LIBERTY

LIBERTY'S WRITTEN EVIDENCE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

OCTOBER 2020

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent research.

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INTRODUCTION

1. Liberty welcomes the opportunity to provide written evidence to the Independent Review of Administrative Law (IRAL). Liberty has been providing legal advice and supporting landmark cases since 1934. Our legal team provides services to claimants involved in judicial review cases as well as bringing public interest challenges in the areas of human rights and equality law. Our long history in bringing public law challenges means we are well placed to comment on the operation of judicial review as well as the critical role it plays in upholding justice and accountability within the UK's constitutional settlement.

2. Liberty's expertise in bringing judicial review challenges is augmented by our policy and campaigns work in Parliament and in the wider community. From this standpoint, it is apparent that the Review cannot be divorced from political reality. Liberty's submission to the 'Call for Evidence' sets our response to the operation and effectiveness of judicial review in the context of the broader policy considerations at play.

3. In summary, Liberty's submission addresses the following:

    - The framing of this Review is concerning, setting up a false conflict between judicial review and effective governance, and the timescale allotted for it is far too short for a review of this scale;

    - Focusing the questionnaire on Government departments rather than broader public bodies will give a misleading and incomplete view of the experience of being susceptible to judicial review. The codification of judicial review grounds in statute would reduce – not increase – clarity, and hinder its role as an essential constitutional safeguard and avenue of redress;

    - The test for justiciability as applied by the courts is sufficiently clear. There is no justification for legislative steps to exclude certain decisions or powers from the scope of judicial review. This would only serve to erode executive accountability;

    - The procedural rules for making a judicial review claim are clear for practitioners, but the process is not accessible to litigants in person. Access to justice should be expanded, not restricted;

- Time limits for judicial review are extremely short. A positive reform would be for a clear three-month time limit and the removal of the additional requirement to act promptly;

- Claimants' recoverable costs are not disproportionate, and escalating costs can be avoided by defendants properly engaging with the case from the earliest opportunity. Remedies are limited and discretionary, and should not be restricted further;

- The pre-action protocol and Alternative Dispute Resolution (ADR) are useful tools and public bodies should engage fully at the pre-action stage to resolve issues without going to court. However, this will not always be appropriate, especially when judicial review seeks to clarify the law, and the procedure should recognise that;

- Public interest standing is not treated too leniently. The ability of representative groups to hold public bodies to account is strongly within the public interest, is necessary when no individual is willing or able to make a claim, protects the rights of disadvantaged groups, and is already subject to tests that often see permission denied; and finally,

- The best way to minimise the need for judicial review is simply to ensure decisions are taken fairly and lawfully.

BACKGROUND REMARKS

4. Before addressing the substantive questions in the Call for Evidence, several preliminary points bear mentioning.

FRAMING

5. The Review must take as its starting point the purpose of judicial review within the UK's constitutional settlement. Liberty identifies five key principles which underpin the constitutional role of judicial review:[1]

[1] With thanks to the Public Law Project for their support in the provision of evidence and resources which have informed this response.

- **The Rule of Law:** Public bodies of all kinds, including the government, must act in accordance with the law. No one, especially not the government, is above the law. Judicial review is often the prime mechanism for ensuring that compliance happens in practice.

- **Access to justice:** Everyone should have effective access to the courts and tribunals, in order to challenge where necessary, the decisions affecting them. To be effective, everyone must have access to justice in theory and in practice.

- **Parliamentary sovereignty:** Public bodies – including the government – must comply with the laws set out by Parliament. It is the role of the courts through judicial review to ensure that is what happens.

- **Good governance:** Judicial review plays a key role in ensuring good governance. Good governance is underpinned by good decision-making. Where a decision doesn't meet the appropriate standards, it is vital that avenues of redress are available to those adversely affected by decisions. This holds public bodies to account and ensures they discharge their duties properly.

- **Enforcement of rights:** Public bodies have a legal obligation to act compatibly with the human rights of those affected by their actions. Where a public body has failed to uphold this obligation, judicial review is the primary means through which people can enforce their rights.

