BDB PITMANS

THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

CALL FOR EVIDENCE

RESPONSE FROM BDB PITMANS

26 OCTOBER 2020

INTRODUCTION

BDB Pitmans is a top 100 UK law firm. Our London headquarters are based in the City, and we have further offices in Reading, Cambridge and Southampton.

Our public and administrative law practice comprises some 30 lawyers - 10 partners and 20 qualified solicitors or barristers. We provide a market leading service as litigators, advisors and legislative drafters.

Our client base covers central and local government, the wider Public Sector, the Third Sector, regulators, corporate bodies and individuals.

THE REVIEW AND CALL FOR EVIDENCE

The Government launched the Independent Review of Administrative Law (the Independent Review/IRAL) on 31 July 2020. The following eminent practitioners and academics were asked to form the panel (the IRAL Panel):

Lord Faulks QC

Professor Carol Harlow QC

Vikram Sachdeva QC

Professor Alan Page

Celina Colquhoun

Nick McBride

Terms of Reference (ToR) were also published, and to give effect to them, a Call for Evidence was made on 7 September 2020, with the deadline for responses set originally for midday on 19 October 2020, but subsequently extended to 5pm on 26 October 2020.

The intention is that the IRAL Panel will report back to the government by the end of this year.

OVERARCHING CONCERNS

Before turning to the questions posed in the Call for Evidence and the ToR, we wish to put on record at the outset a series of overarching concerns about the IRAL.

Foremost amongst these is the sheer breadth of the review, and of the questions asked in connection with it, coupled with the absence of any firm proposals for reform on which we and all those asked to comment can focus in our response.

The Call for Evidence in particular refers to the government's own Consultation Principles ("…the principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation…"). Yet, it is unclear whether this exercise is intended to be a formal consultation (if it is, it is surely flawed by reference to these principles), or simply early "market engagement". If the latter, it would be helpful to know what part in that process IRAL's promised report to the government at the end of this year will play, and what the subsequent steps will be.

For present purposes, we assume that no formal proposals for reform of judicial review will be made on the basis of the IRAL alone, not least because the constraints placed upon it (and especially those as to timing) preclude any sufficiently detailed and evidence-based analysis of the current arrangements.

We are unsure of the government's reasons for its request to IRAL to conduct this work now. Consultations on the reform of judicial review took place previously in 2012 and 2013. Some changes were made as a result; but nothing it seems to us has altered in the intervening period to require the task to be repeated again. Further, many good suggestions for procedural reform were made after the previous consultations, but left unactioned (see, for example, the *Bingham Centre for the Rule of Law Report 24/01: Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (**the Bingham Report**). We consider that rather than seeking to re-invent the wheel through IRAL, government's time would be better spent looking again at those proposals.

We are also unpersuaded that the government understands: the pivotal place that judicial review occupies in our constitutional settlement, and its impact on other areas of law; the importance when thinking about reforming it of considering all the branches of state that will be affected – that is, Parliament, as well as the executive and the judiciary; and the scope for ill-considered and hastily implemented proposals to cause a constitutional crisis.

RESPONSE TO CONSULTATION QUESTIONS

SECTION 1 – QUESTIONNAIRE TO GOVERNMENT DEPARTMENTS

1 ***In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?***

a. ***judicial review for mistake of law***

b. ***judicial review for mistake of fact***

c. ***judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)***

d. ***judicial review for disappointing someone's legitimate expectations***

e. ***judicial review for Wednesbury unreasonableness***

f. ***judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account***

g. ***any other ground of judicial review***

h. ***the remedies that are available when an application for judicial review is successful***

i. ***rules on who may make an application for judicial review***

j. ***rules on the time limits within which an application for judicial review must be made***

k. ***the time it takes to mount defences to applications for judicial review***

2. ***In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?***

3. ***Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?***

From this, we would appreciate your response to the following questions:

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

We make our detailed comments about many of the issues touched on in the questionnaire later in the body of this response.

For now, we would simply flag that the questionnaire itself seems to us to be loaded; and to set up false dichotomies – for example, between the respective branches of state, and between government and the people it serves. It is also regrettable (and, we think, unfair) that IRAL has not sent corresponding questionnaires to other key groups from which it seeks views, and which are likely to have a very different perspective from government on the issues of concern.

