UK Administrative Justice Institute response to the Independent Review of Administrative Law

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About UKAJI

The UK Administrative Justice Institute (UKAJI) was founded in 2014 and was initially funded by The Nuffield Foundation until 2017. Since then, UKAJI has been funded by the University of Essex. UKAJI's objective is to act as a catalyst for the expansion of empirical and socio-legal research on administrative justice in the UK.[1]

About the authors

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All three contributors to this response are currently involved in a short-term ESRC-funded impact project, which is intended to ensure that The Law Society of England and Wales has access to the best available evidence relating to judicial review in order to assist its response to the IRAL and later to assess proposals for reform. However, this response is an independent academic one and does not represent the opinions or interests of The Law Society.

[1] https://ukaji.org/about/ (accessed 8 October 2020).

Summary of key points

Q 1: IRAL's questionnaire and terms of reference

UKAJI is pleased that the IRAL will base its work on the available evidence and obtaining the views of government departments is an important element in this. However, UKAJI considers that the evidence available to the IRAL would have been substantially improved had a similar questionnaire been sent to a wider range of stakeholders involved in judicial review litigation, including claimant lawyers in particular.

UKAJI believes that the period of time available for this review is inadequate given the complexity, scope, and importance of the issues.

UKAJI considers that the framing of the questionnaire and the review more generally in terms of the need to balance the interests of individuals in challenging the executive against the role of the executive in carrying out the business of government is problematic. It obscures additional crucial facets of judicial review, particularly its role in supporting the sovereignty of Parliament and ensuring that the executive acts in accordance with the law. This is a concerning omission in light of Bills currently being pursued by the executive in Parliament which have the potential to undermine the rule of law and the executive's obedience to it, including the Internal Market Bill, the Overseas Operations (Service Personnel and Veterans) Bill, and the Covert Human Intelligence Sources (Criminal Conduct) Bill.

Given that judicial review is only one facet of the broader administrative justice landscape and has connections with other avenues of accountability and redress, UKAJI believes that the IRAL's questionnaire should have placed judicial review within its broader context by asking respondents to consider whether the current relationship between judicial review and alternative forms of redress, including statutory appeals, is appropriate, and if not why this is the case.

Human rights are central to judicial review principles, yet there is no express reference to human rights in IRAL's questionnaire or terms of reference. UKAJI recommends that the IRAL takes account of human rights and the place of the Human Rights Act 1998 given that a failure to do so would be a sizeable lacuna in the consideration of issues such as justiciability, the grounds of review, and principles of statutory construction.

UKAJI is of the view that IRAL's questionnaire should have included specific questions about the perceptions of public bodies towards the role that human rights and the Human Rights Act 1998 play in judicial review. Similar questions directed to claimant lawyers would also have been useful, particularly asking whether they believe that human rights offer protections that other grounds and redress mechanisms do not.

Given the importance of human rights to judicial review, the learning done by IRAL on human rights should become a point of reference for, and feed into the work of, the upcoming review of the Human Rights Act 1998.

UKAJI recommends that all responses received by the IRAL should be made publicly available unless specific justifications exist to keep the response confidential.

Q 10: What can be done to minimise the need for judicial review?

UKAJI recommends that, rather than exclusively focus on the law related to judicial review, the IRAL should further consider how poor-quality initial decision-making and inadequate administrative redress increases the need and demand for judicial review.

The IRAL should consider how government departments and public administration more widely can best learn from experience of judicial review and incorporate this learning into decision making in order to further good government.

UKAJI also recommends that the IRAL should give careful consideration to the most effective ways of improving the quality of initial decision-making and mechanisms of administrative redress so as to further decrease the demand for judicial review.

UKAJI recommends that the IRAL should consider the potential consequences of restricting access to judicial review for the wider administrative justice system and the pressure thereby placed on, and the need for, alternative means of redress.

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

UKAJI is concerned that the current limitation period for lodging judicial review proceedings may inhibit the ability of the parties to resolve disputes without legal proceedings and encourage claimants to file claims that could be resolved without involvement of the court with consequential costs. This is a matter to which the panel must give careful consideration.

UKAJI believes it is time to explore the option of ADR more fully in practice in the context of judicial review proceedings. This is not to imply a rose-tinted perspective of ADR, which may be inappropriate in some public law disputes. There is legitimate concern, for instance, about how successful negotiation or mediation can be with the power imbalance between, say, central government and the individual, and one must recognise that it is not possible to mediate or negotiate about whether a public body has a legal power or not. That is a matter of law for the court and not agreement between the parties. In addition, ADR has the disadvantage of not establishing precedents for individuals outside of the immediate dispute.

The focus of UKAJI's response

1. UKAJI understands that many organisations and individuals will be responding to this call for evidence. Not wishing to duplicate material, while we comment where necessary on some of the key constitutional implications of the work to be done by the IRAL, this response will be focused and limited. Particularly, this response reflects UKAJI's remit to research administrative justice and will seek to locate judicial review within that context, including consideration of the potential unintended consequences that might emerge from reform proposals that have the effect of limiting access to judicial review.[2] In relation to Q.1 we will particularly comment on: what we think ought to have been included in the questionnaire but was omitted; to whom the questionnaire should have been directed in addition to public bodies; and the transparency of the process being adopted by the IRAL. This response will also address Q.10 relating to what more can be done to minimise the need to proceed with a judicial review and Q. 12 relating to the role of alternative dispute resolution in judicial review proceedings.

The scope of IRAL's work – judicial review is only part of the wider administrative justice landscape

2. By 'administrative justice', UKAJI means administrative and executive decisions and actions taken by public bodies in relation to natural or legal persons, and the mechanisms of review, appeal, accountability, and redress available when complainants regard those decisions to be unlawful, unfair, or faulty. These redress mechanisms might include judicial review, administrative review, mandatory reconsideration, statutory appeals to tribunals, complaints to ombuds, and alternative dispute resolution mechanisms, such as mediation, negotiation, and arbitration.[3] Some of these mechanisms may focus only on redress for breaches of legal rules and principles, such as judicial review, while others may have a broader remit, such as the power of ombuds to provide investigation and remedies for maladministration.[4]

3. The work of the IRAL is framed as a review of *administrative law*. Administrative law ordinarily refers to the law governing the composition, procedures, powers, duties, liabilities, and rights of administrative and executive bodies normally carrying on

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[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf (accessed 13 October 2020) p.11.

