



Public Law Project

PLP Statement on the Independent Review of Administrative Law Process

Reform of judicial review is a constitutionally serious undertaking. In our view, the Independent Review of Administrative Law Panel has been subjected to significant constraints, which mean that the Review cannot provide a sound basis for reform of judicial review.

First, the Panel has not been given enough time to adequately consider the issues raised by the Review. The scope of the Review is significant. But the Panel is planning to issue its report by Christmas, and the Call for Evidence provided only six weeks for public bodies and members of the public to respond. Although this has been extended by a week, there is not enough time for the Panel to do its job. Neither the consultation window, nor the more general timeframe under which the Panel is operating, is appropriate for a wholesale review of administrative law. Notably, the time available is much shorter than for previous reviews of administrative law. The Law Commission's two previous reviews, completed in 1976 and 1994, included 18 months and six months of consultation, respectively.¹ Sir Geoffrey Bowman's 2000 review was the product of a year-long process.²

Second, it is impracticable for the Panel to gather adequate evidence on the operation of judicial review in the time available. The Terms of Reference and the Call for Evidence ask the Panel to proceed on the basis of evidence.³ They ask the Panel to consider not only how judicial review is operating today, but also how it has developed 'over the last thirty to forty years.'⁴ This is a formidable task. Some critics of judicial review focus on a handful of high-profile cases.⁵ But this is no way to get a detailed and accurate picture of how judicial review is operating on the ground. Evidence-based reform of judicial review would require, among other things, a careful analysis of the full run of cases going through the system. It would also require detailed engagement with the available empirical evidence. Academics and civil society organisations have already done important work in this area but there remain many

¹ Law Commission, *Report on Remedies in Administrative Law* (Law Com No. 73, March 1976); Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No. 226, 26 October 1994).

² Lord Chancellor's Department, *Review of the Crown Office List: A Report to the Lord Chancellor* (2000).

³ Terms of Reference 1 (The Review 'should consider data and evidence on the development of JR and of judicial decision-making'); Call for Evidence 4 ('The panel are particularly interested in receiving evidence around any observed trends in judicial review, how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by judicial review.').

⁴ Call for Evidence 2.

⁵ See, e.g., Richard Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 2019).

significant gaps in our knowledge about the issues raised by the Review.⁶ In short, as a legal community, we currently lack the evidence required for the Panel to answer those questions and such a compacted timeframe exacerbates that problem.

Third, the questionnaire will not provide an accurate picture of judicial review. There does not appear to be any mechanism for ensuring that the questionnaire elicits a representative, balanced view of judicial review. The questionnaire's focus is the perceived negative effects of judicial review, rather than its positive role in protecting individual rights and interests, furthering the rule of law, and promoting good governance.⁷ Further, the questionnaire is addressed only to 'Government Departments.'⁸ Cases against local authorities, ombuds services, regulators, NHS bodies, and lower courts and tribunals make up a significant proportion of the overall judicial review caseload.⁹ At least some of these bodies have different responsibilities, different levels of resources, and different skill-sets from central government, which would influence their experience of judicial review. Empirical research has shown how judicial review can improve the decision-making of these bodies.¹⁰ The questionnaire is, on its face, unlikely to adequately capture their views and experiences. The questionnaire also lacks any reference to a number of important matters under consideration by the Panel, such as whether the duty of candour should be modified or limited.¹¹ Without inviting comments on all matters under review, subsequent reform risks lacking legitimacy.

Fourth and relatedly, given the considerations above and the importance of transparency, we strongly urge the Panel to publish all of the responses to the Review, including the questionnaires completed by government departments and other public bodies. This is essential to enable people to understand and engage with the Review and the Panel's ultimate findings.

⁶ For example, the Terms of Reference ask whether codifying the law of judicial review would 'increase public trust and confidence' in judicial review (Note C), but there is no current data on this and it would be impossible to gather it in the time provided by the Review.

⁷ For example, the first and most detailed question asks whether any of a number of 'aspects of judicial review seriously impede the proper or effective discharge of central or local government functions'. It makes a passing reference to 'the importance of maintaining the rule of law', but does not ask respondents to address or provide evidence on that fundamental issue. The second question asks whether 'the prospect of being judicially reviewed improve[s] your ability to make decisions', but immediately follows this by asking whether it 'result[s] in compromises which reduce the effectiveness of decisions'. The third question asks whether there are 'any other concerns about the impact of the law on judicial review on the functioning of government (both local and central)'.

⁸ Call for Evidence 6. This is despite the fact that the Call for Evidence elsewhere mentions local authorities.

⁹ See, in relation to local authorities, Lucinda Platt and others, 'Mapping the use of judicial review to challenge local authorities in England and Wales' [2007] Public Law 545, and in relation to ombuds services, Richard Kirkham, 'Judicial review, litigation effects and the ombudsman' (2018) 40(1) *Journal of Social Welfare and Family Law* 110.

¹⁰ See 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.

¹¹ The Terms of Reference confirm that the Review is considering whether "procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular ... in relation to the duty of candour, particularly as it affects Government" (1).