2. ***In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?***

We develop some suggested improvements to the current process of judicial review in the body of our response below. In summary, though, we think there may be scope to encourage greater engagement with the pre-action protocol process by permitting the extension of time limits by consent; and arguments for new stand-alone grounds of judicial review. We also think there would be merit in clarifying the nature and extent of any duty to give reasons.

SECTION 2 - CODIFICATION AND CLARITY

3. **Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?**

In addition to the question set out above in the Call for Evidence, Question 1 in the ToR asks: "Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute."

The law on judicial review – both the decisions which are amenable to it and the grounds on which they can be challenged - has evolved through the common law over centuries. It is well-understood by specialist lawyers and judges and is applied consistently. It would be impossible to recreate in statute the nuance and flexibility of the case law, which has evolved alongside the public sector itself, and can be applied to meet the changing mores of our constantly changing society. It would be impossible for statute to anticipate every type of decision which can be subject to judicial review (something tacitly recognised in the catch-all category in the list of grounds in the IRAL questionnaire to government departments), or to detail every possible ground of challenge; the only result would be a deluge of satellite litigation, and as a result judges supplementing the statutory grounds with tried and tested common law principles.

We note at this point IRAL's intention to consider the position in other common law jurisdictions and, in particular, Australia. It is well-documented that any such comparative exercise must, to be of value, take account of the cultural, economic and political background of the relevant jurisdiction, as well as its legal framework. We find it hard to see how the comprehensive comparison that would need to be undertaken could be achieved by IRAL, given the constraints that have been imposed upon it, not least in terms of time.

Further, even on a high level analysis, it is difficult to see why the Australian experience of codification especially is thought to offer a preferable model to the English law one, when the codified law forms only one part of the bigger public law picture in Australia, a factor which of itself has led to considerable confusion on occasion – and, as noted above, associated satellite litigation.

Given that neither the profession nor the courts have expressed concerns about the clarity of the current law in this jurisdiction, we presume that the intention of the Independent Review is to narrow the scope of judicial review rather than to expand or clarify it. For the reasons explained below, in our view that would be a grave error.

The IRAL has indicated its plan to examine whether the separation of powers has been tipped too far in favour of the courts, enabling them to "conduct politics by another means". We assume this is the result of high profile challenges to government decisions in recent years, and in particular those cases which focussed on the government's approach to Brexit. It appears that any intention to codify the law on justiciability is motivated by a desire to place certain categories of executive decision beyond the reach of judicial oversight altogether. That would be a decision of vast constitutional significance, and not one which should properly be made following the relatively swift and limited review currently being undertaken by the IRAL Panel.

There also appears to be an underlying assumption in some quarters that a substantial percentage of judicial review challenges are vexatious, and are used by "activists" to delay perfectly good decisions taken by the government and other public bodies. As a firm which acts extensively for defendants in judicial review, that has not been our experience. Vexatious claims are swiftly filtered out at the permission stage.

Further, with all due respect to our public authority clients (and we know they themselves would concede this), their decision-making is not always perfect, at the executive level or more generally – and particularly when the resources available to them are increasingly stretched. Judicial review plays a crucial role in redressing serious failures where they arise, and in encouraging a culture of diligent decision-making and record-keeping.

Ultimately, we take the view that codification would not simplify judicial review, but would instead be likely to cause greater confusion, and to be at odds with any attempt to streamline the process.

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 first part of our answer to this question also contains our response to Question 2 of the ToR, which asks: "Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government."

We disagree with the premise[1] that "historically, there was a distinction between the scope of a power…and the manner of the exercise of a power within the permitted scope" and that "over the course of the last forty years (at least), the distinction between "scope" and "exercise" [of a power] has been blurred by the courts". We therefore reject the implied assumption that, at some point in history, the manner of the exercise of a power was non-justiciable and that this position has been eroded over time to broaden the scope of judicial review.

