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

OCTOBER 2020

INTRODUCTION

Bates Wells is a city law firm with one of the longest standing, largest and most experienced administrative and public law teams. The team is tier 2 ranked in the Legal 500 directory and band 2 ranked in the Chambers & Partners directory. The Head of Department, Melanie Carter is in the top band of leaders in the field for both directories. Three other members of the firm are praised for their experience of administrative and public law in Legal 500 (Emma Dowden-Teale, Claire Whittle, Alistair Williams), and two others in Chambers and Partners (Rupert Earle – Band 3, John Trotter – Senior Statespeople). The firm recently gained a significant professional regulatory practice when a team headed by Nicole Curtis (Band 1 ranked in both Legal 500 and Chambers and Partners) joined from Penningtons Manches – this practice includes all the judicial review and public law work for their clients.

To quote Legal 500: "The public and regulatory department at Bates Wells is pre-eminent in the third sector, evidenced by senior associate Claire Whittle's representation of global NGOs in sensitive public inquiries. Emma Dowden-Teale recently brought new charity clients in the education sector to the firm's roster, while practice head Melanie Carter is handling novel public law challenges to the Secretary of State's policy on public rights of way. Prestigious central government departments, public authorities and regulators also retain the team to handle judicial review litigation and policy and governance advice, ranging from Brexit-related issues to safeguarding practices and the regulation of qualifications bodies. Carter is also engaged by the National Audit Office to advise on the auditing of local authorities and NHS bodies" (Legal 500, 2020).

According to Chambers and Partners: "The team is known for "advising a diverse array of regulators on the interpretation and implementation of public law obligations. Also well-versed in resisting potential challenges including judicial reviews. Frequently instructed to advise on public sector audits and maintains considerable strengths in media and advertising regulation. Regularly sought after by charities and non-profits in relation to their regulatory concerns" (Chambers and Partners, 2020).

We respond in detail to the IRAL call for evidence below, based on this expertise. However, as an opening point, we raise a general concern. We do not consider a sufficient level of detail has been provided in the IRAL call for evidence or terms of reference about the reforms under consideration. We would expect the IRAL or Government to consult again when the proposals are at a more formative stage, to allow proper engagement with any alternatives proposed to the current regime, and we stand ready to contribute to such a consultation. A future consultation should also be open to the public and address by way of specific questions other perspectives including critically claimants and claimant organisations, third sector and civil society, commercial entities and NDPBs.

To summarise our submission below, we consider the current judicial review regime is fit for purpose. Judicial review – as currently conceptualised and employed - is extremely important to the proper and effective discharge of central, local government and other public bodies' functions. It acts as a check to ensure that the law is being interpreted correctly. Even if unsuccessful, judicial review challenges often test assumptions about the exercise of functions, or clarify the law, and this leads to better governance. We oppose any narrowing of the availability of judicial review, which in our view would

pose access to justice issues contrary to the fundamental constitutional principle set out in *R(Unison) v Lord Chancellor* [2017] UKSC 51.

ANSWER 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?***

Firstly, we consider the questionnaire is overly leading in the way it poses questions to government departments and other public bodies - implying at the outset that judicial review does impede the proper or effective discharge of central or local governmental functions. We consider that a similar (non-leading) questionnaire should have been posed to claimant organisations, in order to provide the IRAL panel with a balanced evidence base.

In our experience judicial review is extremely important to the “proper and effective discharge of central and local governmental functions”. It is not an impediment. Judicial review clarifies the law, which leads to better governance overall. For instance, in a case we are currently undertaking for a public body (an NDPB), the claimant has challenged our client’s interpretation of the law in its statutory guidance. Even if the claimant proves to be wrong, the court’s view on the correct

interpretation of the law will be useful for formulating our client's policies in future and will help it to ensure it is fulfilling the role assigned to it by Parliament. The prospect of challenge encourages good decision-making from the beginning (as reflected in the Government's own publication "Judge Over Your Shoulder").

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 consider the law of judicial review could be strengthened by:

- Allowing parties to agree an extension to the three month time limit for submitting claims, to allow proper pre-action engagement in every case.
- Creating a clear, stand-alone ground of judicial review for breach of the equal treatment principle.
- Pinning down the extent and scope of the duty on public bodies to give reasons.
- Extending proportionality review to other cases.

Whilst we are not suggesting codification of the judicial review process with these suggestions (other than the first bullet point), we believe this could be a useful opportunity for Government to signal its approval of judge made law that encompasses these suggestions.

We strongly object to narrowing the availability of judicial review. We note that reforms to judicial review were last consulted upon by the government in 2012[1] and in 2013.[2] To the extent that proposals were not taken forward following those consultations, it is unclear what has changed to mean that they should be taken forward now.

