R (UNISON) v Lord Chancellor* [2017] UKSC 51 at [72].

¹⁵⁸ Varda Bondy and Maurice Sunkin, ‘Settlement in Judicial Review Proceedings’ [2009] *Public Law* 237; Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009). The settlement rate in other areas, for example judicial review of police actions, tends to be much lower.

Question 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?

Alternative dispute resolution (ADR) already plays an important role in judicial review proceedings:

1. Judicial review is a remedy of last resort.¹⁵⁹ Where a claimant has a suitable alternative remedy, the court may refuse permission or relief, or make an adverse costs order.¹⁶⁰ This encourages claimants to pursue other available avenues of redress, such as internal reviews, complaints processes and statutory appeals, before turning to judicial review.
2. The Pre-Action Protocol requires the parties to exchange views on the lawfulness of the particular decision at an early stage. It also requires the parties to set out and respond to proposals for ADR, and indicates that costs consequences may follow any unreasonable refusal to engage in ADR. In our experience, however, claimants frequently offer to engage in ADR at the pre-action stage, but defendants rarely accept such offers.
3. The permission stage is, in substance, “a form of early neutral evaluation”.¹⁶¹ The court can refuse permission to proceed for claims that are not arguable, and even where permission is granted, it gives parties an indication of “the strengths and weaknesses of their respective cases”.¹⁶²

Other forms of ADR, such as mediation, could potentially play a greater role in helping to resolve disputes between individuals and public bodies. In a 2009 study, only 6% of lawyers interviewed had experience of mediation in public law disputes.¹⁶³ Mediation could empower lay claimants, by giving them “an opportunity to take part in negotiations and present their own narrative”.¹⁶⁴ It could also help resolve disputes “where parties are in general agreement about the course of action required ... but need help to hammer out the detail”.¹⁶⁵

¹⁵⁹ See, e.g., *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835. See also Ministry of Justice, *Pre-Action Protocol for Judicial Review*, [9]–[10].

¹⁶⁰ See, e.g., *R (MD (China)) v Secretary of State for the Home Department* [2011] EWCA Civ 453; *R (Archer) v HM Revenue and Customs* [2019] EWCA Civ 1021.

¹⁶¹ Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 26.

¹⁶² Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 26.

¹⁶³ Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 28 n 6.

¹⁶⁴ Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 37–8.

¹⁶⁵ Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 46.

The suitability of ADR in any particular case will depend on a range of matters, however, including the following:¹⁶⁶

1. **Urgency:** A matter may be so urgent as to require a claimant to move immediately to judicial review. This is particularly the case where the claimant's life or liberty is at stake.
2. **Time limits:** As discussed above, judicial review is subject to tight time limits. These time limits constrain the capacity for claimants to engage in ADR, at least without also issuing parallel judicial review proceedings. Empirical research indicates that the time limits curtail negotiations "which might have resulted in settlement had there been sufficient time."¹⁶⁷
3. **Expense:** Requiring parties to engage in ADR may lead to increased costs if the ADR proves futile and the matter ultimately ends up in court.
4. **Nature of the dispute:** Many judicial reviews turn on binary questions of law that leave little room for compromise.¹⁶⁸
5. **Need to resolve a point of legal principle:** While ADR might help resolve particular disputes, it cannot authoritatively settle points of legal principle. When a judicial review ends with a judgment and orders, it provides other people in the same position as the parties with certainty and clarity about their legal rights and duties.¹⁶⁹ As one solicitor noted as part of a 2009 study, "it's really important that some of these points of principle go before the court and are determined ... otherwise we're faced with a complete stagnation of development of the law, and particularly for vulnerable people the law has to be clarified".¹⁷⁰

Each of these factors would require careful consideration in devising any proposal to expand the use of ADR in judicial review proceedings. It would also be necessary to ensure that funding arrangements (including the availability of public funding where necessary) were sufficient to mitigate any disparity of resources and/or power between the parties.

¹⁶⁶ See Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 17–24.

¹⁶⁷ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: the resolution of public law challenges before final hearing* (Public Law Project, 2009) 30–1.

¹⁶⁸ Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 46.

¹⁶⁹ See, in a different legal context, *R (UNISON) v Lord Chancellor* [2017] UKSC 51 at [72].

¹⁷⁰ Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (Nuffield Foundation and Public Law Project, 2009) 32.

Question 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?

The current rules governing public interest standing are appropriate and applied sensibly by the courts. A person can only bring an application for judicial review if they have a ‘sufficient interest’ in the matter to which the application relates.¹⁷¹ What constitutes a sufficient interest is a question of judgment to be determined in the particular circumstances of the case.¹⁷² In many contexts, it is necessary for a person to show some particular interest to bring a judicial review.¹⁷³ But this is not always necessary, for the following important reasons.

