Hackney Community Law Centre's Response to the Independent Review of Administrative Law Secretariat's Call for Evidence

October 2020

About Hackney Community Law Centre

Hackney Community Law Centre is a not for profit charity that provides legal advice and representation to residents of Hackney and surrounding boroughs. Hackney Community Law Centre employs solicitors, trainee solicitors, and paralegals to represent marginalised and underprivileged individuals in housing, welfare benefits, asylum and immigration, and employment matters. Many of our clients have low income, vulnerabilities, and have little power in comparison with that of central government and local authorities.

The majority of our work, accordingly, involves administrative law principles. We represent claimants in judicial review proceedings, defendants in possession proceedings brought by local authorities and registered providers of social housing, applicants for homelessness assistance and appellants in statutory reviews and appeals under the Housing Act 1996, appellants in welfare benefits appeals, and applicants and appellants in immigration cases.

Scope of this response

The scope of this report focuses on administrative law in housing, homelessness, and welfare benefits cases. In particular, we intend to focus on judicial review of welfare benefits decisions and policies, judicial review of local authorities' failure to provide accommodation under part VII of the Housing Act 1996, and public law defences in possession proceedings.

Due to our limited resources, as a charity of only 10 employees, we do not intend to provide data on statutory reviews and appeals under the Housing Act 1996 or statutory appeals of welfare benefits decisions. Nor do we focus on asylum and immigration cases. This is not to say that there is not substantial and important aspects of administrative law in those areas. For example, in the last 2 years, we have handled over 100 statutory reviews and appeals of decisions by local authorities as to whether duties are owed to homeless applicants under part VII of the Housing Act 1996. Likewise, we have assisted more than 200 welfare benefits claimants and appellants since 1 January 2019. We do touch upon these areas of law in the third and fourth part of this response.

Introduction

This response has taken a four-step approach to producing evidence for the secretariat. In the first part, we take an analytical approach to the Government calling this review of administrative law, looking at the context and potential bias created by the Government's agenda of curtailing the power of the Judiciary and reducing scrutiny of Executive action. In particular, we are concerned with the methodology of the review calling for evidence in questions 1 and 2 from Government Departments but not Claimant lawyers. This creates a methodological risk that the responses will be skewed towards the institutional interests of public, executive bodies without assessing the impact on citizens' rights. Accordingly, the second and third parts of the response reply to questions 1 and 2 in the Review Questionnaire. In the second part, we will do a data analysis of the judicial review cases we have represented in since 1 January 2019. The data we have compiled is limited to judicial review claims or proposed claims for welfare benefits and homelessness matters. The evidence shows that most cases, 73%, settle before a letter before claim is sent on in the pre-action protocol stages of the case. Our conclusion is that the data paints a picture of local authorities and central government accepting that they made an error, whether in law, fact, or overlooking a vital aspect of a case. This supports the proposition that judicial review is beneficial to decision making and executive accountability. Third, we provide anecdotal evidence of the human element of judicial review, discussing cases handled by our members of staff throughout their careers which vindicated citizens' rights and facilitated effective administration. We conclude that limiting judicial review would have a substantial and long lasting social cost. In the fourth part, we will draw together our evidence and respond to the questions set by the panel and propose some improvements to the current system, whilst recognising that, as administrative law stands, it is, on the whole, appropriate, effective, and well-balanced.

1. Context Surrounding the Review of Administrative Law

We take great concern in the apparent trend of this Government's attempt to destabilise the constitutional balance between the branches of state. Administrative law's primary purpose is "to keep the powers of government within their legal bounds", in order to protect citizens and their rights.[1] A secondary purpose is to facilitate good and effective administration.[2] Administrative law is carried out by the Judiciary, who are independent from the other branches of state and impartial, thereby willing to stand up in vindication of others' rights, where appropriate, and call out ineffective or inefficient administration.[3] This is the rule of law, a foundational aspect of British democracy. In October 2019, the Prime Minister prorogued Parliament, thereby undermining the scrutiny and accountability of the executive. This decision was unanimously held to be unlawful by an 11-member-constituted panel of the Supreme Court (*Miller (no. 2) and Cherry v Prime Minister* [2019] UKSC 41). With Parliament closed down, the Courts acted as a check to the Executive's attempt to reduce scrutiny by Parliament and accountability to the representatives of the electorate. Had the Supreme Court not struck down the prorogation, it "would have dramatically enhanced the powers of the executive over Parliament".[4] It must be noted that the Judiciary did not conduct a merits based review of the Government's decision, but rather, the lack of any reason given (the Prime Minister did not provide an affidavit) meant there was no justification whatsoever of the decision [61]. The Supreme Court makes it clear that this was an exceptional judgment in exceptional circumstances [50, 57]. As a modern democracy, we hold our country up to be one where our Government does not act arbitrarily but in a reasoned manner. So Lord Thomas Bingham espoused the following principle in his book, *the Rule of Law*:

> "Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably"[5]

It is exactly that principle that the Government fell afoul of, thereby exceeding their powers, and the judiciary were right to uphold the rule of law. We are concerned that the Government, in conducting this review, is striking back at the judiciary for this judgment and, in doing so, will undermine a core feature of the rule of law.

