Independent Review of Administrative Law

Society of Labour Lawyers
The legal think tank of the Labour Party

Response from the Society of Labour Lawyers

25 October 2020

Foreword by Kate O'Rourke, Chair of the Society of Labour Lawyers

The Society of Labour Lawyers, founded by Gerald Gardiner QC nearly 75 years ago, is the principal professional body for supporters of the Labour Party in the legal profession. This paper has been prepared by a group of contributors chaired by the distinguished public lawyer James Goudie QC. The contributors are practising lawyers with very extensive experience of public law and judicial review, appearing for both claimants and defendants. The submission is intended to present an objective and non-partisan commentary on the issues raised by the consultation.

The Society believes that judicial review plays a fundamental role in the UK's constitutional democracy. Not only it is an essential concomitant of good decision and policy making, but it is the embodiment of the constitutional principles of the rule of law and the separation of powers. Any attempt significantly to diminish the scope of judicial review should be strongly resisted.

Now is a time when both the power and the presence of the British state are expanding at pace to meet the urgent demands of the Covid-19 pandemic, in combination with preparations for a potential No-Deal Brexit. It is critical that our public administration remains subject to robust scrutiny and accountability throughout this volatile period, and beyond. Efforts to curtail judicial review at this moment would limit democratic accountability at a time when public trust in government and its policies is critical to the nation's welfare.

The Society of Labour Lawyers' submission provides a detailed assessment of the suggested need to reform the substantive and procedural law of judicial review in the UK, and also discusses where appropriate the possibility of implementing changes to the law that would enhance its value. We hope that the panel benefits from our representations.

Kate O'Rourke

Chair of the Society of Labour Lawyers

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A. EXECUTIVE SUMMARY

1. The conclusions of this Review must flow from the constitutional role of the Administrative Court. Democracy is the lodestar of the constitution. It guides judicial decision making and is the source of constitutional principle. Judicial review plays an integral role in ensuring that the UK remains on a democratic course in three principal ways:

    a. Enforcing the will of parliament;
    b. Ensuring that the executive acts in a manner compatible with democratic governance; and
    c. Upholding the rule of law by ensuring that individuals can hold the government accountable for unlawful acts.

Codification

2. There is little to recommend codification and, in particular, nothing to recommend a restrictive form of codification.

3. Permitting the government to define (and confine) the grounds on which it can be held accountable to the law amounts to making the executive judge in its own cause. It will enhance the ability of government to breach civil rights while limiting the ability of individuals to seek redress for such wrongs.

4. Codification is impractical. Codifying legislation, to be effective, must either be limited to the assertion of general principles (which will not alter the status quo) or else be so complex as to remove any possible benefit in terms of clarity, transparency, or legal certainty.

Justiciability

5. Questions of justiciability are ultimately about executive impunity. If a power is not justiciable, then citizens have no meaningful remedy when it is exercised unlawfully. There is no possible justification, in a democracy, for allowing the executive to act with impunity from the law.

6. There is no evidence of a decision on justiciability inhibiting public policy or the business of government. While judicial decisions may embarrass the government, the political impacts of a judicial decision are irrelevant in law. The fact that a decision has political impacts does not make it a "political" decision.

7. The assertion that the judicial branch has sought to enhance its powers at the expense of the executive or parliament is unevidenced and wrong. Analyses advancing this position, such as that by John Finnis, tend to be riddled with factual and legal errors and untethered from either legal authority or constitutional history.

8. The number of claims for judicial review has remained generally steady since the turn of the century. The success rate of claims is broadly equivalent to private law.

9. Questions of justiciability are, as a matter of constitutional law, none of the government's business. They are the stuff of law, not politics. The test for justiciability is simple and clear: does the matter raise a question that the court is capable of answering? In other words: does it raise a question of law? The courts have already explored whether the nature and subject matter of a power should be considered when answering that question. Such an approach was rejected because it requires the court to engage in subjective and abstract conceptual reasoning. That is the business of the legislature. Ironically, therefore, imposing a "nature and subject matter" test on justiciability would be the surest way of forcing the courts to engage with "political" questions.

Procedure

10. **Duty of candour** – The duty of candour is critical to the rule of law and must not be abrogated or limited. It may, however, be clarified by amendment to the Civil Procedure Rules ("CPR") to define its scope more clearly.

11. **Standing and public interest groups** – Claims brought by public interest groups enable citizens to hold the government to account where individuals acting alone would often struggle to do so. Such claims tend to be better prepared and save time and money by presenting issues to the court in a single claim rather than a series of individual challenges.

12. **Time limits** – The current rules on limitation strike the appropriate (but delicate) balance between ensuring legal and administrative certainty and ensuring that individuals can hold the government accountable to the law. Changes to the rules would upset this balance, either frustrating administrators or else denying citizens the ability to vindicate their legal rights.

13. **Relief** – The Administrative Court grants relief on the basis of whether the decision-maker's error made a material difference to the decision under challenge. This allows the court to confer remedies that are both sensible and practical. Statutory "clarification" has only inhibited the functioning of this principle.

14. **Appeals** – The current procedure safeguards the judicial review process from legal error. Limiting or altering rights to appeal would expose individuals to the risk of injustice from such errors.

15. **Costs and interveners** – Interveners are an essential aspect of judicial review. They enhance the court's analysis, allowing it to consider argument and information that would not otherwise be available. The current threshold for intervention is high but appropriate, ensuring that the courts have access to relevant assistance while avoiding getting bogged down by irrelevant arguments.

B. INTRODUCTION

16. Citizens have, and emphatically should have, rights, both absolute and qualified. Correspondingly, public authorities, inescapably, have obligations, both absolute and qualified.

17. Rights are to a large extent regulated by the European Convention of Human Rights ("the Convention"). All European countries, in the broadest sense, are parties, with the sole exception of the Belarus dictatorship.

18. Public sector obligations are generally a subject matter of domestic administrative law. What that is about is control of abuse of power and dereliction of duty.

19. Five points need to be made at the outset. First, administrative law, and human rights law, apply to all public authorities, national and local. For example, much judicial review is brought against local authorities. However, the Review makes copious references to "the Government". By this, it apparently means Central Government. As a matter of basic principle, the same basic rules should continue to apply to all levels and emanations of Government, the most powerful as much as the least powerful.

20. Second, Procedure, the fourth topic of the Review, is every bit as important as substance. This is illustrated by human rights. The UK signed up to the substance of the Convention 70 years ago. Then 20 years ago the great achievement of the Human Rights Act 1998 was to make the substance of the Convention enforceable in UK courts, to bring rights home, and to do so without infringing Parliamentary Sovereignty.

21. Third, each topic must be considered on its merits, but regard must also be had to the combined and cumulative picture, the wood as well as the trees. Extensive changes with a common theme of limiting judicial review would severely damage the rule of law. Expanding non-justiciability, reducing the grounds for judicial review, restricting standing, disclosure/candour and the remedy that can be granted, and increasing funding difficulties would not only be bad in their own right. They would together get the overall balance wrong, unduly shield executive action from effective scrutiny, and diminish the essential rights of citizens. This would of course be aggravated if it were to be in conjunction with weakening the Human Rights Act and/or deliberately breaching international law or threatening to do so. There is a potential constitutional crisis. It must be averted.

22. Fourth, it should not be assumed that consideration of changes to judicial review should be confined to proposals to limit it. Changes should also be considered that would enhance its value.

23. Fifth, the question of justiciability is ultimately one of the extent to which public bodies are able to act with impunity in respect of the law. In a democracy under the rule of law, public authorities should be legally accountable to citizens through the courts as they are politically accountable to citizens through parliament, the devolved legislatures, and local councils. It would, therefore, run entirely contrary to both the principles of democracy and the rule of law to in any way limit justiciability.

C. THE ROLE OF JUDICIAL REVIEW IN A DEMOCRACY

24. Until relatively recently, it was axiomatic, beyond a few extreme fringes, that judicial review played an essential role in the UK's constitutional democracy. As Lord Dyson put it:

> "Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review". [***R (Cart) v Upper Tribunal*** **[2012] 1 AC 663 at 122**]

25. Since the May and Johnson governments were embarrassed in a number of high-profile decisions, this consensus has been dented and the basic principle requires restatement.

26. Democracy is both the bedrock of our constitution and the golden thread running through it. Unlike, however, the United States or the French Fifth Republic (for example), the UK constitution was not established on what would be recognised today as a democratic basis. It is necessary to begin with this point because both "the constitution" and "democracy" are too often discussed as if they are static concepts. Indeed, the terms of this Review appear to presuppose that the evolutionary nature of judicial review is a "bug" rather than an essential feature of the constitution.

27. When the United Kingdom was established in 1707, although on a nominally parliamentary basis, the franchise was limited to a small number of property-owning men (many of whom had multiple votes) and the monarch still retained shades of the Tudor and Stuart pretensions towards absolutism. Catholics, women, and people of colour were entirely excluded from any form of political society. Over the ensuing 300 years, the UK took slow steps towards becoming a democracy with the expansion of the franchise, the roll-back of religious, racial, and gender discrimination, and the transfer of political power from the monarch and their ministers to the parliament in its capacity as the holder of the democratic mandate. Democracy, then, is better described as the lodestar of the constitution. It describes the constitutional direction of travel. In Lord Browne-Wilkinson's words:

> "[T]he constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the *democratically elected legislature* as the sovereign body." [***R (Fire Brigades Union) v Secretary of State for the Home Department*** **[1995] 2 AC 513 at 552**]

28. The current point in that history was summed up by Lady Hale in ***Cherry/Miller*** **[2019] UKSC 41 [2020] AC 373, 2020 SC (UKSC) 1 at 55**:

> "Let us remind ourselves of the foundations of our constitution. *We live in a representative democracy*. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). *The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that*. This means that it is accountable to the House of Commons – and indeed to the House of Lords – for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts."

29. It is surely impossible to reject the proposition stated in this paragraph.

30. The role of judicial review in such a democracy is threefold. The first is to enforce the rule that only parliament may make law or authorise the making of law (the "illegality" ground of judicial review). As Lord Dyson put it in his Sultan Azlan Shah Lecture:

> "It includes ensuring that these bodies comply with their statutory obligations. Since these obligations are the result of the democratic process, their enforcement is an essential handmaiden to democracy itself. It is the very antithesis of something that undermines or constitutes a threat to democracy. It is true that the interpretation of statutes is undertaken by judges and, as we are frequently reminded, judges in the UK at any rate are not elected by the people and are not accountable to Parliament. But that should not be a cause for concern, since the aim of the interpretative process undertaken by the judges is to ascertain and give effect to the will of Parliament. Someone has to undertake this (sometimes difficult) task.
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> …
>
> Insisting on the performance of these obligations is one of the hallmarks of any truly democratic system."[1]

31. The second role is to ensure that the government does not exercise its powers in a manner incompatible with a democracy (the "reasonableness" and "procedural fairness" grounds). This involves considering two classes of powers. The first is those powers granted to the executive by parliament. The second is the powers retained by the executive from the, pre-democratic, days of monarchical rule: "prerogative powers". In Dicey's words:

> "The prerogative appears to be historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the crown. The prerogative is the name of the remaining portion of the Crown's original authority ... Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of the prerogative."[2]

32. The second purpose is as important (and co-essential with) the first. As Lady Hale put it:

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. …[I]t is a purpose

[1] Lord Dyson, "Is Judicial Review a Threat to Democracy?", Sultan Azlan Shah Lecture (November 2015).
[2] Dicey, A.V., *The Law of the Constitution* (10th Ed.) (London; MacMillan, 1956), pp. 434–5.

> of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not." [***Ghaidan v. Godin Mendoza*** **[2004] UKHL 30 [2004] 2 AC 557 at 132**]

33. The executive exercises enormous power (famously compared,[3] by Lord Hailsham, to a dictatorship), which creates commensurately enormous opportunity for abuse. Lord Acton's argument that any institution wielding power will almost inevitably abuse or misuse it in some way[4] remains as true today as it did in the 19th century. The executive wields power that may be used to dismiss parliament, remove or block its political opponents from power, or trample individual rights and civil liberties.

34. The primary check on the abuse of executive power is parliament. But parliament is not institutionally capable of providing the necessary protection. There is both a principled and an institutional reason for this. From a principled perspective, parliament represents the majority. In a democracy, the rights of the minority must also be protected. The reason for this is simple: the majority must be able to change. A majority acting with unchecked power could make itself the majority in perpetuity by removing the rights of its political opponents.

35. From an institutional perspective, parliament is not equipped to police the day-to-day behaviour of the executive. It cannot, for example, investigate every contravention of individual rights. It is also notable that the executive controls when parliament sits (through its power to prorogue), what it discusses (through its control of the order paper), and how long it spends on any issue (through its control of the parliamentary timetable). The Johnson government, which mandated this Review, expressed outrage when parliament briefly took back the latter two powers in September 2019 to pass the European Union (Withdrawal) (No. 2) Act 2019. Judicial review fills this chink in the armour of democracy and ensures that individual rights of the sort described by Lady Hale are protected from abuse:

> "Every legal power must have legal limits, otherwise there is dictatorship…. the Courts are the only defence of the liberty of the subject against departmental aggression". [***Pengarah Tanah dan Galian v Sri Lempah Enterprise*** **[1979] IMLJ 135**]

36. The third purpose of judicial review is to uphold the rule of law. This combines the principles embodied in the first two purposes with a third element: fairness. It means that the same rules apply to everyone, whether prince or beggar. The rule of law is

[3] Lord Hailsham, "Elective Dictatorship", Dimbleby Lecture (London; BBC, 1976).
[4] Lord Acton, Letter to Bishop Creighton dated 5 April 1887, in Figgis, J.N., and Laurence, R.V. (eds), *Historical Essays and Studies* (London; Macmillan, 1907).

also a constraint upon judicial review: The same rules and/or principles must be applied to everyone. The courts, like the executive, are not entitled to (and do not) apply one rule for their friends and another for their foes. In a democracy, just as the state can hold individuals accountable (or individuals hold each other accountable) through the law, so individuals can hold the state accountable.

D. CODIFICATION

The Question for the Review

1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.

(Terms of Reference, paragraph 1)

The question of codification

37. The substantive law of judicial review in the UK is a product of the common law, while certain procedural aspects of judicial review are governed by legislation in the form of section 31 of the Senior Courts Act 1981 and RSC Ord 53 (now Civil Procedure Rules, Appendix 1), as well as the CPRs. In general terms, the question in paragraph 1 of the Terms of Reference for the Review – outlined above – is whether the substantive grounds of judicial review ought to be codified.

38. We will assess how far the form of codification contemplated by the Government would embrace the values associated with codification and secure the intended objectives for reform. We will also critically compare the experience of codification of judicial review in other common law jurisdictions, principally Australia, particularly drawing upon the lessons learned in these jurisdictions.

39. We will show that codification of the sort envisaged, or likely to be pursued, is unlikely to function in the manner envisaged by the Government, and any attempt to do so ought to be avoided, as there is a significant danger that the rule of law would be fundamentally undermined in the attempt.

The case for codification

40. There are numerous arguments employed in favour of codifying the substantive grounds of judicial review. In his paper "*Judicial review and codification*",[5] Timothy Jones highlights four of the key potential benefits of codification of judicial review. These include:

    a. **Legal certainty**. Legal certainty has not been a consistent feature of the common law grounds of review, with grounds like "unreasonableness" and "procedural fairness" being criticised as opaque and malleable. The argument goes that

[5] Timothy H. Jones, Judicial Review and Codification, 20 LEGAL Stud. 517 (2000).

codification would present an opportunity to provide a degree of legal certainty to the law. On this note, Jones suggests that one possible advantage might be the emergence of a discrete jurisprudence for each ground of judicial review set out in statute.[6]

b. **Greater clarity**. A related argument is that codification might bring greater clarity to the law, by clearly setting out in one place the challenges that can be made to administrative decisions, making the law more accessible and fostering greater awareness amongst members of the public and administrators. That is, codification may make the law of judicial review more understandable to those who are not legally trained.

c. **Democratic legitimacy**. This argument challenges the democratic basis of the judiciary's authority to review executive action and asserts that it lacks positive legal authority for judicial review. In this respect, it should be the function of the legislature – especially in a democratic state that espouses parliamentary rather than judicial supremacy – to establish the legal principles to be applied in judicial review proceedings.[7] Codification would provide clear authority to the judiciary to exercise judicial review and address the criticism that they have taken these powers to themselves.

d. **Rationality**. The common law of judicial review is a result of the development of legal principles on a case-by-case basis. Whereas codification presents an opportunity to rationalise and reform the existing principles of judicial review and to substantively improve the law, for example by removing confusion.