[3] https://ukaji.org/what-is-administrative-justice/ (accessed 8 October 2020). UKAJI also produced a discussion paper: 'What is administrative justice? A discussion paper' (3 March 2015). Available at https://administrativejusticeblog.files.wordpress.com/2016/08/what-is-administrative-justice-a-ukaji-discussion-paper.pdf (accessed 8 October 2020).

[4] See [37]-[38] in *R (Rapp) v Parliamentary and Health Service Ombudsman* [2015] EWHC 1344 (Admin), for instance, where Andrews J. makes clear that 'maladministration' is not limited to illegality.

statutory functions.[5] The proper enforcement of all these matters includes the mechanism of judicial review but is not limited to this.[6] While judicial review is a constitutionally important facet of administrative law, it does not by itself constitute administrative law.[7] Indeed, public bodies take millions of decisions every year and in the grand scheme of these decisions, judicial review is a marginal activity undertaken by statistically very few people.[8] As Harlow and Rawlings have put it, the number of judicial reviews in the context of the number of administrative decisions is 'infinitesimal'.[9] However, this has not prevented judicial review from becoming a heated and high-profile topic of discussion among politicians, lawyers, judges, and academics.[10] This is not to dismiss those debates but it does help to locate the place of judicial review in the wider administrative context. It also provides the background against which concern that judicial review is overused should be assessed.[11]

4. The Department for Work and Pensions, for instance, makes around 12 million social security decisions every year.[12] Since the introduction of mandatory reconsideration in 2013,[13] the number of reconsiderations has increased year on year.[14] In 2017, for instance, around 300,000 social security decisions were challenged by mandatory

[5] Anthony Wilfred Bradley and Keith Ewing, *Constitutional and Administrative Law* (14th edn Pearson Longman, 2007) 657-658.
[6] *ibid*, 9-10.
[7] Theodore Konstadinides, Lee Marsons and Maurice Sunkin, 'Reviewing Judicial Review: The constitutional importance of the Independent Review of Administrative Law 2020' (UKCLA, 24 September 2020). Available at https://ukconstitutionallaw.org/2020/09/24/theodore-konstadinides-lee-marsons-and-maurice-sunkin-reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/ (accessed 9 October 2020).
[8] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 381.
[9] Carol Harlow and Richard Rawlings, *Law and Administration* (Weidenfeld and Nicolson, 1984) 259. A point they subsequently reiterated: Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 712.
[10] Indeed, the high-profile cases which may well have been the impetus for this review are *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R (Miller) v Prime Minister* [2019] UKSC 41.
[11] Lewis Graham, Lee Marsons, Maurice Sunkin and Joe Tomlinson, 'A guide to reading the official statistics on judicial review in the Administrative Court' (UKAJI, 15 October 2020). Available at https://ukaji.org/2020/10/15/a-guide-to-reading-the-official-statistics-on-judicial-review-in-the-administrative-court/ (accessed 16 October 2020).
[12] Social Security Advisory Committee, 'Decision Making and Mandatory Reconsideration: A study by the Social Security Advisory Committee' (Occasional Paper No. 18, July 2016). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538836/decision-making-and-mandatory-reconsideration-ssac-op18.pdf (accessed 13 October 2020) p.5.
[13] Work and Pensions Committee, 'Employment and Support Allowance and Work Capability Assessments' (1st Report, 16 July 2014). Available at https://publications.parliament.uk/pa/cm201415/cmselect/cmworpen/302/30202.htm (accessed 13 October 2020), para.[91].
[14] Robert Thomas, 'Mandatory reconsideration: what do the latest stats tell us?' (UKAJI, 16 June 2016). Available at https://ukaji.org/2016/06/16/mandatory-reconsideration-what-do-the-latest-stats-tell-us/ (accessed 13 October 2020).

reconsideration.[15] By 2020, the number of mandatory reconsiderations for just one form of benefit – Personal Independence Payments (PIPs) – had reached 1.6 million.[16] Moreover, the number of appeals to tribunals in the social security field has remained relatively steady at around 160,000 per year.[17] By contrast, fewer than 1,000 social security decisions are challenged by way of judicial review every year.[18] For this reason, '[m]any take the view…that judicial review has little or no place in social security law given the comprehensive appeals system for decisions on entitlement to welfare benefits.'[19]

5. Though not quite as numerically substantial, the Home Office nevertheless takes around 3 million immigration decisions each year. An estimated 6,000 of these decisions are challenged by way of internal administrative review.[20] Therefore, at least quantitatively, judicial review is a marginal activity at the fringes of administrative law, though qualitatively it no doubt has a role to play in establishing the basic framework of procedural and substantive norms,[21] alongside other factors such as users' expectations regarding the performance of public bodies.[22]

6. As Le Sueur, Sunkin and Murkens (2019) put it, while it may not operate or appear as a coherent or unified system,[23] and while it may not be as eye-catching as the criminal

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[15] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 380.
[16] Personal Independence Payment: Official Statistics to April 2020 (28 July 2020). Available at https://www.gov.uk/government/publications/personal-independence-payment-april-2013-to-april-2020/personal-independence-payment-official-statistics-to-april-2020#mandatory-reconsiderations-mrs (accessed 13 October 2020).
[17] Social Security Advisory Committee, 'Decision Making and Mandatory Reconsideration: A study by the Social Security Advisory Committee' (Occasional Paper No. 18, July 2016). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538836/decision-making-and-mandatory-reconsideration-ssac-op18.pdf (accessed 13 October 2020), p.14.
[18] Civil Justice Statistics Quarterly, England and Wales, January to March 2019 (provisional). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806896/civil-justice-statistics-quarterly-Jan-Mar-2019.pdf (accessed 13 October 2020).
[19] Desmond Rutledge (Garden Court Chambers), 'Welfare Benefits and Judicial Review' (Public Law and Judicial Review North 2012: Challenges to Justice, 12 July 2012). Available at https://publiclawproject.org.uk/wp-content/uploads/data/resources/130/PLP_2012_Rutledge_JR_and_Welfare_Benefits.pdf (accessed 13 October 2020), para. [9].
[20] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 381.
[21] Government Legal Department, 'The judge over your shoulder' (October 2018). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf (accessed 13 October 2020).
[22] Oliver James, 'Managing Citizens' Expectations of Public Service Performance: Evidence from Observation and Experimentation in Local Government' (2011) 89(4) Public Administration 1419-1435.
[23] Andrew Le Sueur, Maurice Sunkin and Eric Kushal Murkens, *Public Law: Texts, Cases and Materials* (4th edn Oxford University Press 2019) 561-562.