The Government's efforts having been frustrated, in the run up to the general election in December 2019, the Conservative Party suggested in their manifesto that

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[1] H. W. R. Wade and C. F. Forsyth, *Administrative Law 11th Ed* (Oxford, 2014), p. 4.

[2] M. Elliott and J. N. E. Varuhas, *Administrative Law 5th Ed* (Oxford, 2017), p. 9: "After all, judicial review and ministerial accountability to some extent offer *complementary*, not *alternative*, mechanisms for ensuring good administration."

[3] Wade and Forsyth, pp. 16-17.

[4] N. Reed Langen, 'Is the Supreme Court more Interventionist?', U.K. Const. L. Blog (14 October 2020): https://ukconstitutionallaw.org/2020/10/14/nicholas-reed-langen-is-the-supreme-court-more-interventionist/.

[5] See also Wade and Forsyth, pp. 15-16;

they wished to curb the power of the judiciary.[6] The Conservative Party were successful in the election with 13 million votes. However, this is only 28% of the population eligible to vote in the election (47 million eligible voters) and less than 20% of the entire UK population (66.5 million). The Conservative Party, in control of the Government and Parliament (the very reason why the green light theory would not be appropriate in the UK),[7] instigated a review into administrative law. Appointed to chair the review was Lord Edward Faulks, a supporter of rebalancing power in favour of the executive with little to no checks.[8] Professor Mark Elliott observes "the underlying agenda is plainly the limitation of the courts' powers and the resultant shielding of the Government from judicial scrutiny".[9] This bias has been noted in analysis of the terms of IRAL's call to evidence itself, where it request evidence from Government Departments specifically, but not 'claimant' lawyers.[10] We stand starkly in opposition to such a mode of action.

Subsequently, the executive has introduced legislation (the Internal Markets Bill) that is intended to entirely exclude the jurisdiction of the Courts in reviewing secondary legislation created under the Act,[11] has sustained an anti-lawyer rhetoric,[12] and has marginalised Parliament during the COVID emergency,[13] going so far as to only permit a 90 minute debate on the Coronavirus Act 2020, a statute enabling some of the most draconian restrictions on civil liberties seen in our generation.[14] These

[6] Mark Elliott, 'The Judicial Review Review I: The Reform Agenda and its Potential Scope', Public Law for Everyone (3 August 2020): <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/>.

[7] Lord Hailsham, "Elective dictatorship", The Listener (21 October 1976): 496–500.

[8] Edward Faulks, 'The Supreme Court's prorogation judgement unbalanced our constitution. MPs should make a correction' (7 February 2020): https://www.conservativehome.com/thinktankcentral/2020/02/edward-faulks-the-supreme-courts-prorogation-judgement-unbalanced-our-constitution-the-commons-needs-to-make-a-correction.html.

[9] Mark Elliott, 'The Judicial Review Review II: Codifying Judicial Review – Clarification or Evisceration?', Public Law for Everyone (10 August 2020): https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/.

[10] T. Konstadinides, L. Marsons and M. Sunkin, 'Reviewing Judicial Review: The constitutional importance of the Independent Review of Administrative Law 2020', U.K. Const. L. Blog (24th September 2020): 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/.

[11] J. King and S. Tierney, 'The House of Lords Constitution Committee reports on the United Kingdom Internal Market Bill', U.K. Const. L. Blog (16 October 2020): 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/; R. Cormacain, 'The United Kingdom Internal Market Bill and Breach of Domestic Law', U.K. Const. L. Blog (23 September 2020): https://ukconstitutionallaw.org/2020/09/23/ronan-cormacain-the-united-kingdom-internal-market-bill-and-breach-of-domestic-law/.

[12] Tom Batchelor, 'Knife attack on law firm 'inspired by Priti Patel's activist lawyer remarks'', the Independent (12 October 2020): https://www.independent.co.uk/news/uk/crime/priti-patel-activist-lawyer-refugees-knife-attack-law-society-b965947.html.

[13] Meg Russel and Lisa James, 'MPs are right: Parliament has been side-lined', The Constitution Unit (28 September 2020): <https://constitution-unit.com/2020/09/28/mps-are-right-parliament-has-been-sidelined/>.

[14] See, e.g. Nick Thomas-Symonds MP (lab), Hansard (HC), (30 September 2020), Volume 681, Column 400, (available at https://hansard.parliament.uk/commons/2020-09-30/debates/AAB1B147-2F78-4F41-ADE6-F1E50B3F3ECB/CoronavirusAct2020(ReviewOfTemporaryProvisions): "Today, we find ourselves with 90 minutes to debate this unprecedented set of powers. There is no credible reason whatever why that could not

actions and others have led to the Speaker of the House of Common criticising the executive's contempt for the constitution.[15] Likewise, the House of Lords has strongly expressed its concerns.[16] It is not in the interests of democracy for a Government representing only 28% of the electorate to be without external scrutiny or constitutional checks and balances. This is the role of the Judiciary. We are concerned that the recent trend in Governmental actions are undermining the rule of law, destabilising the constitutional balance between the branches of state, and threatening the very foundations of British democracy.

