PUBLIC LAW SOLICITORS ASSOCIATION (PULSA)

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

OCTOBER 2020

INTRODUCTION

PULSA is an association of UK public law solicitors set up to enhance practice, develop professionally, discuss issues and respond to consultations. It has been established since 2015 and has provided the structure for very senior solicitors engaged in the practice of public law to meet and debate current issues that impact on government, citizens and society. Its members, who are drawn from the most senior in their field, work in private practice, public sector in-house settings (regulators, local government, NDPBs, former Government lawyers etc.), the third sector and academia. They work for parties on all sides of judicial review - central and local government, other public bodies (for example, regulators, NHS bodies and educational establishments) and individual, corporate and charitable claimants. It operates by private invite thereby ensuring the highest level of public law debate, both in substance and in practice. Senior practitioners and academics share views in a Chatham House setting - roundtables discussing core public law and practice issues - allowing for a unique opportunity for sharing, learning and development. Attendees at its private events and on its mailing list, run to over 100 individual senior public lawyers.

PULSA has collaborated with Young Public Lawyers Group, the Non-Departmental Lawyers Group as well as ALBA and Solicitors in Local Government in a range of round table events and debates. These are on the issues that have an impact on public law, and the role that senior solicitors have in seeking outcomes in resolution that avoid adding to the judicial resource, as well as ensuring that a level playing field exists to understand public decision-making and to provide effective scrutiny, including through the courts where appropriate.

In response to the Ministry of Justice's Independent Review of Administrative Law (IRAL), the core group of PULSA organisers came together in two roundtables, held in September and October 2020, to discuss the main areas upon which evidence is sought. The core group have provided this response rather than the wider membership given the time constraints and practicality of convening a large group. Individuals involved in the response were Helen Holmes, Helen McGrath, Iain Miller, Jamie Potter, Juliet Oliver, Joanna Ludlam, Laura Carlisle, Martin Smith, Matthew Smith, Melanie Carter, Nusrat Zar, Olivia Carter, Paul Craig, Sarah Court-Brown, Suki Binjal and Virginia Cooper. Organisations represented were Baker McKenzie, Bates Wells, BDB Pitmans, Bevan Brittan, Bindmans, Fieldfisher, Herbert Smith Freehills, Lawyers in Local Government, and Oxford University. The views of individuals do not represent the views of the organisations. The PULSA response below documents the discussion that took place in those roundtables.

As an introductory point, PULSA wishes to raise a concern about the level of detail provided in the IRAL call for evidence about alternatives to the current regime. It is very difficult to comment in an informed way about reforms to administrative law when no concrete proposals for change are put forward.

Should the IRAL and of course Government propose to make any reforms to administrative law, we would expect it to consult fully and in detail on the proposed changes. Any such consultation should occur when the proposals are at a formative stage - to allow proper engagement with any alternatives

proposed to the current regime - and should have a longer time period for responding than the current call for evidence, given the complexity and significant constitutional implications of any reform.

As a general comment, PULSA notes that reforms to judicial review (including many of the areas currently under consideration) were 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. It is important not to re-invent the wheel in this review. Many excellent resources exist from the 2012 and 2013 consultations about the advantages and disadvantages of different options for reforming judicial review. In particular, we note the Bingham Centre for the Rule of Law's report *Streamlining Judicial Review in a Manner Consistent with the Rule of Law.* To the extent the recommendations from this report have not been implemented, we would suggest they are considered now. The report is available at: https://binghamcentre.biicl.org/documents/53_streamlining_judicial_review_in_a_manner_consistant_with_the_rule_of_law.pdf

Overall, PULSA considers the current judicial review regime is fit for purpose. Many of the public authorities we represent would agree that judicial review – and threatened judicial review - lead to better decision-making overall. This is not a government vs. citizen dichotomy. It is a question of good governance, which is in everyone's best interests. We consider many of our defendant clients would agree that judicial review is not necessarily aimed at unpicking political decisions. Generally speaking, it is about getting the law right and supporting the rule of law. When the courts make important clarifications to the law, that is to be welcomed. This is an important submission for that point alone – PULSA does not consider even its defendant clients would support a wide-ranging reform of administrative law.