What will codification look like?

41. An assessment of the consequences, and merits, of codifying the grounds of judicial review in the UK will depend on the precise form of codification that occurs. The key issues in this regard will be: (i) the degree of specificity with which the grounds of judicial review are set out in the codifying statute; and (ii) how far codification is a restatement of the existing law as opposed to substantive reform of the grounds of review (whether in an expansive or restrictive direction).

[6] Above n. 5, at 520.
[7] Above n. 5, at 521, referring to P Verkuil 'Crosscurrents in Anglo-American Administrative Law' (1986) 27 William and Mary LR 685 at 708.

42. In terms of the first criterion, there are broadly speaking two approaches to codification. The first is what Mark Elliott labels the "window-dressing" model,[8] in which the grounds of judicial review are set out in statute as a set of high-level principles. This model reflects the approach taken in the United States, where the Administrative Procedure Act 1946 adopts general language and sets out broad principles of judicial review.[9] For example, section 10(e)(5) of the Act directs a court to set aside an administrative decision if unsupported by "substantial evidence"; however, the Act gives no guidance as to the meaning of "substantial" in this context. The principle had already been established in the case law and the meaning and effect of the standard would continue to be shaped by judicial decision. A similar approach was taken in New Zealand under the Judicature Review Procedure Act 2016, where the procedure for seeking judicial review was codified along with the remedies that may be sought. Indeed, New Zealand had previously undertaken a review of its law of judicial review, where, in relation to codification, the Public Administrative Law Reform Committee found that:

> "Far from clarifying the law, legislation might have the opposite effect. First, while the statute would probably in large part restate the law, in some degree it would not. But it will probably not be clear of every provision whether it merely restates the law or effect some change in it […] Secondly, the particular drafting might introduce linguistic arguments not available (or not so readily available) under the present law".[10]

43. It was on this basis that New Zealand has only ever sought to codify the procedure of seeking judicial review, rather than the substantive law.

44. For the purposes of judicial review in the UK, the principles-based (or "window-dressing") approach might involve placing the broad principles espoused by Lord Diplock in the ***R (Council of Civil Service Unions) v Minister for the Civil Service* [1985] A.C. 374 ("GCHQ")** on the statute book. The legislation would provide that judicial review is available on the grounds of legality, procedural fairness, rationality, and (possibly) proportionality, and would confer on the courts the power to intervene when these principles were offended.

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[8] Mark Elliott, Public Law for Everyone, *The Judicial Review Review III: Limiting judicial review by 'clarifying' non-justiciability – or putting the lipstick on the proverbial pig*, available at https://publiclawforeveryone.com/2020/08/20/the-judicial-review-review-iii-limiting-judicial-review-by-clarifying-non-justiciability-or-putting-lipstick-on-the-proverbial-pig/.

[9] Section 10(e) of the Administrative Procedure Act 1946.

[10] Twelfth report of the Public Administrative Law Reform Committee (Government Printer, September 1978) 21.

45. However, as Elliott observes, this would "amount to codification in cosmetic sense only"[11] and would leave the door open to the continued judicial elaboration of the grounds of judicial review. Indeed, the experience in the US has been that the codified grounds of judicial review under the Administrative Procedure Act 1946 have retained the malleability of judge-made law and their meaning has continued to evolve over time.[12] Administrative law in the US, therefore, continues to be heavily influenced by judicial decision. Consequently, this model of codification does not embrace the values associated with codification described at paragraph 40 above. For instance, as Jones highlights,[13] while putting the broad principles into legislation may contribute to democratic legitimacy, the operation and evolution of those principles will remain subject to judicial elaboration. It would be fair to say that this approach, in substantive terms, does not represent a material break with the status quo. For this reason, we find it highly unlikely that the Government had this approach to codification in mind, nor that utilised in New Zealand, when drafting the Terms of Reference.

46. The second broad approach to codification – which Mark Elliott refers to as the "all-encompassing" model – is a more granular one, which involves setting out in some detail the available grounds of judicial review. The Australian Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ***AD(JR) Act 1977***)[14] is a statute of this type, setting out a non-exhaustive list of grounds for review (in section 5 of the Act) and encompassing a combination of general and more specific provisions. That being said, even the AD(JR) Act 1977 lacks guidance on the interpretation of many principles contained in the statute and has remained reliant on judicial interpretation of the grounds of review. We will return to the Australian experience when considering the merits of codification below.

47. The second criterion in assessing the merits of codification concerns the question of how far the exercise represents a rationalisation, or restatement, of the existing law of judicial review as opposed to a substantive reform to the grounds of review. In this respect, our strong suspicion (from reading the Terms of Reference together with, for example, the Conservative manifesto in 2019 and remarks from government ministers and right-wing commentators such as contributors to Policy Exchange's "Judicial

[11] Above n. 8.
[12] Above n. 5, at 524. The cited text refers to the period 1946–2000 but the author understands that the courts' wide discretion to apply the broad principles under the Act remains the same today.
[13] Above n. 5, at 522.
[14] Administrative Decisions (Judicial Review) Act 1977, No. 59, 1977, available at https://www.legislation.gov.au/Details/C2017C00238.

Power Project"[15] in recent years) is that the Government will seek to use codification as a means of narrowing the grounds of judicial review and to limit the circumstances in which administrative decisions will be amenable to judicial review. Mark Elliott refers to this third approach to codification as the "restrictive" model. This might involve codifying the existing grounds of review in a way that affords them a more narrow meaning than they currently have, or it might simply mean excluding some of the existing grounds from application under the statute (whether by ouster clause or not including certain grounds in an exhaustive list in the statute).

48. Given these considerations and the language used in the Terms of Reference,[16] it seems to us that the Government intends to pursue a restrictive approach to codification, which sets out in some detail (i.e. not just in principle) the grounds of judicial review and the types of decision that are excluded from review (whether by virtue of their subject matter or the nature of the decision being made). We will show that codification in this form will not function in the manner, or produce the effects, intended by the Government, and contend that such reform of substantive judicial review should be avoided at all costs given its capacity to undermine the rule of law and the proper functioning of the separation of powers within our constitution.

Codification – a retrograde step

49. Codification of the grounds of judicial review in the UK in the manner contemplated by the current government would not deliver the benefits associated with "rationalising" the law of judicial review. As will be shown, rather than substantively improving the law – ordinarily a key driver behind reform – codification of this sort would do little to improve the clarity or legal certainty of the substantive law of judicial review. More fundamentally, however, it would be a significant retrograde step for the British constitution, good governance, and the rule of law.

50. Section C of this submission argues forcefully for the role of judicial review in a modern democratic society. In keeping with those representations, we object as a matter of principle to the carving out of areas of policy and law in which the government cannot be challenged judicially and may, therefore, act with impunity. This would make the government the judge in its own cause and run contrary to the principles of democracy

[15] See https://policyexchange.org.uk/judicial-power-project/.
[16] Independent Review of Administrative Law, Terms of Reference: see references in paragraphs 2–3 regarding the "clarification" of justiciability and questioning "which grounds the courts should be able to find a decision to be unlawful", as well as references to the "experience in other common law jurisdictions" (Note B) and the promotion of "clarity and accessibility in the law" (Note C).

and the rule of law. It would, fundamentally, undermine the separation of powers inherent in the British constitution.

51. Such reform would also run counter to the modern conception of judicial review, which envisages the courts as doing more than merely enforcing statute law, but embracing a more substantive notion of the rule of law, which encompasses the protection of justice and of the fundamental rights of individuals affected by the exercise of executive authority. A further distinctive – and in our view essential – characteristic of the evolution of judicial review of administrative action has been the progressive development by the judiciary of legal standards against which the powers of public officials can be measured.

52. Yet, the approach to codification that the Government intends to pursue would put a stop to, or at best severely limit, the scope for judicial elaboration of the grounds of judicial review (including the possibility of expanding or clarifying the existing heads of review, or introducing new ones). This would impede the progression of the law towards a more substantive conception of legality and circumscribe the capacity of the common law to uphold and safeguard constitutional principles and fundamental rights – both of which signify a deeply regrettable attack on the rule of law. All government actions should be determined within the rule of law and interference with access to the courts should be reserved for only the most extreme circumstances.

53. We would discount the “democratic legitimacy” argument in favour of codification on similar grounds. Any form of codification that, as in the present context, seeks to narrow the scope and operation of judicial review would be inherently anti-democratic by reference to the more substantive notion of the rule of law described above and which is now well established in UK constitutional law. This is because its effect would be to reduce or, in some cases, exclude governmental accountability and to limit or, in some cases, exclude fundamental rights such as access to justice and to a remedy in judicial review.

54. Moreover, the democratic legitimacy argument does not fit comfortably with the Westminster system of government. Within this system, an executive with a large majority in the House of Commons could easily secure the passage of its legislative proposals through parliament. As such, codification may have the effect of placing the content of the grounds of judicial review in the hands of the government, a situation that can be exploited to prevent or hamper executive accountability at common law.

This would be a manifestly anti-democratic outcome. In this sense, the argument concerning democratic legitimacy is better suited to the US model, under which Congress would be legislating the grounds of review by reference to which the judiciary would hold the executive to account.

Clarity

55. One of the stated advantages of codification is to give the law greater clarity, serving an educative, or at least informative, function for administrators and members of the public, who will be capable of understanding the grounds of judicial review. However, this is entirely unlikely, given the manner in which we expect the Government to seek to codify judicial review. Whilst codification might superficially aid clarity and certainty by providing an express list of heads of review, in order to meaningfully enumerate and elucidate the grounds of review, the legislation would need to be so lengthy, detailed, and technical as to undermine any notion that the law is clear and accessible to the lay person. Indeed, such complexity and detail may well generate ambiguity and uncertainty where it did not previously exist and give rise to further litigation, as described by the New Zealand Public Administrative Law Reform Committee, set out above.

56. Further, as Mark Elliott highlights,[17] this is exacerbated by the fundamental difficulty that the grounds of judicial review are exceptionally difficult to understand and define in an abstract way outside of the specific context of the statutory framework that defines the powers whose exercise is under review in any given case. The New Zealand Law Commission acknowledged the challenging nature of the codification exercise when it noted in 2001 whilst considering further codification of judicial review in New Zealand, "there is a limitless range of administrative powers and situations which it is impracticable to express in legislation with the degree of specificity that would be useful".[18] This is also a result of the fact that the legal principles of judicial review deal with complex questions of individual and collective rights which are not easy to define. As such, with regard to Note C of the Terms of Reference, we find it highly unlikely that the contemplated codification exercise will promote clarity and

[17] Mark Elliott, Public Law for Everyone, *The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration?*, available at https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/.
[18] New Zealand Law Commission, Mandatory Orders against the Crown and Tidying Judicial Review, Study Paper 10, at paragraph 71, available at http://www.nzlii.org/nz/other/nzlc/sp/SP10/SP10-3_.html.

accessibility in the law and increase public trust in judicial review as a result. Indeed, it is likely to do the very opposite.

57. It is also worth noting that the less detail and technicality provided in the codifying statute – i.e. the closer one gets to the principles-based model – the more one will rely on judicial elaboration and interpretation to understand the scope of judicial review. As noted above, this is the case in the US where the Administrative Procedure Act 1946, while codifying the broad principles of judicial review, allowed for considerable ambiguity in the statute and left it to the judiciary to determine the meaning and effect of those specified principles. If this scenario were to arise in the UK as a result of codification, it would be difficult to claim that codification had resulted in greater clarity of the grounds of judicial review.

Flexibility

58. A further risk of (the more detailed approach to) codification is that the statutory wording will place limits on the courts' ability to adapt the law to new contexts, as compared with the considerable scope to do so under the common law. This risk is acute in the context of the anticipated form of codification where, in order to achieve the Government's stated policy objective of reducing scope for judicial "creativity", the legislation will seek to constrain or prevent the judicial development of the law. For instance, for the same reason concerning judicial law-making, it may be deemed necessary for the list of review grounds contained in any codifying statute to be *exhaustive* – in which case the judiciary's ability to establish new heads of review will be severely inhibited, if not impossible.

59. One of the inherent advantages of the common law is its flexibility and adaptability, which allows the courts to keep pace with modern developments and changes in society. Precedents are made in the courts before being challenged, overturned, and replaced with new ones. In this sense, the common law has provided fertile soil for the development of the law and allowed the grounds of review to evolve over time in response to individual cases but always guided by constitutional principles, such as good governance and the separation of powers, and the need to safeguard fundamental rights.

60. It was for this reason that, when the New Zealand Law Commission explored the possibility of codifying the law of judicial review, the major hurdle it encountered was defining exactly what powers are reviewable. Indeed, it was exactly the problem of

finding a form of words that would not only encapsulate the present powers that could be reviewed, or had been reviewed under the common law, but would also encapsulate those powers that had not been subject to review or did not yet exist. As the New Zealand Administrative Law Committee stated: "there is a limitless range of administrative powers and situations which it is impractical to express in legislation with the degree of specificity that would be useful."[19]

61. Codified grounds of review threaten this flexibility and the extent to which these crucial principles and rights may inform the development of judicial review in future, particularly if the legislation is highly prescriptive (e.g. granular in detail and specifying an exhaustive list of grounds), in which case rules will impose a straitjacket over the development of the law. Commentators have made similar observations in respect of Australian codification, where placing the grounds of review in the AD(JR) Act 1977 has arguably resulted in the ossification and stunting of judicial development of those grounds.[20]

62. The question becomes whether the trade-off is worth it. Lord Woolf has previously asserted that the loss of flexibility inherent in the common law of judicial review would be too high a price to pay for the clarity that would come with codification.[21] We strongly support this sentiment and, in any event, we note that codification in the UK would most likely not produce greater clarity of the substantive law of judicial review (for the reasons set out above).

Constitutional impasse – lessons from Australia

63. It is clear from the Terms of Reference that the Government will seek to rely on the example of codification in Australia, under the AD(JR) Act 1977, in support of any restatement of the principles of judicial review in statutory form in the UK. We can draw salient lessons about codification from the Australian experience, which serve to illuminate how codification of a similar sort will not function effectively in the UK and will not deliver the benefits of codification set out at the beginning of this section.

64. The AD(JR) Act 1977 is a piece of federal legislation in Australia that aimed to simplify, codify, and, in part, expand common law judicial review. The Act established a single,

[19] Above n. 18.
[20] See, for example, Mark Aronson, '*Is the ADJR Act hampering the development of Australian administrative law?'* (2004) 15 Public Law Review 202
[21] Sir Harry Woolf Protection of the Public - A New Challenge (London: Stevens & Sons, 1990) p 32. See also J Jowell and P Birkinshaw 'English Report' in J Schwarze (ed) Administrative Law under European Influence (London: Sweet & Maxwell, 1996) pp 273-332.

simple procedure for bringing a claim in respect of any ground or remedy in judicial review, codified the grounds of judicial review, and established certain new rights for individuals, such as the statutory right to reasons for a decision.