We respond to the call for evidence for two purposes:

1. To show that in the majority of cases, in our experience, that are contemplated or brought under the judicial review procedure are settled before issue because the relevant Secretary of State, local authority or private body acting in a public capacity accepts that they have acted unlawfully, and that administrative law acts to facilitate good administration;
2. To demonstrate that administrative law acts to vindicate the rights of underprivileged, underrepresented, and marginalised groups and individuals, many of whom are minorities.

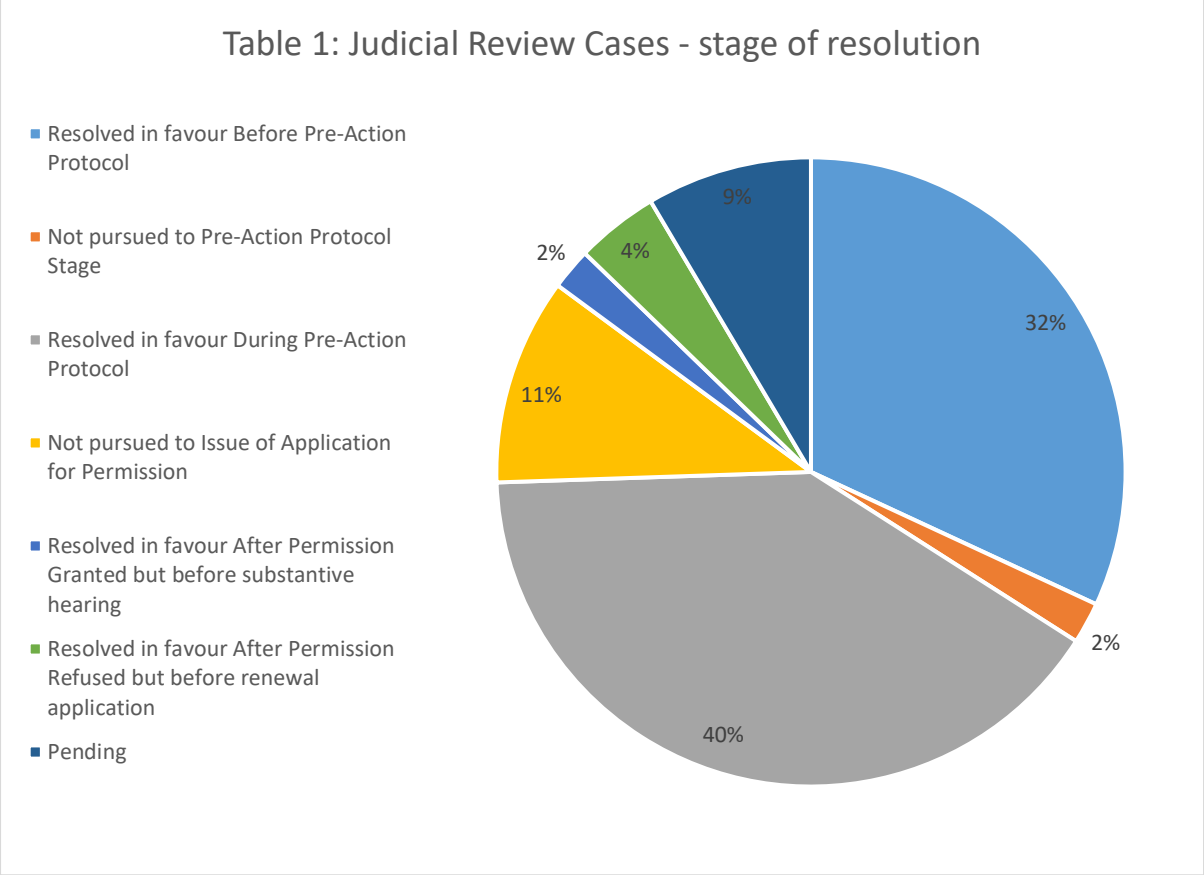
have been extended. The Government may not wish to face scrutiny, but they need to accept that they will make better laws for everybody if they do accept scrutiny."

[15] See https://www.bbc.co.uk/news/uk-politics-54352765; R. Brazier, 'Contempt for the Constitution?', U.K. Const. L. Blog (6th October 2020): https://ukconstitutionallaw.org/2020/10/06/rodney-brazier-contempt-for-the-constitution/.

[16] Select Committee on the Constitution, *United Kingdom Internal Market Bill,* 17th Report of Session 2019-2021 (HL 15/16 October 2020).