Finally, we would note that the executive vs. judiciary prism addressed in the IRAL is missing an extremely important element. The UK has three branches of government – Parliament, the executive and the courts. The review appears to overlook this, and the role of Parliament is forgotten. This is an extremely worrying omission and the role of Parliament must be considered in more detail by the IRAL.

[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

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?***

PULSA is concerned about the leading nature of these questions, and about the fact that questions of this nature are only asked of government departments, with no corresponding invitation to local government, arms length bodies, other public bodies, or claimant organisations.

The effective discharge of government functions is not the only consideration when evaluating judicial review. It does not take precedence over access to justice, the rule of law or the ability of citizens to hold the government to account under our constitution (and in any democracy). The balance promised in the IRAL terms of reference between "the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts" and "the role of the executive to govern effectively under the law" seems to have been forgotten in this section, which only emphasises the latter.

We comment in detail on grounds of judicial review, remedies, standing, time limits, defences, impact on decision-making and costs below.

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)?***

PULSA considers 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.

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?***

PULSA is not convinced that a legislative provision setting out the grounds of judicial review[3] would provide any greater clarity than the current common law position. Indeed, a statutory provision would be likely to lose a wealth of nuance from the common law.

Public law practitioners have no need for clarification in legislation – the grounds of judicial review are already well-understood. Codification might help litigants in person, however it is likely a legislative provision would either have to be so high level as not to be useful in understanding the tests actually applied, or so detailed as not to be comprehensible to litigants in person.

Were codification to proceed, we consider judges would still supplement the statutory grounds with existing principles from the common law. In addition, codifying judicial review might increase the risk

[3] For example, a statutory provision setting out Lord Diplock's three grounds (illegality, irrationality and procedural impropriety) from *Council of Civil Service Unions and Others Appellants v Minister for the Civil Service Respondent* [1985] A.C. 374

of satellite litigation. There is some evidence of this in Australia, where there has been litigation about what a decision is for judicial review purposes.

The IRAL questionnaire to government departments itself shows that it is hard to produce a short list of all possible grounds of judicial review, of the type that would be required in legislation. The list in the government questionnaire includes "any other ground of review" thus recognising that the preceding list does not capture all grounds. It is impossible to think of a short list that would capture all grounds. Producing a list at a particular point in time also risks ossification, and legislation not developing in line with evolving tests in the common law. In Australia there have been difficulties associated with codifying the grounds of judicial review, and the codified provisions have not been interpreted as covering the whole terrain of judicial review, leading to further confusion.

There is an 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, and that the former should not be subject to judicial review. This supposed distinction between review of the scope and the exercise of government power appears to us to be a fallacy. Paul Craig notes that 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 was review for rationality and there was a fertile ground for "proportionability". These cases were about the manner of exercise of government powers and the courts frequently intervened. There is no evidence to sustain the argument that only issues that went to scope were reviewable. Even in the 20th century, there are famous cases much more than 40 years old in which the courts considered exercise of government powers. 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.

On balance, PULSA is of the view that any codification of the judicial review process to clarify the existing grounds of judicial review would be likely to cause more confusion than it resolved. PULSA strongly objects to any codification to reduce or eliminate the existing grounds of judicial review.

If the review does decide to proceed with codification, we would note that in the majority of civil law regimes the code relating to judicial review is limited to administrative procedure rather than substantive grounds of judicial review, and we would suggest the same limitation here. Substantive public law does not appear appropriate for codification in the UK.

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?

(The first section addresses ToR question 2: "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"):

In PULSA's view, it is generally clear which subject matters are liable to be seen by the courts as non-justiciable, although each case is considered on an individual basis and the common law develops as it goes along. The fact that the executive and the judiciary have clashed recently on justiciability (for

example, in the *Miller* cases) does not appear to us to suggest that the system is broken, but rather that our constitutional system of checks and balances is working as intended.

PULSA considers that attempting to clarify areas of non-justiciability further than they are clarified in the common law would be liable to run up against the same problems discussed above in relation to codification generally. In addition, it is not clear that expanding the heads of non-justiciability would be effective. If the route were 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 consider that the rule of law provides the courts with an inherent jurisdiction to decide cases, which even Parliament could not overturn. Any attempt to force the courts to apply new areas of non-justiciability could result in a constitutional crisis if judges failed to comply.