Actions akin to judicial review have existed, in various guises, for over 450 years and we can find very little evidence of this distinction between "scope" and "exercise" ever existing in rigid terms. On the contrary, case law from the 17th century onwards is replete with examples where the manner in which powers have been exercised has been the subject of judicial review. There are many cases – *Kruse v Johnson*[2] being just one – that illustrate that the courts have, for a very long time, been able to challenge the exercise of power. The court in *Kruse* explained that its duty was to condemn byelaws made by local authorities if they were *"found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men"*[3]. The manner of the exercise of a power has always been justiciable by the courts; the notion of some clear difference between "scope" and "exercise" is a fallacy.

As we have noted already, judicial review is inherently flexible, but that is a virtue not a vice. It has adapted over time from being principally a means by which to mediate between public and private interests, to a key constitutional check and balance ensuring that public bodies discharge their statutory and common law duties in the public interest. Just as judicial review itself has adapted over the years to meet the needs and expectations of a changing societal compact between citizens and the state, so the concept of "justiciability" has evolved too.

The exercise of statutory power (whether derived from primary or secondary legislation) will be subject to judicial review. The position in that regard is clear and would not be rendered any more so by codification.

It is equally clear that an exercise of prerogative power should not automatically be beyond the reach of judicial review. Any proposal to reverse that position would be damaging to our constitution and democracy, and to the rule of law.

At the same time, there are well-accepted "excluded categories" of prerogative power, which are not amenable to judicial review, including, for example, the making of treaties and the defence of the realm. Contrary to opinion in some quarters, the decision of the Supreme Court in *R(Miller) –v- The Prime Minister [2019] UKSC, 41, [2020] AC 373* did not serve to open up to judicial scrutiny a previously "excluded category" of prerogative power. Rather, it re-

[1] See in particular footnote E to the ToR

[2] [1898] 2 QB 91

[3] Ibid, 98-100

stated the orthodoxy: where a prerogative power whose subject matter puts it beyond judicial review is exercised within its proper limits, there will be no recourse to the courts; but questions about the existence and limits of a prerogative power have always been – and remain –matters squarely for the judges.

Again, we do not consider any attempt to codify the non-justiciable prerogative powers to be desirable. It would not, in practice, deliver clarity; and to the extent that the exercise was designed to allow the government and other public bodies to act without appropriate judicial scrutiny, it would threaten fundamental rights – including, notably, the right of access to justice – and greatly undermine the commitment to fairness so highly-valued in our society. Further, there is a real risk that it would result in a constitutional crisis, if Parliament were to attempt to incorporate into legislation provisions purporting to oust the courts' jurisdiction[4].

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

Although not entirely clear, we presume that limb (i) is intended to focus on a proposed codification of the grounds on which a decision could be found to be unlawful and/or a narrowing in the scope of those grounds. For the same reasons discussed above, we do not consider that codification would be helpful, nor that any such narrowing would be justified. The current grounds of judicial review are clear and well-understood, by the courts and practitioners. To the extent that some litigants in person, for example, do not have such a ready understanding, we would suggest that the solution to that issue lies in an increase in the funding available to bring judicial review, which would in turn allow those who, absent that funding, would be litigants in person to retain qualified representatives. If anything, a strong case could be made for adding to the list of recognised grounds, for example to allow proportionality to be taken into account much more widely than is currently the case, and to include a stand-alone ground based on the principle of equal treatment.

As to limb (ii) - "should those grounds depend on the nature and subject matter of the power?", our view is that they should not, or at least not any more than is currently the case, where the context of a particular challenge does inform the intensity of rationality review, for instance. In broader terms, though, it would be impossible to categorise every possible public law power by "nature" or "subject matter", and equally impossible then to specify grounds of unlawfulness applicable to decisions made pursuant to each category of power.

Turning to limb (iii) - "what remedies should be available in respect of the various grounds on which a decision may be declared unlawful?", it is not clear whether the government intends to start from scratch in determining what remedies should be available to a successful party in a judicial review, or whether the intention is to evaluate whether the existing remedies are

[4] See Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 and R (Privacy International) v Investigatory Powers Tribunal & Ors [2019] UKSC 22 for a full discussion of the issues.

appropriate. We note in this regard that the introduction of the "no substantial difference test" (in section 31 of the Senior Courts Act 1981) has already had a substantive effect in restricting the availability of relief in judicial review. Further, and more generally, the granting of relief is always a matter of discretion for the court, and subject to a long-established, and clear set of rules and principles.