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?***

It is not clear to us what purpose statutory intervention would serve. The only acceptable purpose of codification would be to set out the existing judicial review process in legislation. We are opposed to fundamental reform. However even codification for clarification seems likely to face a number of issues. For example, a statutory provision setting out Lord Diplock's three grounds of judicial review from *CCSU* would be unlikely to give any greater clarity than current guidance, however, it would be likely to miss out a wealth of nuance.

Public law practitioners have no need for the judicial review process to be clarified in legislation. Codification also seems unlikely to assist litigants in person since the statutory provision would presumably need to be so high level as not to be useful in formulating a claim, or so detailed as not to be accessible to individual claimants. It is likely judges would still supplement the statutory grounds of judicial review with (or at least rely on in the process of interpretation) principles from the common law, therefore it is unlikely any legislation would give litigants in person the whole picture.

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

The implication from the call for evidence and IRAL terms of reference is that clarification of the judicial review process in legislation is not what is being contemplated at all. Rather, the questions seem to imply that the availability of judicial review should be narrowed as part of any codification exercise. We oppose this.

We note the implication in footnote E of the IRAL terms of reference that judicial review of the exercise of government power (as opposed to the scope) is a new development in the last 40 years. We do not understand the supposed distinction between review of the scope and exercise of government power. Judicial review has existed for about 450 years and many of the current heads of judicial review were created in the 17th and 18th centuries. From the 17th century onwards there has been review of the manner of exercise of government powers. Even in the 20th century, the courts have been considering the exercise of government powers for much longer than 40 years. For example:

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

It is clearly appropriate for the exercise of government powers to continue to be reviewable, as well as the scope. There is no point establishing the scope of government powers in court if they can go on to be applied in an irrational or otherwise procedurally flawed manner – we fail to see how any such limitation would support the rule of law. It is worth remembering that the current grounds of judicial review are not simply an invention by judges. The three heads of judicial review from *CCSU* (illegality, irrationality and procedural impropriety) serve our country's democratic, constitutional purposes. To quote *De Smith* (a leading practitioner textbook on judicial review):

> The standards applied by the courts in judicial review must ultimately be justified by constitutional principle, which governs the proper exercise of public power in any democracy… These grounds are not isolated requirements of a discrete area of law; they refer to and attempt to impose upon all decision-makers standards that are inherent in a democracy… The general principles are specifically implemented in the context of contemporary standards of fairness as well as other values… Values such as these are part of our general legal system, developed in accordance with accepted norms as to the proper role of the democratic state and the rights of individuals within it.[3]

For this reason, we strongly oppose any codification to reduce the existing grounds of judicial review, including by placing the exercise of government powers outside of the reach of public law. We also tend to oppose codification for clarification purposes. It is not clear that this would assist practitioners or litigants in person. The UK constitution is not generally codified and it is not clear why substantive judicial review – a constitutional check and balance - should be any different.

If the review does decide to proceed with codification, we suggest codification is limited to administrative procedure rather than substantive grounds of judicial review, as in some civil law jurisdictions.

[3] Lord Woolf, *De Smith's Judicial Review* (Eighth edition, Sweet & Maxwell Ltd 2018) paragraphs 1–024, 1–025, 1–030.

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

ToR question 1: "Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government"

It is generally clear to us which subject matters are non-justiciable, and it is right that in a constitutional democracy, the areas of non-justiciability should be limited, and that they should be interpreted narrowly by the courts. The separation of powers has been a foundation of British democracy for centuries. The fact that the executive and the judiciary have clashed recently on the question of justiciability (for example, in the *Miller* cases) proves that our constitutional system of checks and balances is working as intended. Judicial review is a critical means of achieving accountability. The market cannot be relied upon to regulate the public sector as it does the private sector. The role of judicial review is crucial in this regard.

We do not see any need to clarify the law of justiciability. Indeed, it is not clear that the government would be able, or entitled, to narrow the non-justiciable areas of the law. If the government were to ask Parliament to insert a clause into a particular statute rendering it non-justiciable, the courts may well hold the clause ineffective (per *Anisminic* and *Privacy International*). It is not clear that even Parliament could force the courts to apply a clause ousting their jurisdiction. Many believe that the courts have an inherent jurisdiction to consider cases against the government brought by the people in a constitutional democracy and even Parliament should not be able to oust that jurisdiction. Rendering the exercise of public powers non-justiciable would not strike the right balance between citizen and government, and it would be liable to undermine the rule of law. Access to justice is regarded as a fundamental constitutional right in this country (see *Unison*). Any attempt to undermine it by rendering the exercise of public powers non-justiciable would require Parliament to squarely confront what it was doing under the principle of legality. It is not inconceivable that if the courts were asked to enforce without question legislation compromising fundamental rights this could lead to a constitutional crisis.