The terms of reference of the IRAL seem to suggest at footnote E that in the past, the exercise of public power was non-justiciable, and only the scope of public power was justiciable. This distinction is said to have been "blurred" over the course of the last 40 years. As we have already mentioned, this distinction appears to be a fallacy. The exercise of public power has been justiciable since the 17th century. Even in the 20th century, there are famous cases much more than 40 years old in which the courts reviewed exercise of government powers.

We consider the justiciability of the exercise of public powers is a crucial check and balance on the government, and it would be an access to justice issue if the justiciability of this area of law were removed. The review's terms of reference note the balance that must be struck between "the citizen being able to challenge the lawfulness of executive action through the courts" and "the role of the executive to govern effectively under the law". 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 (per *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, and might even prompt the courts not to apply legislation compromising fundamental rights at all, which could lead to a constitutional crisis, as discussed above.

Many members of PULSA act for public authorities (defendants), yet even these members do not favour rendering the exercise of public powers non-justiciable. We consider many of our defendant clients would agree that judicial review – and threatened judicial review - of the exercise of public powers leads to better decision-making overall. The claimant lawyers in PULSA agree. This is not a government vs. citizen dichotomy. It is a question of good governance, which is in everyone's best interests. Lessons are learnt from judicial review about how to ensure mistakes do not happen again. Public bodies are not forced into time-consuming litigation – with good advice, they will often review poor decisions and look at them afresh without going all the way to court.

The group noted the experience of clients that are officers from public authorities which are led by politicians or appointed Boards that they sometimes have to rely on public law and judicial review to stand up to political or partisan pressures to do the wrong thing in law.

Of course, there are judicial reviews that are unmeritorious and/or frivolous, and these add to the burden of public authorities. For example, some judicial reviews are brought simply because claimants do not want the proposed action "in their backyard". However, unmeritorious and frivolous cases occur in all areas of litigation, and judicial review has the advantage of a permission stage, where such cases are usually knocked out. Further, in 2015 the changes brought about by the Criminal Courts and Justice Act 2015 introduced the ability of the Court to determine a claim as 'totally without merit', thereby preventing claimants with frivolous claims from being able to request a renewal hearing and therefore secure their 'day in court'.

Moreover, it has not been the experience of our members that such unmeritorious cases are brought by experienced solicitors. Rather they are often brought by litigants in person whose knowledge of public law, quite understandably, is not complete. It is our view that the most likely reason for the increase in litigants in person in the Administrative Court is the increasing restrictions on legal aid over previous decades. Were such litigants in person able to access proper advice from experienced

solicitors, it is likely many of those claims would not be brought. The reduction of legal aid has therefore had the perverse effect of increasing the costs of other aspects of the public sector.

(The second section addresses ToR question 3: "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"):

Question 3 from the terms of reference (above), does not appear in the call for evidence after the question about justiciability. Nonetheless, we answer it here, since in our view priority should be accorded to the original Ministry of Justice terms of reference.

PULSA considers the existing grounds of judicial review are well-established and well-understood. There does not appear to be a good reason to reduce them. No argument has been provided by the government about why any of the existing grounds of judicial review should be removed. Our starting assumption is that unless the government provides a well-reasoned case for reducing the grounds of judicial review, they should remain as they are.

We can, however, see an argument for increasing the grounds of judicial review. We consider that proportionality review could be useful in a wider range of contexts, a clear ground of failure to provide reasons could be useful, and that the equal treatment principle should be a free-standing ground of judicial review, rather than a sub-set of rationality review.

The existing grounds already depend on the nature and subject matter of the power to some extent. This is not always the case - an error of law is an error of law – but context does play an important role in fine-tuning rationality and proportionality review and the jurisprudence makes it clear that context is important. We have already dealt with the fallacy of the scope vs. exercise of power dichotomy in the terms of reference and we do not see a case for amending the grounds of judicial review based on whether the scope or the exercise of public power is being challenged (to the extent that this is even obvious).

On remedies, the Criminal Courts and Justice Act 2015, which brought in a "no substantial difference" test (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 for the claimant if the conduct complained of had not occurred, and must refuse to grant relief in these circumstances) has already reduced the availability of relief in favour of defendants. The resulting section 31 of the Senior Courts Act 1981 is used a lot, and claimants often lose on these grounds. It does not appear to be appropriate to further restrict remedies at this point, and certainly not in respect of some grounds more than others, as appears to be implied by the question in the terms of reference.