65. It is important to note that the AD(JR) Act 1977 was intended to help overcome what was widely considered a technical, narrow, and complex process for seeking judicial review with opaque, antiquated, grounds. In other words, the underlying rationale for codification in Australia was to *expand* the reach of judicial review and make it more straightforward for individuals to exercise their rights and bring judicial review claims. That is, to improve access to justice. Whereas the present British government's motivation for seeking to codify the substantive law of judicial review is arguably the antithesis of this: namely, to narrow, or limit, the scope of public law challenge and to reduce the accountability of the executive to the courts. That is, to substantially reduce access to justice. This distinction has important implications for the question of how far the UK government can realise its policy objectives through codification, and indeed whether it should.

Role of the common law post-codification

66. The key provision of the AD(JR) Act 1977, for present purposes, is section 5 of the Act, where the grounds of judicial review are laid out in statutory form. These grounds mostly reflect the existing common law grounds, with for example "breach of the rules of natural justice"[22] and "error of law, whether or not the error appears on the record of the decision"[23] being included as heads of review. The Act did not remove or narrow the application of existing grounds of review and it sought to embrace the common law of judicial review rather than substantively change or limit it.

67. Indeed, the entire exercise of codification in Australia was based on the premise that the culture of the common law would pervade the operation and application of the Act.[24] Mason J captured this expectation well in ***Kioa v West* (1985) 159 CLR 550 at 576**, when he remarked that

> "The statutory grounds of review enumerated in s. 5(1) are not new – they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. […] [I]t is not the primary object of the section to amend or alter the common law content of the various grounds."

[22] Section 5(1)(a).
[23] Section 5(1)(f).
[24] Above n. 5, at 525.

68. As Jones explains,[25] this has become the dominant principle in the judicial interpretation of the grounds set out in the 1977 Act. The statute is not independent and freestanding, but must be read against common law principles in line with the interpretative method developed by the Australian judiciary. Furthermore, section 5(1)(j) permits review of administrative action on the basis that "decision was otherwise contrary to law". This open-ended provision was included in the Act to facilitate, or even ensure, the continued common law development of the substantive law of judicial review.

69. This is in sharp distinction to what we might expect from any codifying legislation in the UK. Here, it is fair to assume that the statute will not afford the common law such an obvious role in the continued development of the grounds and remedies of judicial review. Rather, the grounds of review provided in the statute will likely be more limited than under the common law and indeed in respect of certain administrative action the jurisdiction of the court is likely to be ousted entirely. The courts will be tasked, strictly, with only applying the grounds of review as specified in detail in the statute and will have minimal licence to shape the development of the law.

70. This distinction between the Australian model and the likely British approach has important consequences for the possibility of the reform delivering its intended effects. For, whereas the Australian model embraces and depends upon the common law for its operation, the British model will seek to eschew the common law and minimise judicial elaboration on the grounds of review. Yet, as will be explained, it will be near-impossible for the legislation to displace the common law principles and fundamental rights that underpin judicial review and which the courts will (rightly) continue to uphold when interpreting the grounds of review contained in the statute.

Can judicial review be limited by statute?

71. The interpretation of statutes and other pieces of legislation is a part of the High Court's inherent jurisdiction. It is from this inherent jurisdiction that the common law has developed the law of judicial review. Any attempt, through codification or otherwise, to limit or oust the court's authority to judicially review administrative actions is a direct challenge to the High Court's inherent jurisdiction and will be fiercely resisted by the judiciary. This jurisdiction, and the exercise of judicial review thereunder, is a

[25] Above n. 5, at 526.

fundamental part of the British constitution, and safeguard to the rule of law. It is extremely unlikely, therefore, that the British judiciary, when faced with an Act of Parliament that seeks to oust this ancient jurisdiction and so fundamentally undermine the rule of law, will not seek to read the legislation down, such that it becomes a mere gloss on the existing common law (like, for example, the Human Rights Act 1998, which left common law constitutional rights intact).[26] Therefore, any such attempt to limit or narrow judicial review by way of codification is almost certainly doomed to fail.

72. Mark Elliott supports the conclusion that the task of curtailing judicial review through codification would be far from a straightforward matter.[27] He emphasises that judicial review is an expression of fundamental constitutional principles, which forms part of the bedrock of the UK constitution and, consequently, the grounds of review will be highly resistant to being displaced. Courts will seek to interpret the codifying legislation in a manner that is consistent with these principles, which "would mean reading into statutory powers such conditions and limitations as would be necessary to render their exercise consistent with the constitutional principles that underpin the grounds of judicial review".[28]

73. Accordingly, to be certain of successfully restricting judicial review through codification, the Government would need to include language in the codifying legislation that expressly prohibits the courts from exercising their innate interpretative function in specified circumstances. In other words, the legislation would need to contain ouster clauses in respect of the types of decisions or subject matter that the Government wished to shield from review. Otherwise, the codifying legislation risks allowing for continued judicial elaboration of the substantive law of judicial review and failing to exclude judicial scrutiny of certain executive action. It is clear from recent remarks from cabinet ministers that the Government is contemplating such radical action. Take, for example, the words of Home Secretary Priti Patel in her 2020 Conservative Party Conference speech:

> "No doubt those who are well-rehearsed in how to play and profit from the broken system will lecture us on their grand theories about human rights. Those defending the broken system – the traffickers, the do-gooders, the lefty lawyers, the Labour Party – they are defending the indefensible".[29]

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[26] In support of this reasoning, see *Jackson and others (Appellants) v Her Majesty's Attorney General (Respondent)* [2005] UKHL 56, in particular at paragraphs 107 and 159, and *Moohan and another (Appellants) v The Lord Advocate (Respondent)* [2014] UKSC 67, in particular at paragraph 35.
[27] Above n. 17.
[28] Ibid.
[29] See https://www.theguardian.com/global-development/2020/oct/06/home-secretarys-dangerous-rhetoric-putting-lawyers-at-risk.

74. The form of words required to achieve such an ouster would not be difficult to find, despite being constitutionally incendiary. For instance, the legislation might specify that: "*the exercise of [prerogative powers] by the Secretary of State is not justiciable in the courts of England and Wales*".

Absence of constitutional backstop

75. The Australian experience provides a helpful comparator on the application of ouster clauses (known in Australia as "privative" clauses). An ouster clause is a legislative attempt to limit or exclude judicial intervention in a certain field. Statutory attempts to oust the jurisdiction of the court have largely failed in Australia. Section 75(v) of the Australian constitution protects access to the courts, as it includes an "entrenched minimum provision of judicial review",[30] which cannot be removed by statute, even where the statute purports to do so. Section 75(v) provides that the High Court shall have original jurisdiction "in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Parliament, therefore, cannot take this protection away; it cannot deprive the court of its inherent jurisdiction to review administrative action.

76. The constitutional backstop in section 75 of the Constitution was applied in *Plaintiff S157*,[31] which concerned section 474 of the Migration Act. Section 474 of the Act purported to exclude challenging, appealing, reviewing, quashing, or calling into question a "privative clause decision". It also purported to exclude prohibition, mandamus, injunction, declaration, or certiorari as a remedy in any court.[32] The High Court made clear that where there is a jurisdictional error (i.e. breach of a ground of judicial review) a privative clause is ineffective to oust judicial review. The constitutional jurisdiction of the courts enabled them to read privative clauses more narrowly than the text suggests, such that in some cases the clause was entirely deprived of effect. In *Plaintiff S157*, this meant that the court rejected a literal interpretation of section 474 of the Migration Act 1958 and held that the writs of mandamus and prohibition were available for decisions involving jurisdictional error. These arguments are based on the principle of constitutional validity.[33]

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[30] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].
[31] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
[32] Migration Act 1958 (Cth) section 474(1).
[33] See https://www.alrc.gov.au/wp-content/uploads/2019/08/fr_129ch_15._judicial_review.pdf article, 418–420.

77. Furthermore, the principle of legality operates in Australia to provide further protection to judicial review. As a matter of statutory interpretation, courts will assume that parliament did not intend to restrict access to the courts unless an intention to do so was made unambiguously clear.[34] As such, in any privative clause, there will need to be a clear and unmistakable intention to deprive the court of jurisdiction.

78. The situation in the UK, however, is different. Whilst we can expect the principle of legality to operate in a similar fashion in the UK, there is no constitutional backstop comparable to section 75 of the Australian constitution. This means that there is no legal mechanism that would operate to safeguard judicial review in the scenario where parliament expressly legislated – in the form of an ouster clause – to exclude the possibility of judicial review with respect to certain grounds of review, types of decisions, or concerning certain subject matter. It is theoretically possible that a court would refuse to apply such a provision on the grounds of unconstitutionality; however, this is virtually unthinkable in practice. Consequently, it would be the case that codification on these terms – i.e. in the form required to guarantee that the Government's objectives are met – would totally remove the jurisdiction of the courts to hear certain matters that presently exist under the common law grounds of review.

79. This eventuality would represent an unprecedented assault on the judiciary and its proper role to uphold the separation of powers, and its place in our constitution. The contemplated ouster(s) – whether concerning deportation orders, government procurement contracts, or otherwise – would preclude the courts from hearing such cases and deny them the opportunity to assess the lawfulness of executive action in those contexts. It would thus denude the judiciary of its innate interpretative function under the constitution. This in turn would put certain executive action beyond the reach of the courts and beyond constitutional accountability. It would be nothing short of a constitutional crisis.

80. On the topic of ousters, it is worth noting the recently condemned Internal Market Bill,[35] which enables the government to breach international law and, through the use of ouster, exempts from legal challenge a number of the government's powers under the legislation. In a recent discussion on the Bill,[36] Lord Neuberger remarked that a legal

[34] *Momcilovic v The Queen* (2011) 245 CLR 1, [43]–[44] (French CJ).
[35] https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf.
[36] See https://www.theguardian.com/law/2020/oct/07/brexit-strategy-puts-uk-on-slippery-slope-to-tyranny-lawyers-told and https://www.ft.com/content/37c8d9ab-e0de-49ad-b3e8-4edf343adfb3.

challenge to the ouster clause contained in the legislation would put judges in an unenviable position where they must choose between an overt challenge to the executive on the one hand, and a craven acquiescence in an acknowledged breach of international law on the other. Former Attorney General Dominic Grieve further cautioned that the Bill contained an "ouster clause which goes to the heart of parliamentary democracy".[37]

81. It is no defence to the accountability charge for the Government to argue that parliament will continue to serve as a check on executive conduct (given its ability to legislate away the ouster provisions), since under the Westminster model the executive for the most part enjoys a majority in the House of Commons or otherwise commands the confidence of the House. The modern concept of judicial review is one that embraces a substantive conception of legality based on the rule of law and the championing of fundamental rights. The constitutional consequences of a codification that seeks to curtail judicial review in this way are manifestly contrary to the rule of law and the principles of good administration, and we strongly oppose codification on this basis. As Locke famously put it, "wherever law ends tyranny begins".

Legal certainty

82. Finally, the argument that codifying the grounds of judicial review would result in greater legal certainty – as to the nature and operation of administrative law – is also vulnerable to challenge. Legal certainty requires that citizens be able to regulate their affairs in a way that does not break the law. It is treated as a grounding value for the legality of legislative and administrative measures taken by public authorities. Some envisage that adopting codified judicial review grounds and procedures would provide greater certainty for decision-makers by establishing clear and limited grounds of review (for example, by excluding an opaque ground of review such as "unreasonableness") and removing the unpredictability inherent in judicial discretion. However, there is reason to doubt whether the contemplated reform can deliver on the professed benefits of a codified system.

83. Under the restrictive and detailed (as opposed to principles-based) approach to codification likely to be pursued by the Government, significant uncertainties and ambiguities will remain and new complexities and questions will arise. For "whereas in the case law we are concerned with ideas, in the statutes we are concerned with

[37] https://www.theguardian.com/law/2020/oct/07/brexit-strategy-puts-uk-on-slippery-slope-to-tyranny-lawyers-told.

words. The statute book is littered with phrases that have become battlegrounds".[38] The courts will necessarily play a role in resolving these difficulties through methods of statutory interpretation and will thus continue to contribute to the development of the grounds of judicial review.

84. The Australian experience is instructive in this respect. The application of the AD(JR) Act 1977 generated substantial difficulties concerning the interpretation of aspects of the legislation. Take, for instance, the scope of application of the "no evidence" ground of review contained in section 5(1)(h)[39] – and, specifically, its relationship with the error of law ground in section 5(1)(f) – which was for a long time considered uncertain and in need of clarification. It was uncertain whether a "lack of evidence" case that could not be brought under s5(1)(h) could nevertheless be brought under s5(1)(f), or whether the error of law ground should be read to exclude a case for error based on lack of evidence. The matter was ultimately settled by the High Court in ***Australian Broadcasting Tribunal v Bond*** **(1990) 170 CLR 321**, which imposed a more conservative approach than the prevailing view at that time and pointed towards judicial review being more limited under the Act than at common law. But the critical point here is that judicial elaboration was <u>essential</u> to making sense of the codifying legislation, since the 1977 Act had introduced an element of confusion and uncertainty around the "no evidence" ground of review, which never existed before codification. Similar complexities and uncertainties can be expected should the grounds of review be codified in the UK.

85. Further, we have already described how the substantive grounds of judicial review will be firmly resistant to being displaced by the codifying statute, given the nature of statutory interpretation under the common law and the influence of fundamental rights and constitutional principles that underpin judicial review. These circumstances will inevitably contribute to legal uncertainty and, at times, make it difficult for decision-makers to have full confidence as to the interpretation and operation of particular grounds of review.

86. If, however, to achieve its aims, the Government pursues the nuclear option of inserting in the codifying legislation ouster clauses with respect to specific administrative decisions, this would of course achieve legal certainty in respect of the specified

[38] Aubrey L Diamond, 'Codification of the Law of Contract' (1968) 31 Modern Law Review 361, 380.
[39] Section 5(1)(h) of the Act specifies that an aggrieved person may apply to court in respect of a decision for which "there was no evidence or other material to justify the making of the decision".

decisions. However, the legal and constitutional ramifications of such measures would go far beyond the question of legal certainty and, for the aforementioned reasons, would represent a significant setback for the rule of law and British constitutional democracy.

Summary

87. Our assessment is that codification in the form envisaged will not function in the manner, or produce the effects, intended by the Government, and contend that such reform of substantive judicial review should be avoided at all costs given its capacity to undermine the rule of law and the proper functioning of the separation of powers within our constitution.

88. As we have stated, there is good reason to suspect that the Government will seek to use codification as a means of narrowing the grounds of judicial review and to limit the circumstances in which administrative decisions will be amenable to judicial review. Such reform would represent a retrograde step for UK administrative law. It would impede the progression in the law towards a more substantive conception of legality and circumscribe the capacity of the common law to uphold and safeguard constitutional principles and fundamental rights – both of which signify a deeply regrettable attack on the rule of law.

89. Furthermore, reform of this nature – a restrictive approach – would do little to adduce the supposed benefits of codification in any event. The legislation is likely to need to be so lengthy, detailed, and technical – in order to avoid the possibility of judicial elaboration on the grounds of judicial review (which appears to be the Government's intention) – as to undermine the notion that the law becomes clear and accessible to the lay person. Similarly, the inherent flexibility and adaptability of the common law, which has facilitated the incremental development of substantive judicial review in response to individual cases, would be traded away for a clarity that is purely illusory on closer inspection.

90. As the Australian experience reveals, legal uncertainty will remain as the codifying statute gives rise to new complexities and questions that fall for judicial determination. We have also seen how the substantive grounds of judicial review will push back against displacement by the codifying statute, supported by the rules of statutory

interpretation and the influence of fundamental rights and constitutional principles in judicial review.

91. In the event that the Government did take the radical step of inserting ouster clauses in the codifying statute, to remove the courts' jurisdiction in respect of specific administrative decisions, this would denude the judiciary of its innate interpretative function under the constitution and would go to the heart of parliamentary democracy. In the absence of a constitutional backstop, such as section 75 of the Australian constitution, the use of ouster clauses would amount to an unprecedent assault on the judiciary and its proper role to uphold the separation of powers, and its place in our constitution. Thus, while the Government's objective to restrict the role of the judiciary would be achieved in this scenario, constitutional crisis would ensue as a result.