6. It is important to set these principles out at the outset. Liberty is concerned that the framing of the review takes a different starting point. The background to the Review is the Government's manifesto commitment to *"guarantee that judicial review is available to protect the rights of individuals against an overbearing state, while ensuring that it is not used to conduct politics by other means or to create needless delays"*.[2]

7. This framing of the interface between judicial review and the other branches of government is reflected in both the Terms of Reference and the Call for Evidence, which both ask the question: *"...how well or effectively judicial review balances the legitimate interest of citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government".*

[2] Conservative Manifesto 2019, p. 48, available from: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.

8. This situates judicial review as antithetical to effective government and good administration. Taking the above principles as the starting point, this positioning of judicial review is not correct. Judicial review is essential to good government by ensuring that public bodies discharge their legal duties, do not abuse their powers and act compatibly with the rights of those affected by their actions. Crucially, judicial review ensures ordinary people whose lives are adversely affected by poor public body decision-making have an avenue of redress. This avenue of redress is an essential check on power, so that good, fair and lawful decisions underpin the "carrying on" of the business of government.

TIMESCALE AND EVIDENCE

9. The task with which the Panel is charged is an unenviable one. Taken together, the terms of reference ask the Panel to carry out a wholesale review of the judicial review process, going to the heart of the role which public law plays in the UK's constitutional settlement and how it operates in practice. Over the years, there have been various reviews and commissions tasked with looking at aspects of the judicial review process. Each time, there has been a recognition of the magnitude of the task and the need for adequate funding, resourcing and time.[3] Unfortunately, the proposed timeline for this Review – with just six weeks for the submission of written evidence and the Panel expected to report by the end of 2020 – is manifestly insufficient for a review of this scale. The Secretariat for the Review appears limited to providing administrative support and the expert members of the Panel lead busy professional lives. Liberty encourages the Panel to recognise the impossibility of fulfilling its role to the necessary standard within such a tight timeframe and without adequate resourcing, and for any recommendations made to reflect this.

10. The Terms of Reference rightly steer the Panel as to the importance of examining data and evidence as part of the Review. To be effective, this approach requires the highest standards and all available empirical evidence should be considered by the Panel. However, there is a marked deficit in relevant, authoritative data on the

[3] The JUSTICE/All Souls Review of Administrative Law took over 10 years and made only minor recommendations in its 1988 report: *'Administrative Justice: Some Necessary Reforms* (Oxford University Press, 1988); the Law Commission in its 1994 report *'Administrative Law: Judicial Review and Statutory Appeals'* chose "not to look at the substantive grounds of judicial review" as they believed they should "continue to be the subject of judicial development"; a 2010 Law Commission report on *'Administrative Redress: Public Bodies and the Citizen'* commented that due to vigorous opposition from the Government to their initial proposals, it was "impractical" to pursue their project any further; and both of the Jackson reports on civil litigation costs (2009 and 2013) focussed on just one aspect of judicial review.

operation of judicial review. Stakeholders like the Public Law Project and others have drawn attention to this issue and have done great work to identify and where possible fill these gaps.[4] However, gaps remain and at present it cannot be said that there is a comprehensive data and evidence base upon which the Review can base its work.

11. Robust evidence and data are integral to any reform process. However, it is particularly important in the present context. Judicial review is not well understood by those who do not work within or adjacent to the legal profession.[5] What public discourse on judicial review exists is dominated by controversial or anomalous cases which do not reflect 'business as usual'. This creates a skewed perception of the role and functioning of judicial review. The inflated visibility of and commentary on high-profile cases will inevitably influence perspectives on judicial review, even of those with expertise in the field. For this reason, due regard must be paid to the available empirical evidence base, and its gaps. Liberty encourages the Panel to approach its task with this in mind, and to avoid making recommendations which cannot be adequately supported by a robust evidence base.

SECTION 1 – QUESTIONNAIRE TO GOVERNMENT DEPARTMENTS

QUESTION 1 – COMMENTS ON QUESTIONNAIRE

12. Liberty has concerns about both the list of recipients of the questionnaire and its contents. While the questionnaire asks about the discharge of local government functions, it appears that it has only been sent to Government departments. However, as the process of assessing the lawfulness of *public body* decision-making, judicial review is not limited to central government. The public functions discharged across public bodies vary considerably. This will inevitably produce different experiences of and perspectives on judicial review by defendants. The Review should therefore ensure that views are sought from all public bodies that are susceptible to judicial review, not just Government departments.