In respect of decisions which are found to be unlawful, in almost all cases the claimant's preference is for the decision to be revoked (i.e. quashed). A quashing order also impliedly gives the public body an opportunity to reconsider its decision in appropriate circumstances, which means it may not always be as unwelcome to the defendant body to which it is directed as it might initially appear. We would not (to the extent that this is proposed) support any move to replace quashing orders with declarations of incompatibility (familiar from the human rights context), as they would create obvious practical difficulties – for public bodies and those dealing with them alike – and are not consistent with an overarching aim of making the law clearer.

The availability of other remedies, in particular prohibiting and mandatory orders, adds a degree of additional flexibility, and our view is that those remedies should also be maintained. We see no reason to limit the categories of cases in which certain remedies are available, rather than simply allowing the judge, having heard the case, to determine which remedy is appropriate.

Our view is that the available remedies should stay as they are. They are tried and tested and sufficiently broad to cover all types of claim.

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?**

We have considerable experience of bringing and defending judicial review claims, and of acting in appeals against judicial review decisions to the Court of Appeal and the Supreme Court. We consider the process at each stage to be clear.

From the ToR, however, appeals seem to be an area of particular concern for the IRAL. This is particularly surprising, given the substantive reforms to the appeals process made relatively recently, and as a result of earlier consultations by this government on judicial review – namely the removal of the right to an oral renewal hearing in any case certified to be "totally without merit"; the imposition of a fee for any oral hearings that are allowed; and the provision of a broader right of "leapfrog appeal" from first instance to the Supreme Court.

It is right that the government and other public bodies are not deflected from their core functions by frivolous or spurious litigation: but it is equally important that cases that raise genuinely important issues and are potentially of wider relevance are heard, where appropriate, by the Court of Appeal or the Supreme Court. Also, experience shows that oral

advocacy can be a potent weapon[5], and in our view it would be a dangerous and retrograde step to further limit, or even remove, access to it. The appeals process as it stands achieves the necessary balance effectively; it seems to us that any further reform to restrict appeals would inevitably disturb that balance.

At the same time, we do not exclude the possibility of further refinements to allow those appeals that are brought to progress more efficiently than they do at present. As noted earlier in this response, the Bingham Report contains many practical and carefully-crafted recommendations that would bear close consideration. Of particular relevance to the question of appeals is R22 which proposes that: *"Claimants could be permitted to invite the Administrative Court to grant permission, dismiss the substantive application, and grant permission to appeal to the Court of Appeal."*

Duty of Candour

The Call for Evidence does not mention the duty of candour, but Question 4 of the ToR asks: "Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government."

The general thrust of this question appears to be that the obligations arising from the duty of candour are unduly onerous, especially for government, and that consideration should be given to alleviating that burden in the future. However, the duty of candour is in fact less burdensome than the disclosure obligations in other types of civil litigation. In general a statement from a public official setting out the decision making process is taken at face value and supporting documents do not necessarily need to be produced. It is only if the Court does not consider the information provided to be full and frank that it may consider it appropriate to draw inferences against the decision maker. There is also scope for claimants to make specific disclosure applications, if the interests of justice require it.

Further, it is worth remembering that the government's own guidance[6] (**Tsol Guidance**) on the duty of candour was produced in response to the failure by government in high profile litigation to comply properly with it.

Although defendant public bodies may consider the duty of candour to be onerous (and in the case of complex decisions it can be, in practice), the reality is that good administration and government requires decision makers to know, and to be transparent about, and accountable for, their decisions and the underlying reasons for them - whether or not those

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[5] *The Queen (on the application of Mohammed Zahir Khan) –v- Secretary of State for the Justice Department [2020] EWHC 2084 (Admin)*, is but one recent example of an important case in which permission to appeal was granted at an oral renewal hearing.

[6] Treasury Solicitor's Department, "Guidance on discharging the duty of candour and disclosure in judicial review proceedings" (January 2010).

decisions are the subject of challenge. If the reasons are known, disclosing them frankly in court proceedings should not cause undue problems and should promote good practice.