As we have already mentioned, the exercise of public power should be justiciable following this analysis – indeed, the exercise of public power has been justiciable since the 17th century.

An appropriate level of deference to governmental decisions and those of other public authorities, in particular those with specialist expertise, is already built into the judicial review process. Provided the government and other public bodies exercise their discretion reasonably, properly and in accordance with the law, there is always a wide range of possible options open to them. The Courts are also particularly reluctant to intervene in areas of clear government expertise, such as the allocation of public funds (for example, within the NHS).

ToR question 2: "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"):

We note the Panel particularly invites "evidence on how well or effectively JR balances the legitimate interest in citizens being able to challenge the lawfulness of executive action and the role of the executive in carrying on the business of government, both locally and centrally".

In our view, the current grounds and remedies in judicial review already achieve this balance. We consider this view would be shared by many of the public bodies we represent. The fact that decisions may be challenged in the courts is a useful restraint on poor decision-making, which has the capacity adversely to affect many. The fact is that public bodies make better decisions when they are aware they may be held to account. Watering down judicial review is liable to impact the effectiveness of government, regulators and other public bodies. The threat alone of judicial review can focus the mind of a public body and have an impact in ensuring a well-reasoned decision. Equally, explanations of the law provided by the courts in one judicial review can have an impact beyond the single case in which they arise. If one claimant causes a public body to review a decision, the public body may

review a wide range of similar decisions without the need for further litigation. This has happened recently in one of our cases for a higher education body. In addition, other public bodies with similar statutory purposes may amend their decision-making in the same way. This is a cheap and effective way for government and other public bodies to have the law clarified in relation to their functions.

Most judicial review claims that get past the permission stage do have some merit (our experience is that in recent years judges have been stricter than the CPR implies at weeding out poor cases at the outset); and for every case that has reached Court there have been many threats which have caused the government and other public bodies to rethink and reach better decisions without litigation, to the benefit of those whom the law is intended to protect (e.g. individuals, in particular those most vulnerable to an imbalance of power and private entitles with no access to the levers of power). Public bodies can always protect themselves by having an internal appeal or independent review mechanism before the courts will allow judicial review to be invoked. The system could be much worse from a defendant's perspective – there could be no permission stage, a longer time limit for bringing claims, a full merits review with full disclosure and cross examination of witnesses and greater availability of damages claims. The recoverable costs in judicial review proceedings appear to be much higher here than in the rest of Europe, where they appear to be fixed in the low thousands.

One way to improve judicial review in this regard would be for judges to ensure that claimants are not allowed to shift their grounds at trial away from those on which they were granted permission (without being prompted to do so by new evidence). Many judges are already good at doing this. Equally, judges should always ensure that deference is accorded to government and public bodies where those bodies are best able to judge what is appropriate / proportionate. As we have already mentioned, this already frequently happens.

Of particular note is the position of what might be seen as private sector membership bodies, but ones entrusted with statutory responsibilities with an important role in protecting the public. In the professional regulatory sphere (in which we have significant expertise), we note the existing grounds of judicial review are successful at ensuring that professional regulatory bodies can be held to account in relation to performing their public interest duties. These duties include important public protection responsibilities and upholding professional standards. For many years the Professional Standards Authority (formerly CHRE) has had the power to challenge in the High Court decisions of statutory healthcare regulators with regards to fitness to practise, but in other areas, judicial review remains the main route by which healthcare regulators may be held to account. By way of example, in 2017 there was a challenge by way of judicial review to the General Pharmaceutical Council's (GPhC) proposed changes to its new standards of Conduct, Ethics and Performance. (*R (on the application of Pitt) v General Pharmaceutical Council [2017] EWHC 809 (Admin)*). The challenge did not succeed, but, as those bringing the action noted "one of the consequences of this action is that the GPhC will be aware its work is being carefully scrutinised."[4]

Similarly, judicial review is the means by which non-healthcare regulators (for example in the fields of law, accountancy and architecture) may be held to account in terms of ensuring their compliance with their public interest functions.

Hybrid or non-core public authorities (so not central or local government or NDPBs) are often not subject to much Governmental direction or control and the role of the courts is all the more important in terms of ensuring good decision making and the protection of the public.

Judicial review is nearly always seen as a remedy of last resort in our experience, and even then many applications for judicial review are refused at the permission stage. Since 2002 judicial review applications have had less than a 5% success rate (Kirkham 2018) and the 2019 data confirms this trend, with a figure of 2-3% depending on the exact figures used (Ministry of Justice 2020a; Ministry of Justice 2020c).

In our experience, the challenges which do proceed generally have wider implications beyond the specific facts giving rise to the challenge.

