The Independent Review of
Administrative Law

By email: iral@justice.gov.uk

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Dear Sir / Madam

Response to call for evidence: "Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?"

The Independent Review of Administrative Law is inviting evidence as to "how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally".

Rook Irwin Sweeney LLP is a new law firm specialising in public law and human rights, including judicial review, in England and Wales. Our three Partners collectively have nearly 40 years of experience running judicial review claims in the High Court. Our particular area of expertise is in acting for disabled children and adults and their carers in the context of health, social care and education related cases. It should go without saying that, this client group have protected characteristics under the Equality Act, and judicial review if a vital way to ensure that their rights are protected, and that the laws passed by Parliament are enforced.

Through our work, we see on a daily basis, the critical importance of judicial review as a means by which unlawful decisions can be challenged by citizens. As stated above, although we represent a wide range of clients, most of our clients are disabled children and adults or their carers. Many of our clients lack mental capacity to make particular decisions and most are highly vulnerable individuals who rely on public services for their needs to be met. Over the last decade the country has seen very significant cuts to local authority and health bodies' funding, and is still grappling with a pandemic that will have lasting impact on the country, and this client group in particular. We have seen a significant increase in cases arising from unlawful decisions by local authorities and health authorities in breach of legislation passed by Parliament, for example the Children and Families Act 2014, the Mental Capacity Act 2005 and the Care Act 2014. These cases include seeking urgent respite for a disabled child whose parents cannot provide them with their care, emergency accommodation for a disabled adult made homeless, challenging a refusal to fund cancer treatments and closures of day centres, schools and other

essential public services. Without effective access to judicial review, our clients would have no adequate remedy by which to challenge breaches of their legal rights.

In preparing these submissions, we have had the opportunity to review the evidence submitted on behalf the Public Law Project and confirm that we fully endorse the same, including the six areas of positive reform that are proposed.

We have also had sight of the submission made on behalf of the South West Administrative Lawyers Association and share similar broad concerns about the nature of this review as follows:

- The remit of the review is so broad as to make a response to a call for evidence difficult to provide, particularly in the short timeframe provided. The subject matter, judicial review, has developed over centuries and is a critical aspect of our constitution.
- The "independent" panel reviewing the matter does not include a solicitor who is experienced in judicial review cases. This is an obvious flaw and should be remedied immediately.
- The proposals for changes to judicial review at this stage are unknown. Again, this makes it difficult to respond to a call for evidence, and we expect a full public consultation to take place if any proposals are put forward.
- There is no empirical evidence that we are aware of which justifies the need for such a wide-ranging review. We consider that this review appears to be motivated by the desire to strengthen executive authority, and wind back the crucial constitutional role of the judiciary as a check and balance on such power. We consider judicial review to be a foundational component in our democracy and any attempt to reduce its effectiveness is undemocratic and will be rigorously opposed by the legal profession and many others.
- It may be that the government and/or Parliament does not have any such power to reduce the role of the judiciary as a check on executive power, but this review appears to assume it does. The executive cannot define the extent of its own power – that is a role for the judiciary. The constitutional principles involved are long established and are key aspects of the rule of law in England and Wales.

In respect of the questions regarding the codification of judicial review, we agree with many others that:

- Codification is inconsistent with our unwritten constitution and our system of checks and balances, which has developed over centuries;
- There is no empirical evidence to justify such a wholesale change;
- Codification would lack flexibility;
- Whilst codification may appear to have the advantage of simplifying public law principles and improving accessibility of the same, statute cannot oust common law entirely and therefore common law principles will continue to be relied upon outside of the statute. It would not be possible to define all grounds of unlawful executive decision making in statute; and

- Any code would likely require judicial interpretation and case law would inevitably result.

In respect of the questions regarding the scope of judicial review, i.e. which decisions/powers are and are not subject to judicial review, and justiciability, we agree with many others that the current principles under common law are suitably flexible and effective. Any attempt to limit the scope of judicial review or limit justiciability is potentially contrary to the rule of law and gives rise to an unacceptable risk of authoritarianism.

We agree with others that the relevant Civil Procedure Rules clearly set out practice and procedure and we see no need for this to be codified within statute. We consider the current judicial review procedure, including for permission and appeals, is already very strict and there is no basis to "streamline" the process any further. We consider that the permission stage is already used to screen out cases, and the rule that legal representatives are not paid in circumstances where permission is refused (under the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015) already acts as an adequate barrier against unmeritorious claims. We agree with others that if any changes to procedure are required, the appropriate body to consider the issue is the Civil Procedure Rules Committee, not government or Parliament.

We consider that the duty of candour is critical not only in enabling a citizen to challenge an executive decision or policy, but it also promotes good administration by the executive. We stress again that judicial review does not only apply to the Executive, but all public bodies including local authority social care and education departments, for example. If the duty of candour is diluted, decision makers would not face judicial scrutiny and this could give risk to unlawful decision making taking place without scrutiny. The only alternative to current principles would be to apply a system of standard or specific disclosure, which is likely to be more onerous on public bodies. The duty of candour has been critical in many of our cases. For example, in *Re Blake, Morrison, and Christian Kitchen v London Borough of Waltham Forest* [2014] EWHC 1027 (Admin), the disclosure of evidence from the local authority as to its reasoning to propose to close a Soup Kitchen was vital in demonstrating that they had not complied with the Public Sector Equality Duty and that the decision was therefore unlawful. The Soup Kitchen continues to serve local people on Walthamstow to this day.