In our experience the system generally works well and the duty of candour seldom causes an issue. Our defendant clients do their utmost to comply and generally consider it a good discipline as it is important that they know what information they held at the relevant time, how it contributed to their decision-making, and also where that evidence is.

Of course, the duty of candour is only one of the means of obtaining information; others being available pursuant to the Freedom of Information Act 2000, for example, or the Data Protection Act 2018 (and the General Data Protection Regulation). In many other jurisdictions, access to the decision making file is a right even at the earliest stage of decision-making itself. By contrast, in this jurisdiction, people's rights to access information about the reasons underpinning a decision is already quite limited, and we think if any change is to be made at all, those rights should be broadened, not narrowed.

In our experience, the main issue is that sometimes claimants will only receive a full account of a decision with the detailed grounds, and have therefore to negotiate the pre-action and permission stages on the basis of incomplete information. Not infrequently, we ask the decision makers specific questions pre-action about the reasons underpinning their decision, only to be told that we will receive details of those reasons if and when permission is granted.

This is despite the Tsol Guidance clearly providing that: *"[t]he duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions"*.

Further, in our view the current, confused position is not really in the interests of claimants or defendants. We would welcome greater clarity therefore about the stages at which the duty of candour applies, not only for government departments, but for defendants generally. We understand (and again the Tsol Guidance covers this) that there may be factors – for example, the volume of information sought, and the confidentiality of such information – which inevitably result in some delay in its provision. In general terms, however, we consider that early disclosure of the relevant evidence is likely to facilitate the early resolution of a greater number of cases, and therefore be consistent with the streamlining of the judicial process in which the IRAL in particularly interested.

Ultimately, judicial review cannot fulfil its pivotal constitutional function without disclosure. For the reasons set out above, in our view the only alternative to the duty of candour is a stricter disclosure duty of the sort required in other types of civil litigation. By definition, this would add to the burden of those on whom the duty was imposed, and increase the costs of judicial review litigation.

SECTION 3 – PROCESS AND PROCEDURE

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?***

Time Limits

We begin our answer to this question with some general observations. First, although certain judicial review claims can take some time to progress through the Courts, there are mechanisms for speeding up the process if the question of implementing (or not implementing) a decision is in any way time critical.

Secondly, decisions stand until the conclusion of a successful judicial review and so defendants are, in principle at least, in a position (unless an interim injunction is granted, at a hearing in which questions of good administration will be fully aired) to act on the basis of the decision reached.

Thirdly, we have seen nothing in practice to suggest that the current arrangements are insufficient to ensure "effective government and good administration without too many delays".

We turn next to some more specific comments on the applicable time limits in judicial review.

Currently, a judicial review claim in the Administrative Court must be brought promptly, and in any event within 3 months after the grounds to make the claim first arose. It is entirely possible therefore, and not infrequently the case, that claims brought within 3 months, but deemed not to have been issued promptly, are ruled out of time.

An equivalent time limit applies to judicial reviews in the Upper Tribunal, and there are shorter time limits for certain planning and procurement cases, for challenges to the decisions of public inquiries and for so-called "*Cart*" judicial reviews.

The Administrative Court does have a discretion to extend the 3 month longstop time limit, but it does so relatively infrequently, and is quick to refuse claims where no satisfactory explanation is given for the delay – especially if the merits of the case are weak.

We would point to two key, and in our view powerful, arguments which militate against the further shortening of the time limits associated with judicial review. First, such cases are frequently complex – whether factually, or legally, or both, and the process is often front-loaded. Any curtailing of the time given to the parties to prepare their case would be likely to have a negative impact on the quality of the preparation done – by all the parties – and thus on their ability, and that of the court, to carry a relatively swift and efficient assessment of the merits.

Secondly, we think that shorter time limits will reduce the effectiveness of the pre-action protocol processes, resulting in more claims being brought and a tendency for cases to run

longer while the work which ought to have been done initially, and which might have brought them to a quicker conclusion, is deferred to a later stage.

The existing time limit for cases in the Administrative Court is already very tight, and allows very little opportunity for the parties to explore ADR options – another area of particular focus for the IRAL.

For the reasons set out above, we would not support any further shortening of the time limits associated with judicial review. On the contrary, we think that there could be real benefits of the sort the IRAL and government would welcome in extending or re-shaping those time limits, in appropriate cases.