justice system,[24] there is nevertheless an entire 'landscape of administrative justice' of which judicial review is only a small part:

> Access to the courts is a fundamental right, but the courts form only part of the 'landscape of administrative justice'. Only a small proportion of disputes between individuals and public bodies reach the courts; most are dealt with by the public bodies following complaints or requests to look at decisions again, by appeals to independent tribunals, or by complaints to ombuds.[25]

7. Despite this wider administrative law landscape and despite its nomenclature, in the Government's introduction to this review of *administrative law*, there is only reference to *judicial review*.[26] The same is true in the terms of reference,[27] and in the call for evidence.[28] This is perhaps inevitable. Despite the name of the panel, the political priorities which have led to its establishment do not relate to wider issues of administrative law enforcement, accountability, and redress. Nor do these priorities underlie the wider Constitution, Democracy and Rights Commission, whose establishment or non-establishment is a matter of debate.[29] Instead, the political priorities are constitutional in character, concerning the relationship between courts and the executive in its development of high policy. As such, judges and the inherent jurisdiction of the High Court take centre-stage rather than the broader edifice of law, practice, policy, and rules governing the activities of the administration.[30] We do not criticise this

[24] Ann Abraham, 'The Parliamentary Ombudsman and Administrative Justice: Shaping the Next 50 Years' (JUSTICE, Tom Sargant Memorial Annual Lecture 2011, 13 October 2011). Available at https://justice.org.uk/wp-content/uploads/2015/02/Parliamentary-Ombudsman-and-Administrative-Justice.pdf (accessed 14 October 2020), p.7.

[25] Andrew Le Sueur, Maurice Sunkin and Eric Kushal Murkens, *Public Law: Texts, Cases and Materials* (4th edn Oxford University Press, 2019) 559.

[26] https://www.gov.uk/government/groups/independent-review-of-administrative-law (accessed 9 October 2020).

[27] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf (accessed 9 October 2020).

[28] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf (accessed 9 October 2020).

[29] Lewis Graham, 'The Perpetual Constitution, Democracy and Rights Commission' (UKAJI, 14 October 2020). Available at https://ukaji.org/2020/10/14/the-perpetual-constitution-democracy-and-rights-commission/ (accessed 17 October 2020).

[30] Theodore Konstadinides, Lee Marsons and Maurice Sunkin, 'Reviewing Judicial Review: The constitutional importance of the Independent Review of Administrative Law 2020' (UKCLA, 24 September 2020). Available at https://ukconstitutionallaw.org/2020/09/24/theodore-konstadinides-lee-marsons-and-maurice-sunkin-reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/ (accessed 13 October 2020).

constitutional focus per se. The proper function of courts vis-à-vis the executive is a good question to which there is no obvious answer.[31]

8. However, equating *administrative law* with *judicial review* and the inevitable focus on judges that arises at the expense of public redress conceived more broadly has long been regarded as dubious.[32] As Tomlinson (2020) has put it eloquently:

> Public authorities take millions of decisions each year, and it has long been observed that much of that decision-making involves an interpretation of legal norms. Even in the realm of dispute resolution, judicial review is marginal. Administrative review – that is, internal reconsideration by the relevant decision maker – is now the largest public law dispute mechanism. Tribunals…have long determined many more cases than judicial review does.[33] To be clear, there is not a near-obsessive focus on judicial review in administrative law scholarship, there is a near-obsessive focus on just the principles of judicial decision-making within judicial review.[34]

9. We are concerned that the IRAL is making – or is being directed to make – the same error.

Given that judicial review is only one facet of the broader administrative justice landscape and has connections with other avenues of accountability and redress, UKAJI believes that the IRAL's questionnaire should have placed judicial review within its broader context by asking respondents to consider whether the current relationship between judicial review and alternative forms of redress, including statutory appeals, is appropriate, and if not why this is the case.

[31] Lord Mance, *The Role of Judges in a Representative Democracy* - Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas (24 February 2017). Available at https://www.supremecourt.uk/docs/speech-170224.pdf (accessed 14 October 2020).

[32] Genevra Richardson and Hazel Genn, 'Tribunals in transition: resolution or adjudication?' (2007) Public Law 116, 118-119.

[33] Robert Thomas 'Current developments in UK tribunals: challenges for administrative justice' in Sarah Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, 2017).

[34] Joe Tomlinson, 'Do we need a theory of legitimate expectations?' (2020) Legal Studies 1-15, 12.

Concentrating on judicial review risks ignoring the relationship between judicial review and administrative law more generally

10. We are concerned that in adopting an artificially narrow approach focused only on judicial review, the panel will obscure – or, indeed, actively ignore – how judicial review interrelates with other facets of administrative law and will produce recommendations divorced from that wider context. In particular, judicial review is a remedy of last resort,[35] and as such its use is intimately connected to the use of other administrative law remedies.

11. The risk is that an inquiry focusing exclusively on the remedy of last resort will deal only with the symptoms rather than the causes of public disputes i.e. the final stage of litigation rather than the initial poor-quality decision-making which give rise to the demand for judicial review to begin with. Indeed, research in several practice areas indicates that the majority of judicial reviews are exclusively decided on grounds of bare legality, such as conformity with established policies or statutory powers.[36] Research also indicates that around three-quarters of judicial reviews relate only to the application of existing law to the facts of the claimant's case.[37] As such, the vast majority of claimants in judicial review proceedings are not seeking to make high-profile or wider socio-political points. They are seeking redress and the proper application of law to the facts of their own case.