[4] See for example, Public Law Project, 'Reform of Judicial Review: Looking at the Evidence' – a series of roundtable seminars on evidence based reform of judicial review: https://publiclawproject.org.uk/uncategorized/reform-of-judicial-review-looking-at-the-evidence/.

[5] Initial polling conducted by Liberty through Britain Thinks on public understanding and opinion of judicial review shows that there is low awareness of judicial review. Existing knowledge among participants was limited to a select few high-profile cases over recent years, with little to no understanding of the purpose and process of judicial review.

13. More concerning is the leading nature of the questionnaire which asks only whether the listed aspects of judicial review "seriously impede the proper discharge or effective discharge" of central and local government functions. This sets up judicial review as creating an antagonistic relationship between claimants on the one hand and public bodies on the other. However, the rationale of judicial review is to ensure rational, fair and lawful decision-making. In fact, many government lawyers welcome and hold a positive view of the judicial review process. The Government Legal Department has itself acknowledged that *"administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked"*.[6] In the context of a statute-heavy legal system and the proliferation of secondary legislation, judicial review fulfils an important role in clarifying the law, helping public bodies carry out their duties effectively and lawfully.[7]

14. It goes without saying that judicial review can only succeed if the public body in question has acted unlawfully. The unlawful discharge of public functions cannot on any analysis be understood as the "proper" or "effective" discharge of those functions. Many more claims settle at the pre-action stage once the public body's attention is drawn to the flaw under challenge.[8] Any mechanism of accountability is going to involve resource and some practical burden. However, that is the necessary cost of ensuring that public bodies act lawfully. Ultimately, the best way for public bodies to avoid being challenged in the courts is to make lawful decisions in the first place.

QUESTION 2 – MATTERS NOT COVERED ABOVE

15. It is notable that the Terms of Reference refer to the duty of candour and disclosure obligations, but the Call for Evidence does not. The reason for this is not clear. Liberty is concerned however by the Terms of Reference, which speak of the "burden" of these duties only "as it affects Government". This is again

[6] GLD, 'The judge over your shoulder – a guide to good decision making', p. 31 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf.

[7] Research suggests that an improved quality of services often follows successful judicial review claims. See: Platt, Sunkin and Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales', *Journal of Public Administration Research and Theory*, Vol. 20, Issue 2 (2010).

[8] This has been powerfully demonstrated in the context of challenges to the Government's Covid-19 guidance. There have been several challenges to Covid-19 guidance around the failure to account for people with specific health needs. On each occasion, amendments have been made following pre-action correspondence to address the specific needs of disabled people. See for example: https://www.bindmans.com/news/government-amends-guidance-on-self-isolating-when-returning-to-the-uk and https://www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary.

emblematic of the problematic framing of judicial review throughout the published documents on the Review.

16. Firstly, in judicial review cases, *both* parties owe a duty of candour and have an obligation to disclose certain information relevant to the case, not just the Government. Secondly, the duty as owed by the Government reflects the underlying rationale of judicial review – to ensure rational, fair and lawful decision-making. This duty is one *"owed by the defendant to give a full and accurate explanation of its decision-making process, identifying the relevant facts and the reasoning underlying the measure being challenged"*.[9] This promotes transparency and facilitates equality of arms between the parties, by providing each person affected by public body decisions the necessary information to effectively challenge that decision.

17. Public bodies have previously shown a reluctance to comply with this duty.[10] In Liberty's experience, the Government will often seek to comply with the duty of candour only minimally, informing the Court of a relevant issue but then resisting disclosure. Such minimal compliance can create unnecessary delays, hindering the expeditious progress of claims. There should not be any issue with locating or disclosing documents underlying decision-making. If there is, then this is an issue with the processes of data collection and record keeping, not with the duty of candour or disclosure. Given the importance of these duties to the effectiveness of judicial review as part of good governance, Liberty would only support recommendations which strengthen, rather than water down the duty of candour and disclosure.