2. Data Analysis of Judicial Review Matters at Hackney Community Law Centre

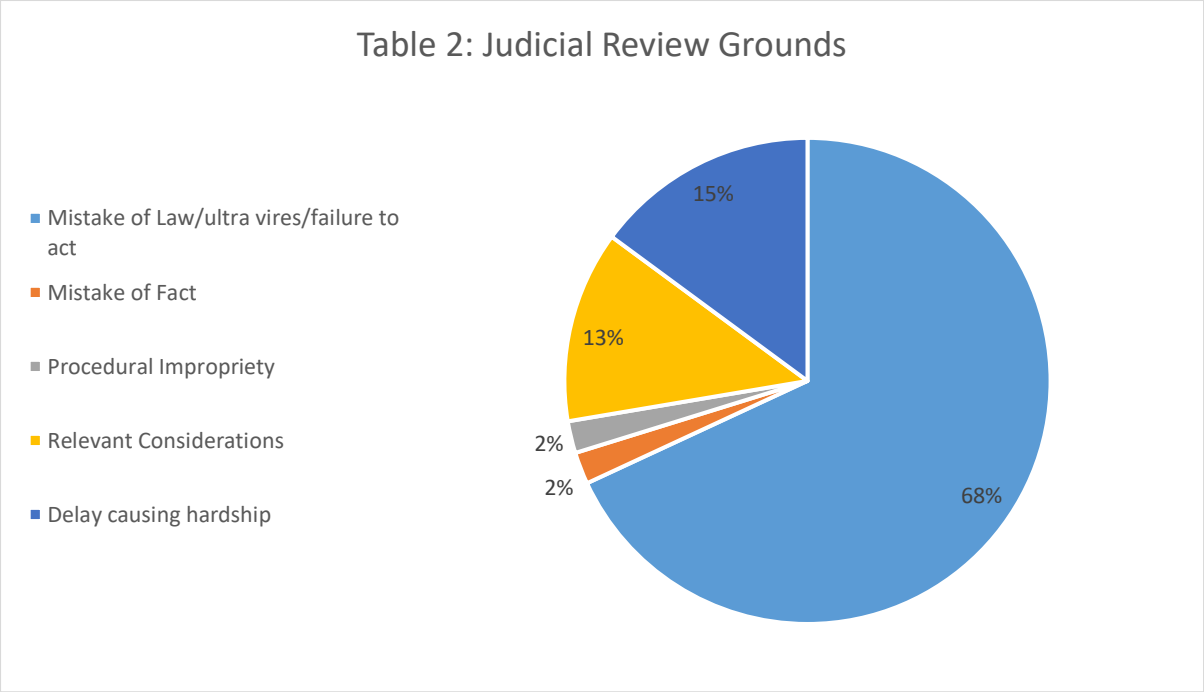
We have represented over 500 clients since January 2019 in housing, welfare benefits, and public law (judicial review) cases. The majority of our housing cases involve statutory reviews and appeals under ss. 202 and 204 of the Housing Act 1996 or possession claims, some of which involved public law defences. Most of our welfare benefits cases involve statutory reviews and appeals to the First-tier Tribunal (Social Entitlement Chamber). Having surveyed our data, we have 47 clients from 1 January 2019 to present who instructed us to take steps to bring a judicial review of either central or local government. Our data showed that 72% of these 47 cases were resolved prior to needing to issue a judicial review claim (Table 1). The reason for resolution was that the legal advisers of the public body accepted (sometimes tacitly) that the decision in question was unlawful and resolved the matter accordingly. This evidences that, in the majority of instances where a judicial review claim is contemplated, the unlawfulness of the public body's decision was sufficient clear that their lawyers advised not to defend the claim. It is the threat of judicial scrutiny that creates the incentive for public bodies to settle. Without recourse to a coherent and effective system of judicial review, these clients would have been unable to obtain a resolution, thereby catapulting them into homelessness and destitution.



Including cases that are currently pending resolution, namely where we are waiting a response from the relevant public body in the pre-action protocol stage or are in the court system, only 15% of our judicial review cases proceeded to issue of a claim. Of the cases where we did issue, 42% of them were resolved in favour of our clients either after permission was successfully granted or between permission being refused and a renewal application being made. The remaining 58% of cases are pending. That means that, in all of the 7 cases

where we issued judicial review proceedings and the matter is no longer live, the issue was resolved in our client's favour. The two main reasons for this occurring was: 1) that the relevant public body accepted that its decision was unlawful after the claim was issued; 2) our client was provided an alternative remedy that made the claim academic. These results would not have been possible if our clients were denied access to justice or recourse to judicial review.

Our data further showed that the majority (68%) of our clients' judicial review claims were brought as a result of a public body's mistake of law, *ultra vires* act, or failure to act (Table 2). In housing cases, this most frequently involves the failure of a local authority decision maker to appreciate how the law on homelessness applies in a particular context. After receiving correspondence prior to taking steps under the pre-action protocol or receiving a letter before claim threatening legal action, local authorities tend to change their decision without there being a necessity to issue a judicial review claim. However, there are a small number of instances where we have had to issue to the High Court to seek injunctive relief for failure to provide accommodation when a vulnerable client is homeless. A recent example is explained in the section below, where a client, who had been diagnosed with health conditions which made him vulnerable to dying from COVID, was refused accommodation by his local authority in April 2020. The High Court granted permission and injunctive relief, thereby taking a vulnerable client off the streets and into safety. Following interim relief, the local authority accepted a duty was owed and agreed to settle the case. The trends set out in our evidence show that the principles of administrative law improves public bodies' decision making because most cases involve a misunderstanding of the law or what duties are owed. It is for this reason that the vast majority of cases are settled prior to issue of a judicial review claim. However, without the threat of judicial review, none of these cases would settle and there would be a detrimental effect on the efficiency and effectiveness of administrative decision making.