First, there might be no particular person who is more affected than the public at large. In *Ex parte Rees-Mogg*, for example, the England and Wales High Court accepted “without question” that Lord Rees-Mogg had standing to challenge the Foreign Secretary’s decision to ratify the Maastricht treaty because of “his sincere concern for constitutional issues”, and because there was no other identifiable claimant.¹⁷⁴ In these cases, public interest standing is essential to ensure executive accountability before the law.

Second, the direct impact of the challenged measure might “fall[] on a class whose members are likely to lack the financial and organisational resources required to litigate”.¹⁷⁵ Practitioners contributing to our Judicial Review Roundtables confirmed that in a number of cases, they worked with representative bodies to bring a judicial review claim because other parties who were more directly affected were unable or unwilling to bring a claim themselves. In these cases, public interest standing is essential to ensure that all people have access to justice, either directly or through an appropriate representative action.

Third, “a suitably expert organisation may be better placed to present arguments about the impact of policy on the affected class as a whole, rather than one individual in particular”.¹⁷⁶ In these cases, public interest judicial reviews promote efficiency. If a government decision affects a large number of people, this may result in many individual cases making overlapping claims based on different evidence, and possibly leading to inconsistent and confusing results. Well-timed, efficient representative litigation can offer the government an opportunity to concentrate its resources, argue its case fully, and bring clarity to the law.

This sensible approach to public interest standing promotes the constitutional purposes of judicial review. It recognises that judicial review exists not only to “redress individual grievances”, but also

¹⁷¹ Senior Courts Act 1981 s.31(3).

¹⁷² *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses* [1982] AC 617.

¹⁷³ *Walton v The Scottish Ministers* [2012] UKSC 44 at [94].

¹⁷⁴ *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552 at 562. See also the discussion in *R (DSD) v Parole Board for England and Wales* [2018] EWHC 694 (Admin) at [110].

¹⁷⁵ *R (McCourt) v Parole Board for England and Wales* [2020] EWHC 2320 at [43].

¹⁷⁶ *R (McCourt) v Parole Board for England and Wales* [2020] EWHC 2320 at [43].

to “maintain[] the rule of law”.¹⁷⁷ There is a strong public interest in the courts hearing meritorious challenges to government decisions.¹⁷⁸ Flexible rules of standing are in place “because of the importance in public law that someone should be able to call decision makers to account”.¹⁷⁹ An overly restrictive approach to standing would insulate executive action from accountability.

These rules do not open the floodgates to ‘busybodies’ and campaigning organisations. The courts apply the rules of standing carefully, based on what the rule of law requires in the particular case. They have recently made clear that campaigning activities and public and Parliamentary support alone are not grounds for standing to bring an application for judicial review.¹⁸⁰

This is supported by the available empirical evidence. There is no evidence that the courts are overly lenient in relation to public interest standing. Public interest judicial reviews are relatively rare.¹⁸¹ Over 75% of judicial review cases are brought by the individual directly affected by the decision under challenge, rather than an organisation, representative group or other public body.¹⁸²

There is no evidence of widespread use of the judicial review process to achieve political ends.¹⁸³ Neither the Terms of Reference nor the Call for Evidence, nor the Lord Chancellor in announcing the Review, has identified any cases which are said to have involved the conduct of ‘politics by other means’. The standing rules play, for the reasons set out above, an important role in upholding the rule of law by allowing the legality of the use of executive power to be brought before the court in appropriate cases in which it would not otherwise be brought to light.

The phrase also begs the question of what ‘politics’ means in this context. The lawfulness of executive policy and action goes to the heart of the constitutional purpose of judicial review. In

¹⁷⁷ *Walton v The Scottish Ministers* [2012] UKSC 44 at [90].

¹⁷⁸ *R v Somerset County Council, ex p Dixon* [1998] Env LR 111 at 117–21.

¹⁷⁹ *R v Secretary of State for the Home Department, ex parte Bulger* [2001] EWHC Admin 119 at [20].

¹⁸⁰ *R (McCourt) v Parole Board for England and Wales* [2020] EWHC 2320 at [50] (“In our view, [the claimant’s] interest is established by the effect of the decision on her and her family, and by a consideration of what the rule of law requires in this context, not by her campaigning activities and certainly not (as was at one stage suggested) by the public and Parliamentary support which those activities have attracted. Successful campaigners do not, by virtue of their success as campaigners, acquire standing to challenge public decisions with which they disagree; conversely, popularity or a high profile in the media or in Parliament is not, and must not be allowed to become, a precondition of access to the court”).