SECTION 2 – CODIFICATION AND CLARITY

CODIFICATION

18. In Liberty's view, there is no case for the codification of judicial review in statute. This is for two main reasons. First, if the aim of codification is to increase clarity

[9] Cranston and Lewis JJ, "Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings", Discussion Paper, 28 April 2016, p. 3 https://www.judiciary.uk/wp-content/uploads/2016/04/consultation-duty-of-candour-april-2016.pdf#:~:text=%2828%20April%202016%29%20FOREWORD.%20%281%29%20This%20Discussion%20Paper,in%20relation%20to%20the%20recommendations%20set%20out%20herein.

[10] In a recent example, the Court of Appeal held that the Government had committed a "serious breach of the duty of candour and co-operation" in the proceedings (*Citizens UK v SSHD* [2018] EWCA Civ 1812). In that case, the Government failed to provide all relevant evidence of its decision-making with regards to vulnerable unaccompanied asylum-seeking children. The judgment also revealed that lawyers at the Home Office gave advice on how to avoid legal challenge by not providing reasons for refusal.

and accessibility, it will not do that. Second, if the aim is to in any way limit or restrict the grounds of judicial review and the courts' ability to apply them, Liberty strongly disagrees that this is the appropriate way forward.

19. In common law jurisdictions like the UK, legislation – whether primary or secondary – will never produce a full legal code. Legislation falls to be interpreted by the courts. Were legislation to simply provide, for example, that judicial review lies on grounds of legality, procedural fairness and rationality, that would tell the reader little. On their own, the grounds of judicial review are abstract to the point of being meaningless – they attain meaning from their application to a specific factual matrix. The meat on the bones will always come from the interpretation of these high-level principles by the courts.

20. Were legislation to go further, and perhaps attempt to set out the grounds of judicial review in some meaningful detail, the result would be so lengthy, detailed and technical that it would fail entirely in its objective of improving clarity and accessibility. Indeed, such an endeavour is likely to produce more litigation not less, as the courts grapple with the application of what are currently flexible concepts and principles within a rigid legislative framework. As a product of the UK's common law system, the development of judicial review is necessarily an incremental and organic process. Putting it into a legislative straitjacket would hinder the courts' ability to develop judicial review over time in response to the prevailing needs of the day.

21. Given the framing of judicial review by the Government as in tension with "good governance", Liberty is concerned that the Panel may consider the codification of judicial review as a means of restricting claims proceeding on certain grounds. Liberty would strongly oppose any attempt to do so. It would be a mistake to assume that the law of judicial review is amenable to limitation or codification like any other area of law. Judicial review and the courts' application of the grounds is an expression of fundamental constitutional principle. While the primacy of parliamentary sovereignty is a defining feature of the UK's unwritten constitution, it sits alongside the fundamental principles of the rule of law and the separation of powers. The interface between these concepts is necessarily a complex one and parliamentary sovereignty does not operate as a blunt "trump card". Any attempt to restrict the grounds or oust the courts' ability to apply them in statute will be complicated by the courts' inherent interpretative function, a function it will continue to exercise compatibly with constitutional principle. However, that is not

to say that seeking to limit the grounds of judicial review in statute would have no effect. Ultimately, it would threaten the ability of judicial review to fulfil its primary function as an essential constitutional safeguard and avenue of redress for those adversely affected by unlawful decisions.

JUSTICIABILITY

22. The Panel will no doubt be aware of the immediate impetus behind the Government's interest in the legal principle of non-justiciability in the context of the Review. The Supreme Court judgments in *Miller I* and *Miller II* brought the justiciability of prerogative powers to the fore of legal and political debate.[11] There has been extensive academic, legal and political discussion of the substance of those decisions and we do not seek to add anything further to that debate. Liberty is concerned however about the nature of much of the public discourse – including by members of Government – following not only the *Miller* judgments but also subsequently, in connection to the role of the courts and the legal profession within the UK's democratic system. From headlines castigating judges as "enemies of the people", to recent statements from Government departments, Secretaries of State and the Prime Minister deriding "activist" and "lefty" lawyers, there is emerging a prevailing narrative which actively and recklessly seeks to politicise judicial review.[12] It is this divisive narrative which underpins the Government's apparent concern about judicial review being used to "conduct politics by other means" and its interest in "clarifying" justiciability. Liberty is strongly of the view that this narrative, rather than being based in fact, is instead a rhetorical device being used by the current Government and some commentators to justify retrograde 'reforms' aimed at limiting executive accountability.