In our experience, the most common remedy in judicial review is the quashing order, which quashes the original decision and requires it to be retaken, but without imposing particular conditions or requirements on the new decision. This remedy is not seen as draconian by public bodies in our experience. Such orders usually allow authorities plenty of latitude to retake the same decision in a lawful way.

To the extent the panel is considering replacing quashing orders with a wider use of declarations of incompatibility (as seen in the human rights context), PULSA is against such a development. In our view, any judgment that does not annul the original decision poses problems for the receiving public authority. Having an unlawful decision as a result of a declaration on the books poses a variety of problems – for example, when a court, as it can now under existing legislation, issues a declaration that an item of account is unlawful - this has the potential to create considerable uncertainty for the public authority and private sector bodies contracted with the authority. If the review is trying to promote certainty and clarity in judicial review the use of declarations of incompatibility will not assist.

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?***

In PULSA's view, the judicial review process is clear. The association's members have brought and defended a wide range of judicial review claims, without any confusion. Similarly, the process for appealing a case to the Court of Appeal or Supreme Court has been used by the association's members and is quite clear.

Appeals

In relation to appeals (which are a particular focus in the IRAL terms of reference), PULSA notes the reforms brought in following the Government's last consultations on judicial review. These 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.

In our view, 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 there is no 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 potentially important issues reach the Court of Appeal and the Supreme Court. The Supreme Court in particular has a unique position at the top of our judicial system and is able to more fearlessly hold the Government to account than the High Court or Court of Appeal.

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

If restrictions were placed on appeals of permission decisions - for example restrictions on a Claimant's ability to request that the decision be reconsidered at an oral hearing - this too could have serious implications. 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.

One recommendation PULSA has to reform the appeals process in judicial review is to adopt a recommendation from the 2014 Bingham Centre Report referred to in our introduction, and in effect create an appeals process that bypasses the High Court:

"*Claimants could be permitted to invite the Admin Court to grant permission, dismiss the substantive application, and grant permission to appeal to the Court of Appeal*" (R22).

This would be done on the grounds that the case is plainly apt for the Court of Appeal and the assistance to the Court of Appeal in having a judgment below is outweighed by the avoidable expense to the public purse.

This would save the cost to the public purse of having the claim considered by two courts, but it would ensure important issues are considered by the more senior court.

Duty of candour

We note the duty of candour is mentioned in the terms of reference, but not in the questions in the call for evidence themselves. We therefore include here some views on the duty of candour.

It is accepted by practitioners that the duty of candour is not as wide as the disclosure obligation in other civil litigation. Practice direction 54 makes it clear that the normal disclosure rules are not applicable in judicial review unless the court orders otherwise, which is rare.

We consider the duty of candour is the right approach to disclosure in judicial review, given the constitutional purpose of judicial review to examine public wrongs. The fact is that the defendant is likely to have the most information in its hands.

We know that the duty of candour can be an onerous responsibility for defendants in some circumstances. It is a broad duty, and looking for evidence to explain the decision-making process followed can be like looking for needle in haystack. Fulfilling it is costly, for example if witness statements are required to explain the decision-making process. Nonetheless, public bodies take it very seriously and may repeat the exercise several times. Claimant lawyers in the group explain that they never feel overwhelmed with information and it is rare for defendants not to be candid. If this occurs, it is usually corrected by the court. We consider this is as it should be - the government has a duty to enhance the rule of law by coming to litigation with its cards up on the table to enhance the evidence. It is not clear how to make the scope of the duty of candour narrower without undermining the purpose of the judicial review process as a whole to review public wrongs effectively.

Narrowing the scope of the duty of candour might also be of little practical assistance in lessening the burden on public authorities, given that the duty sits alongside other regimes – such as Freedom of Information – and claimants might be pushed towards making wide FOIA requests if they could not access information using the duty of candour.

We consider the duty of candour aids good decision-making - there is something helpful about the message that public authorities need to understand what information they hold and where the evidence lies. That simple message is important culturally in getting public bodies to make sound decisions. This perspective is also shared by some defendant lawyers, in-house lawyers at public bodies, and local government lawyers – the duty of candour is such an important safeguard that the benefits outweigh any negative concerns.