92. Finally, we would suggest that a more fruitful exercise may be to consider whether the *procedural* aspects of judicial review might be further codified in the UK. The substantive grounds of judicial review are best left to the common law, for the many reasons set out above; however, codification of the procedural aspects of judicial review may prove helpful in improving clarity where the law can be opaque and difficult to access. This approach has been successfully pursued in other common law jurisdictions, for example New Zealand. We note that the topic was not considered in this submission as it did not feature in the Terms of Reference.

E. JUSTICIABILITY AND NON-JUSTICIABILITY

The Questions for the Review

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.

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.

(Terms of Reference, paras. 2 and 3)

The Problem this Review is Trying to Solve

93. It is not clear that this Review sets out to solve a problem that really exists. The most politically controversial cases of the last decade have, in fact, had minimal impact on public policy. Rather, the court has confined itself to identifying the correct way to take public policy decisions.

94. While *Miller/Cherry*, for example, represented a certain embarrassment for the Johnson administration, it did not actually impact substantively on the business of government. The Prime Minister claimed that the prorogation (the decision at issue in *Miller/Cherry*) was necessary to make way for a Queen's Speech announcing a new legislative agenda. This went ahead on 14 October 2019 almost exactly as scheduled. The impact of *Miller/Cherry* was merely to prevent the government from carrying on its business in the absence of parliamentary scrutiny (again, surely a relatively uncontroversial proposition). If we are to believe the Johnson government's claims that its only goal was to introduce a new legislative agenda, and it had no desire to govern without parliament, the decision in *Miller/Cherry* did not raise any real issue at all.

95. Similarly, the first *Miller* case, while embarrassing for the May government, did not actually change public policy or negatively affect the practical business of government. The May government's intention was to serve on the EU a letter under Article 50 of the Treaty of the European Union. The court merely said that the decision must be made

by parliament rather than the executive. Parliament, as the elected representatives of a people that had just voted to leave the EU, unsurprisingly decided to serve the letter.

96. It has been suggested that there has been an increase in the number of judicial review cases. This is not true. Indeed, there were fewer claims made in 2019 than in 2000.[40] In general, the numbers of claims begun, settled, given permission to proceed, and concluded have remained roughly static throughout this century. Around 50 per cent. of all claims are settled (usually to the benefit of the claimant). The ultimate success rate for judicial review claims has remained somewhere between 40 and 50 per cent. throughout the century.[41] This is broadly equivalent to the success rate for private law claims.

97. The exception to this is immigration claims. The rapidly increasing complexity of immigration law since the mid-1990s saw a corresponding increase in claims for judicial review. These are now dealt with almost entirely by the Upper Tribunal rather than the Administrative Court (and are consequently, it is presumed, outside the scope of this Review – although that is not particularly clear). In any case, since a peak in the early years of the last decade, the number of immigration and asylum claims have also declined. Given the labyrinthine complexity of much of immigration legislation, it would hardly be surprising if claims increased. The solution, however, is not to limit review. Indeed, to do so would have no effect but to allow the government a greater space in which to act unlawfully. The number of immigration claims could be brought down by taking a simpler and more evidence-led approach to immigration law. This would bring greater clarity and, therefore, reduce the instances in which the court is required to resolve ambiguity in the law.

98. Proponents of the "increase in claims" fiction often attempt to make good their case by referring to the (very low) numbers of judicial review claims in the mid-20th century. This is a bad argument. Prior to 1983, there was no requirement that public law claims must be brought by judicial review [***O'Reilly v Mackman*** **[1983] 2 A.C. 237**]. Statistics

[40] Civil Justice Statistics 2000–2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806900/civil-Justice-stats-main-tables-Jan-Mar_2019.xlsx (last accessed 26 September 2020).
[41] Spurrier, M., and Hickman, J., "Public Bill Committee Briefing paper Following Oral Evidence Re. Part 4 Criminal Justice And Courts Bill" (London; Public Law Project, 2014), available at https://publiclawproject.org.uk/wp-content/uploads/data/resources/171/PLP-The-number-of-JR-cases.pdf (last accessed 26 September 2020).

before this date do not, therefore, represent the true number of claims made against the government on public law grounds.

99. It is, however, fair to say that there has been an expansion of judicial review since the early years of the 20th century. This reflects two trends. The first is that already discussed, that is, the common law subjecting an increasing range of government powers either to democratic or legal accountability, or both.

100. The second is the increasing volume and complexity of litigation since the mid-20th century. While the number of Acts of Parliament declined from 1900 to 2019 (from well over 100 per annum in the early years of the last century to just 33 in 2019), the Acts passed have become substantially longer. More importantly, there has been a corresponding rise in secondary legislation (which can be amenable to judicial review).[42] Any moderate expansion in judicial review is consequently to be expected given these factors.

101. The terms of this Review speak of "properly balancing" the objectives of the "citizen being able to challenge the lawfulness of executive action" and "the role of the executive to govern effectively under the law". This is, in our view, a faulty premise. There is no "balance to be struck" between citizens enforcing their rights and the executive being inconvenienced. The executive has no right or power to govern save within the law. In a democracy, citizens must be able to enforce their rights against the state, save in the most extreme circumstances. There is absolutely no constitutional authority that supports placing the convenience of the executive on a par with the rights of individuals.

102. Once, however, a claim is brought, the courts already carve out a substantial ambit of appreciation for the practicalities of government. This rests on four pillars:

    (i) The permission stage – claims in judicial review cannot proceed without permission. This weeds out hopeless and nuisance cases. Around 50 per cent. of claims that reach the permission stage are allowed to proceed.[43]

[42] "Acts and Statutory Instruments: the volume of UK legislation from 1950 to 2016", House of Commons Library (2017), available at https://commonslibrary.parliament.uk/research-briefings/cbp-7438/ (last accessed 26 September 2020). The data in this research shows a drop in secondary legislation from 2016 to 2019 (the "May government years") which can be explained by parliament's and the government's focus on Brexit, which led to parliamentary and executive time being spent increasingly on non-legislative activity.

[43] Spurrier, M., and Hickman, J., "Public Bill Committee Briefing paper Following Oral Evidence Re. Part 4 Criminal Justice And Courts Bill" (London; Public Law Project, 2014), available at

(ii) Judicial deference – judges take pains not to intrude upon questions of public policy (a distinction is properly drawn between "public policy decisions" and the process by which decisions are taken; only the latter is the proper preserve of the courts). As Lord Bingham put it:

> "…. Great weight should be given to the Home Secretary, his colleagues and Parliament on this question, because they were called upon to exercise a pre-eminently political judgment…. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role for the court. It is the function of political and not judicial bodies to resolve political questions…. The present question seems to me to be very much at the political end of the spectrum." [***A v Secretary of State for the Home Department*** **[2005] 2 AC 68 at 29**]

(iii) The limits of judicial review – the courts do not make decisions for the executive. The extent of judicial review is to require the executive to re-make a decision in a proper and lawful manner.

(iv) The role of parliament – judicial review preserves the pre-eminent constitutional position of parliament. It is always open, therefore, for the executive to ask parliament to legislate on a particular issue.

103. Finally, it must be recognised that sometimes "bad claims" are the price we must pay to live in a democracy under the rule of law. It is right that there is tension between executive and the Administrative Court because the court exists to allow individuals to test and challenge the state. Speaking in the context of criminal justice, Blackstone famously said that "it is better that ten guilty persons escape than that one innocent suffer".[44] The same principle can be applied to judicial review. If we genuinely respect individual rights and the accountability of government to the law, then it is better that ten unmeritorious claims are made than a single violation of civil rights or democratic principles is permitted.

104. It was until recently acknowledged in government that the prospect of judicial review, while perhaps inconvenient, led to better decision and policy making. As the government's own guidance acknowledges, the way to avoid judicial review is not to attack the courts but rather:

> "to inform and improve the quality of administrative decision-making – though, if we are successful, that should have the incidental effect of making decisions less vulnerable to Judicial Review…

https://publiclawproject.org.uk/wp-content/uploads/data/resources/171/PLP-The-number-of-JR-cases.pdf (last accessed 26 September 2020).

[44] Blackstone, W., *Commentaries on the Laws of England* (London; Cavendish-Routledge, 2001) (originally published in Oxford by Clarendon Press, 1765–1770).

> We have always tried to emphasise what is best practice in administrative decision-making, rather than what you can get away with: see, for example, on the recording and giving of reasons".[45]

Principles of Justiciability

105. Ultimately, the question of justiciability is that of the extent to which the executive should be allowed to act with impunity from the law. In their original incarnation, as the powers of a would-be absolute monarch, prerogative powers were always (and inherently) exercised with impunity. It is axiomatic that this conception of prerogative powers is incompatible with a democratic constitution.

106. The prerogative was brought into the realm of legality in a string of decisions (notably ***Padfield v Minister of Agriculture, Fisheries and Food*** **[1968] AC 997**) establishing that (a) the existence and (b) the extent of prerogative powers is amenable to judicial review. This represented no more than the recognition that the executive should not be judge in its own cause. If the existence and extent of prerogative power is determined only by the executive, then that branch of government has, in substance, unlimited power.

107. The problem, from a democratic perspective, with the decision in *Padfield et al* was that it maintained an arbitrary distinction between prerogative power and statutory power. The only genuine difference between the two being that the former is granted by parliament while the latter is a hangover from the days of (attempted) autocracy. As Lord Roskill put it:

> "[given that] all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power' – would 'hamper the continual development of our administrative law by harking back to … the clanking of mediaeval chains of the ghosts of the past". [***R (Council of Civil Service Unions) v Minister for the Civil Service*** **[1985] A.C. 374 ("GCHQ")**]

108. In *GCHQ*, the House of Lords recognised that prerogative powers must, as a rule, be subject to the same standards of review as statutory powers. This established that not only was the executive not permitted to exercise powers it did not have, but also (for the first time) it was required to exercise its prerogative powers lawfully. The court agreed that some questions about the exercise of prerogative powers lay outside its competence, thereby establishing the doctrine of justiciability. It was divided, however, on the proper way to identify these issues.

[45] "The Judge Over Your Shoulder", Government Legal Department (2016).

109. Lord Diplock took the view that, given that the courts are neither constitutionally nor institutionally equipped to determine questions of public policy, the court must consider the question before it and ask whether it was a question of policy or law. Lord Roskill, by contrast, argued that the court must look not at the nature of the question before the court but at the "nature" or "subject" matter of the executive power in question.

110. Lord Roskill's approach is inherently problematic. It involves the court in an abstract examination of the "nature" of a power. There is little clarity about how this should be determined and certainly no clear standards. In attempting to grapple with such abstract concepts, the court must inevitably stray into territory for which it is constitutionally and institutionally ill equipped. Abstract questions of political philosophy are for parliament and the executive. The courts lack the capability to engage with them and, in a democracy, it is inappropriate that they should do so.

111. It is unsurprising, then, that Lord Diplock's approach is preferred over Lord Roskill's. Notable decisions include ***R v Secretary of State for Foreign and Commonwealth Office, Ex p Everett*** **[1989] QB 811**, in which the court analysed the decision (as opposed to the power) to grant a passport, and ***Lewis v Attorney General of Jamaica*** **[2001] 2 AC 50**, in which the House of Lords held that, while the merits of the decision whether to grant a petition of mercy could not be reviewed ("mercy" being inherently incompatible with legal standards), the fairness of the process by which that decision was reached was a proper question for the court (because procedural fairness can be subject to judgment against objective standards). Leggatt J's analysis in ***Mohammed (Serdar) v Ministry of Defence*** **[2017] UKSC 1** (which was subsequently noted with approval by the Supreme Court) best sums up the current position:

> "[The question of justiciability] no longer rests on a rule that certain areas of decision-making by the executive such as foreign policy are 'no-go' areas for the courts but on a consideration of whether or to what extent the particular decision of the executive with which the case is concerned is or is not justiciable".

112. As Lord Dyson put it:

> "Over time, our understanding of the concept of justiciability has evolved and has become more refined. In particular, the concept has developed from a very blunt instrument into a more surgical one that is capable of being applied with suitable exactitude. This development has occurred precisely because it has been increasingly recognised that the principle of justiciability can sensibly and appropriately be applied only to specific questions that a court is asked to resolve, as distinct from broader and more imprecise notions such as the nature of a power or the subject-area occupied by a given decision."[46]

[46] Lord Dyson, "*Is Judicial Review a Threat to Democracy?",* Sultan Azlan Shah Lecture (November 2015).

Judicial Review and "Politics"

113. In recent years, government lawyers have attempted to reverse the (nearly three-decade-old) consensus in favour of the Diplock approach by introducing the concept of "high politics". While this has found little favour with the courts, it has proved a popular idea among legal commentators, particularly those who favour executive dominance. The idea gained a veneer of respectability when the Divisional Court used the term (albeit taken from the submissions of Sir James Eadie QC rather than any judicial authority) in *Miller/Cherry*. Although that decision was subsequently overturned by the Supreme Court, proponents of the "high politics" theory have attempted to resurrect it through extra-judicial means.

114. The idea of "high politics" is an entirely empty concept. It is without definition and can, in practice, mean almost anything. It is, as a result, a recipe for executive impunity. Almost any question can be made into one of "high politics". Let us take, for example, an executive that decided to use the prerogative of mercy to pardon 50 major party donors who were convicted of fraud. It seems likely that opposition parties would have something to say about this. The executive could defend its decision by pointing to the charity work that these individuals had performed, the jobs their companies had created, and the inevitable "long history of public service". This could easily be described as a "political" matter because it is a subject of intense political debate. Applying Lord Diplock's approach, and guided by the decision in *Lewis*, it is clear that this is a justiciable question: The Administrative Court would be competent to determine whether the decision to pardon these individuals was reached in a procedurally fair manner (was, for example, the fact that they were party donors taken into account?). Applying the "high politics" approach, however, the fact that the pardons were a matter of political controversy could quite conceivably be used to move such an abuse of power outside the realm of justiciability.

115. Similarly, questions about whether a decision must be taken by parliament or by the executive have been described as matters of "high politics" [see ***Miller v Secretary of State for Exiting the European Union*** **[2017] UKSC 5**]. This is obviously wrong. While there may be political controversy about which branch of government takes a decision (particularly one, as in *Miller I*, which concerns a cherished ideological goal), analysing the question according to an arbitrary and undefined concept of "high politics" cannot but lead to a bad decision. In *Miller I*, the court was required to consider the clearly defined question of whether issuing a notice under Article 50 would impact

on primary legislation. This question was, quite obviously, answerable according to objective legal standards.

116. It has been suggested that the mere fact that the executive may be accountable to parliament for its decision is sufficient to make the matter a question of "high politics". This is both contrary to precedent and obviously absurd. It, first, ignores the differing institutional competences of parliament and the courts. The former is well equipped to consider general questions of policy but ill equipped to forensically analyse the application of law in specific situations. Second, if this argument were taken seriously, it would oust the entire public law jurisdiction of the courts. Parliament's competence is, in theory at least, unlimited. It can rule (and has done so) on questions ranging from individual criminal offences to relatively minor planning decisions. This does not mean that it is best placed to do so as a rule.

117. Finally, questions are often described as "political" simply because they have political consequences. It should be axiomatic that the courts are not concerned about whether the government of the day is embarrassed by their decisions. *Miller/Cherry* was, as will be discussed below, a paradigmatic example of this.