We would also welcome the lifting of the bar on parties agreeing an extension of time to issue judicial review proceedings. More specifically, a provision could be incorporated into the pre-action protocol to allow the parties to seek an extension to the standard time limit (or a fixed number of extensions up to a set period, say 6 months). If the parties are close to settling, it seems illogical to require that they divert their time and energy to the preparation of a formal claim, for fear that the application will be rejected for being out of time. Further, the very act of requiring the preparation of such a claim may serve to dissipate any good will that had been established between the parties in the effort to find a pre-action settlement.

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

8. ***Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?***

We answer these two questions on costs together. In doing so we focus on privately funded judicial review, and do not address the Aarhus Rules or the position of publicly funded litigants. We also provide a response to that part of Question 4 in the ToR which asks: "Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: …(g) on costs and interveners."

The way in which costs are awarded has a significant influence on the way that the parties to judicial review behave. Crucially, reform in this area has the potential to have a dramatic effect on access to justice. For that reason, and for the others we develop in more detail below, we do not consider that any such reform should be contemplated as a result of the work of the Independent Review.

As to concern about the proportionality of judicial review costs orders, we consider that adequate provision is made in that regard in the relevant parts of the Civil Procedure Rules (CPR). The costs of judicial review are often not insignificant, but tend, in our experience, to be considerably lower in the majority of cases than the costs orders made in other types of civil litigation. It is also our experience that successful defendants tend to be awarded a higher proportion of their costs (absent costs capping orders) than would be the case on a standard assessment in other civil litigation.

Similarly, we do not agree that the current costs rules are too lenient on unsuccessful parties, or too leniently applied by the courts. If a party (claimant or defendant) "loses" the case, the usual position is that costs follow the event. In the same way, if permission is refused on the papers, the defendant will generally receive the costs of its Acknowledgement of Service. We would not welcome any proposal to award defendants in such cases a greater measure of their costs, as the present approach serves to focus minds at the permission stage on minimising costs.

As regards permission more generally, a successful defendant at that stage will receive all the associated costs, bar those incurred by attendance at an oral permission hearing. This reflects the fact that defendants are not generally required to attend such oral hearings, although there is sufficient flexibility in the rules – and their application by the courts – to permit recovery where attendance has in fact been requested, or is otherwise needed.

The courts also maintain firm control over the number of parties participating in judicial review matters, and an unsuccessful party will not usually have to pay two or more sets of costs. The overriding objective here is to deter unnecessary duplication of work – for example by Interested Parties. Again, however, the right balance is struck in our view, with facility for Interested Parties who deal with issues not addressed by the defendant, or who have different interests from that defendant, to appear and recover the costs involved.

We wondered whether the suggestion of possible leniency to unsuccessful parties was a reference, in part at least, to cost capping orders (CCOs) – themselves introduced as the result of an earlier government consultation on reform of judicial review. If so, we do not agree that they lead to any such leniency. In practice, the circumstances in which they are available are tightly prescribed, and as a result they are relatively rare. They are also designed to secure that the courts have appropriate parties and representations before them in true public interest cases, and we do not consider that any further reform is necessary in that regard.

CCOs are also relevant to the issue of standing and costs. While it is true that CCOs do restrict the ability of a successful defendant to recover costs, the costs protection they afford is reciprocal; in other words defendants benefit too. Further, CCOs are only available in cases which are properly considered public interest proceedings, and even then only once permission has been granted.

Lastly under this section, we turn to interveners. Interveners play a unique and vital role in judicial review litigation, but it is one under the present rules which is only exercised very rarely. The courts retain absolute control over the involvement of interveners, and only allow them to appear and make representations where there is a clear benefit. Interveners' costs are only exceptionally paid by other parties to the litigation, and interveners are at risk themselves of having to pay another party's costs if, for example, they submit evidence which is not useful in the case. Accordingly, we think that the current arrangements governing interveners, and their costs in particular, work well and do not need to be changed.