23. As a matter of general principle, no government power – whether statutory or prerogative – is completely unfettered. For a power to exist, it must have

[11] [2017] UKSC 5 and [2019] UKSC 41.
[12] 'British newspapers react to judges' Brexit ruling: Enemies of the people', *The Guardian* (4 November 2016) https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling; 'Jacob Rees-Mogg brands Supreme Court ruling a 'constitutional coup' as MPs prepare to grill Boris Johnson', *Politics Home* (25 September 2019) https://www.politicshome.com/news/article/jacob-reesmogg-brands-supreme-court-ruling-a-constitutional-coup-as-mps-prepare-to-grill-boris-johnson; 'Home Office wrong to refer to 'activist lawyers', top official admits', *The Guardian* (27 August 2020) https://www.theguardian.com/politics/2020/aug/27/home-office-wrong-to-refer-to-activist-lawyers-top-official-admits; 'Conservative conference: Priti Patel takes aim at migration 'do-gooders' as she launches asylum reform plan', *The Independent* https://www.independent.co.uk/news/uk/politics/priti-patel-asylum-conservative-conference-2020-human-rights-b781701.html; 'Johnson opens new front in war on 'lefty lawyers' *The Law Society Gazette* (6 October 2020) https://www.lawgazette.co.uk/news/johnson-opens-new-front-in-war-on-lefty-lawyers/5105891.article#:~:text=The%20prime%20minister%20today%20broadened,and%20their%20clients%20at%20risk.

boundaries and limits which define it. It is well-established that it is within the jurisdiction of the courts to consider the existence and extent of a legal power.[13] It is not clear on the face of the Call for Evidence whether the Panel is referring only to prerogative powers when it asks whether "certain decisions should not be subject to judicial review". The Terms of Reference suggest that this question may be limited to executive prerogative powers. If this is so, then it is already the case that the courts consider the "nature and subject matter" of a prerogative power when determining whether an issue is justiciable.[14] However, the nature and subject matter of a power cannot define its legal limits.[15] The extent, or boundaries, of a power are set by reference to constitutional principle, including the rule of law and the separation of powers. Assessment of the application of these constitutional principles to the exercise of a power is rightly the domain of the courts. Any legislative step to 'clarify' justiciability would therefore inevitably seek to oust the courts' ability to consider questions that are currently, and rightly, regarded as suitable to judicial treatment.

24. What is clear from the case law is that the courts will not review an issue where the exercise of a prerogative power is squarely within its legal limits.[16] It is where the Government seeks to stretch its own power *beyond* accepted limits that you find the courts intervening, as was the case in *Miller II*. It is for this reason that it is so important to preserve the courts' ability to make what are often complex and subtle assessments of the legal limits of prerogative power, as a necessary check on attempts by the Government to act *outside* its powers. It would be wholly inappropriate for the Government of the day to be able to pick and choose based on the "nature and subject matter" of a power whether the courts could determine its *legal limits*. Such political expediency would indeed see the courts being used to "conduct politics by other means" in a manner wholly inappropriate under the UK's constitution. Moreover, the brunt of this constitutional impropriety would be faced by the individuals who rely on judicial review as their last and often only avenue of redress against unlawful public body actions. Liberty could not support this and encourages the Panel to recommend maintaining the status quo. All public body decisions, where those powers are exercised as public functions, should remain subject to judicial review. The State must be accountable for its decisions.

[13] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[14] *Miller II* [35].
[15] *Miller II* [36].
[16] For example, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76.