Miller/Cherry: A Response to Finnis

118. It might be hoped that, in a submission to a committee charged with examining fundamental constitutional change, a section such as this would not be necessary. John Finnis is a philosopher of natural law whose work is chiefly concerned with exploring or importing (depending on which of his academic critics one prefers) the ideal of his Christian faith into legal rights discourse. He is not a constitutional lawyer, theorist, or practitioner, and he has never appeared in a constitutional matter or published peer-reviewed work on constitutional law. Finnis wrote a paper entitled "The Unconstitutionality of the Supreme Court's Prorogation Judgment". The paper is riddled with factual errors and fails to engage in any analysis of constitutional authority, and the author appears unaware of the majority of relevant case law. It was not peer reviewed but, rather, was published by Policy Exchange, a partisan think tank.

119. It is astonishing that a paper such as this should play any role in serious constitutional debate, yet it is clear that it does. The chair of this Review has described Finnis' paper as "the last word" on the *Miller/Cherry* decision. This statement is problematic for two primary reasons: first, if one accepts the principle of the rule of law, then it is the Supreme Court's judgment that is the "last word" on the *Miller/Cherry* case. Second, it

appears that the chair of this Review has already made up his mind on the issues raised by its principal trigger. That makes this entire exercise seem rather academic. Nevertheless, in the spirit of engagement, it is necessary to briefly explain why no weight should be given to Finnis' paper.

120. The fundamental problem with Finnis' argument is that it appears unchained from any sort of authoritative basis. He does not engage in analysis of relevant case law or elucidate what he believes to be the foundational constitutional principles on which he bases his analysis. The closest that he comes is repeated references to the Bill of Rights of 1689, which he seems to think enjoys a legal status roughly equivalent to the US Constitution:

> "…an Act of Parliament which for over 300 years has been regarded as decisive in defining the constitution of the United Kingdom and the law and conventions (including judicial conventions) governing the highest organs of the realm".

121. Not only is Finnis obviously wrong about the constitutional status of the Bill of Rights but, even if he were correct, he proceeds to apply it from "first principles" without regard to the substantial interpretational jurisprudence that has developed in the 331 years since the Bill of Rights became law.

122. The strength of the Supreme Court's reasoning in *Miller/Cherry* is its clear analytical foundation:

> "Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons – and indeed to the House of Lords – for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts."[47]

123. It is not clear how, in any rational analysis, a critique of the judgment can be given weight unless it at least addresses this basis. It may be argued that the court's reasoning is incompatible with this basis or, indeed, that it is the wrong starting point (although neither argument would be particularly compelling). Finnis does neither. He, rather, sidesteps any genuine constitutional analysis in favour of vague references to the Bill of Rights and "300 years" of (unparticularised) history.

[47] *Miller/Cherry*, at 55.

124. Finnis' argument is, at the level of principle, relatively easy to refute. In a democracy, which relies on the accountability of the executive to the legislature, we must simply ask the question: "Should the former be able to dismiss the latter at will?" The answer must come back in the negative or else the executive could simply dismiss the legislature whenever it wished to avoid scrutiny: the UK would be a democracy in name only. Finnis does not address this central question. If, however, his real problem is not with the this but, rather, with the fact that it was enforced by the courts, then his argument is equally easy to answer. As Finnis himself appears to accept, at the level of principle, it is possible for the executive to dismiss parliament in a manner that prevents the latter from blocking or reversing the prorogation. The prorogation prerogative can, therefore, be used with impunity unless it is accountable to the law. This is, of course, a point of political theory rather than law but, given that this Review is charged with making a decision about the political role of the law, it cannot be ignored.

125. Finnis' argument does not become more compelling when his points are taken in turn. First, he complains that the Supreme Court should have refused the claimant's remedy because prorogation is a "proceeding in parliament" and, therefore, protected by Article IX of the Bill of Rights. First, his argument proceeds on a factual error. He spends a considerable amount of time arguing that "the Crown is an integral part of parliament" and, consequently, the monarch's actions in relation to parliament should fall within Article IX. Setting aside the ahistorical nature of this point (Article IX was intended to protect parliament from an overweening monarch, not to confer rights on the Crown), the actions of the monarch were not before the court in *Miller/Cherry*. The decision challenged was not the Queen's decision to prorogue but, rather, the Prime Minister's decision to advise prorogation. Finnis' argument is aimed at a straw man.

126. Finnis ignores the extensive authority delineating the nature of "proceedings in parliament" save for claiming that the "Supreme Court owed us all an answer" to the argument, in ***R (Barclay) v Lord Chancellor*** **[2014] UKSC 54**, that royal assent to legislation is a "proceeding in parliament". The answer is, as the residents of Sesame Street may have put it, "one of these things is not like the other". In the absence of analysis as to why the advice to prorogue (which takes place entirely outside parliament) should be treated in the same manner as the royal assent (which takes place entirely inside parliament), it is not clear that the Supreme Court "owes" Finnis an answer to anything. Nevertheless, it suffices to say that the court determined the issue of remedy in reference to the authorities ***R v Chaytor*** **[2011] 1 A.C. 684**, ***Erskine***

***May, Parliamentary Practice*, 25th ed. (2019)**, and ***R (UNISON) v Lord Chancellor* [2017] 3 WLR 409**. These provide authority for the proposition that a wrong act, the effects of which reach into parliament, is not protected by Article IX. Just as Mr Chaytor's expenses fraud (which took place almost entirely on the parliamentary estate) was not a proceeding in parliament, neither was the Prime Minister's unlawful advice (which took place in Downing Street and Balmoral). The Supreme Court reached its decision on the basis of extensive consideration of the authorities. Finnis reaches his only in ignorance of them.

127. Finnis' second point is that the court did not treat the executive with sufficient deference. He complains that the court treats the executive "as if it were an administrative body whose acts can – even at the highest level of interactions between supreme components of the separation of powers – be subjected to judicial review and scrutiny on just the same basis as a local government planning officer's". That is, of course, exactly what the executive is. Finnis may yearn for the pomp and circumstance of the imperial crown but, in a democracy under the rule of law, the highest levels of government can be no less accountable to the law than the lowest. It is worth noting as well that the Supreme Court is itself an integral "component of the separation of powers". Perhaps to give Finnis the benefit of the doubt, his real problem is that the court did not spend long enough analysing the many considerations that the executive may have weighed before advising the Queen to prorogue. There is a simple reason for this: they were not raised. The government had the opportunity to explain the reasoning behind the prorogation decision. It provided four short documents, each of which suggested the reason for the decision was that the government wanted to introduce a new legislative agenda through a Queen's Speech. The five-week prorogation self-evidently was not necessary to achieve this end and so it can have come as no surprise that the court did not believe it. In the absence of any other, more convincing, explanation, the court had no option but to find that the prorogation was not justified.

128. Finnis suggests that the inevitable result of the Supreme Court's failure to sufficiently bow and scrape is:

> "any citizen moved by desire to affect the political future of the country (as this English plaintiff and the Scottish MP claimants unquestionably were) can demand that every communication amongst the Queen's ministers themselves, and of them with their advisers or political or personal associates, be promptly handed over – perhaps within hours or days of their creation or occurrence – to the litigants and their legal advisers and thence, soon enough, to the whole world".

129. In the first instance, it is not particularly clear why this is problematic. If government is making decisions lawfully, reasonably, and in the national interest, it is not clear why it would not be happy to disclose its communication to the public (save for those that fall within statutory exemptions) and trust the voters to evaluate their government. In the second, it is wrong. If Finnis had read the full decision, he would have known that disclosure was, in fact, requested by the claimants and refused.

130. Finnis' third point is that the court's decision disrupted the "political constitution" by interfering in prorogation where it should have left it to "constitutional convention". Constitutional conventions are not subject to judicial review because they are, in practice, no more than "gentlemen's agreements", which can be abandoned without consequence as soon as it becomes convenient to do so. An example is the Sewel Convention, which provides that the Westminster parliament may not legislate on a matter within the competence of a devolved legislature unless the latter expresses consent. This convention was breached as soon as the devolved legislatures withheld consent to legislation relating to Brexit.

131. The flaw in Finnis' argument is that there is no constitutional convention governing prorogation. A better argument would be that parliament should have been left to legislate against prorogation if it chose to do so. Finnis flirts with this point. He, first, claims that the Prime Minister's letter of 28 August gave MPs and "the electorate advance notice of intent to seek authority to prorogue". This is false. If Finnis had read the following paragraph of the letter (or the date at the top), he would have realised that the letter was sent after the Prime Minister had already obtained authority to prorogue.

132. Finnis also claims that the court's decision not to leave the matter to parliament was made on the basis of an "extreme hypothetical". That point is already answered by the court:

> "In our view, it is no answer to these points to say, as counsel for the Prime Minister argued, that the court should decline to consider extreme hypothetical examples. The court has to address the argument of counsel for the Prime Minister that there are no circumstances whatsoever in which it would be entitled to review a decision that Parliament should be prorogued (or ministerial advice to that effect). In addressing that argument, it is perfectly appropriate, and necessary, to consider its implications. Nor is it any answer to say that there are practical constraints on the length of time for which Parliament might stand prorogued, since the Government would eventually need to raise money in order to fund public services, and would for that purpose require

> Parliamentary authority, and would also require annual legislation to maintain a standing army. Those practical constraints offer scant reassurance."[48]

133. Finnis' treatment of this point is intellectually dishonest. He, first, insinuates that the court accepted that it was dealing with an "extreme hypothetical". This phrase was, in fact, used by counsel for the executive and dismissed by the court. Second, he implies that this "extreme hypothetical" lies at the centre of its analysis. In fact, it is an aside: dismissing an argument made by counsel for the executive. The meat of the court's analysis of the question of whether the matter of prorogation should be left to parliament comes earlier in the judgment:

> "… [T]he courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts. As Lord Lloyd of Berwick stated in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 572–573:
>
> > 'No court would ever depreciate or call in question ministerial responsibility to Parliament. But as Professor Sir William Wade points out in Wade & Forsyth, *Administrative Law*, 7th ed (1994), p 34, ministerial responsibility is no substitute for judicial review. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 Lord Diplock said:
> >
> > > "It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."….'
>
> …
>
> Although the United Kingdom does not have a single document entitled 'The Constitution', it nevertheless possesses a constitution, established over the course of our history by common law, statutes, *conventions* and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the *legal* limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.
>
> The *legal* principles of the constitution are *not* confined to statutory rules, but include *constitutional principles developed by the common law*…".[49]

134. Finnis' fourth point is the claim that the court appropriated for itself the power to determine the matter of prorogation by "judicial fiat". In fact, the court's decision rested

[48] *Miller/Cherry*, at 43.
[49] *Miller/Cherry*, at 33–40.

on a solid bed of judicial authority. It is clearly established that the court is entitled to review the existence and extent of prerogative powers. Finnis claims that, in fact, the court was reviewing the exercise of the power to prorogue. Even if this is correct, it has been established that the court has been entitled to do this since 1985. Finnis, unable to dispense with the constitutional principle of parliamentary sovereignty, argues that the court "suddenly transform[ed] the historic principle of Parliamentary accountability into a legal principle". This, once again, is ignorant of authority. Parliamentary accountability has been recognised as a legally enforceable constitutional principle for decades. As Lord Bingham said in ***Bobb v Manning*** **[2006] UKPC 22 at [13]**:

> "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy".

135. Finally, Finnis accuses the court of "political" decision making:

> "No surprise, then, that the Judgment's review of the 'effects' of the prorogation on the operations of Parliament is, if not simply missing, at best perfunctory and declamatory, indeed rather unmeasured: this prorogation had 'an extreme effect on the fundamentals of our democracy'. A political assessment wide open to reasonable doubt."

136. Quite apart from the fact that Finnis misstates the civil test for evidence, the court never said those words. Finnis is quoting from the summary of arguments made by the claimants. This is less a straw man than a bogeyman.

137. Other critiques of *Miller/Cherry* fall into many of the same errors as Finnis. Indeed, none can surmount the obvious point that, if we are to, in practice as well as in theory, live in a democracy under the rule of law, the courts must be able to ensure that the executive does not use prerogative power to exclude democratic scrutiny. Parliamentary sovereignty is meaningless if parliament can be sent home whenever it looks like disagreeing with the executive.

Reform of Judicial Review

138. If there is a flaw in the English courts' approach to justiciability, it is an excess of deference towards the executive that is inappropriate in a modern democracy. Prerogative powers are a case in point. They are a relic of a pre-democratic time. In a democracy under the rule of law, there is no justification for the executive possessing unaccountable power in any area.

139. The English courts, in attempting to avoid even the perception of involving themselves in "political" questions, can take an excessively formalistic approach to questions of justiciability. A better approach is that adopted by the Court of Session, in which the principles of justiciability flow not from archaic questions of deference, but from the constitutional purpose of judicial review. As Lord Drummond-Young put it in ***Wightman and others v Secretary of State for Exiting the European Union (No. 2)*** **[2018] CSIH 62, 2019 SC 111 at 67**:

> "The fundamental purpose of the supervisory jurisdiction is in my opinion to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose. Consequently I would have no hesitation in rejecting any arguments based on procedural niceties, or the detailed scope of previous descriptions of the supervisory jurisdiction, if they appear to stand in the way of the proper enforcement of the rule of law."

140. Lord Hope set out the principles of the Scots approach in more detail in ***West v Secretary of State for Scotland*** **1992 SC 385 at 412**:

> "The following propositions are intended therefore to define the principles by reference to which the competency of all applications to the supervisory jurisdiction under Rule of Court 260B is to be determined:
>
> The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.
>
> The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.
>
> The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy.
>
> By way of explanation we would emphasise these important points:
>
> Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.
>
> The word 'jurisdiction' best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply 'power to decide', and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an

excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.

There is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires.

Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a tri-partite relationship, between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised."

141. The Scots law approach does not lead to substantially different conclusions to the English law approach. It does, however, allow the courts to analyse questions of justiciability in a manner that is both simpler and more accessible for lay people. If, therefore, the principle of justiciability is to be encapsulated in statute, parliament should not take a prescriptive approach but, rather, establish a starting point for the court's analysis, along the lines taken by the Court of Session. Such a provision may be drafted as follows (as an example only):

"**Justiciability**

(1) The administrative court shall not consider any claim unless that claim raises issues which are justiciable.

(2) An issue is justiciable if it raises questions which the court is capable of answering.

(3) The court shall determine whether it is capable of answering a question by reference to the constitutional purpose of judicial review.

(4) The constitutional purpose of judicial review is to ensure that all actions of public authorities are carried out in accordance with the law."

Summary

142. In the light of the above arguments, the specific questions posed to the Review are relatively self-evident and can be answered briefly.

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.

143. The principle of justiciability is clear: A question is justiciable where it is (a) a question of fact or law and (b) can be determined according to legal standards.

144. The government should under no circumstances consider the justiciability of a public law power. This would make the government the judge in its own cause: carving out areas of policy and law in which it awards itself the right to act with impunity. This is contrary to the principles of democracy and the rule of law.

145. There is no question of it being appropriate for a government to seek to hamstring the judiciary's powers in this regard in an attempt to make decision making easier by removing one of the consequences of bad decision making. A procedure for the review of decision making by public bodies needs to be flexible and free from interference.

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.

146. The grounds for judicial review are those identified in *GCHQ*. There is no suggestion that any of these is problematic. Altering any of these grounds would require a positive argument that the executive should be permitted to act unlawfully, unfairly, or unreasonably. No such argument could be compatible with democratic government.

147. Introducing impunity from the law based on the "nature and subject matter" of the power exercised when making the decision would set the law back nearly 30 years. This approach was proposed by Lord Roskill in *GCHQ* and, over the course of nearly three decades of forensic judicial scrutiny, has been found to be inadequate. It requires courts to engage in abstract reasoning about the "nature" of a power that can only lead to arbitrary decision making, which is a recipe for executive impunity.

148. The lawfulness of a decision is a zero-sum question. There are no degrees of unlawfulness. An unlawful decision is nullity; all remedies available to the court flow from this principle. It is imperative that it be maintained. If unlawful decisions are permitted to stand, then the government is not, in practice, accountable to the law.

F. PROCEDURAL ISSUES IN JUDICIAL REVIEW

The Questions for the Review

4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.