12. It will do no good to pretend that because the law governing judicial review is altered that these disputes will no longer arise. Restrictions on judicial review, for instance, may increase pressure on, or for, other avenues of redress, which will need to be created, resourced, staffed, funded, trained, enhanced, and reformed in order to work effectively and efficiently. For instance, while judicial review has played only a small role in providing redress during the Windrush debacle,[38] there was nevertheless a need to create a dedicated Windrush Compensation Scheme.[39] Consequently, it must be understood that restricting or limiting access to judicial review does not make the need for redress vanish;

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[35] *R (Cart) v Upper Tribunal* [2011] UKSC 28; *Kay v Lambeth London Borough Council* [2006] UKHL 10.

[36] Richard Kirkham, 'Judicial review, litigation effects and the ombudsman' (2018) 40(1) Journal of Social Welfare and Family Law 110-125, 120-121; Robert Thomas and Joe Tomlinson, 'Immigration judicial review: An empirical study' (2019). Available at https://www.research.manchester.ac.uk/portal/files/131898159/Immigration_Judicial_Review_Report_Online_.pdf (accessed 22 September 2020), p.99.

[37] Varda Bondy, Lucinda Platt and Maurice Sunkin, 'The Value and Effects of Judicial Review: The nature of claims, their outcomes and consequences' (Public Law Project, 2015). Available at https://publiclawproject.org.uk/wp-content/uploads/data/resources/210/Value-and-Effects-of-Judicial-Review.pdf (accessed 10 September 2020).

[38] Tim Buley, 'An overlooked weapon in Windrush cases: judicial review' (Free Movement Blog, 30 May 2018). Available at https://www.freemovement.org.uk/an-overlooked-weapon-in-windrush-cases-judicial-review/ (accessed 13 October 2020).

[39] https://www.gov.uk/government/collections/windrush (accessed 13 October 2020).

it just shifts the dispute elsewhere in the system. This is an unintended consequence that the panel must be alive to.

The importance of getting it right first time

13. In our view, if there is a political desire to have still fewer judicial reviews and to render judicial review an even more marginal activity than it already is, it is important to understand why judicial review is used and to seek to reduce the need to resort to judicial review. Working towards improving the quality of initial decision-making by public bodies and administrative forms of accountability and redress is of particular importance. Indeed, in spite of the so-called 'right first time agenda' heralded a decade ago by the now abolished Administrative Justice and Tribunals Council (AJTC),[40] it is widely recognised that initial decision-making can be of variable quality among public bodies:

> There are many reasons why initial decisions are often of poor quality. Low-level and poorly trained staff have to make sensitive and difficult decisions quickly. Legal rules and policies are often impenetrably complex and change frequently. Organisational cultures to meet performance targets and key performance indicators often replace the core task of taking good decisions…There can be a constant challenge between working with operational undercurrents whilst trying to maintain and develop a depth of expertise within a department…There are also wider political forces at work that can feed down and influence initial decision-makers, especially when dealing with classes of people perceived by the state as 'undesirable' – social security claimants, immigrants, and asylum claimants.[41]

14. The Social Security Advisory Committee made similar points specifically in relation to welfare benefit decision-making:

> [Decision-makers] must have appropriate and adequate skills, guidance and training to carry out this role effectively, accurately interpreting often complex laws and making decisions that are based on suitable evidence. In carrying out this task, [decision-makers] do not operate in a vacuum; their capability in part determined by the effectiveness of process management and oversight.[42]

[40] Administrative Justice and Tribunals Council Annual Report 2009-10. Available at https://senedd.wales/Laid%20Documents/GEN-LD8280%20-%20Administrative%20Justice%20and%20Tribunals%20Council%20Annual%20Report%202009-10-03112010-201569/gen-ld8280-e-Cymraeg.pdf (accessed 13 October 2020).

[41] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 382.

[42] Social Security Advisory Committee, 'Decision Making and Mandatory Reconsideration: A study by the Social Security Advisory Committee' (Occasional Paper No. 18, July 2016). Available at

> Speaking to newly recruited caseworkers, some felt training had been quite general and did not prepare them for some of the specifics of their role. They felt they had not received enough training on decision making generally, for example on the need to weigh up evidence. This view was also held by staff working on [mandatory reconsideration] that much of what was covered was not directly relevant to the tasks at hand.[43]

15. Drawing on concepts devised by Simon Halliday, there are issues of *legal consciousness*,[44] and *legal conscientiousness*,[45] whereby initial decision-makers lack an understanding of relevant rules, procedures, and laws, or are culturally pressured to make decisions in line with or influenced by political priorities, performance targets, and time pressure. The result is that in general, tribunals allow approximately 30-47% of appeals,[46] and for some decisions the number of successful appeals is much higher. In 2019, for instance, the overturn rate for Employment Support Allowance (ESA) and Personal Independence Payment (PIP) decisions stood at 75%; 67% for Disability Living Allowance (DLA) decisions; and 65% for Universal Credit (UC) decisions.[47] In 2013-14, the costs of appeals against decisions taken by the Department for Work and Pensions were just short of £70m,[48] though costs have tended to remain below £30m thereafter.[49] As the Social Security Advisory Committee put it, '[m]uch of this could be avoided if decisions were of a higher quality and better understood by claimants.'[50]

16. Immigration is another field where the quality of initial decision-making and administrative redress mechanisms can be problematic. The current EU Settlement Scheme is operating poorly, for instance, with around 90% of decisions being overturned

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538836/decision-making-and-mandatory-reconsideration-ssac-op18.pdf (accessed 13 October 2020), p.6.

[43] *ibid*, p.46.

[44] Simon Halliday, 'After Hegemony: The Varieties of Legal Consciousness Research' (2019) 28(6) Social and Legal Studies 859-878.

[45] Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart Publishing, 2004).

[46] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 382.

[47] Tribunal Statistics Quarterly, April to June 2019 (provisional). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830965/Tribunal_and_GRC_statistics_Q1_201920.pdf (accessed 13 October 2020), p.3.

[48] Social Security Advisory Committee, 'Decision Making and Mandatory Reconsideration: A study by the Social Security Advisory Committee' (Occasional Paper No. 18, July 2016). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538836/decision-making-and-mandatory-reconsideration-ssac-op18.pdf (accessed 13 October 2020), p.6.

[49] https://www.whatdotheyknow.com/request/436586/response/1063825/attach/html/5/171006001%20Lily%20Boulle.pdf.html (accessed 13 October 2020).