If the duty of candour were to be dispensed with, in our view the only thing that could replace it would be a harder-edged disclosure duty. It is clear that some level of disclosure is necessary in judicial review as otherwise claimants will not know the factors that went into the decision, which is crucial. A harder-edged disclosure duty would be more onerous on government, and would dramatically increase the costs of judicial review. We note that comparatively, the UK rules on candour are at the limited end of the spectrum. In most civil law countries access to the file is available when the initial decision is taken, and at the litigation stage.

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?***

We note the focus in the IRAL terms of reference on time limits. In our view the current three month time limit (alongside the requirement that a judicial review claim be brought 'promptly') strikes the right balance between enabling time for a claimant to lodge a claim (and crucially, engage in pre-action correspondence with the defendant) and ensuring effective government and good administration without too many delays.

The government's 2012 and 2013 consultations on reforming judicial review did not result in a general shortening of JR time limits, although they did shorten some specific time limits. PULSA does not consider there is now a case for shortening time limits for judicial review more generally, and would not support reducing the time limits in judicial review generally to 6 weeks,[4] 30 days,[5] or 2 weeks.[6] Shorter time limits for judicial review could paradoxically lead to more claims, as claimants are forced to issue to protect their position. Shortening time limits would also cause access to justice issues and would hinder compliance with the pre-action protocol for judicial review, which is designed to ensure engagement between claimants and defendants to prevent the need for a claim to be issued at all. Claimants come to the claimant lawyers in PULSA and tell them they have been engaging with the public body, which is why they have missed the deadline to bring a claim.

PULSA's members find the pre-action protocol in judicial review very useful in clarifying and sometimes avoiding claims. The association would not be in favour of reducing use of the protocol.

One improvement to the judicial review process that PULSA does suggest is allowing parties to agree an extension to the three month time limit between themselves. Quite often public bodies get pre-action letters three weeks before the deadline for a claim. In such circumstances, it would be very helpful if they were allowed to agree an extension to allow the completion of pre-action correspondence. Whilst extensions can be agreed at the moment, the court does not have to approve them. In such circumstances, the lawyers for the claimant and defendant may try to get the court to approve a stay on proceedings in order to complete pre-action correspondence, and this is often approved. However, there is no requirement for the court to approve this course of action, and it can be risky.

Ironically, the burdens on Government which feature in the Questionnaire would be likely heightened by a shortening of the time limit.

Finally, on this question, it might be helpful if public bodies were required to make it clear – when publishing a decision –that claimants have three months (and must act promptly) to bring a challenge. This would ensure adequate time pressure, without hindering access to justice.

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?***

[4] As in certain planning cases.
[5] As in certain procurement cases.
[6] As is the case during the course of an inquiry under s.38 of the Inquiries Act 2005.

We answer the two questions on costs together. Overall, PULSA is of the view that the current costs regime works well, and we would not be in favour of changing it.

Question 7 may be aimed at asking whether claimants should face a bigger costs penalty at the permission stage. Currently, it is common for defendants to bear their own costs in defending a permission decision on the papers, even if they "win". PULSA would not be in favour of amending the current rule so that the costs of the permission stage followed the decision (with the claimant paying the defendant's costs if they do not get permission on the papers). We would also not be in favour of linking the recovery of costs to standing.

In our experience, defendants receiving a favourable permission decision is useful 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. Our defendant clients do not typically think it is appropriate 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. Litigants in person would be unlikely to be able to pay the costs of large public bodies in any event. Our defendant clients are usually satisfied to have defended the claim at the permission stage, and to have gained legal insights into the way they perform their functions. Judicial review is generally seen as relatively "cheap" litigation by public bodies, compared to other civil litigation.

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. We note that where an oral hearing is considered necessary at the permission stage, in our experience claimants are already often ordered to pay the defendant's costs of the hearing.

On the question of costs and intervenors (in the IRAL terms of reference), we note the changes already brought in following the 2012/2013 consultations. If the concern with intervenors is about busy-bodies who do not add to the case, PULSA does not really understand the concern. Claimants and defendants are rarely asked to pay the intervenor's costs. If the intervenor does increase costs, 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. The members of PULSA note they are already very cautious about intervening in cases, and only do so if they have a proper point to make.