We agree with others that the concept of standing cannot and should not be narrowly defined and is rarely an issue in practice. In our experience, current practice allows for appropriate flexibility; for example in *R (Ms C and Mrs W) v SoS for Work and Pensions* [2015] EWHC 1607 (Admin) the DWP was found to have acted unlawfully as a result of the severe delays in determining claims for personal independence payments. The claimant's PIP claims were determined during the course of the claim, but the claim proceeded as there were thousands of other PIP claimants affected by the delays. A strict application of a narrow definition of standing might have prevented this important legal challenge.

We consider that the requirement under CPR 54.5(1) that claims are brought "promptly and in any event not later than 3 months after the grounds for making the claim first arose" is already very restrictive, and strikes a balance between providing time for the claimant to prepare their case and not obstructing executive decision making. Our experience is that the courts already interpret the requirement to bring a claim 'promptly' in a robust way which allows for flexibility according to the individual facts and we have experience of cases where permission has been refused on grounds of timing, even where claims have been brought well within three months. We consider that reducing the time limit to bring a judicial review claim is not only unnecessary, but would amount to a significant barrier to access to justice, particularly to individuals who seek to challenge decisions to local authority and health authority decisions, where they are unlikely ever to have engaged with a solicitor in relation to these issues previously. Our clients are often vulnerable and marginalised; many of our clients struggle to access advice and representation and so it is frequently the case that weeks or even months elapse before they are aware of the possibility of judicial review. For example, the case of *R (De Burgo) v Oxfordshire CCG* was refused permission to proceed as the High Court found that it had been brought out of time.[1] Ms De Burgo was an elderly woman who had sought to challenge the decision to close her local GP surgery and was unaware of the availability of judicial review until shortly before the limitation period expired. Our clients often approach numerous other organisations before they are referred to us, and then we need sufficient time to secure funding (a decision by the legal aid agency, another public body which has experienced significant funding cuts), follow the pre-action protocol which involves engaging in complex correspondence, and preparing the claim. We are not aware of any evidence that the current time limits for judicial review (which importantly, including the requirement to bring the claim 'promptly') are impeding good administration by executive decision makers and there is therefore no justification for any such change.

We agree with others that the current rules regarding intervenors are appropriate. Intervenors are rare in practice and add real value. In our experience, in those rare cases where an intervention is made, the expertise of the intervenor actively assists the court to decide the matter. The court already has sufficient case management powers under existing rules to determine and limit the scope of any intervention and in our experience uses these robustly.

As to the remedies available via judicial review, as set out above these are common law principles developed over centuries and were recognised in the Administration of Justice (Miscellaneous Provisions) Act 1938 and the Senior Courts Act 1981. We agree with others that it may be unlawful for the government and/or Parliament to curtail these remedies. The current system is discretionary and therefore provides for appropriate flexibility. We are not aware of any problems caused by the current system or any evidence that change is required.

In respect of costs, we again agree with others that there is an implicit assumption within the call for evidence that the court and/or the current rules on costs are "too lenient" on unsuccessful parties. Yet, the CPR is clear that the general rule is the

[1] www.bbc.co.uk/news/uk-england-oxfordshire-38841057

unsuccessful party pays the successful party's costs. Often we represent claimants who benefit from public funding and thereby costs protection, which means they will not be required to pay more than they can afford if the case is lost. If this were not the case, there would quite simply be no access to justice for some of the most vulnerable people in our society. Only those on very low incomes can access legal aid in any event. As set out above, the rules which prevent costs being paid to legal aid lawyers in the event that permission is not granted is already a barrier to unmeritorious claims and there is no evidence that the current rules regarding costs are too lenient.

In respect of the current system for determining costs post-settlement (as per the Administrative Court Judicial Review Guide 2020 and the ACO Costs Guidance of April 2016), we consider that the current system is proportionate and, whilst the outcome can be unpredictable, it at least prevents costs from escalating within disputes about costs.

We agree with others that cases very often appropriately settle at the pre-action stage or post-permission. In fact, our experience is that the vast majority of cases settle at this pre-action stage. Even after a case has been issued, our experience is that parties will often continue to engage in negotiations throughout the duration of the case. Whilst we will always consider the use of a formal Alternative Dispute Resolution ("ADR") process, our experience is that it is often unsuitable - largely because the issue will relate to point of law that cannot be 'settled' and/or there is no time to do so as the claim must be issued within 3 months and without delay. In some cases, the defendant is only prepared to negotiate when the claim is issued or permission is granted. We agree with others that an ADR process could be beneficial if properly funded and it provided a genuine opportunity for the parties to reach an agreement out of court, but only if it would not result in the claimant losing the ability to issue a claim to avoid missing limitation and only if any process avoided any delay in urgent cases which inevitably and urgently need to be determined by the court. We agree with others that any such procedural changes in respect of ADR should be considered by and implemented by the Civil Procedure Rules Committee and/or Law Commission.

In conclusion, we do not consider that this review is necessary or evidenced-based, and it appears to be motivated by a desire to limit the role of judicial review rather than conduct a balanced analysis. We consider that any such attempt has potentially grave consequences for our constitution and the rule of law and will be rigorously opposed.

Yours faithfully

ROOK IRWIN SWEENEY LLP