CLARITY

25. In Liberty's view the procedural rules for making a judicial review claim are sufficiently clear for practitioners. However, the process is not accessible to litigants in person. Given the proven effectiveness of judicial review as a mechanism for holding public bodies to account and securing redress for those adversely affected by bad decisions, access to legal advice and representation for individuals is vital. However, the reality is that judicial review is unaffordable for much of the population, preventing otherwise wholly meritorious claims from proceeding.[17]

26. For the vast majority of individuals who cannot afford to privately fund a claim, access to justice depends on the availability of legal aid. Judicial review has been retained in scope for legal aid, but access to legal aid is impeded by restrictive financial eligibility criteria,[18] the low rates of remuneration for legal aid providers[19] and the introduction of rules which prevent claimants' lawyers from being paid at all if permission is not granted.[20] In consequence, the number of legally aided judicial review claims has been falling year on year since 2013.[21] Access to legal aid funding for individuals is essential in order to ensure that those who are most dependent on public services have practical and effective access to judicial review. In its approach to the Review, the Panel must recognise and make recommendations which increase access to justice, not further limit it.

SECTION 3 – PROCESS AND PROCEDURE

TIME LIMITS

27. The time limit to bring a judicial review claim is extremely short in comparison to other types of claim, in acknowledgement of the need for public bodies to have certainty in implementing their decision making. Claimants must act extremely quickly to get advice in time to comply with the pre-action protocol, obtain funding and costs protection and carry out all the steps required to issue a claim within three months, and in practice many

[17] Research from the Law Society has shown that people of modest means, the 'Just About Managings' and poor families are also financially excluded by the unfair means rules. See, The Law Society, *'Disqualified from justice: Legal means test report'* (2018) https://www.lawsociety.org.uk/topics/research/legal-aid-means-test-report/.
[18] Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013
[19] For High Court work, preparation and attendance are paid at a basic rate of £71.55 per hour in London and £67.50 per hour outside of London, and advocacy at £67.50 per hour. Civil Legal Aid (Remuneration) Regulations 2013.
[20] Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013.
[21] https://www.gov.uk/government/collections/legal-aid-statistics

poor decisions go unchallenged as a result of the strict time limit. The requirement to act promptly as well as not later than three months from the date that the grounds first arose creates uncertainty for claimants and is already a much shorter time limit than most areas of law. A clear three-month time limit with no additional requirement to act promptly would reduce this uncertainty without creating additional delays in public administration.

COSTS

28. In the vast majority of judicial review cases, there is imbalance of power between an individual claimant and a comparatively well-resourced public body with an in-house legal team. There are also procedural reasons why claimants' costs are likely to exceed defendants' costs. A lay client will have to provide detailed instructions before being advised, a process which will almost inevitably be significantly more time consuming than the equivalent task with an experienced defendant public body with all the relevant documentation to hand. The significant amount of time it takes to prepare a claim will be greater where claimants are distressed, require an interpreter, or have other characteristics frequently seen by lawyers acting for vulnerable groups. The claimant must comply with the pre-action protocol and send a detailed letter before claim setting out the case and proposed grounds of challenge. In order to commence proceedings, a claimant is required to provide a detailed statement of facts and grounds, copies of all the documents on which they intend to rely, as well as all the relevant statutory materials. In comparison with other types of claims there is no provision in the rules for claimants to provide evidence later, other than in reply to the defendant's evidence post-permission. As a result, judicial review is a significantly front-loaded process for claimants.

29. Despite this imbalance, we do not consider that the level of claimants' recoverable costs in judicial review are disproportionate[22] to the outcomes achieved for individuals. In Liberty's experience of public interest litigation on behalf of claimants, the costs become disproportionate only when the defendant fails to comply with the pre-action protocol, does not provide disclosure promptly or fully, or when the defendant fails to engage properly with the litigation and subject matter of the dispute. Escalating costs could be avoided by engagement with the case from the earliest opportunity.

[22] The Call for Evidence asks whether the costs are proportionate but does not explain what costs should be proportionate to.

30. In relation to the costs of unmeritorious claims, the permission stage provides a check on those claims.[23] The defendants' costs up to the permission stage are limited to a response to the pre-action letter and summary grounds of defence. Engagement with the pre-action protocol, the duty of candour and prompt disclosure all help to ensure that unmeritorious claims do not incur significant costs for either party prior to permission.