[50] Social Security Advisory Committee, 'Decision Making and Mandatory Reconsideration: A study by the Social Security Advisory Committee' (Occasional Paper No. 18, July 2016). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/538836/decision-making-and-mandatory-reconsideration-ssac-op18.pdf (accessed 14 October 2020), p.6.

on administrative review, according to a freedom of information request.[51] In addition, for some years the Independent Chief Inspector of Borders and Immigration has published reports criticising the administrative review process by UK Border Force and UK Visas and Immigration, particularly on the basis that reviewers are reluctant to question and second-guess their colleagues' negative value judgements of claimants' credibility.[52] In their empirical study of immigration judicial reviews, Robert Thomas and Joe Tomlinson noted several concerns with immigration administrative review, including errors and omissions being repeated across multiple decision-makers, limited grounds of review being available, and failure to seriously engage with representations made by claimants.[53]

17. For any public bodies who wish to avoid eventual judicial reviews, this erratic quality of initial decision-making and administrative redress is clearly self-defeating. As the Ministry of Justice noted in 2012:

> Government departments, public authorities and agencies have a responsibility to ensure that as many decisions as possible are right first time. As a dispute proceeds through the process from the original decision maker through to resolution there will be an increase in the cost to and time required from both Government and users of the system.[54]

18. By contrast, decision-making by tribunals appears to be of reasonably high quality when compared with initial decision-making and administrative redress mechanisms. As Thomas and Tomlinson (2017) have put it:

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[51] https://www.freemovement.org.uk/eu-settlement-scheme-administrative-review/ (accessed 20 September 2020). More detailed research is available from Joe Tomlinson in 'Quick and Uneasy Justice: An administrative justice analysis of the EU Settlement Scheme' (Public Law Project, 2019). Available at https://publiclawproject.org.uk/wp-content/uploads/2019/07/Joe-Tomlinson-Quick-and-Uneasy-Justice-Full-Report-2019.pdf (accessed 20 September 2020).

[52] Independent Chief Inspector of Borders and Immigration, *An inspection of Administrative Reviews* (May – December 2019) (Published May 2020). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886101/An_inspection_of_Administrative_Reviews.pdf (accessed 20 September 2020); Independent Chief Inspector of Borders and Immigration, *A re-inspection of the Administrative Review Process* (January – March 2017) (Published July 2017). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669189/A-re-inspection-of-the-Administrative-Review-process.pdf (accessed 20 September 2020).

[53] Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study*. Available at https://drive.google.com/file/d/1IsTGQJgs4W8ERvmtWBFYrdexPQd9cXqr/view (accessed 20 September 2020) pp.158-159.

[54] Ministry of Justice, 'Administrative Justice and Tribunals: A Strategic Work Programme 2013-2016' (December 2012). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217315/admin-justice-tribs-strategic-work-programme.pdf (accessed 13 October 2020), p.17.

There are structural and procedural reasons why tribunals both make better quality decisions and why they are well-placed to identify errors and mistakes at the initial decision-making stage. More resources are put into the tribunal stage than initial decision-making. Initial decision-makers do not have a legal background. They are typically under pressure to make decisions quickly according to key performance indicators. Decision-makers work on the basis of interviews with claimants or evidence compiled from a claim form. By contrast, tribunal hearings take place either with representation or the tribunal may adopt an inquisitorial approach. At oral hearings, the appellant can attend and be asked questions by the tribunal judge or panel. Furthermore, whereas both decision-makers and tribunals must give reasons, tribunals are aware that their decisions can be scrutinised before the Upper Tribunal.[55]

19. Rather than advocate any specific reforms in this submission, UKAJI prefers to highlight that several well-researched and well-evidenced reform recommendations in this area already exist, including an ESRC report by Thomas and Tomlinson (2016) on reforming initial decision-making, administrative review, and statutory tribunals.[56] We regard this as the preferable way to minimise the need for judicial review.

UKAJI recommends that, rather than exclusively focus on the law related to judicial review, the IRAL should further consider how poor-quality initial decision-making and inadequate administrative redress increases the need and demand for judicial review.

UKAJI recommends that the IRAL should consider how government departments and public administration more widely can best learn from experience of judicial review and incorporate this learning into decision-making in order to further good government.

UKAJI also recommends that the IRAL should give careful consideration to the most effective ways of improving the quality of initial decision-making and mechanisms of administrative redress so as to further decrease the demand for judicial review.

UKAJI recommends that the IRAL should consider the potential consequences of restricting access to judicial review for the wider administrative justice system and the pressure thereby placed on, and the need for, alternative means of redress.

[55] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 383.
[56] Robert Thomas and Joe Tomlinson, 'New ESRC Report Launched: Current issues in administrative justice – examining administrative review, better initial decisions, and tribunal reform' (UKCLA, 23 November 2016). Available at https://ukconstitutionallaw.org/2016/11/23/robert-thomas-and-joe-tomlinson-new-esrc-report-launched/ (accessed 17 October 2020).

Concerns in relation to IRAL's balancing exercise between individual redress versus government efficiency

20. In addition to the omission of the wider context in which judicial review operates, UKAJI is further concerned about the omission of any reference to the most fundamental premise of British constitutionalism, namely parliamentary sovereignty or supremacy. Indeed, there is no reference to Parliament in either the terms of reference or the call for evidence. Instead, the IRAL's work is expressly framed as an exercise to determine the appropriate balance between the interests of individuals in challenging the executive against the role of the executive in carrying out the business of government. This neglects the role of judicial review in supporting the sovereignty of Parliament and in ensuring that the executive acts in accordance with the law, as a junior constitutional partner.[57]

21. Government is not entitled to ignore the law as enacted by Parliament, even if this would substantially improve its efficiency, save it money, and accomplish all of its objectives. This has been accepted as a fundamental aspect of our constitution for centuries.[58] UKAJI is particularly concerned about this omission at a time where the executive intends to pursue a number of Bills which have detrimental consequences for the rule of law, including appearing to remove some forms of delegated legislation from judicial review challenges altogether.[59]

22. The IRAL locates judicial review within a struggle between executive, individuals, and judges when that is not necessarily its primary – and certainly not its exclusive – place within the constitution. Arguably, its basic, irreducible, and core role is to ensure that government acts within the powers granted by the sovereign Parliament.[60] As Lord Reed explained at [23] in *R (Public Law Project) v Lord Chancellor*:

> [An executive act] will be held by a court to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring [an executive act] to be invalid…the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive

[57] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, Lady Hale at [90].
[58] See, for the classic example, *Entick v Carrington* (1765) EWHC KB J98.
[59] Jeff King and Stephen Tierney, 'The House of Lords Constitution Committee reports on the United Kingdom Internal Market Bill' (UKCLA, 16 October 2020). Available at https://ukconstitutionallaw.org/2020/10/16/jeff-king-and-stephen-tierney-the-house-of-lords-constitution-committee-reports-on-the-united-kingdom-internal-market-bill/ (accessed 19 October 2020); Samuel Beswick, 'Marching Against Dicey's Rule of Law' (UKCLA, 19 October 2020). Available at https://ukconstitutionallaw.org/2020/10/19/samuel-beswick-marching-against-diceys-rule-of-law/ (accessed 19 October 2020); Covert Human Intelligence Sources Bill Factsheet (1 October 2020). Available at https://www.gov.uk/government/publications/covert-human-intelligence-sources-draft-code-of-practice/covert-human-intelligence-sources-bill-factsheet-accessible-version (accessed 19 October 2020).
[60] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1.

> from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned.[61]

23. It is because of parliamentary supremacy that the executive may not frustrate or undermine the operation of an Act of Parliament, either by means of its prerogative powers,[62] or by using statutory powers in ways that undermine the objectives of the parent Act.[63] It is also for this reason that the executive can only interfere with or alter fundamental constitutional principles or legal rights if express power to do so has been conferred by an Act of Parliament, known as the 'principle of legality'.[64] Ultimately, Lord Reed summarised the interrelationship between parliamentary supremacy and judicial review at [68] in *R (UNISON) v Lord Chancellor*:

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them...Without [access to courts], laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.[65]

UKAJI considers that the framing of the questionnaire, and the review more generally, in terms of the need to balance the interests of individuals in challenging the executive against the role of the executive in carrying out the business of government is problematic. It obscures additional facets of judicial review, particularly its roles in supporting the sovereignty of Parliament and ensuring that the executive acts in accordance with the law. We are particularly concerned by this omission in light of legislation currently being pursued by the executive in Parliament with detrimental consequences for the rule of law, such as the Internal Market Bill, the Overseas Operations (Service Personnel and Veterans) Bill, and the Covert Human Intelligence Sources (Criminal Conduct) Bill.

[61] [2016] UKSC 39.
[62] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *Laker Airways Ltd v Department of Trade* [1977] QB 643.
[63] *Padfield v Minister of Agriculture* [1968] AC 997.
[64] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (UNISON) v Lord Chancellor* [2017] UKSC 51; *R v Secretary of State for Home Department ex p. Simms* [1999] UKHL 33.
[65] [2017] UKSC 51.

The omission of human rights and the Human Rights Act 1998 in particular

24. We are concerned that there is no express reference to human rights in IRAL's terms of reference or the call for evidence. We also note that the Lord Chancellor and Secretary of State for Justice, Robert Buckland QC MP, recently confirmed to the Joint Committee on Human Rights that reforms to the Human Rights Act 1998 will be considered in a separate review not involving the IRAL.[66]

25. We understand the political and logistical reasons for this. A review considering both judicial review and the Human Rights Act 1998 simultaneously might have been regarded as too contentious and too much work, certainly within the short space of time available to this panel. However, the separation of these reviews again suggests that the IRAL is being directed to take an artificially narrow approach. It is difficult to see, for example, how issues such as justiciability can be considered without addressing the Human Rights Act 1998. After all, sections 6 and 7 of the Act create an express statutory obligation on public bodies to act compatibly with human rights and provide victims of a violation the right to pursue legal proceedings against a public body. As Lord Sumption put it at [29] in *R (Lord Carlile) v Secretary of State for Home Department*, these obligations and rights make justiciable matters that would have otherwise been non-justiciable without the Act.[67] Lord Bingham made similar comments at [40]-[42] in *A v Secretary of State for Home Department*:

> Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal...[68]

26. Moreover, there are principles of review that now exist because of the Human Rights Act 1998, including proportionality. As Lord Steyn observed at [26] in *R v Secretary of State for Home Department ex p Daly*, there was a material difference between the traditional common law approach to substantive review (which focused on rationality) and the type of review required vis-à-vis Convention rights (which focused on proportionality) protected in the Human Rights Act 1998.[69] Indeed, while Lord Bingham confirmed at [88] in *Belfast City Council v Miss Behavin' Ltd* that there was no shift to a merits review with Convention issues, the standard of review was different and more intensive than that

[66] https://www.lawgazette.co.uk/news/government-to-review-human-rights-act/5105899.article (accessed 14 October 2020).
[67] [2014] UKSC 60.
[68] [2001] UKHL 47.
[69] [2001] UKHL 26.

traditionally adopted at common law.[70] In addition, over the years, the approach of the courts to common law rationality review has been directly affected by human rights.[71]

27. As such, human rights are now intimately entwined into the life of judicial review and while surgical procedures may be used to try to separate them, there is a real risk that the patient will not survive the surgery. Human rights are interconnected with – and, indeed, can determine – justiciability, proportionality, the modern manifestation of rationality, and principles implied into statutes as a matter of statutory construction. We would be sceptical of any attempt to reform the grounds of judicial review without regard to human rights.

28. In addition, abolition or the substantial weakening of the substantive grounds of domestic judicial review could simply lead to a greater number of cases being pursued in Strasbourg via the European Convention on Human Rights. Most obviously, this will increase the time it takes to resolve litigation and will increase expenses for both claimant and Government.[72] In addition, this could weaken the dialogue that has been encouraged between the British courts and Strasbourg with both applying proportionality review,[73] and may simply restore the situation prior to the Human Rights Act 1998 where the Government won cases domestically only to lose them in Strasbourg. The difference in decisions between the English Court of Appeal in *R v Ministry of Defence ex p. Smith*,[74] and Strasbourg in *Smith & Grady v United Kingdom*,[75] as a classic example.