(Terms of Reference, paragraph 4)

149. The following sections of the submission will address each of the areas of reform to the procedure for judicial review contemplated at question 4 of the Terms of Reference for the Review.

a. *Disclosure and candour (Q4a-b)*

The Terms of Reference

150. Although the Call for Evidence does not ask any specific questions about the duty of candour, it does state, in general terms: "*The IRAL welcomes evidence under the terms of reference*".

151. The Terms of Reference for the Review state:

> "*The review should consider in particular: ….*
>
> *4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on [sic] the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government …*"

152. The drafting is not clear. Quite apart from the syntactic error, the reference to "*policy decisions*" – with no indication of what is meant by that phrase – is especially vague. Any number of matters could be described as "*policy decisions*", no matter how serious their implications for the Government's compliance with the law; yet there appears to be some sort of implication that documents concerning "*policy decisions*" should not be disclosable.

153. While the Terms of Reference contain no concrete proposals for amending the duty of candour, the references to "*streamlining*" and to the "*burden*" of disclosure imply that the Government is considering abrogating or reducing the duty of candour.

154. For reasons set out below, such measures would be unjustified and would damage the rule of law. The duty of candour might benefit from some clarification, but it should be preserved.

What is the duty of candour?

155. The duty of candour requires 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*".[50]

156. Although the Terms of Reference focus on the defendant's duty of disclosure, it should also be noted that claimants are subject to an equivalent duty of full and frank disclosure.[51]

What is the justification for the duty of candour?

157. The court's function in judicial review is to review the legality of a decision, measure, or failure to act in relation to the exercise of a public function (see CPR 54.1(2)). This function is critical to the "*rule of law*", which requires compliance by public bodies with the law, and the administration of the law by the courts.[52]

158. The court cannot effectively fulfil that function unless it is apprised of the decision-maker's reasoning, and the facts relevant to the lawfulness of the decision under

[50] "Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper" (28 April 2016), commissioned by the Lord Chief Justice and written by Mr Justice Cranston and Mr Justice Lewis ("the LCJ Discussion Paper"), at paragraph 2. See *Tweed v Parades Commission for Northern Ireland (Northern Ireland)* [2007] 1 AC 650 at paragraph 31 *per* Lord Carswell and paragraph 54 *per* Lord Brown.

[51] *Cocks v Thanet DC* [1983] 2 AC 286 at 294G; *R (Khan) v SSHD* [2016] EWCA Civ 416 at paras 35–37, 71.

[52] In "The Rule of Law" (Penguin, 2011), Tom Bingham identified the core principle of the rule of law as being "*that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made … and publicly administered in the courts*" (page 8). He identified eight key ingredients of that core principle, which included "*Ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which they were conferred, without exceeding the limits of such powers and not unreasonably*" (page 60), "*Adjudicative procedures provided by the state should be fair*" (page 90), and "*The rule of law requires compliance by the state with its obligations in international law as in national law*" (page 110).

challenge. The "*vast majority of the cards will start in the authority's hands*".[53] The defendant public body, therefore, needs to explain the facts and its reasoning in order that the court can fulfil its function.

159. These points were put by Cranston J and Lewis J, at paragraph 10 of the LCJ Discussion Paper[54] as follows:

> "*The underlying concept, however, is that the courts need to be placed in a position where they can carry out their role of ensuring the lawfulness of the decision under challenge, itself an element of the maintenance of the rule of law.*"

160. Indeed, it is not solely the court which should be interested in ensuring that public bodies comply with the law. Public bodies should, far from being concerned to "win at all costs", share that objective. This is part of their own function in upholding the rule of law and improving standards in public administration.

161. Thus, in ***R v Lancashire County Council ex p. Huddleston*** **[1986] 2 All E.R. 941**, the Court of Appeal described the duty of candour by reference to the "*relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration*" and their "*common interest … in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected*".[55] More recently, in ***R (Citizens UK) v Home Secretary*** **[2018] 4 WLR 123**, the Court of Appeal said at paragraph 106: "*the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.*"

Abrogating the duty of candour would damage the rule of law and probably escalate costs

162. It follows that abrogation of the duty would damage the rule of law. In almost any claim for judicial review, the courts currently rely on information provided by the defendant public body, pursuant to its duty of candour. If the duty were abrogated, the courts would no longer be able to reach informed decisions as to whether public bodies have acted lawfully.

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[53] *R v Lancashire County Council ex p. Huddleston* [1986] 2 All E.R. 941 at p 945 *per* Sir John Donaldson MR.
[54] Above n. 50.
[55] *Per* Sir John Donaldson MR at p 945 and *per* Parker LJ at p 947.

163. If the courts' work were stymied in that way, unlawful actions by public bodies would go unchecked. To take a recent example, the London Borough of Tower Hamlets commenced a High Court challenge[56] to the grant by the Secretary of State for Housing, Robert Jenrick, of planning permission for a development by Westferry Developments Ltd (a company controlled by Richard Desmond) on the Isle of Dogs. It claimed that the grant was unlawful because it was vitiated by apparent bias; it appeared that the Secretary of State had timed the grant in order to enable the developer to avoid a £40m infrastructure levy. In pre-action correspondence, the Secretary of State refused to provide evidence of the process leading to his decision, and asserted that the challenge was not "*substantiated*". Subsequently, after the commencement of court proceedings, when the Secretary of State was faced with the prospect of having to explain the process leading to his decision pursuant to his duty of candour, he accepted that that grant had been unlawful, and that it should be quashed. If he had not been subject to any duty of candour, he may have maintained his pre-action stance, and a grant of planning permission that was unlawful (and whose timing deprived the Council of £40m) may, therefore, have remained in place.

164. There is also a practical point: were the duty of candour to be abrogated, it would almost certainly need to be replaced by a general duty of disclosure, which would be likely to result in the costs of judicial review rising, not falling. The effect would be the opposite of the "*streamlining*" that the Government apparently desires. In particular:

(i) Contrary to ordinary civil litigation, there is no general duty of disclosure in judicial review proceedings.[57] This is precisely because standard disclosure is generally unnecessary where the defendant can be expected to discharge its duty of candour.[58]

(ii) The absence of any general duty of disclosure reduces the costs of judicial review. Disclosure exercises in ordinary civil litigation are increasingly expensive. Lord Justice Jackson, in "Civil Litigation Costs Review Preliminary Report", identified the

[56] The challenge was brought by way of a statutory review under section 288 of the Town and Country Planning Act 1990, but such proceedings are the same as ordinary judicial review proceedings insofar as the duty of candour applies in both.
[57] See paragraph 12.1 of Practice Direction 54A ("*Disclosure is not required unless the court orders otherwise*"). This means that standard disclosure under CPR Part 31 does not ordinarily apply.
[58] See e.g. *R v SSHD, ex p Fayed* [1998] 1 WLR 763 at 775C *per* Lord Woolf MR.

absence of disclosure requirements in judicial review as a significant factor in judicial review costs generally being lower than the costs of other litigation.[59]

(iii) Were the duty of candour to be abrogated, it would almost certainly need to be replaced by a duty of disclosure in order to ensure that judicial review disputes can be determined fairly; if there were no duty of candour and no duty of disclosure, then there would be no mechanism at all to ensure that the parties and the courts are supplied with the relevant information needed to determine claims for judicial review. A new duty of disclosure would escalate the costs of judicial review.

Some clarification of the duty of candour would be beneficial

165. Any legal duty should be clear. Practitioners have expressed some uncertainty over the precise parameters of the duty of candour. It would be desirable for those parameters to be clarified.

166. There are three particular areas of uncertainty.

(i) First, there is some uncertainty over the timing of the duty. In particular, does it apply only once permission for judicial review has been granted, or does it also apply to pre-action correspondence and any Summary Grounds for contesting a claim that a defendant might choose to file prior to the grant of permission?

On the one hand, there is no case law that states that the duty of candour applies prior to the grant of permission,[60] and it would be surprising if the duty were to apply at the pre-action stage, given that the duty is to the court. In ***Marshall v Deputy Governor of Bermuda* [2010] UKPC 9, paragraph 30**, the Privy Council recorded a concession made by counsel that the duty of candour did not arise until after permission to apply for judicial review had been granted. The Privy Council did not dispute the correctness of this concession.

On the other hand, the Treasury Solicitor's Guidance[61] suggests that the defendant owes such a duty as soon as a department is aware that someone is likely to

[59] See Part 7, Chapter 35, paragraph 2.3.
[60] The point was left open in *I v SSHD* [2010] EWCA Civ 727 at paragraph 50.
[61] "Guidance on Discharging the Duty of Candour" (January 2010).

challenge a decision or action affecting them and that it applies to the letter of response under the Pre-action Protocol.[62]

(ii) Secondly, there is some uncertainty over the extent of the duty. In particular, is it limited to information relevant to the grounds that a claimant has raised for challenging the defendant's decision; or does it also extend to other matters, beyond the scope of the pleaded issues?

In *Huddleston*, the Court of Appeal stated that a claimant is not "*entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him*"[63] and that "*the grant of [permission] does not constitute a licence to fish for new and hitherto unperceived grounds of complaint*".[64]

However, the Treasury Solicitor's Guidance suggests that the duty requires the defendant to disclose all documents and information that will assist the claimant's case and/or "*give rise to additional (and otherwise unknown) grounds of challenge*".[65] And in ***R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)*** **[2016] 3 WLR 157**, Lord Kerr at paragraph 183 quoted (without disapproval) a textbook that expressed the same view.

(iii) Thirdly, there is some uncertainty as to whether compliance with the duty requires the disclosure of documents as opposed to the provision of information.

The classic formulations of the duty of candour express it as a duty to provide information, rather than necessarily to disclose documents.

However, public bodies may choose to discharge their duty of candour by means of voluntary disclosure. The courts have encouraged the disclosure of significant

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[62] See paragraph 1.2. ("*The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions.*") No authority is cited for this proposition.
[63] *Per* Parker LJ at p 947.
[64] *Per* Sir John Donaldson MR at p 946.
[65] Paragraph 1.2.

documents as good practice, and indicated that they should ordinarily be provided where they are the "*best evidence*" of what they say (see *Tweed* at paragraph 4 *per* Lord Bingham). In some cases, especially where the court is required to resolve an issue of fact or to assess the proportionality of the defendant's action, disclosure of documents may be necessary (see *Tweed* at paragraph 57 and ***R (Al-Sweady) v Secretary of State for Defence*** **[2009] EWHC 2387 (Admin)**). In deciding whether a document should be disclosed, the test should be "*whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly*" (*Tweed* at paras 3 and 38).

167. It is suggested that these three areas of uncertainty could be clarified, respectively, as follows.

(i) The duty of candour does not apply until permission for judicial review is granted. Of course, even before permission is granted, the defendant must take particular care to not mislead the court – actively or by omission. But this is not the same as the imposition of a duty of candour at the pre-permission stage.

Compliance with any duty of candour requires time and cost. Imposing such a duty prior to the grant of permission could subvert the timetable for judicial review and add significant costs at a time when the defendant can recover only a small sum in respect of the costs of its Acknowledgement of Service and Summary Grounds.

The timing of the duty could be clarified via a relatively minor amendment to paragraph 12 of Practice Direction 54A, which was proposed in the LCJ's Discussion Paper, namely, the insertion of a new paragraph 12.2, which states: "*12.2. A defendant should, in its detailed grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted*". A defendant's detailed grounds and evidence are not due until after permission has been granted.

(ii) The duty of candour should not extend beyond the provision of information about the decision-maker's reasoning and the facts relevant to a claimant's grounds of challenge. A duty of candour in relation to as yet unidentified grounds of challenge would be excessively onerous.

(iii) The duty of candour can be expressed in Practice Direction 54A as a duty to identify relevant facts and the reasoning process (see paragraph 167(i) above, adopting the recommendation in the LCJ's Discussion Paper).

This is preferable to imposing any new general duty to disclose relevant documents in judicial review proceedings. In many cases, the imposition of such a duty would be excessive and unnecessary.

Defendants should continue to take a view as to whether, applying the case law identified above, the issues in a particular case require disclosure not only of information but also of documents; or whether to discharge their duty via voluntary disclosure of relevant documents. If it is said that the disclosure of a particular document is necessary for fairly dealing with an issue, that can be dealt with by means of an application for specific disclosure.

Summary

168. The duty of candour in judicial review proceedings is critical to the rule of law. It should not be abrogated.

169. The duty should be clarified by way of amendments to the CPR, providing that:

(i) the duty does not apply prior to the grant of permission for judicial review;
(ii) the duty does not extend beyond the provision of information about the decision-maker's reasoning and the facts relevant to a claimant's grounds of challenge; and
(iii) it is a duty to identify relevant facts and the reasoning process, and it does not necessarily require disclosure of documents.

b. Possible amendments to the law of standing (Q4c)

170. Our assessment is that the rules of public interest standing are not treated too leniently by the courts and no reform to the rules governing standing is required.

171. The current test for standing is whether a claimant has a "*sufficient interest in the matter to which the application relates*" (section 31 of the Senior Courts Act 1981). The test has been interpreted so as to include those who have a direct and personal interest in the

decision under challenge. It also includes “public interest” challengers, who might not have a direct and personal interest in the decision.

172. The rationale for recognising public interest challenges has been summarised by the Supreme Court in ***AXA General Insurance Ltd v HM Advocate*** **[2011] UKSC 46 [2012] 1 AC 868, §§169–170** *per* Lord Reed JSC. This is that the essential function of the courts is the preservation of the rule of law, which extends beyond the protection of an individual’s legal rights. There is a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual. For these reasons, a narrow, rights-based approach to standing is incompatible with the performance of the court’s constitutional function of preserving the rule of law. The exercise of the court’s supervisory jurisdiction necessarily requires the court to go beyond the protection of private rights, and requires an approach to standing founded on the public interest. This approach recognises that the function of the court’s supervisory jurisdiction is not limited to redressing individual grievances, but includes a constitutional role of maintaining the rule of law.

173. However, the courts take into account the context of the claim when applying the standing rules. The rules of public interest standing do not apply to all claims for judicial review. They do not apply to claims that a public authority has acted in breach of section 6 of the Human Rights Act 1998. A claimant must establish that they are a “victim” within the meaning of Article 34 of the European Convention on Human Rights (“ECHR”), which usually requires that they have been directly affected by the decision. NGOs acting in the public interest are not regarded as “victims”. Nor do the rules apply to procurement judicial review claims alleging that a public authority has breached the Public Contract Regulations 2015. Standing in these claims is restricted to those who can show that the performance of a competitive tendering procedure might have led to a different outcome that would have had a direct impact on them: see, for example, ***R (Chandler) v London Borough of Camden*** **[2010] PTSR 749**; and ***(Wylde) v Waverley BC*** **[2017] EWHC 466 (Admin)**.

174. In 2013, the Government consulted on whether the law governing standing should be narrowed. It was suggested that the wide approach to standing was vulnerable to misuse by those who wanted to take advantage of the judicial review process for ulterior motives. The then Government decided not to make any changes to the test for standing, and considered that any concerns that had arisen about the cost

consequences of public interest challenges could be addressed by amending the law relating to costs. So far as we are aware, no research has been carried out into the impact of these amendments, which were implemented in the Criminal Justice and Courts Act 2015. In our experience, there is nothing to suggest that they have not achieved the objective sought.

175. Nor are we aware of any evidence to establish that public interest challenges have an adverse impact on the operation of the judicial review process. That is not our experience in practice. On the contrary, rules of public interest standing enable the courts to perform their constitutional function to uphold the rule of law. It would undermine that fundamental principle if unlawful decisions were immune from challenge simply because no individual had come forward who had been directly affected by the decision.

176. In our view, there are already mechanisms in place to ensure that public authorities are protected from unmeritorious "public interest" claims and are able to recover their costs of defending unsuccessful claims where appropriate.