Our data showed that 15% of our cases were contemplated as a result of delay in decision making causing hardship. All of these cases involved the Department for Work and Pensions' delay in processing benefits claims. Many claimants for subsistence benefits were having several months' delays in their claims being processed. For some, this meant they were unable to afford basic necessities such as food, heating, or electricity. For others, this

places their home at risk as they were unable to afford to pay their rental liability. Without a strong system of judicial review, these claimant would have been left without a remedy.

The final observation to make about Table 2 is that 13% of cases involve the failure of a public body to take into account a relevant consideration. This occurs where a case worker has overlooked and material fact or piece of evidence. In such as situation, oftentimes, the decision maker can become entrenched in their view. We do not speculate as to the motives. What we do note is that in such cases, it is usually with the threat of judicial review being issued that a decision maker will review the decision in our clients' favour and correct their decision. Without the recourse to judicial review, it is unlikely a decision maker would change their view.

Finally, our data shows a trend that the majority (68%) of cases involve the exercise of functions under duties or some form of an entitlement to a benefit. This shows that the majority of our cases do not involve the judicialisation of policy decisions, which fall within discretionary powers. It is not uncommon for public bodies to make errors when considering a person's legal rights, by which we mean rights corresponding to duties, or rights to some form of benefit. For example, recently, in April 2020, a Department for Work and Pensions decision maker made an error of law by holding that our client, a vulnerable survivor of domestic abuse, was not legally residing in the UK, despite the law stating that a person who is granted a 'Destitution Domestic Violence Concession' visa is exempt from the Habitual Residence Test for Universal Credit. The relevant law and how it should be applied was clearly set out in the Department for Work and Pension Advice for Decision Makers but the decision maker in this instance had failed to appreciate the situation. Ordinarily, a Universal Credit claimant could write for a review of the decision on their online journal. However, the Department for Work and Pensions has a practice of closing online journals when a person is refused Universal Credit based on the Habitual Residence Test. As a result, our client approached us because she was unable to challenge the decision. With the threat of judicial review, the Department for Work and Pensions quickly changed their decision, as it would not stand up to scrutiny in front of an Administrative Court Judge. It was judicial review that allowed an incorrect decision to be changed without substantive harm being caused to our very vulnerable client.

The data we have collected shows that judicial review plays an important role in the vindication of people's rights. Without recourse to such as system, the power of the Executive would be overbearing and individuals would be unable to defend their interests or rights. For this reason, we strong urge the Government not to curtail the powers of the Judiciary but to work alongside groups both from the majority and minority to take into account their interests and how Government policies may be affecting them.

3. The Human Element of Judicial Review Cases

We have dealt with a wide variety of cases in the last 20 years that have had an important impact not only on the vindication our clients' rights but also effective public administration. All of these cases were funded by Legal Aid which allowed our clients' access to justice – although the increasing restrictions on Legal Aid eligibility and increasingly punitive costs regimes in the Administrative Court is stifling this access. Our conclusion that administrative law not only allows the protection of individual's rights but also facilitates effective administration is supported in academic literature. Professor Maurice Sunkin notes "evidence indicates that judicial review may lead to improvements in the quality of public services; that it may assist officials in their work by clarifying the law, setting standards for decision-making, and stimulating re-evaluation of services".[17] We have picked a representative selection of cases which show the importance of administrative law and access to justice.

Questions of Jurisdiction and Duty

The first pair of cases we put to the panel are those involving disputes as to which public body has jurisdiction over providing relief to vulnerable individuals. Hackney Community Law Centre were the solicitors representing the Second, Third and Fourth Claimants (A, D & Y) in *R (On the application of AW) v LB Croydon and R(On the Application of A, D & Y) v LN Hackney (Interested Party: Secretary of State for the Home Department)* [2005] EWHC 2950 (Admin). A, D and Y were vulnerable and disabled failed asylum seekers, who were waiting for the Secretary of State for the Home Department to make decisions on their immigration applications, and, in the meantime, required accommodation. Neither the Secretary of State nor the Local Authority accepted responsibility for accommodating them, with the Secretary of State arguing that the local authority should accommodate under s.21 of the National Assistance Act 1948 and the local authority arguing that the Secretary of State should accommodation under s. 4 of the Immigration and Asylum Act 1999 (see para [36]). The practical effect of this disagreement between the two public bodies was that these three vulnerable individuals were at threat of homelessness, destitution, and significant deterioration in their health. Further, this case had broader implications on the administration of public affairs, namely, which public body had the duty to provide assistance. Judicial review proceedings were initiated so that the Administrative Court could resolve this question of jurisdiction. The Court concluded that it was for the local authority to provide accommodation under s.21 of the National Assistance Act. This clarified a question of importance both to the individuals and the administrative bodies. The Court acted not only as a vindicator of rights but as a facilitator of effective and efficient administrative decision making: in the future, public bodies knew at an early stage who owed what duty.

The second of the two cases on jurisdiction is *R (On the application of M) (FC) (Respondent) v Slough Borough Council (Appellants)* [2008] UKHL 52. Hackney Community Law Centre represented the Respondent who was the applicant for judicial review. M was a vulnerable individual who had been diagnosed with HIV living in

[17] Sunkin, *The Impact of Public Law Litigation* in: Elliott and Feldman, *The Cambridge Companion to Public Law* (2015, Cambridge), p. 254.