29. Reassurance about the place of fundamental rights in judicial review would have been particularly welcome since the EU Charter of Fundamental Rights will cease to have effect in the UK at the end of the Brexit implementation period. This development will affect constitutional checks that are currently capable of correcting outdated legislation. For instance, after 31 December 2020, claimants in cases like *Benkharbouche* (where the Supreme Court held that the State Immunity Act 1978 was unlawful for breaching Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights),[76] will not be able to get a remedy beyond a declaration that their rights have been breached under s.4 of the Human Rights Act 1998.

[70] [2007] UKHL 19.
[71] *Kennedy v Charity Commission* [2014] UKSC 20; *Pham v Secretary of State for Home Department* [2015] UKSC 19; *UNISON v Lord Chancellor* [2017] UKSC 51.
[72] Rights Brought Home: The Human Rights Bill (October 1997). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf (accessed 27 August 2020).
[73] *R v Horncastle* [2009] UKSC 14.
[74] [1996] 1 All ER 256.
[75] (1999) 29 EHRR 493.
[76] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

UKAJI recommends that the IRAL takes account of human rights and the place of the Human Rights Act 1998 even though they are not expressly within its terms of reference. Failure to do so would be a sizeable lacuna in the consideration of issues such as justiciability, the grounds of review, and principles of statutory construction.

In addition, the learning done by IRAL on human rights should become a point of reference for, and feed into the work to be undertaken by, the upcoming review of the Human Rights Act 1998 so that important reflections can be shared.

UKAJI is of the view that IRAL's questionnaire should have included specific questions about the role that human rights and the Human Rights Act 1998 are perceived to play in judicial review by public bodies. Similar questions directed to claimant lawyers would also have been useful, particularly asking whether they believe that human rights offer protections that other grounds and redress mechanisms do not.

Alternative dispute resolution and judicial review

30. Paragraph 9 of the Pre-Action Protocol for Judicial Review neatly encapsulates the tension between the three-month maximum time limit for lodging a judicial review application and the desire for disputes to be resolved other than through litigation:

> The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed…then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits…Exploring ADR may not excuse failure to comply with the time limits.[77]

31. This tension is a pity. There is consistent evidence that the imposition of a short time limit compels claimants to lodge applications before the guillotine falls even if they would have preferred to resolve the case amicably with the defendant public body.[78]

[77] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv#alternative (accessed 15 October 2020).

[78] Varda Bondy and Maurice Sunkin, 'The dynamics of judicial review litigation: the resolution of public law challenges before final hearing' (Public Law Project, 2009). Available at

There is also evidence that defendant lawyers themselves agree with this assessment. As Bondy and Sunkin (2013) put it: 'Many solicitors acting for claimants and for defendants told us that had more time been available for negotiation their case may have been settled out of court, but proceedings had to be issued in order to meet the time limit.'[79]

32. There is then significant concern that short time limits may hamper attempts to encourage ADR prior to the lodging of applications. This is despite an acceptance of the advantages of ADR mechanisms in contexts where its value may not be obvious, such as the use of mediation in the Court of Protection. In this context, there has been an initial pilot study,[80] a number of research studies,[81] and a practitioner roundtable event discussing the advantages and limitations of such an option.[82]

33. UKAJI believes it is time to explore the option of ADR more fully in practice in the context of judicial review proceedings. This is not to imply a rose-tinted perspective of ADR, which may be inappropriate in some public law disputes. There is legitimate concern, for instance, about how successful negotiation or mediation can be with the power imbalance between, say, central government and the individual, and one must recognise that it is not possible to mediate or negotiate about whether a public body has a legal power or not. That is a matter of law for the court and not agreement between the parties. In addition, ADR has the disadvantage of not establishing precedents for individuals outside of the immediate dispute.[83]

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https://publiclawproject.org.uk/resources/the-dynamics-of-judicial-review-litigation/ (accessed 26 August 2020); Varda Bondy, Lucinda Platt and Maurice Sunkin, 'The value and effects of judicial review: The nature of claims, their outcomes and consequences' (Nuffield Foundation, 2015). Available at https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Value-and-Effects-of-Judicial-Review.pdf (accessed 26 August 2020).

[79] Varda Bondy and Maurice Sunkin, 'Judicial review reform: who is afraid of judicial review? Debunking the myths of growth and abuse' (UKCLA, 10 January 2013). Available at https://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/ (accessed 26 August 2020).

[80] https://www.courtofprotectionmediation.uk/ (accessed 15 October 2020).

[81] Charlotte May, 'Court of Protection Mediation Research – Where are we in the UK?' (18 June 2019). Available at https://ukaji.org/2019/06/18/court-of-protection-mediation-research-where-are-we-in-the-uk/ (accessed 15 October 2020); Jaime Lindsey, 'Researching mental capacity disputes: The role of mediation in improving participation in the Court of Protection' (10 January 2020). Available at https://ukaji.org/2020/01/10/researching-mental-capacity-disputes-the-role-of-mediation-in-improving-participation-in-the-court-of-protection-2/ (accessed 15 October 2020); Jaime Lindsey, 'Virtual hearings, participation and openness in the Court of Protection' (8 April 2020). Available at https://ukaji.org/2020/04/08/virtual-hearings-participation-and-openness-in-the-court-of-protection/ (accessed 15 October 2020).

[82] Jaime Lindsey, 'A roundtable on the role of mediation in the Court of Protection' (25 June 2020). Available at https://essexlawresearch.blog/2020/06/25/a-roundtable-on-the-role-of-mediation-in-the-court-of-protection/ (accessed 19 October 2020).

[83] Varda Bondy, Linda Mulcahy, Margaret Doyle, and Val Reid, 'Mediation and Judicial Review: An empirical research study' (Public Law Project, 2009). Available at https://www.nuffieldfoundation.org/sites/default/files/files/MediationandJudicialReview.pdf (accessed 16 October 2020); Varda Bondy and Maurice Sunkin, 'The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing' (Public Law Project, 2009). Available at

34. On the other hand, empirical research indicates that around 75% of judicial reviews relate to the application of accepted legal standards and principles to individual facts, not questions about the *a priori* existence of legal powers. And, indeed, the vast majority of judicial reviews do not create new precedents or legal standards. They merely apply pre-existing law.[84] Therefore, UKAJI believes that this is an area to explore empirically so its limitations and successes can be more readily understood.