REMEDIES

31. The remedies available to the Court are limited and discretionary. The majority of judicial review claims involve a challenge to an individual decision[24] and where these cases are successful, the original decision will usually revert back to the public decision maker. In the minority of judicial review claims which challenge a legal power or policy itself, declaratory relief plays an important role in clarifying the law. The role of judicial review in improving the quality of public decision making is a reason not to further limit the available remedies.

THE PRE-ACTION PROTOCOL, AND SETTLEMENT

32. In order to minimise the need for judicial review, public decision makers should ensure that decisions are taken fairly and lawfully and with appropriate advice from in-house lawyers. Training for decision makers, full and proper records and compliance with the principles of good administration will all reduce the need for judicial review claims against public bodies. Proper compliance with the duty of candour by the decision maker can minimise the need for claims to proceed and early disclosure is an important mechanism for public bodies to avoid proceedings in the first place.

33. Where it is properly complied with, the pre-action protocol provides the parties with an adequate opportunity to resolve issues before resorting to litigation. Public bodies should seek advice at the pre-action stage and engage fully with the issues raised in the pre-action letter to avoid the need for unnecessary litigation. For example, Liberty sent a pre-action letter on behalf of the family of a teenager who had been murdered by a person with very serious criminal convictions, challenging the Coroner's decision not to investigate the wider circumstances of their daughter's death. Following the letter before action, the Coroner reviewed the position and agreed to conduct a wider inquiry, taking into account the Home Office and police failings in the case. This led to the Coroner

[23] 20% of applications issued in 2019 were granted permission, Ministry of Justice, *Civil Justice Statistics Quarterly, England and Wales, January to March 2020*
[24] The Value and Effect of Judicial Review, Vardy, Platt and Sunkin, 2015.

making several recommendations about the future monitoring of offenders. In another example, Liberty sent a pre-action letter on behalf of the Joint Council for the Welfare of Immigrants challenging the decision to increase immigration tribunal fees by 500%, which resulted in the Ministry of Justice deciding not to go ahead with the fee increase.

34. Alternative Dispute Resolution (ADR) has an important role to play in some judicial review claims. The pre-action protocol requires both parties to consider ADR at the pre-action stage and parties can be penalised if they fail to comply with ADR suggestions. Mediation and without prejudice negotiation are useful tools for resolving claims or proposed claims for judicial review in some instances, and ADR can also facilitate more flexible solutions than the remedies available to the court, to the advantage of both parties. However, ADR does not have the same role to play in judicial review claims seeking to clarify the law. There can be no negotiation or alternative dispute resolution of some issues and it is important that the judicial review procedure recognises and allows for that.

35. The majority of judicial review claims settle before reaching final hearing[25] and in Liberty's experience, those which do are likely to settle in the claimant's favour. In one example, Liberty represented a man who had been dismissed from the Royal Navy because of his sexuality and at the same time stripped of his medals. He brought judicial review proceedings seeking the return of his medals, and shortly before the hearing the Ministry of Defence agreed to return the medals and to establish a policy whereby others affected could also apply to have their medals restored. This highlights the importance of judicial review as a means of resolving issues in claimants' favour often without the need for a hearing once the public body is made aware of the flaw being challenged. This also illustrates the wider impact of judicial review once a public body has recognised its mistakes: the policy enabling others to apply to have their medals restored provides a remedy for many other people without them needing to pursue claims themselves.

STANDING

36. The suggestion in the Call for Evidence that public interest standing for judicial review is treated too leniently by the courts is based on a flawed premise that preventing unlawful action by public bodies is not in the public interest. Claims brought by representative groups and organisations facilitate the application of the rule of law to government

[25] 27% of applications issued in 2019 settled pre-permission, Ministry of Justice, *Civil Justice Statistics Quarterly, England and Wales, January to March 2020*; as many as 30% drop out after receiving permission, Robert Thomas, *Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis* [2015] Public Law 652

decision making and ensure that public bodies act lawfully. As Sedley LJ said in ex parte Dixon:

> "*Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power*".[26]