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 the response that follows, we also address Question 4(e) of the ToR, which asks: Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular:…(e) on the principles on which relief is granted in claims for judicial review"

To a very large extent, we have already addressed these issues in our answer to limb (iii) of Question 3 in the Call for Evidence (see above). We referred there to the breadth of remedies available on judicial review, and the discretion given to the court to decide (on clear and accepted principles) whether to grant any such remedy at all.

We further surmised that the principal concern for the IRAL might be the quashing order, and that there may be an unspoken proposal to substitute for them something akin to declarations of incompatibility, at least in cases of challenge to central government decision-making, and perhaps more widely. We are firmly of the view, however, that quashing orders are not unduly onerous. In the majority of cases, they leave sufficient room for the bodies subject to them to make the same decision again, and to do so on more robust grounds. By contrast, to the extent that a new declaration of incompatibility-type remedy failed to annul the decision originally challenged, it would only serve to create confusion, for decision-makers and those dealing with them alike. Similarly, an award of damages in lieu of a quashing order would not been consistent with the important constitutional role which judicial review plays in our system.

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

11. ***Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?***

12. ***Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?***

Questions 10, 11 and 12 all concern early settlement.

In our view, the most effective way of minimising the need to proceed with judicial review would be to encourage greater adherence to the relevant pre-action protocols. We have suggested elsewhere in this document that avoiding further shortening the current time limits for judicial review would help in that regard. Facility for parties who are near settlement to agree between themselves an extension of time for a claim to be issued would also assist.

Our experience of settlement before trial is also largely of settlement at the pre-action stage, or on issue, although the granting of permission (and the associated perception in defendants' minds at that stage that the risk of an adverse costs order has increased) can also lead to compromise agreements.

By contrast, we have little, if any, experience of settlements at "the door of the court". It seems likely that this is a reflection of the particular nature of judicial review, and of the disputes that arise in that context (as opposed, for example, to commercial disputes which

lend themselves far more readily to settlement and ADR, given the greater focus on pure pecuniary loss).

The clients for whom we act understand quite clearly that the courts consider judicial review to be a remedy of last resort, and that proper consideration must be given (for example, at the pre-action protocol stage) to the question whether ADR is appropriate. Once again, though, the particular nature of judicial review (and the fact that claims of that type may engage the wider public interest) often means this simply will not be the case.

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?

In our experience the courts interpret the "sufficient interest" requirement of standing appropriately, by recognising that, in order to fulfil its proper function, judicial review must be available to claimants seeking to vindicate the public interest, as well as those aiming to protect private rights. Any attempt to codify what constitutes a "sufficient interest" would inevitably be incomplete and/or unduly restrictive, given that an analysis of standing is generally linked to broader considerations of the merits of the claim, its public interest, the importance of the issues in dispute, the availability of other claimants, and the remedy sought.

Any attempt to revive the proposed changes to standing mooted by the government in 2013, when it was suggested that claimants should have to demonstrate a "direct interest" in the subject matter of a claim, would be entirely misguided, for the same reasons now as before. The intention of such changes would presumably be to limit the ability of campaign groups, charities and NGOs to challenge flawed decisions relevant to their areas of expertise unless they happened to be individually affected by them. Such changes would undermine the essential function of judicial review, which exists to protect public, rather than private, interests.

If a public body has made a flawed decision, it cannot be right for the courts to be barred from reviewing it because none of the individuals directly affected by it – which in some cases will be a small pool – are willing and able to bring the claim. Indeed in some cases – for example some challenges to decisions affecting the environment and/or animals – there would be no one with a sufficiently direct interest in the outcome to bring the claim were environmental groups and the like prevented from doing so. In many cases an individual claimant could, if necessary, be identified, but the courts often benefit from having challenges made by bodies with a deeper and broader understanding of the matters in dispute - hence the involvement of such bodies as interveners in cases brought by individual claimants.

We think the number of claims which such changes would prevent would in the end be relatively small, but it would nonetheless be contrary to the objective of good public administration for certain categories of decision to be arbitrarily exempted from challenge.

Our view is that the post-2015 procedure is working well. The way to prevent spurious challenges is through a review of the merits at the permission stage, with the availability of a "totally without merit" certification; the rules on standing, however amended, cannot be utilised to achieve the same end in a way which applies fairly and consistently across all categories of case.

BDB Pitmans
26 October 2020