35. At this stage, not wishing to foreclose different options that may work well in different contexts, UKAJI offers no view on what forms of ADR are most appropriate for judicial review. However, it is worth noting that many claimant and defendant lawyers already report that there are consistent incidents of *negotiation* in public law disputes, by which they mean attempts to resolve the dispute without having to lodge an application with the Administrative Court.[85]

36. As a final point relating to minimising the need for judicial review, UKAJI notes that by virtue of the European Union (Withdrawal) Act 2018, Ministers have considerable power to issue statutory instruments capable of amending or repealing primary legislation connected with Brexit (a so-called 'Henry VIII clause'). As of October 2020, 622 statutory instruments have been issued.[86] Each of these statutory instruments is subject to judicial review in principle. In addition, if the Internal Market Bill 2020 currently making its way through Parliament is enacted, there is likely to be a need for the courts to resolve significant constitutional and statutory interpretation issues concerning the possible ouster of certain legal challenges to statutory instruments passed under the Act.[87] For at least these reasons, UKAJI is sceptical that this is likely to be a time during which a substantial decline in the use of judicial review to determine important constitutional issues is to be expected. In recent years, this country has been progressing through several 'constitutional moments' in an increasingly polarised political environment. This

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https://publiclawproject.org.uk/wp-content/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf (accessed 16 October 2020).

[84] Varda Bondy, Lucinda Platt and Maurice Sunkin, 'The Value and Effects of Judicial Review: The nature of claims, their outcomes and consequences' (Public Law Project, 2015). Available at https://publiclawproject.org.uk/wp-content/uploads/data/resources/210/Value-and-Effects-of-Judicial-Review.pdf (accessed 10 September 2020).

[85] Varda Bondy and Maurice Sunkin, 'The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing' (Public Law Project, 2009). Available at https://publiclawproject.org.uk/wp-content/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf (accessed 16 October 2020).

[86] Alexandra Sinclair and Joe Tomlinson, 'Plus ça change: Brexit and the flaws of the delegated legislation system' (Public Law Project, 13 October 2020). Available at https://publiclawproject.org.uk/uncategorized/tsunami-of-eu-withdrawal-laws-rubber-stamped-latest-plp-research/ (accessed 19 October 2020).

[87] Mark Elliott, 'The Internal Market Bill – A Perfect Constitutional Storm' (Public Law for Everyone, 9 September 2020). Available at https://publiclawforeveryone.com/2020/09/09/the-internal-market-bill-a-perfect-constitutional-storm/ (accessed 19 October 2020).

does not foreshadow a decline in society's capacity for constitutionally important litigation.[88]

UKAJI is concerned that the current limitation period for lodging judicial review proceedings may inhibit the ability of the parties to resolve disputes without legal proceedings and encourage claimants to file claims that could be resolved without involvement of the court with consequential costs. This is a matter to which the panel must give careful consideration.

UKAJI believes it is time to explore the option of ADR more fully in practice in the context of judicial review proceedings. This is not to imply a rose-tinted perspective of ADR, which may be inappropriate in some public law disputes. There is legitimate concern, for instance, about how successful negotiation or mediation can be with the power imbalance between, say, central government and the individual, and one must recognise that it is not possible to mediate or negotiate about whether a public body has a legal power or not. That is a matter of law for the court and not agreement between the parties. In addition, ADR has the disadvantage of not establishing precedents for individuals outside of the immediate dispute

Reflections on IRAL's process

37. The panel is rightly concerned to base its deliberations on the available evidence, including on such matters as the trends in judicial review over the last thirty to forty years. However, the challenges in identifying, marshalling, and understanding that evidence in the short time available cannot be overestimated. This is particularly so when there can be multiple interpretations of the same evidence.[89] It is noteworthy that the IRAL's secretariat quickly produced a full questionnaire to government departments. The responses are likely to provide significant evidence relating to how government departments experience and perceive judicial review. This will be a valuable addition to our knowledge base.

38. However, UKAJI remains concerned that there has been no overt confirmation from the IRAL that these responses from government departments will be made publicly available. We are also concerned that the IRAL has not confirmed that responses beyond that of departments will be published. It should not be down to individual respondents to

[88] Mark Elliott, 'The United Kingdom's constitution and Brexit: A 'constitutional moment'?' (Public Law for Everyone, 28 May 2020). Available at https://publiclawforeveryone.com/2020/05/28/the-united-kingdoms-constitution-and-brexit-a-constitutional-moment/ (accessed 19 October 2020).

[89] Tom Hickman and Maurice Sunkin, 'Success in judicial review – the current position' (UKCLA, 20 March 2015). Available at https://ukconstitutionallaw.org/2015/03/20/tom-hickman-and-maurice-sunkin-success-in-judicial-review-the-current-position/ (accessed 14 October 2020).

voluntarily publish their submissions. The importance of this issue demands transparency and public knowledge of what information and interests were represented in the IRAL's deliberations.

39. In addition, we are concerned that the evidence from government departments will only provide a partial view of the working of the system – the view of defendant public bodies subject to judicial review. Ideally, a similar exercise would have been conducted to seek the views of claimants and their lawyers, as well as other users of the system such as third-party interveners. Such an exercise would have provided a counter-balance and corrective to defendant-focused evidence and would have helped to ensure that the IRAL had access to the full range of experiences and opinions.[90] We recognise of course that designing, circulating, and analysing results of multiple questionnaires would be a resource intensive and time consuming exercise and would have been extremely challenging in the very short timescale available to the IRAL. The reality, however, is that a much larger, longer, and more transparent exercise would be necessary in order to obtain a proper and reliable evidence base for the range and complexity of the reforms under consideration.

UKAJI recommends that all responses received by the IRAL should be made publicly available online unless specific justifications exist to keep the response confidential.

Furthermore, UKAJI expresses the view that a more balanced, thoughtful and thorough exercise could have been conducted had a similar questionnaire been made available online for a wider range of stakeholders involved in judicial review litigation including advisers and claimant lawyers in particular.

UKAJI also believes that the period of time available for this review is inadequate. The constitutional and procedural issues alone are complex enough without the wider administrative justice aspects to which we have referred.

[90] As part of an ESRC-funded impact project that is intended to help The Law Society obtain evidence to inform its response to the IRAL, the authors have assisted The Law Society with a questionnaire that was sent to its membership.