Slough. M was able to live with his condition as long as he had access to his medication, which had to be kept in refrigerated conditions, and to a doctor every 3 months. The issue in this case was whether the local authority had a duty to M to provide accommodation under s. 21(1)(a) of the National Assistance Act 1948 if, without accommodation, he would have a "need of care and attention". If the s.21(1)(a) duty was not owed, it was for the Secretary of State for the Home Department to provide accommodation under the Immigration and Asylum Act 1999. Lard Hale, in the House of Lords, remarks:

> "30. My Lords, it might appear that this case too is part of the "inverted and unseemly turf war" between central and local government, but although the Secretary of State intervened on a different issue in the Court of Appeal, he has not intervened on the issues before us."

This is another case of disputed jurisdiction between public bodies where the practical effect is a vulnerable individual being threatened with homelessness, destitution, deterioration of health and death. The House of Lord held that, for a person to fall under s. 21(1)(a), they would need to, at the time of application for assistance, be in "need of care and attention" and that M was not. The local authority did not owe a duty to M. The position was clarified for M, for Slough Borough Council, for future applicants for assistance, and other local authorities. It was for Central Government to provide accommodation. This case played a vital role in facilitating effective public administration, even though, our client, M, was unsuccessful.

In both of these cases, it is clear that, in practice, there are often disputes of jurisdiction between public bodies and, in absence of these being resolved politically, as was did not happen in either, vulnerable individuals are at significant risk without the ability of recourse to administrative law to vindicate their rights. In the former case, it was clarified that the local authority should provide accommodation. In the latter, it was confirmed that the applicant should seek assistance from the Secretary of State for the Home Department. It was a comprehensive system of Legal Aid and recourse to judicial review that allowed the public bodies to clarify who owed a duty and the individual to obtain support. Thus, the Judiciary acted as a facilitator of good administration and a vindicator of rights.

<u>Questions of Law</u>

The Judiciary also play an important role in interpreting often broad statutory wording. Hackney Community Law Centre represented the Appellant in *Haile v London Borough of Waltham Forest* [2015] UKSC 34 concerning the test for causation for the purposes of whether a statutory duty to accommodation was owed by the local authority under s.193 of the Housing Act 1996. The applicant was in an advanced state of pregnancy and living in a single persons' hostel in Leyton. About 4 months before she gave birth, she surrendered her room in the hostel because of the sanitary conditions. She would have had to leave the accommodation once she gave birth anyway. The question was whether she had made herself intentionally homeless under s.193(2) of the Housing Act 1996 as a result of leaving the single persons hostel. The Supreme Court, with Lord Reed giving the majority decision, upholding the policy objectives of the statute, held that "a later event constituting an involuntary cause of

homelessness can be regarded as superseding the applicant's earlier deliberate conduct, where in view of the later event it cannot reasonably be said that, but for the applicant's deliberate conduct, he or she would not have become homeless" ([63]). The applicant would have become homeless whether or not she left the accommodation when she did. This decision achieved clarification of the test a local authority should apply in absence of guidance from Parliament or the Executive and vindicated the rights of a single mother with a young child.

Protecting rights following errors of law or fact

The Judiciary is able to protect individuals' rights when an error of law or fact has been made by granting interim relief, prior to permission being granted or refused. There are two cases which exemplify this role of the courts. In an unreported case, *RS v a London Borough* [2020] EWHC (Admin), our client was a vulnerable British national with serious asthma who was wrongly refused emergency accommodation during the COVID-19 lockdown. Initially, the local authority had refused to accept that he was in priority need. This was challenged in pre-action correspondence and it was accepted that the applicant was a vulnerable individual. Having accepted an error of fact had been made, the local authority then attempted to provide a "final" offer of accommodation outside of London. RS would have been required to travel on several trains in a period where COVID-19 cases were reaching their peak, placing him at risk of death, so he refused the offer. The local authority, incorrectly, believed that, in law, they could, therefore, no longer provide any assistance to our client. We applied to the High Court for an interim order requiring the local authority to provide interim (emergency) accommodation and the order was granted. Subsequently, the council accepted a duty was owed and made an offer of suitable accommodation that would not involve extensive travel. Therefore, the ability of the High Court to grant interim remedies vindicated our client's rights and prevent a vulnerable individual from becoming very sick or even dying.

Following acceptance of the duty, the application for judicial review was considered by the Administrative Court on the papers and refused, meaning our client became liable for the legal costs of the other side (which can amount to thousands or tens of thousands of pounds). Ordinarily, a claimant could apply for a renewal hearing and it is likely that the refusal would be overturned. However, our client was no longer eligible for Legal Aid because the council had accepted the duty and offered suitable accommodation: challenging the initial permission decision would not have produced "a benefit for the individual", so RS was excluded from Legal Aid. Our client could not afford to privately pay a barrister for the renewal hearing, being a low income individual. Accordingly, if our client returns to work, the local authority could enforce the costs order against him. This is an injustice. The local authority would never be prejudiced by judicial review costs rules or the restrictive Legal Aid rules, because they have deep pockets. These rules act as a deterrent for challenge to public bodies' decisions. This case was rife with errors in the decision making. Our client should not be punished for challenging this.