[4] www.the-pda.org/the-judicial-review-of-the-gphcs-new-standards

For example, a recent General Medical Council case (*The Queen on the application of Dr Ashish Dutta v General Medical Council* [2020] EWHC 1974 (Admin)) considered issues relating to the assessment by regulators' disciplinary committees of witness credibility – an issue which is of relevance to all regulators hearing witness evidence.

The fact that judicial review exists as a mechanism to hold regulators – and all public bodies – to account is in itself a public good, even outside the specifics of any particular challenge that may be brought.

The fact that decision makers are aware they are susceptible to challenge by JR tends to focus minds and lead to more considered and better-reasoned decisions, something which is in the public interest. This idea is at the heart of the 'The judge over your shoulder – a guide to good decision making' publication, first produced in 1987 and regularly updated by government since.

The publication is distributed to civil servants and aims to help them understand the things a judge may look at when considering a challenge to a decision, and the factors that should be taken into account by decision makers when deciding on a course of action.

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 consider – and this view is shared by other public law practitioners – that the process of making, responding to, and appealing a judicial review are clear. The process is no more complicated than in other areas of civil litigation, and in some ways (for example, the lack of disclosure and cross-examination of witnesses), the process is easier.

It is not clear what the current system of judicial review fails to achieve. It should be an objective of any constitutional democracy to have an effective system of administrative law that encourages public bodies to act legally and take decisions appropriately because they may be challenged if they do not. As part of any such system, meritorious complaints should be considered in detail and upheld where the government or other public body is in the wrong. The system should be regulated so that it does not become a tool to influence public bodies inappropriately, abuse power, bring vexatious claims or waste public time or money.

We consider the current system of administrative law achieves all of these objectives. Access to justice must remain the overriding priority. We know that judicial review creates work for public bodies, depleting funding and other resources (which may already be scarce). Judicial review naturally involves the use of public funds, although the cost to the taxpayer is not as high as is sometimes suggested. The fact that policies and objectives may be delayed or prohibited altogether can also be a frustrating prospect for those in public bodies, and the threat of judicial review may have negative effects on the morale of the service providers and professionals involved in various public bodies. For claimants, even successful judicial review involves a great deal of time, work and uncertainty; the procedure can be stressful and potentially very expensive. However, this is an acceptable price to pay for a system that encourages lawful decision-making and fundamentally keeps government and other public bodies accountable to the people they represent.

Tightening the current judicial review system could also have many unintended consequences. For example, many EU Regulations allow for self/co-regulation providing that the self/co-regulator is subject to the supervisory jurisdiction of the courts – the UK regime might well be subject to challenge if the courts had less power to intervene in judicial review than they do now. Equally, the availability of judicial review is important to those who regulate expression outside of a specific statutory framework being able to contend that they are "prescribed by law" for the purpose of Article 10(2) of the European Convention on Human Rights (restrictions on freedom of expression). In *Kennedy v Charity Commission* the Supreme Court (Mance, Toulson LJs) contended that it was not necessary to find that the Freedom of Information Act's absolute exemptions in some areas offended against a right of access to information (if it existed) under Article 10 of the Convention, on the basis that the availability of judicial review would allow a challenge to the application of absolute exemptions (including on

proportionality grounds), outside of the Freedom of Information Act. Again, this would need to be revisited if judicial review was significantly tightened. These are just examples, the courts have also expressed similar views in other areas.

Appeals

The appeals process in judicial review was reformed following the Government's consultations in 2012 and 2013. These reforms included the removal of the right to oral consideration where a judge has certified the claim as "totally without merit" and the introduction of a fee for such oral renewals as are still permitted. In addition, the Criminal Justice and Courts Act 2015 made the scope of "leapfrog appeals" wider and appeals can now bypass the Court of Appeal and go straight to the Supreme Court where the appeal raises issues of national importance; the result is of particular significance; or the benefit of early consideration by the Supreme Court outweighs the benefit of consideration by the Court of Appeal.

The first two of these reforms ("totally without merit" cases and a fee for oral renewals) already address any concern about a growth in judicial review cases and appeals, and we do not see a case for further restricting appeals. Further restricting appeals could have serious constitutional implications and undermine the impact of the judicial review process, meaning that fewer cases raising important issues reach the highest courts in the land.

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

We do not support restricting oral appeals of permission decisions, if this is being considered. Oral advocacy is a powerful tool and it is often the case that judges can be persuaded on hearing arguments in person that are lost when a case is considered on the papers alone.

Duty of candour

The duty of candour is mentioned in the terms of reference, but not in the call for evidence itself. We address it here nonetheless. The duty of candour is already a narrow disclosure obligation compared to full disclosure. However, it is incredibly important. Transparency is central to justice generally, and this is especially true in relation to government and other public bodies, who act in the interests of the public.