¹⁸¹ In addition, the rules on legal aid place a practical check on public interest judicial reviews. A claimant can only obtain legal aid for a judicial review if it has “the potential to produce a benefit for the individual, a member of the individual’s family or the environment”: Legal Aid, Sentencing and Punishment of Offenders Act 2012 sch 1 para 19(3). This means that, in most cases, a representative judicial review must be self-funded.

¹⁸² Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, University of Essex and London School of Economics, 2015). A separate study into judicial reviews of ombudsman decisions arrived at a similar figure. See Richard Kirkham, ‘Judicial review, litigation effects and the ombudsman’ (2018) 40(1) *Journal of Social Welfare and Family Law* 110.

¹⁸³ Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, University of Essex and London School of Economics, 2015).

that sense judicial review will often be ‘political’ in the sense of reviewing government policy directly or reviewing actions or omissions which may then sound in policy. If, on the other hand, what is being talked about is ‘party politics’, we have seen no evidence of political parties utilising judicial review as an inappropriate tool in the armoury of party tactics. Judicial review has been used by Members of Parliament (and further research may be warranted to explore the circumstances in which MPs bring judicial review in their representative capacity). However, the reality is that law and politics are inextricably bound together and what is ‘political’ is a matter of subjective assessment. It is unsurprising that an executive whose policies and actions are being challenged may construe such challenge as being ‘political’. It does not follow that such challenge is democratically inappropriate.

Even if it were possible to identify some outlying cases in which individuals or pressure groups have sought to use judicial review for political aims rather than to advance legitimate legal arguments, that does not found any case for reform of the standing rules. The court is able to control its own process and has well-established mechanisms to prevent abuse.

Annex A: PLP Judicial Review Roundtables

A list of participants in the Judicial Review Roundtables is given below. The Roundtables were held by video conference on 9 and 25 September and on 2 October 2020.

Over the course of the three two-hour sessions, the convenors and participants discussed many of the issues related to the Terms of Reference as well as the specific questions in the Call for Submissions. The format allowed for free and open discussion, and whilst hosted by PLP, discussions were not constrained by a particular agenda or viewpoint, whether of PLP or any other.

These discussions helped to solidify and develop some of PLP’s ideas, whilst challenging others. As such, whilst they were of significant use in the preparation of PLP’s submission, they informed rather than dictated PLP’s position. Our response should therefore not be understood to represent the views, individually or collectively, of Roundtable attendees.

Chairs:

Professor Paul Craig QC (Hon), University of Oxford
Dinah Rose QC, Blackstone Chambers and Magdalen College, University of Oxford

Rapporteurs:

Lewis Graham, Public Law Project and University of Cambridge
Dr Joe Tomlinson, University of York and Public Law Project

Participants:

Karen Ashton, Central England Law Centre
Sir Jack Beatson, Former Lord Justice of Appeal and Law Commissioner
Dr Joanna Bell, University of Oxford
Kirsty Brimelow QC, Doughty Street Chambers
Dr Natalie Byrom, The Legal Education Foundation
Lord Carnwath, Former Justice of the UK Supreme Court
Melanie Carter, Bates Wells Braithwaite
Rosa Curling, Leigh Day
Professor Liz Fisher, University of Oxford
Professor Sandra Fredman QC, University of Oxford
Polly Glynn, Deighton Pierce Glynn
Dr Catherine Haddon, Institute for Government
John Halford, Bindmans LLP
Ben Jaffey QC, Blackstone Chambers
Lisa James, University College London
Professor Peter John, King's College London
Professor Sir Jeffrey Jowell QC, Blackstone Chambers
Professor Jeff King, University College London
Lee Marsons, University of Essex
Dr Chris McCorkindale, University of Strathclyde
Professor Aileen McHarg, Durham University
Professor Richard Moorhead, University of Exeter
Professor Tom Mullen, University of Glasgow
Dr Sarah Nason, Bangor University
Dr Elizabeth O'Loughlin, Durham University
Professor Kate O'Regan, University of Oxford, former Justice of Constitutional Court of S. Africa
Lord Phillips, Former President of the UK Supreme Court
Alison Pickup, Public Law Project
Sir Stephen Sedley, Former Lord Justice of Appeal
Professor Maurice Sunkin QC, University of Essex
Professor Robert Thomas, University of Manchester
Professor Alison Young, University of Cambridge
Dr Jan van Zyl Smit, Bingham Centre for the Rule of Law