177. First, the permission stage acts as a filter to prevent unarguable claims proceeding to a substantive hearing. By definition, any claim that is granted permission raises an arguable case that the public authority defendant has acted unlawfully.

178. Second, if there are any concerns about the costs of public interest claims, those concerns can, in the first instance, be addressed by way of an application for security for costs. The only circumstances in which a defendant's ability to recover costs is limited is if a judicial review costs-capping order is made under section 80–90 of the Criminal Justice and Courts Act 2015. Such orders are now placed on a statutory footing and can only be made in statutorily defined "public interest proceedings". Even when such orders are made, the public authority defendant is entitled to a reciprocal cost cap, thereby removing the risk of that authority having to pay the claimant's reasonable costs should the claim be successful.

Summary

179. In summary, therefore, we do not think that the rules of public interest standing are treated too leniently by the courts. There are both reasons of principle and good practical reasons why such claims should continue. The reason of principle is that set out above: these claims vindicate the rule of law and enable the courts to perform their constitutional

function. The practical reason is that claims brought by public interest groups are often better prepared, and save time and money by presenting the issues to the court in one case rather than through a series of individual challenges.

c. Time limits for bringing claims (Q4d)

Introduction

180. The rationale behind the imposition of time limits on the bringing of claims for judicial review was expressed by Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 at pp. 280–281, as follows:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

181. It is, therefore, fully accepted that some limitation must be placed on the time period during which an administrative decision may be challenged by judicial review. Such limits serve to provide legal certainty and facilitate good administration. However, when considering whether judicial review time limits should be reformed, those important principles must be balanced against the legitimate interest of citizens having a practical and effective ability to challenge the lawfulness of executive action through the courts.

182. As is set out in these submissions, the time limits under the existing judicial review regime appear already to be sufficiently restrictive so as to provide for an appropriate degree of legal certainty and good administration, while also providing for a practical and effective right of access to the courts to challenge the lawfulness of administrative decisions. In short, reform in this area of judicial review is simply not necessary.

183. As will be argued below, any further reduction of the judicial review time limits or any new limitation of the court's discretion in this area will have the unintended consequence of leading to an increase in the number of judicial review claims that are issued protectively before the parties have had an opportunity to seek a negotiated settlement. Rather than "streamlining the process", this would in fact overburden the system and lead to an increase in the costs and resources expended to defend such claims.

The current position

184. The general position in respect of the time in which a judicial review claim must be brought is set out in CPR Part 54.5(1). This rule requires that, in a judicial review claim, the claim form must be filed:
    a. promptly; and
    b. in any event not later than three months after the grounds to make the claim first arose.

185. This time limit may not be extended by agreement between the parties.[66] Case law has made it clear that the requirement that the claim be brought promptly will not necessarily be satisfied even if the claim is brought within three months.[67] The three-month limit is, therefore, essentially a "long-stop", but the primary test that must be satisfied is that the claim has been brought "promptly" after the grounds to make the claim first arose.

186. The question of when the grounds for making a judicial review claim first arise was recently addressed by the Court of Appeal in ***R. (on the application of Badmus) v. Secretary of State for the Home Department*** **[2020] EWCA Civ 657**. At §77 the court held that:

> "…the grounds for making a judicial review claim first arise when a person is affected… by the application of the challenged policy or practice".

187. While the requirement that a claim must be brought promptly is the general position, there are also specific time limits for certain types of judicial review claim:

    a. Claims arising from planning decisions must be brought not later than six weeks after the grounds to make the claim first arose.[68] This parallels the limitation period in which a statutory appeal may be brought to the High Court on a point of law under section 288 of the Town and Country Planning Act 1990.

    b. Claims relating to procurement decisions must be brought within 30 days of the date upon which the claimant knew or ought to have known that grounds for the claim had arisen.[69] This parallels the period in which a statutory appeal may be brought under regulation 92(2) of the Public Contract Regulations (SI 102/2015).

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[66] CPR 54.5(3).
[67] *R. (Sustainable Development Capital LLP) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin) at §31.
[68] CPR 54.5(5).
[69] CPR 54.5(6).

c. Claims challenging a decision of the Upper Tribunal must be brought no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant.[70]

d. Claims arising out of a decision by a minister in relation to a public inquiry or a decision of a member of an inquiry panel must be brought no later than 14 days after the day on which the applicant became aware of the decision.[71]

188. A court may extend the time in which a claim for judicial review may be issued under the powers of case management granted under CPR Part 3.1(2)(a). However, the courts have traditionally recognised that time limits in judicial review claims should be strictly adhered to for the reasons set out at paragraph 180 above.[72] Such extensions of time will, therefore, only be granted if the court considers that there are good reasons to do so.[73]

189. As well as the above limitation periods, s.31(6) of the Senior Courts Act 1981 provides that:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of an application or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

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[70] CPR 54.7A.

[71] s.38, Inquiries Act 2005.

[72] *R. v Institute of Chartered Accountants in England and Wales Ex p. Andreou* (1996) 8 Admin L.R. 557.

[73] The courts have accepted that there was good reason for the delay in the following circumstances:

a. If the applicant was unaware of the decision provided that they applied expeditiously once they became aware of it (*R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386 at p.402);
b. The fact that the claim raises issues of general public importance (*R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 W.L.R. 1482);
c. In the past, delay arising out of the need to obtain legal aid was regarded as a sufficient justification for delay (*R. v Stratford-upon-Avon DC Ex p. Jackson* [1985] 1 W.L.R. 1319);
d. The pursuit by the applicant of alternative legal remedies (*R. v Secretary of State for the Environment Ex p. West Oxfordshire DC* [1994] C.O.D. 134); or
e. The fact the applicant was awaiting the outcome of consultation (*R. (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [87]-[95]).

The following have been held not to be good reasons to extend the time limit:

a. Delay caused by the applicant's lawyers (*R. v Secretary of State for Health Ex p. Furneaux* [1994] 2 All E.R. 652);
b. Delay caused by an applicant's non-legal advisor (*R. v Tavistock General Commissioners Ex p. Worth* [1985] S.T.C. 564); and
c. Time taken pursuing avenues of political redress, such as organising a lobby of Parliament, before applying for permission (*R. v Secretary of State for Health Ex p. Alcohol Recovery Project* [1993] C.O.D. 344; *R. v Redbridge LBC Ex p. G* [1991] C.O.D. 398).

190. In this context, the expression "undue delay" is to be read as meaning failure to act promptly or within three months.[74] Thus, even if good reason were shown for the limitation period to be extended in a late judicial review claim, if it can be established that the necessary prejudice, hardship, or detriment is likely to occur, the court may refuse permission to bring the claim, or a remedy may be refused at a substantive hearing.[75] This provides a significant further safeguard against applicants bringing late judicial review claims that may undermine legal certainty or prejudice good administration.

The 2012 Review and 2013 Reforms

191. The above-mentioned shorter time limits in respect of planning and procurement decisions were established in 2013[76] following a review conducted by the Ministry of Justice in 2012. §45 and §46 of the Consultation Paper explained the government's rationale for not seeking a general reduction in the time limit for bringing judicial review claims across the board at that time as follows:

> 45. The Government recognises that a general reduction in the time limit for bringing proceedings may constrain the time available to seek a negotiated settlement, and that this may potentially be counter-productive. We acknowledge that it carries a risk that parties might be encouraged to circumvent the Pre-Action Protocol and move immediately to litigation potentially leading to further growth in the use of Judicial Review.
>
> 46. For this reason, we are not presently proposing a general reduction in the time limit for bringing Judicial Review proceedings across the board. Nevertheless, we believe that there are some classes of case in which it might be appropriate for shorter time limits to apply. Where shorter time limits for appeals apply there is generally an underpinning policy that the cases should be brought swiftly. We believe that it is reasonable to consider whether the same time limit should apply to Judicial Reviews on the same issues. The disjuncture between these time limits can operate to extend periods of uncertainty for both public authorities and others affected by the matter challenged.[77]

192. It is submitted that the above rationale is equally as valid today as it was in 2012. The classes of case that were then considered apt for shorter time limits are now subject to such reduced time limits. As such, further amendment is simply not necessary. A further reduction of the judicial review limitation periods would, as is pointed out above, be counter-productive.

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74 *R. (on the application of Badmus) v. Secretary of State for the Home Department* [2020] EWCA Civ 657 at §59.
75 *R. v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell* [1990] 2 A.C. 738.
76 The Civil Procedure (Amendment No. 4) Rules 2013.
77 Ministry of Justice, *Judicial Review: Proposals for Reform* (December 2012), available at https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf (accessed 4 October 2020).

The Experience in Other Jurisdictions: Australia

193. Under s.11 of the AD(JR) Act 1977, a judicial review application to the Australian Federal Courts must be made no later than 28 days after the day on which the impugned decision was made. Some Australian states and territories have followed this approach to the judicial review limitation period. However, in 2002, the Law Reform Commission of Western Australia considered the question of limitation periods for judicial review. While the Commission accepted that time limits should apply to the commencement of applications for judicial review, it expressed the view that:

> "The specification of strict limitation periods for the commencement of proceedings has the capacity to create injustice, but on the other hand delay in the commencement of proceedings can itself be a source of injustice. It is the Commission's view, reflected in its report that the balance between those competing considerations is not best struck by the imposition of an arbitrary and inflexible time limit. Instead, the balance is best achieved through the prescription of a time within which proceedings ought be commenced, but with a judicial capacity to extend that time for good cause, and in circumstances which such an extension would not cause undue prejudice or hardship."[78]

194. In the Commission's view, the 28-day period adopted elsewhere was too short because:

> "[this] generally has the consequence of necessitating applications for extension of time which consumes limited judicial resources".[79]

The Commission, therefore, recommended that the most appropriate arrangement should be that proceedings for judicial review should be commenced as soon as reasonably practicable and in any event within six months of notification of the decision under review.[80] It is submitted that this approach is broadly similar to the current regime in England and Wales.

Is Reform of the Judicial Review Time Limit Regime Necessary?

195. As can be seen above, the present limitation period regime in respect of bringing judicial review claims is already quite a restrictive one. The general rule is one of promptness by reference to the circumstances in which the claim arises, rather than a fixed period of three months. Furthermore, the specific time limits outlined in respect of specific claims such as those arising out of planning and procurement matters are already extremely short. In the case of planning and procurement matters, these

[78] Law Reform Commission of Western Australia, *Judicial Review of Administrative Decisions*, Report No. 95 (2002) at p31, available at https://www.lrc.justice.wa.gov.au/_files/P95-R.pdf (accessed 5 October 2020).
[79] Ibid.
[80] Ibid.

limitation periods were changed in 2013 so as to align them with the period in which statutory appeals could be brought under these respective regimes.[81] In this context, it is submitted that it would be inappropriate to further reduce the specific limitation periods.

196. In the context of general claims for judicial review, it is submitted that, under the present arrangements, unduly delayed claims are already liable to fall foul of the existing requirement of promptness under CPR 54.5(1). Furthermore, if a delayed judicial review claim is likely to cause hardship or prejudice, such claims are still apt to founder on the shoals of s.31(6) of the Superior Courts Act 1981 in the event that an extension of the limitation period is granted.

197. Importantly, neither the academic literature surveyed in the preparation of this submission, nor the anecdotal experience of the author supports the suggestion that these existing arrangements have given rise to a phenomenon of late judicial review claims that could be said to jeopardise legal certainty or to frustrate good administration. Rather, it is submitted that the present limitation arrangements strike an appropriate balance between the need for legal certainty and good administration and the legitimate interest of citizens having a practical and effective ability to challenge the lawfulness of executive action through the courts.

198. It is further submitted that the court's powers to extend judicial review limitation periods under CPR part 3.1 is an important discretionary "safety valve" to avoid instances of injustice arising via too strict an application of the limitation period. The survey of the case law at footnote 71 demonstrates that the courts have, to date, taken a sensible and responsible approach to what constitutes a "good reason" for extending the limitation periods. There is no reason to believe that the courts will depart from this sensible and responsible approach. As such, this power should be preserved.

199. As has been acknowledged, the principles of legal certainty and good administration are centrally important to the functioning of a democratic state. However, the Supreme Court has also recognised that the constitutional right of access to the courts is inherent in the rule of law,[82] which is equally important to a functioning democracy.

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[81] Ministry of Justice, *Judicial Review: Proposals for Reform* (December 2012) at §§49-54. Available at https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf (accessed 4 October 2020).
[82] *R. (on the application of Unison) v. Lord Chancellor* [2017] UKSC 51 *per* Lord Reed at §66.

200. As has been seen, the judicial review limitation periods under the present arrangements are already stringent. If these time limits were to be further reduced and the discretion to extend the limitation period restrained or removed, this would create a significant risk that large numbers of potentially meritorious applicants may be precluded from accessing the remedy of judicial review. Given that the present arrangements do not appear to be giving rise to difficulties with late applications, to alter these arrangements would be to risk removing or restricting an important means by which citizens may challenge the lawfulness of administrative action in order to solve a problem that does not exist.

Consequences of a Change to the Limitation Periods

201. Paragraph 4 of the Terms of Reference to which this submission responds suggests that the rationale behind exploring potential changes to the procedural basis of judicial review is to see whether it is possible to "streamline the process". However, it is submitted that a reduction of the judicial review limitation periods and/or a restriction or removal of the courts' discretion to extend such limitation periods would in fact have the opposite effect. Even in light of the current time limits, the imposition of a definitive limitation period often means that a potential claimant will be forced to focus his or her efforts on formulating a claim rather than seeking to determine whether there is scope for an agreement to be reached with the decision-maker.

202. If the time period were to be reduced and or the discretion restricted, it is likely that – as was predicted in the Government's 2012 Consultation Paper – this would, in fact, cause an increase in the number of judicial review claims that are issued protectively before the pre-action protocol can be followed. This would increase the use of judicial review and reduce the limited opportunities that currently exist for claims to be settled by negotiation. This, in turn, would increase the costs and resources incurred by claimants in preparing and bringing claims that may otherwise have been capable of settlement and by public bodies that would have to respond to and ultimately defend such claims. Far from streamlining the system, this would overburden the judicial system with an increased number of issued claims.

203. Furthermore, as was outlined by the Law Reform Commission of Western Australia, a reduction of the judicial review limitation periods would be likely to result in an increased number of applications to the courts for extensions of the time in which a claim may be brought. On the basis of the foregoing, there is simply no need or

justification for amendments to present arrangements, which would increase the costs and resource burden on claimants, public bodies, and the judicial system.

Summary

204. On the basis of the above, it is submitted that the existing arrangements in respect of judicial review time limits strike an appropriate balance between the need to guarantee legal certainty and maintain good administration, and the ability of citizens to obtain practical and effective access to the courts in order to challenge the lawfulness of administrative decisions. On this basis, there does not appear to be any valid justification or need to amend the present arrangements.

d. Principles on which relief is granted in claims for judicial review (Q4e)

Introduction – relief and the current principles on which it is granted

205. The essence of any challenge is the remedy sought. Without effective remedies, access to justice is hollow. The common law has long recognised the need for effective remedies. This is reflected in the Latin maxim *ubi ius ibi remedium* (wherever there is a right, there is a remedy). Effective judicial remedies should be accessible to the public so that its legitimate interests are protected and the law is enforced.

206. Final remedies in judicial review in England and Wales developed incrementally from two sources: prerogative writs against the Crown (orders of mandamus,[83] prohibition, and certiorari[84]) and equitable remedies (principally injunctions and declarations). The remedies now available are regulated by the Senior Courts Act 1981 and the CPRs. The available remedies in judicial review include a quashing order, prohibitory order, mandatory order, and a declaration. In judicial review cases including a human rights element, the courts may also make a declaration of incompatibility and, in specific cases, award damages.

207. In addition, the court can grant interim relief, usually in the form of an injunction, to preserve the status quo pending the outcome of the proceedings. This is a temporary

[83] On mandamus, Lord Mansfield observed in 1762 that "It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one", *R v Barker* (1762) 3 Burr 1265 at 1267.