The duty of candour appears to us the right approach to disclosure in judicial review. It makes sense to make the information required to understand the decision available as quickly as reasonably possible so that the relevant parties can assess whether there are merits in the case and there is a need to revisit the decision – the focus in public law should be on what is the right thing to do to achieve the right result for the public, not on how cases can be avoided as an objective in itself.

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?***

On the issue of time limits and delays, we would resist any move to shorten time frames further than the current 3 month (and prompt) deadline. This is already a very tight timeframe to bring a claim, both compared to other civil litigation, and practically. It takes time for claimants to engage with defendants before filing a claim, and yet this stage is crucial, as it facilitates settlement and prevents many claims from needing to go to court at all. Shortening the time limit for bringing a judicial review

might paradoxically increase the number of claims, as claimants might be forced to file to protect their position.

Some JR challenges involve technical subject matter. For example, a case we were recently involved in required analysis of consumer research, and the technicalities of how a utility was delivered. But perhaps more importantly, where the claimant is not a well resourced company, they may not be equipped to spot the issues and instruct lawyers to bring a claim within the time frame. The ability of individual members of the public to bring claims is a particularly important issue in the public law context, since it is designed to protect the public. Shortening time limits to such an extent that claims became difficult for individuals to bring would be both an access to justice issue and a democratic accountability concern.

Even our more sophisticated claimant clients find the existing 3 month deadline for bringing judicial review claims tight. Representative organisations, who bring claims on behalf of a wide range of beneficiaries in a more organised way, still have to obtain information from their members, consider internally for merit and strategic importance of a claim, and get internal sign off for legal advice before they can instruct lawyers to begin to consider a claim. We would then wish to engage with the proposed defendant using the pre-action protocol for judicial review before even contemplating issuing. This all eats considerably into the 3 month period. We then have to consider the claim, advise, instruct counsel, and (if pre-action engagement is not successful) draft the claim and prepare evidence; the client also needs to get board sign off for litigation which can take some time. The 3 month deadline is already sufficiently challenging for sophisticated clients with significant litigation experience; let alone for litigants in person.

Shortening time frames would lead to claimants commencing proceedings without full knowledge of the situation to which the claim relates, which poses all kinds of problems. These types of problems often occur in public procurement claims in our experience, where the time limit for submitting a claim is shorter. Judicial review is not like public procurement, where claims are often issued by commercial entities with extensive experience of litigation (challenging procurement decisions may be built into the budget) and sophisticated legal teams. The members of the public and representative organisations often challenging decisions in the judicial review context are completely different, and simply need more time to understand decisions, engage with public bodies and formulate claims.

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 note at the outset the leading and one-sided (and arguably biased) nature of these questions. They start from the premise that only a reduction in leniency should be considered.

We answer the two questions on costs together. Costs risk is always a significant factor in deciding whether to bring a judicial review claim. Even sophisticated claimants do not recover anything like their full costs. Bearing in this in mind, claimants are often bearing the expense of correcting unlawful public decision-making, when they are only one affected party. This is already somewhat unfair to claimants. We are by no means the most expensive firm, with rates mostly in line with or below the guide rates, yet even we struggle to recover most of our costs if we win, regardless of which side we are on. In a recent case, we were awarded only about half of our costs up to permission stage, despite the fact that we are probably the only firm with expertise in the area of law, so we almost certainly completed this work in less time than any other firm would have managed. We are also currently involved in attempts to settle our costs on a judicial review for a third sector client in which it has been necessary to issue proceedings twice, as the same mistake was made and conceded twice. It is clear that our client has in effect played a public interest role in monitoring and raising poor decision making, yet there is significant push back at the settlement stage over our costs. Indeed this

seems to be the routine position being taken, regardless of the merits or role played by the claimant in this kind of case.

Costs are also an issue for defendants in judicial review. Defendants also struggle to recover their costs, and may struggle to access insurance cover for these specialised risks. However, large public bodies often have in-house legal teams and legal budgets that mitigate the impact of this.

In our view, making it any harder for claimants to recover their costs than it already is, or making judicial review any more expensive for claimants, would have a chilling effect on access to justice, with individuals simply unable to bring important claims, particularly in light of already substantial reforms to legal aid. Costs reforms should not be used to deny access to justice. There are already processes in place to attribute costs by reference to the merits of a claim, at the discretion of the judge, without automatically placing the costs burden on the claimant.

It is unclear what is meant by "should standing be a consideration for the panel". We do not consider there should be a costs penalty for a party not granted standing, since that party will often have brought valuable information to the attention of the court or the public. Costs penalties used in this way would also have a chilling effect on access to justice, since claimants would be deterred from bringing meritorious claims. As noted below, public law represents a public and not a private interest, such that standing should not play any part in this kind of consideration.