In the second case, our client was a vulnerable survivor of domestic abuse who had been granted recourse to public funds by the Secretary of State for the Home

Department but her Universal Credit claim was refused, erroneously, by the Secretary of State for Work and Pensions. The case was settled prior to issue of a claim although this is because of the threat of applying for interim relief. Our client had moved to the UK under a spousal visa. At the beginning, her partner placed all of the household burdens upon her: she cooked and cleaned, all the while working full time. However, the relationship became psychologically and physically abusive and, just before the COVID lockdown, our client fled to a women's refuge, and was unable to continue to work due to her disabilities. The Secretary of State for the Home Department had granted a Destitution Domestic Violence Concession which allowed her leave to remain in the UK and recourse to public funds. She applied for Universal Credit but her claim was denied alleging she did not have recourse to public funds, contrary both to legislation made by Parliament and guidance issued by the Secretary of State for Work and Pensions herself.

The Secretary of State for Work and Pensions has a policy of closing Universal Credit online journals when claims are refused. Our client was, therefore, unable to challenge the decision online. At the time, the Universal Credit phone lines were experiencing excessive delays of more than 2 hours waiting time. Further, the alternative route of challenging a decision by post was precluded as libraries, printing shops, and advice centres were closed due to lockdown. There is no email address to send mandatory reconsideration requests. The Secretary of State for Work and Pensions is, and has been since 2019, aware that closing of claims in this way is an issue for many claimants but has failed to rectify the problem. This came to a head during COVID. Our client's only remedy then was to initiate correspondence under the pre-action protocol for judicial review. Immediately, the Government Legal Department rectified the matter and our client was awarded Universal Credit. The threat of judicial review and an interim order allowed for the vindication of our client's rights and ensured, retrospectively, good administration. However, there is a broader problem, the closure of online journals, that was not resolved. Legal Aid would have not covered a claim brought to challenge this practice because it would not "produce a benefit" for our client (although it would for thousands of others). It must be said to be in the interests of good administrative for this matter to be resolved, and it is not being resolved politically.

4. Response to the Particular Questions

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

The terms of this review suggest that the Conservative Party seek to codify grounds of judicial review so as to curb the power of the judiciary. The terms make reference to Australia as a comparator. First, although Australia is a comparator, it is not the only country with codified judicial review grounds. If this review is to seriously undertake an exercise of comparative constitutional law, that is not merely a symbolic and decorative way of supporting its conclusion, it must bear in mind and take into account these other jurisdictions. Second, in doing so, the members should also consider the methodological risks of "cherry picking" jurisdictions to support their conclusions and the importance of recognising the socio-political conditions in those countries.[18] One does not need to look far to note differences between Australia and the UK. Australia, like Canada and the US (both bases of the Australian model), is a federal democracy; the UK is a unitary system. If the UK Government is serious about drawing on the Australian model, surely it would be, therefore, open to considering further devolution to Scotland, Wales, and Northern Ireland in the form of Federalism? The Internal Market Bill suggests otherwise.[19]

Our constructive feedback, then, would be that the panel should take a methodological approach of surveying a wide variety of jurisdictions, analysing both content-dependent (intrinsic) and content-independent (extrinsic) reasons for accepting a particular system, and being transparent and open about why they have balanced these reasons in favour of their conclusion and rejected other potential systems of administrative law. For example, if it were to be said that the Australian system of administrative was somehow more effective than the UK, it would be necessary to investigate whether this was because of the codification of administrative law or socio-political reasons. Failure to do so would significantly undermine any conclusions on the codification of administrative law in the UK.

Finally, while it may be that the panel concludes there is benefit in the codification of administrative law, this must be weighed up against the counter veiling costs. Canada is a jurisdiction which codified standards of review. This has, recently, led to a substantial amount of litigation – and, therefore, costs. In the case *Vavilov*, despite there being codification of administrative law, the ambiguities within the

[18] See, for instance, Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP, 2014).

[19] See J. King and S. Tierney, 'The House of Lords Constitution Committee reports on the United Kingdom Internal Market Bill', U.K. Const. L. Blog (16 October 2020): 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/; George Peretz QC, 'The Internal Market Bill puts a leash on the devolved governments', Prospect Magazine (13 October 2020): https://www.prospectmagazine.co.uk/politics/internal-market-bill-devolution-settlement; Institute for Government, 'Devolution: UK internal market' (Report, 15 September 2020): https://www.instituteforgovernment.org.uk/explainers/devolution-uk-internal-market.

legislation – which is inevitable – meant that the Judiciary needed to create a framework of how courts should approach judicial review. Dr Paul Daly notes a long list of cases that have stemmed from *Vavilov*.[20] Codification of administrative law in Canada did not lead to increased clarity or certainty and, if undertaken in the UK, will likely lead to extensive and costly litigation. If there is truly a benefit of codification, this must be weighed against such costs.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