[84] Now known as mandatory, prohibiting, and quashing orders, respectively: see Senior Courts Act 1981 s.29(1) and Civil Procedure (Modification of the Supreme Court Act 1981) Order 2004.

order requiring a public body to do something or not to do something until a final decision has been made in the case.

208. As is noted in *De Smith on Judicial Review*, "*A distinctive feature of all these remedies is that the court has discretion to withhold them from a claimant even if the defendant public authority is held to have acted unlawfully*."[85] It has been said that "*to refuse relief where an error of law by a public authority has been demonstrated is an unusual and strong thing; but there is no doubt that it can be done*".[86] However, the circumstances where relief may be refused are not prescribed.

209. Remedies in public law in England and Wales are thus not a matter of right, and may be withheld altogether. Even if a claimant establishes that a public body has acted unlawfully, final remedies may be withheld at the discretion of the court.

210. It was previously the case that, where it could be demonstrated that the decision-maker would necessarily have reached the same conclusion had he or she not acted in error, a remedy *could* be withheld.[87] Under the principle in *Simplex*, the onus was on those asserting that the decision would have been the same regardless to demonstrate that that was the case.

211. That discretion has now been superseded by section 31(2A) of the Senior Courts Act 1981 Act (inserted by way of amendment in 2015[88]), which provides that the court *must* refuse relief "*if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*".[89] Section 31(3C) of the 1981 Act provides that:

> "*(3C) When considering whether to grant leave to make an application for judicial review, the High Court –*
> *(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and*
> *(b) must consider that question if the defendant asks it to do so.*
> *(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.*"

[85] *De Smith's Judicial Review* (8th edition, Sweet & Maxwell, 2018) 18-023; see also 18–48.
[86] *R v Lincolnshire CC and Wealden DC Ex parte Atkinson* (1996) 8 Admin LR 529 *per* Sedley J (as he then was) at 550.
[87] See eg *Simplex GE (Holdings) Ltd v SSE* (1989) 57 P & CR 306 *per* Purchas LJ at 327.
[88] Criminal Justice and Courts Act 2015 section 84(1).
[89] Senior Courts Act 1981 section 31(2A), the provision may only be disapplied where the court certifies appropriate "*for reasons of exceptional public interest*" (section 31(2B)).

212. Under section 31, therefore, the court's discretion against granting relief is more limited. This change effectively lowered the threshold for refusing relief: the old test of inevitability was replaced by one of probability. The Court of Appeal has also said that the provision is not limited to merely "procedural" or "technical" conduct, but applies "to substantive decision-making across the whole spectrum of administrative action".[90]

Basis for improving current approaches to the grant of final relief

213. At least in principle, section 31(2A) enables defendants or interested parties to put evidence before the court to show that a decision would be highly likely to be the same notwithstanding legal error. The court may be (and in our experience is generally) cautious about how it approaches such evidence.[91] However, in practice, a claimant will not necessarily know the nature of such arguments before commencing litigation. That is problematic and may ultimately have a chilling effect on meritorious claims.

214. This raises the concerns relating to access to justice. First, the court is potentially drawn into a hypothetical adjudication of decisions that it is ill-equipped to make. A failure to consult is a case in point. Public consultation may be required in relation to a particular decision by statute or as a matter of common law fairness at a time when all options are open to a decision-maker and effective public participation can take place. A court's consideration of what *might* have happened had there been such timely consultation is no substitute for the actual thing.

215. In other cases, the court may be required to second-guess what was in the mind of the decision-maker, a point recognised by Blake J in ***R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin),** where he said at [59]: "*In the absence of clear pointers at the time that the flaw was a technical one that made no difference, the court will inevitably be drawn into some degree of speculation or second guessing the decision of the public authority that has the institutional competence to make it*."

216. Second, there is no clear guidance on what the consequence should be in costs if the court withholds relief. The normal position is that costs follow the event: if the relief sought by a claimant is refused, the claimant should pay the costs of the defendant who successfully resisted the claim. The court has a wide discretion on costs, but the

[90] *R (Goring-on-Thames Parish Council) v South Oxfordshire DC* [2018] EWCA Civ 860 at paragraph 47.
[91] See e.g. *Canterbury CC v SSHCLG* [2019] EWHC 1211 (Admin) *per* Dove J at paragraph 115.

risk of a claimant having to pay adverse costs even if it is successful in establishing an error of law is a serious deterrent for claimants and hence for access to justice.[92] Consideration should be given as to whether the presumption should be that there be no order for costs in such cases, save for in exceptional circumstances.

217. Third, the "no substantial difference" test also limits the extent to which the court can make declarations of unlawfulness in circumstances where it has otherwise declined to grant other forms of relief. The term "relief" in s.31(2A) includes all relevant forms of relief (defined in s.31(1)) including as declaration. Therefore, it curtails the ability of the court to act flexibly with respect to the different forms of relief.[93] Prior to the introduction of this test, the courts were able to act more pragmatically, for example, by withholding a quashing order on grounds that to quash a decision would be detrimental to good administration but nevertheless issuing a declaration of unlawfulness, which would give the claimant some form of relief and incentivise the public authority to learn from its mistakes. The effect of the change is, arguably, therefore, to reduce the ameliorating effect that judicial review can have on public administration.

218. Fourth, the discretionary nature of remedies in public law and the principles applicable to granting relief can create uncertainty about the *effectiveness* of remedies in particular areas of public law, such as environmental law. The discretionary nature of final remedies in judicial review, for example, arguably puts England and Wales in conflict with its international obligations under the Aarhus Convention to ensure effective remedies in the environmental context (see Article 9(4)). Any proposed reform must take account of the UK's obligations under the Convention.

Recommendations for reform – rolling back s.31(2A) but otherwise sticking with the status quo

219. In our experience, the paucity of cases in which the courts have actually applied s.31(2A) of the 1981 Act since it was introduced five years ago shows that the provision is not needed. While it might be said that what that demonstrates is that the concerns expressed above are exaggerated, what it, in fact, shows is that the statutory provision – with all its actual and potentially deleterious effects – is not needed. That is because the courts are generally very astute in terms of their approach to granting relief and

[92] Similar considerations as to costs may apply where the court refuses relief for a claim that, although validly brought, has become academic by the time of the hearing.
[93] See, for example, *R (Hawke and Hawke) v Secretary of State for Justice* [2015] EWHC 4093 (Admin).

have been willing, even before the introduction of s.31(2A), to withhold relief in appropriate cases.

220. Such is the well-developed nature of administrative law and the experience of specialist administrative law judges (many of whom regularly represented defendants while in legal practice) that the courts are very much alive to the administrative practicalities faced by public bodies. In our experience,[94] judges are slow to grant relief where the administrative impact of doing so would be detrimental to good administration. The courts are experienced in this and we are unable to think of any examples where a court has granted relief in circumstances where the breach in question concerned a procedural error that resulted in little or no actual prejudice.

221. The principles governing the grant of relief and the approach generally taken by the courts influence claimants and their representatives. Since a claimant has to show that the public body's error may have made a material difference to the decision under challenge, this deters claimants from bringing judicial review on the grounds of academic procedural points and instead encourages them to focus on grounds where it is possible to show that the error in question might have resulted in a different decision.

222. In this way, the current principles governing relief generally strike the right balance between punishing public law wrongs and preserving the needs of sound administration. There is no basis for further "streamlining" the principles in this area, which we take to mean, in this context, placing further restrictions on the ability of claimants to access relief (which would undermine access to justice and hollow out the enforcement of public law norms) and placing further constraints on judicial discretion in this regard.

223. We would argue that s.31(2A) is unnecessary and is an overly prescriptive constraint on judicial discretion that should be repealed. Judges already exercise their discretion prudently and pragmatically. They did so before the rule was introduced and they can be trusted to do so now. It is already hard for a claimant to successfully mount a public law challenge and obtain relief. If public bodies come to understand that there is little danger of relief being granted, even when they are found to have committed a public

[94] The lawyers responsible for preparing this response have regular experience of judicial review, acting at least half the time for defendant public bodies.

law error, that will undermine one of the central functions of the judicial review, which is to improve administrative decision-making and procedural compliance.

Summary

224. The Administrative Court grants relief on the basis of whether the decision-maker's error made a material difference to the decision under challenge. This allows the court to confer remedies that are both sensible and practical. Statutory "clarification" has only inhibited the functioning of this principle.

e. Rights of appeal, including on the issue of permission to bring judicial review proceedings (Q4f)

225. In our view, no procedural change is necessary to the rights of appeal applicable in judicial review, including to the rights of appeal from refusals of permission.

226. Taking first the rights of appeal from substantive decisions on applications for judicial review, permission is needed for such appeal either from the High Court or (if that is refused) the Court of Appeal itself. Applications for permission have to be made promptly and, except where the High Court has granted permission, a single Court of Appeal judge will determine the permission application on paper unless the court is "of the opinion that the application cannot be fairly determined on paper without an oral hearing" (CPR Rule 52.5(2)). CPR Rule 52.6 then provides, so far as relevant, that permission will be granted only "where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard." Where one or both of these criteria are satisfied, it is difficult to articulate a reasoned decision why permission should not be granted.

227. Further restricting appeals from decisions on judicial review applications would create distinctions between cases in which public authorities are held to account as public authorities, and those concerning private bodies or public authorities acting in a public capacity. It is difficult to articulate a justification for creating such a distinction in favour of public authorities, which already, by virtue of their position as public authorities, wield enormous power over the lives of citizens and others.

228. The availability of appeal is, further, necessary as a safeguard against breach by the UK of its international obligations: a recent example of this is ***Re G (a child) (child abduction) G v G (Secretary of State for the Home Department and others***

intervening) **[2020] EWCA Civ 1185**, in which the Court of Appeal partially upheld an appeal against a ruling of the High Court that the claimant's application for the return of his child to South Africa could not be heard until the application of the child's mother for asylum in the UK had been determined. The Court of Appeal took the view that the decision of the lower court had failed to give effect to the UK's obligations under the Convention on the Civil Aspects of International Child Abduction concluded on 25 October 1980 ("the 1980 Hague Convention"). Another, perhaps more commonplace, example is the decision of the Court of Appeal in ***R (Bridges) v Chief Constable of South Wales Police (Information Commissioner & Ors intervening)*** **[2020] EWCA Civ 1058**, in which the Court of Appeal allowed an appeal against a decision of the court below that the defendant's use of automatic facial recognition breached Article 8 of the ECHR. Whatever the Government's views of the outcome of this case, the availability of the appeal to the Court of Appeal avoided the need for an application to the European Court of Human Rights and the possibility of a finding against the UK. These two cases are simply very recent examples of the role of constitutional and practical significance played by appeals from decisions of the lower courts in applications for judicial review.

229. Finally, if claimants were prevented from appealing decisions in applications for judicial review, defendants would also have to be so restricted. This would then create difficulties with problematic precedents, and would prevent defendants from achieving clarity in the case of conflicting decisions.

230. To turn to appeal from refusals of permission (as distinct from substantive decisions), the situation at present is that a claimant is not entitled to appeal the refusal of permission on paper but may request the decision to be reconsidered at a hearing. Even this is not available where the judge refusing permission has concluded that the application is totally without merit in accordance with CPR 23.12 (though appeal to the Court of Appeal is available in such cases). If permission is refused at a renewal hearing, the High Court may not grant permission to appeal the refusal of permission, such an application having to be made to the Court of Appeal itself (***R (Glencore Energy UK Ltd) v Revenue & Customs Commissioners*** **[2018] STC 51**). No further appeal is available beyond the Court of Appeal. Strict time limits apply and in none of these cases is any significant burden placed on the defendant. This being the case, and taking into account the potential for human error at paper stage, there is inadequate justification for further restricting rights of appeal in cases of refusal of permission.

Summary

231. In short summary, no procedural change is necessary to the rights of appeal applicable in judicial review, including to the rights of appeal from refusals of permission, because the current rules maintain an appropriate balance between the needs to secure justice, to maintain consistent and appropriate standards for the exercise of public power, to minimise breach by the UK of its international obligations, and to permit the effective functioning of the courts.

f. Costs and interveners (Q4g)

Interveners

232. Judicial review claims can raise issues of public interest that go beyond those that concern the parties directly involved. Organisations with an interest in the wider public issue often have their own research teams or body of evidence readily available. Through third-party interventions, those organisations are able to submit specialist information, legal argument on the wider implications of a claim, in particular where that claim raises issues in the wider legal and public interest, and provide expertise to the court. Interveners are not just NGOs and third-sector organisations; they can also be independent experts such as the Equality and Human Rights Commission, or the relevant regulatory body. The relevant Secretary of State can, and does, intervene as well. Interveners of all types, therefore, assist the court by allowing it to consider relevant information that would otherwise not be available.

233. The threshold for intervening in judicial review proceedings is already high. Potential interveners must seek consent from the existing parties and demonstrate that they can make a useful additional contribution. Additionally, interveners must request permission of the court to make written and/or oral submissions. On top of this, if evidence is to be provided to the court, permission to do so needs to be applied for when making an application for permission to intervene. Further, the court's own case management means that they can, for example, request written submissions only, where this would provide adequate information, or restrict the length of submissions (both written and oral). This ensures that third parties only intervene in cases where they have received permission at several stages, which ensures an increased likelihood that the intervention is focused and likely to assist the court.

234. There are numerous examples of interveners assisting the court. A small selection, which demonstrates the range of interventions, could include: ***R (Das) v Secretary of State for the Home Department*** **[2014] EWCA Civ 45**. The charities Mind and Medical Justice intervened in this case concerning the Secretary of State's policy of detaining people with mental health problems in immigration detention. The impact of those submissions was clear, as the Court of Appeal referred to the written and oral submissions made by the interveners more than 15 times in giving judgment.

235. In ***Yemshaw v Hounslow London Borough Council*** **[2011] UKSC 3**, the Secretary of State for Communities and Local Government intervened, and was referred to as "having gathered so many of the references together" [20], which were used by the court in its judgment.

236. The Equality and Human Rights Commission intervened in ***R (Ward & rs) – v – LB Hillingdon and EHRC (interveners)*** **[2019] EWCA Civ 692**, regarding whether a housing list policy, which required a ten-year residence in the area, was discriminatory.

Interveners and costs

237. The Criminal Justice and Courts Act 2015, section 87, amended the costs position of those who voluntarily apply for permission to intervene in judicial reviews. While the court can make costs orders for or against interveners under the general discretion in relation to costs, two main principles apply.

    1: *Except in exceptional circumstances, the court may not order a party to the proceedings to pay the interveners' costs in connection with the proceedings.* This principle ensures that, generally, interveners bear their own costs. Their submissions must significantly assist the court for a costs order to be made in the intervener's favour.

    2: *Except in exceptional circumstances, the courts must order the intervener to pay any costs specified in an application for costs incurred by a party if specific conditions are met.* This principle ensures that, where the intervener has acted, in substance, as the sole or principal applicant, or a significant part of the intervener's representations relate to matters that it is not necessary for the court to consider, the intervener could be held retrospectively liable for costs.

238. These principles, taken together, ensure that third parties have to carefully consider whether their arguments and/or evidence would significantly assist the court, and that they keep their intervention under review to ensure that it continues to assist the court on relevant matters, as they have to consider not just their own costs but also the risk of being liable for other costs as well. Section 87 also means that, in practice, interventions rarely create further costs for the parties.

Summary

239. We do not propose that there are any changes that could improve the process of third-party interveners participating in judicial review cases. The process currently ensures that interveners only participate in cases in which they have something substantive to add, which is not being put forward by the parties. The costs process limits third parties to those applications in which they believe they can significantly assist the court, and they have the financial means to pay the costs of doing so.

240. The costs rules are finely balanced and should not be altered to make it any harder for interveners to provide their focused assistance to the court.

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