As to how unmeritorious claims are treated, these are usually dismissed at the permission stage. At the moment, it is common for defendants to bear their own costs in defending a permission decision on the papers, even if they "win". We are not in favour of amending this rule. Receiving a favourable permission decision is useful to defendants beyond the obvious function of dismissing a claim. These decisions contain reasons that help clarify the law in relation to the defendant's functions. This is useful in the long-term. It is also important to remember that judicial review claims are often brought by members of the public. It is not appropriate for large public bodies to go after a member of the public for costs, even if they have front-loaded their consideration of the claim at the permission stage. Disproportionate costs at the permission stage (the risk of a claimant having to pay a defendant's costs at this stage) would also pose real access to justice issues, of the type considered in the recent *Unison* case. In our view, the onus should be on defendants to keep down costs at the permission stage, which experienced lawyers are usually able to do in the case of claims totally without merit. Whilst CPR 54 PDA para 8.6 provides that where an oral hearing is considered necessary at the permission stage, the court will generally not make an order for costs against a claimant, this does in our experience, often happen.

On the question of intervenors and costs (in the IRAL terms of reference) - we note the changes already brought in by the Criminal Courts and Justice Act 2015 following the government's 2012/2013 consultations on judicial review. There is a presumption that intervenors bear their own costs. If an intervenor increases the costs of other parties, it may be asked to pay the additional costs it has caused. This already acts to ensure intervenors only intervene if they have a real point to make and are able to assist the court. Intervenors can often provide valuable evidence to the court that simply could not be offered by the other parties. We do not consider the position on intervenors and costs should 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?***

We consider the existing remedies in judicial review perfectly adequate. These are not, in our view, inflexible. The court has a wide discretion on remedies, and a number of options at its disposal – quashing orders, prohibiting orders, injunctions, mandatory orders and declarations. The most common remedy – the quashing order – seems to us perfectly suited to the task of adjudicating public decision-making, since it sets aside the original decision but allows plenty of flexibility about the way the decision is retaken. The same decision can be arrived at, provided this is done in a lawful way. It is usually helpful to the defendant to have the original decision quashed if it is found to be unlawful -

having an unlawful decision on the books can pose a variety of problems – for example, when the public body is audited.

This mode of undoing a public decision where a body is *functus officio* is critically important both for clarity around the beginning and ending of public powers and also can be achieved efficiently, often by consent with the court in effect rubber stamping the agreed position where a public authority has conceded an illegality. This works quickly and effectively.

We note the Criminal Courts and Justice Act 2015 brought in a "no substantial difference" test in judicial review. This means that the court should refuse permission for judicial review if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, and the court must refuse to grant relief in these circumstances. This has already reduced the availability of relief in favour of defendants in judicial review cases. Claimants often lose on these grounds. It does not appear to be appropriate to further restrict remedies at this point.

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?***

We respond to these questions together, as they all concern early settlement. Good pre-action engagement and correspondence often minimise the need to proceed with judicial review. In our experience, settlement of threatened judicial review claims at the pre-action stage is relatively common. A well-drafted pre-action letter that clearly sets out the issues for the defendant will often provoke reconsideration of the decision without the need to go to court. On the other hand, settlement at the door of the court is rare. If a solution has not been found to the matters of principle to be discussed on the day of the trial, it is unlikely that a last minute offer will do the job; particularly as judicial review is often not about money. The front loading of judicial review (in terms of legal analysis by the parties) means that late developments leading to settlement are, as noted, rare.

There is already a role for ADR in the judicial review process if parties want it – it is listed in the pre-action protocol for judicial review. However, it is not appropriate in many cases. One reason for this is that formal ADR is quite expensive, and it is unlikely the claimant will be able to split the cost (for example, of a mediator) with the defendant. Another reason is that public bodies cannot always be as flexible as their commercial counterparts - public law principles can mean it is not possible to treat the party seeking early resolution differently without a court order, for example, because the decision maker is *functus officio*. Equally a public body which wishes to settle does not have the option of acting lawfully such that it may not be possible to offer a would be litigant the very thing they seek.

That said, if the government wishes to encourage more use of ADR, and we can see a greater role for this, it will need to be funded. One possibility could be to explore a funded fast-track mechanism where an experienced public law mediator looks at proposed judicial review claims and considers methods of early resolution.

We would note that informal methods of ADR may be employed to great effect. Roundtable meetings directly between claimants and defendants to come up with a practical solution to the challenged decision can be effective. Public engagement events to help understand what would make the public more comfortable with the impugned decision can also assist in early resolution of proposed claims.

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?