37. A broadly framed test for standing enables representative groups to bring judicial review claims in the interests of good administration where there is no individual willing or able to bring the claim. For example, Liberty is the claimant in a challenge to the mass surveillance powers contained within the Investigatory Powers Act. Public interest standing is particularly important in this type of case, where individuals adversely affected by the law or policy under challenge may not be aware of that fact due to the covert nature of the power in question. Other examples of representative groups being well-placed to challenge systemic issues include Client Earth's challenge to the government's failure to require local authorities to take action on illegal levels of air pollution, which resulted in the Court ordering the government to require local authorities to investigate harmful air pollution in 33 towns and cities;[27] and UNISON's challenge to the introduction of fees in the employment tribunal, in which UNISON was able to provide the court with detailed empirical analysis of the impact of the charging regime.[28]

38. Public interest standing also enables claims to be brought on behalf of disadvantaged and vulnerable members of the community in matters of public importance. It is often beyond the means of individuals to bring judicial review proceedings and the ability of representative organisations to bring proceedings in their interests is essential to ensure access to justice. For example, the (former) Equal Opportunities Commission was granted standing in relation to a matter concerning sex discrimination due to its "public importance" and ability to "affect a large section of the population",[29] the charity Rights of Women was able to challenge evidential rules which restricted access to legal aid for women who had experienced domestic violence,[30] and the Children's Society had

[26] R v Somerset County Council, ex p Dixon [1998] Env LR 111
[27] https://www.clientearth.org/legal-history-made-clientearth-case-judge-makes-exceptional-ruling/.
[28] https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf.
[29] R v Secretary of State for Employment, ex parte Equal Opportunities Commission [1995] 1 AC 1
[30] R (Rights of Women) v Lord Chancellor [2016] EWCA Civ 91

standing to challenge the removal of legal aid for unaccompanied migrant children.[31] Indeed, sometimes individuals are unable to bring challenges themselves due to the very nature of their experience which forms the subject matter of the case. For example, the End Violence Against Women Coalition was recently granted permission by the Court of Appeal in a judicial review of the CPS's rape charging policy and practice, a claim that an individual directly affected would be highly unlikely to be able to bring but which is extremely important for the court to hear.[32]

39. In any event, only a small number of the total number of judicial review cases are brought by representative groups, and those which are appear to have a high success rate.[33] Representative groups almost invariably receive legal advice before bringing a claim and are able to draw on their own experience in order to present evidence and expert knowledge to assist the court. Organisations which provide frontline services and carry out policy work often have access to detailed evidence about the practical workings of a policy or system and are in a position to observe the detrimental effects of a policy over time. Judicial review claims informed by this kind of evidence ensure that the courts are able to consider systemic issues which would be beyond the scope of more reactive and ad hoc individual claims. There is no evidence that claims brought in these circumstances are vexatious or unmeritorious, and the permission hurdle acts as a filter in weak cases. The court cannot grant permission unless it is satisfied that the claimant has sufficient interest in the subject matter of their claim for judicial review[34] and regularly denies permission on this basis.[35] Any attempt to restrict standing to prevent representative organisations from bringing judicial review claims would limit democratic participation and would be strongly opposed by Liberty.

CONCLUSION

40. Judicial review is not an area of law like any other. The right to challenge unlawful decision-making by public authorities is a vital constitutional safeguard, providing a route to redress for those adversely affected by poor decisions and a check on executive power. It is fundamental to the rule of law that executive decisions are open to review by the courts to ensure that those in power have acted lawfully.

[31] The claim settled, and legal aid for unaccompanied migrant children was brought back into scope: https://www.gov.uk/government/news/separated-migrant-children-given-better-access-to-legal-aid
[32] See: https://www.crowdjustice.com/case/justice-after-rape/ and https://www.endviolenceagainstwomen.org.uk/evaw-launches-legal-action-against-cps-for-failure-to-prosecute-rape/.
[33] Judicial Review: Proposals for Further Reform, Ministry of Justice, 6 September 2013
[34] Section 31(3) Senior Courts Act 1981
[35] See, for example, *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011

This is as important in theory as it is in practice – both the substantive grounds of judicial review as well as meaningful access to the courts must be safeguarded to ensure that this essential mechanism of accountability remains effective. As with every constraint on power, judicial review will always have its critics in government, but it is a necessary protection to us all. The 'business of government' in a representative democracy is to act in the interests of the people and within the bounds of the law. The ability to challenge the government is not something to be balanced against that; it is what makes it possible at all.

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