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?***

PULSA does not consider the remedies available in judicial review are 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 court can also fine-tune these remedies, for example by putting conditions on them – see *Client Earth* for an example of this. It is not clear what extra discretion or flexibility the courts need.

The aftermath of the 2012 and 2013 consultations saw the introduction of the "no substantial difference" test in judicial review, explained above. This has already reduced the availability of relief in favour of defendants in judicial review cases. This test is relied upon a lot by defendants, and claimants often lose on these grounds. It does not appear to be appropriate to further restrict remedies at this point. PULSA certainly is not in favour of lowering the "highly likely" threshold in the no substantial difference test, since the test only kicks in where there is a *prima facie* breach of the law. Lowering the threshold down to "likely" or "possible" would be ridiculous in this context. This would go against the whole constitutional purpose of judicial review. However, without lowering the

"highly likely" threshold it is not clear how any extra discretion could be accorded to the courts on remedies.

If this question intends to imply the most commonly used remedy in judicial review (the quashing order) is too onerous, PULSA does not agree. Quashing orders usually allow public bodies plenty of flexibility in the way they retake decisions in a lawful way, and they very often allow the same decision to be retaken lawfully.

As stated above, to the extent the panel is considering replacing quashing orders with the wider use of declarations of incompatibility (as seen in the human rights context), PULSA is against such a development. In our view, any judicial decision that does not annul the original decision poses a problem for the receiving public authority. To the extent the intention is to replace quashing orders with an award of damages, PULSA notes this has never been the constitutional function of judicial review. Judicial review is not about money – that would be a fundamental change to the way administrative law is understood in this jurisdiction and others.

It is important to note that judicial review is a remedy of last resort. It is somewhat concerning that the focus of the questions in the call for evidence is only on judicial review, and not administrative law as a whole. Judicial review is intimately connected to administrative law as a whole. The review has the potential to change the rules of judicial review without properly considering the effect on administrative law as a whole.

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 answer questions 10, 11 and 12 together, as they all concern early settlement.

In PULSA's experience, settling at door of the court is extremely rare in judicial review. Judicial review simply is not a situation in which coming to an appropriate settlement figure will dispense with the need for a claim. As previously mentioned, judicial review is not about money, it is about principles, and unless a practical solution can be found to the objections in principle with the decision, it is unlikely the parties will settle.

For this reason, traditional ADR will not always be appropriate in judicial review, although it is already available (it is listed on the judicial review pre-action response template), and it is occasionally used. However, taking mediation as an example, it is very expensive, and claimants are not usually in a position to pay for the costs of a mediator, and defendants are unlikely to agree to bear the costs alone. To the extent the review wishes to encourage the use of more formal ADR options in judicial review, it would be necessary for this to be introduced on a funded pilot basis to encourage take up.

PULSA did in fact consider the use of ADR in judicial review at a meeting in 2016. The meeting came up with the following pros and cons of ADR in judicial review (as documented in the minutes of that meeting):

Pros:

- ADR is meant to be cheaper than pursuing litigation;
- ADR is an inherently flexible process;

- There is a whole spectrum of ADR (which is not limited simply to mediation). There are many ways to conduct it with a means of achieving resolution etc in your dispute (e.g. a round table meeting);
- Appointing a neutral evaluator (e.g. senior counsel) to look at the papers and give both sides an independent perspective of the merits;
- Public bodies can be more flexible than they admit;
- You can provide for terms of settlement to remain confidential to minimise the floodgates argument; and
- There are other benefits beyond resolution – ADR can narrow the issues in dispute, show what the people are really wanting to resolve matters, ADR can provide the critical moment to engage senior people and ADR can sometimes allow a claimant to feel like they are being heard (and thus take some of the heat out of a dispute).

Cons:

- Public bodies are not able to be as flexible as their commercial counterparts;
- Public law principles can get in the way – vires/ultra vires (often what is requested by somebody who disagrees is a way that is outside the policy/their powers. What that can boil down to is the party seeking mediation wanting to be treated differently. A decision could have been looked at between 1 and 3 times in an internal complaints process and if everything is deemed to be in order that can cause difficulty);
- It is not as simple to retake a decision – trying to seek Treasury Approval of settlement of proceedings can be quite a complicated process;
- There may be a decision that needs to be formally quashed, i.e. where the doctrine of *functus officio* applies; and
- Floodgates argument (duty of candour releasing documents – shows a weakness that people can pick up).