We have extensive experience of judicial review where issues of standing have arisen, since we represent many charities and Civil Society Organisations (CSOs) involved in judicial review challenges. We do not consider public interest standing is treated too leniently by the courts. We note again the leading and one-sided nature of this question.

It is important for the standing rules to be broad enough to allow for organisations or individuals not directly affected by an issue to bring a judicial review. Representative groups in particular can play an important role as watchdog. They have a unique oversight and expertise in their areas. They do a lot of proactive work, allowing them to spot potential judicial review issues of wider relevance quicker than the general public. Individuals cannot always be relied upon or expected to challenge unlawful decisions – they are unlikely to have the resources or expertise.

We note that where representative organisations are not given standing, they can often find a volunteer to take the case, and help pay the costs. However, this can be liable to increase the work and costs required to bring the judicial review overall. In our view, it is better to be transparent and allow parties with a legitimate interest in an issue to bring, or be involved as a party in, the judicial review. The importance of third sector input is recognised at an international level in the environmental context through the Aarhus Convention, which provides a good analogy.

Public interest standing is also vital to the proper functioning of the UK as a constitutional democracy. It is a democratic requirement that the public be able to hold the government to account for actions taken in their name, and sadly individual claimants do not always have the time, funds or knowledge required to play this important role alone.

Charities, CSOs and other public interest organisations are not treated too leniently by the courts. They are usually only granted "public interest standing" where no individual victim or more appropriate claimant can be identified. They cannot challenge the merits of political decisions and they must have a legal argument, just like any other claimant. If the rules on standing were tightened, there would be decisions that could not be challenged at all, which would prevent the courts from performing the supervisory function so crucial to democracy. The identity of the claimant is not the point in public law - judicial review is about the duties owed by government to the public and not about rights enjoyed by a particular individual. It should not matter whether claims are brought by representative organisations or individuals, provided there is a real public law issue to address. The interests at stake in judicial review are ultimately all citizens' interests. We must not get to a state of affairs where public bodies know that unlawful decisions in some areas may result in challenge whereas others, where no possible claimant with standing exists (for example, in relation to the natural world, which could never bring a claim in its own right), are unimpeachable. That is not the function of public law and would not encourage good decision making.

In fact, representative organisations have an unrivalled ability to organise claimants and bring together alliances and interest groups – this being something which should be valued and seen as a public good. This can decrease work for government by ensuring one well-organised claim (with a broad evidence base) is brought in relation to the same set of issues, rather than multiple scatter-gun claims, which require extra work to be dispensed with one by one.

These organisations can also greatly assist the courts when they intervene in judicial review cases. Many charities and CSOs have research departments and are able to offer valuable evidence to the court that simply could not be offered by the other parties. Intervenors do not increase costs – they bear their own costs and the law already operates so that the intervenor can be asked to pay any additional costs it has caused. For this reason, charities and CSOs only intervene in cases if they have a real point to make and are able to assist the court.

We recently organised a roundtable, alongside the National Council for Voluntary Organisations, to discuss the use of judicial review by charities and CSOs. In the combined response to the IRAL call for evidence that came out of that roundtable, the organisations involved listed examples of judicial review claims brought or supported by charities and CSOs, many of which were of huge public

importance and would not have been brought without the support of the sector. We repeat that submission here:

Representative organisations are also uniquely placed to spot and highlight how government action in one area may impact a different, unforeseen area. For example, Quakers in Britain were involved as an intervenor in a judicial review brought by the Palestine Solidarity Campaign (*R (Palestine Solidarity Campaign Ltd and another) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16). Here, the Quakers' intervention was made in order to highlight how guidance to local authorities about pension fund investment based on ethical pressure would potentially have an impact on ethical investment in a range of fields, including fossil fuel divestment. Quakers in Britain were uniquely placed to see how a change to the rules in one area could have huge unintended consequences elsewhere. It is unlikely the government would have been able to cut across the siloed nature of its own work to perceive these issues on its own. This case highlights the benefits of allowing representative organisations to intervene in judicial reviews – or if no more suitable individual claimant can be found – to bring judicial review claims in their own right.

There has been regrettable reporting in the tabloid press to the effect that judicial reviews are mostly used by charities and CSOs to pursue political ends through the courts. This is simply not the case. Many judicial reviews are brought about issues of nationwide, cross-political public interest. For example, in *R (Godmanchester Town Council) v. Secretary of State for the Environment, Food and Rural Affairs; R (Drain) v. Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, the Ramblers were involved to protect public rights of way that had been in use for a long time under the Highways Act 1980 s.31(1). An adverse precedent had been set in the High Court that effectively rendered the statutory provision a dead letter. A judicial review was brought against two specimen decisions, and the Supreme Court ultimately found in the claimants' favour. The impact of that decision is that rights of way continue to be successfully established by the public as a result of long use. Without the involvement of the Ramblers, it is unlikely the challenge would have been brought, and the legislation would still be being misapplied, to the detriment of the public. This case reinforced the original will of Parliament, by highlighting how an inappropriate precedent had been developed by the courts and local planning inspectors, contrary to the intention of the original legislation.