PULSA notes at that time that it very much benefited from the input of academic Sophie Boyron - https://research.birmingham.ac.uk/portal/en/persons/sophie-boyron(b83d7012-756f-4bdd-91ca-490e9949f97c)/publications.html?page=1 – who has written about the use of mediation in administrative law. We would recommend the review make use of her expertise in this area.

Overall, PULSA is currently of the view that formal ADR (for example mediation) is less appropriate and affordable in judicial review than in other civil litigation contexts – as previously mentioned, judicial review is not a situation in which being in a room trying to agree an amount of money to settle is likely to be helpful.

However, less formal methods of ADR (roundtable meetings in which claimant and defendant speak freely and directly to one another; public engagement events following a controversial decision) have been found to be very helpful in minimising the need to proceed with judicial review, by allowing parties the time to discuss what has gone wrong and what would help the claimant become comfortable with the defendant's decision. This is particularly the case in procedural fairness cases – if there has been a failure to consult there is some scope to explore fixing that error. However, early resolution can be difficult when there is a substantive complaint and a different decision could also be seen as irrational by a different claimant.

There is an apparent tension between the suggestion to widen the use of ADR and the suggestion about reducing time limits for bringing a claim. It is not clear that meaningful ADR could be engaged in if time limits were reduced.

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?

PULSA's members have experience of judicial review with a public interest element, however in its view, standing is almost always granted to the most appropriate party, which is usually an individual victim. For example, in *DSD* (the case involving a challenge to the Parole Board's decision to release

John Worboys) the Court accepted that the victim's family had standing to bring the case, but rejected the standing claim of the Mayor of London.

PULSA does not consider that the rules of public interest standing are treated too leniently by the courts. The courts are careful to limit the standing of inappropriate parties and the vast majority of judicial review cases involve individual victims. Public interest standing cases do not represent a statistically significant number of judicial review cases – we understand that in a survey of 283 judicial review judgments from the Administrative Court in 2017, there were just 18 cases (6%) where a public interest group was the main party. Thus restricting public interest standing cases would be unlikely to significantly reduce the number of cases before the courts, or the number of cases being defended by government.

Charities and representative organisations cannot challenge the merits of political decisions. They must have a legal argument, just like any individual claimant. Moreover, they are usually only granted "public interest standing" where no individual victim or more appropriate claimant can be identified

In our view, the current rules ensure that the most appropriate party to challenge a decision will be granted standing. There is no case for amending the rules on standing. This view is shared by defendant and claimant solicitors, and in-house solicitors at public bodies.

If the rules on standing were tightened, there would be various decisions that could not be challenged at all, which would hinder the ability of the courts to perform their constitutional supervisory function.

Judicial review is about public wrongs, the existence of which is identified by applying the democratic standards of fairness and reasonableness which lie at the heart of judicial review. The identity of the claimant is not the point - judicial review is about the duties owed by government to the public and not about rights enjoyed by individuals.

The government consulted on tightening the rules on standing in 2013, by preventing those with a theoretical or political interest, such as campaigning groups, from bringing claims. Based on strong objections to this course of action, the government decided not to proceed with the introduction of an additional form of standing requirement for judicial review. It is not clear that anything has changed since 2013. Certainly the constitutional function of judicial review as being about public wrongs rather than individual rights has not changed. There appears to be no argument for restricting standing now.

PULSA would certainly not be in favour of making the test for standing in judicial review equivalent to that in human rights cases (victim status).

PULSA's members fully trust judicial discretion to decide whether a case should be heard, and the defendant lawyers in the association would not wish to oust a claim on standing, but rather on the basis that there is no case to answer.

Limiting standing would be a real access to justice issue, and would pose the risk that no-one would have the knowledge, access, or funds to bring an important claim about a public wrong. Judicial review is not an individual remedy, and in many cases it is not about the identity of the claimant – it is about whether a public wrong has been committed.

In PULSA's view, the emphasis of the court should be on whether one of the grounds of judicial review has been made out, not on the identity of the party bringing the claim.

For any clarification or further questions to PULSA please contact Melanie Carter at m.carter@bateswells.co.uk (or on 07974188375).