In another challenge, the Ramblers questioned the government's exclusion of the Isle of Wight from plans for an English Coastal Path. The Marine and Coastal Access Act 2009 allowed for exemptions for islands. This made sense for small uninhabited islands, but it did not make sense for the public in relation to the sizeable Isle of Wight. A pre-action letter and communication with local MPs brought this issue to the attention of the Secretary of State, who quickly addressed the concerns of the public by reversing the original decision. The result is that everyone can enjoy the Isle of Wight's stunning coastal scenery in future.

Another area in which public interest claimants can have a huge impact is climate change. The natural world cannot bring a challenge on its own behalf, and yet it is hugely important that the government and other public bodies recognise the environmental impact of their decisions, for present and future generations. These cases simply must be brought. The standing rules already act to ensure that a judge considers who is best-placed to bring environmental claims. If the only possible claimant is a public interest organisation then there is no question that the claim should go ahead with a public interest claimant, rather than let important environmental aspects of the decision go unnoticed.

For example, in *RSPB, Friends of the Earth Ltd and ClientEarth v Secretary of State for Justice and Lord Chancellor* [2017] EWHC 2309 – a case about cost caps in judicial review under the Aarhus Convention – the public interest claimants were able to make important clarifications to the Civil Procedure Rules, allowing for proper access to justice in environmental cases. Without this clarification, there would have been a deterrent effect on well-founded environmental claims because there would have been no certainty at the outset about the claimant's potential costs liabilities when bringing a case on behalf of the natural world. In another example, Weald Action group is currently supporting a claim which seeks to bring UK planning policy into line with climate change strategy, by questioning whether the defendant should have considered indirect or downstream emissions in respect of the use of oil and gas produced at a UK facility. This claim is clearly of huge public interest and importance, since it seeks to protect the environment for future generations.

Similarly, judicial review can help protect the interests of charities. In *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) the claimant organisation challenged Charity Commission guidance that called into question the charitable status of some independent schools. This guidance was found to be unlawful – the Upper Tribunal said that as long as independent schools made *de minimis* provision for families from deprived backgrounds, the public benefit could be met and charitable status retained.

Judicial review has also protected the interests of animals – in a recent judicial review sought by Compassion in World Farming the Scottish Government was challenged on its policy of approving long-distance international transport of live unweaned calves without nourishment. Ultimately, the Scottish Government agreed to halt such live exports (albeit on other grounds), and the parties settled. Other examples of judicial review, or threatened judicial review, with involvement by the sector relate to:

- Protection of the rights of children (particularly the fundamental right of access to justice);
- Protection of the victims of human trafficking;
- Challenging extreme breaches of the Human Rights Act 1998;
- Challenging local authority decisions contrary to the interests of homeless people (particularly important in this context, since judicial review is the only available remedy); and
- Challenging erroneous exclusions from the housing register at the local level.

Many of these cases re-affirm the importance of the Parliamentary Sovereignty by ensuring primary legislation is applied correctly at the local level. With an increase in the use of secondary legislation in recent years it is more important than ever that judicial reviews can be brought to reassert the intentions of Parliament, as expressed in primary legislation.

Many of the challenges above did not go all the way to Court, but were settled at the pre-action stage. The charitable and CSO sector achieves a huge amount through the use of pre-action letters. They often are able to secure better legal advice at this stage than individuals (particularly given the restrictions on legal aid) and ensure matters can be resolved without going to court, thus avoiding the drain on public resources full litigation can cause.

Many of the challenges above were brought by individuals, with charities and CSOs simply asked to contribute evidence, support, background context or other assistance to claimants and the courts. The assistance of the sector in these challenges made for better claims overall, which were easier for defendants and the courts to deal with. They have also improved government policy and decision-making.

To conclude, we wish to reiterate that public interest standing is vital to the proper functioning of the UK as a constitutional democracy. It is a democratic requirement that the public be able to hold the government to account for actions taken in their name, and sadly individual claimants do not always have the time, funds or knowledge required to play this important role alone.

For further input and/or clarification of this submission please contact Melanie Carter, Head of Department, Public & Regulatory Law at Bates Wells on m.carter@bateswells.co.uk (or call 07974188375) or Sarah Court-Brown, Consultant, Public & Regulatory Law at Bates Wells on S.Court-Brown@bateswells.co.uk (or call 07392198726).