In housing and welfare benefit law, there is a clear, delineated line between what decisions or powers are subject to judicial review and which are subject to statutory reviews and appeals. In terms of justiciability, we do not accept that any Government or executive decision should be exempt from judicial scrutiny. As explained above, review of administrative decisions is a core and vital element of the rule of law and democracy. The UK Judiciary have developed a fair and balanced approach to legal questions that involve "high policy". For example, in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, the Judiciary, exercising judicial restraint, did not consider the question of whether the prohibition of assisted suicide was unlawful, because the matter was being debated by the legislature and executive. In *Pro-Life Alliance v BBC* [2003] UKHL 23, "the H[ouse of] L[ords] held that the prohibition of the showing of aborted foetuses in a party election broadcast could not be interfered with unless the decision was "arbitrary"".[21] In *Manchester City Council v Pinnock* [2011] UKSC 6, the Supreme Court recognised the inherent competence of local authorities to manage their housing stock and indicated judicial intervention would only occur in exceptional circumstances. In *R (on the application of DS and others) v Secretary of State for Work and Pensions* [2019] UKSC 21, the Supreme Court declined to declare the Government's benefit cap policy unlawful as it was not "manifestly without reasonable foundation". On the other hand, judicial intervention was deemed necessary in *Miller (no 2)/Cherry* when the Government, without given reason, prorogued Parliament – an "arbitrary" decision, so to speak, in that it was not reasoned. In *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, a Government policy on housing benefit and Universal Credit housing costs was held to be unlawful as, in the exceptional circumstances of seriously prejudicing the rights of a disabled individual, the Secretary of State failed to provide weighty reasons in justification of such an injustice. The Judiciary, then, has acted as a fair balancing force between the rights of the individual and minority groups, and good and effective administrative. The UK has a developed, nuanced form of administrative law which is capable of reacting to a variety of circumstances. Overturning this balance would reduce the accountability of the executive and, inevitably and necessarily, lead to expensive and time consuming litigation on the limits and boundaries of the "new" administrative law framework.

[20] Paul Daly, 'Vavilov Hits the Road', Administrative Law Matters (updated August): https://www.administrativelawmatters.com/blog/2020/02/04/vavilov-hits-the-road/.
[21] De Smith, *Principles of Judicial Review 2nd Ed*, p 661 footnote 371.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

Until we have seen proposals on what a new procedure would look like, we are unable to comment. Suffice it to say that for unrepresented individuals, not entitled to Legal Aid because of their income, but unable to afford lawyers, the process would be difficult and daunting. One solution to this is granting a more permissive regime of Legal Aid for claims against public bodies, particularly with regards to the means test.

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

The current system does strike an effective balance. The three month time limit ensures that claims are brought promptly but allows for pre-action correspondence seeking settlement. If the time limit is shortened, it is likely that this will lead to an increase in litigation because parties are unable to settle prior to issuing.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

In answering question 7 and 8, we draw on the expertise of Professor Tom Hickman who wrote in February 2017:

> "What is the most important issue in public law? You might be forgiven for thinking it is the gradation of principles of substantive review, or the proper limits of judicial interventionism, or even the scope of residual prerogative powers. But you would be wrong.
>
> There is a much, much graver and more urgent issue in public law and it is this: the majority of the population cannot bring a judicial review claim".[22]

Professor Hickman's point is that the costs regime in judicial review claims is so punitive on unsuccessful parties that most individuals are precluded from bringing claims to vindicate their rights.

> "Many individuals would be bankrupted by an adverse costs order. Even those who would not be bankrupted could not rationally be expected to risk their savings, or the equity in their house, in bringing a judicial review claim to protect themselves and their family from arbitrary action by a public body".[23]

[22] Tom Hickman, 'Public Law's Disgrace', U.K. Const. L. Blog (9 February 2017): https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/.
[23] *Ibid.*

Our experience of judicial review mirrors that espoused by Professor Hickman. The restrictions on financial eligibility for Legal Aid have catapulted many families into a shady realm where they have an inability to seek recourse for erroneous or unlawful decision making. For those families, the risk of an adverse cost order is too much. The costs rules are, thus, not too lenient, but too punitive.

In contrast, public bodies have access to a wealth of public funds, allowing them to defend decisions all the way to the Supreme Court. For a public body, they need not fear adverse costs orders. Making costs orders more punitive, or less lenient, would not increase good administrative but inhibit recourse to remedies in the event that decision making went wrong. There would be less of an incentive for public bodies to make good decisions, and no disincentive to making wrong decisions. This undermines the rule of law.

As a solution, we put forward Professor Hickman's regime:

> "For my own part, I would like to see a regime of qualified one-way costs shifting which requires a defendant to apply at an early stage for any qualification to the default rule. Such an application would have to be made and determined at the permission stage so that claimants would know prospectively what their costs exposure would be and could make submissions on the appropriate level. In case brought by a private individual or SME it would be exceptional for any significant amount to be ordered to be payable in the event that a claim, found to be properly arguable, ultimately fails. No doubt principles governing what is reasonable for claimants to pay would quickly emerge. And to ensure that claims are not deterred by permission stage costs, if a claim is rejected at the permission stage costs would only be awarded against a claimant if the claim was identified as being totally without merit (it is not impossible to countenance a variation of such a rule to address heavy commercial judicial reviews). There is no ideal solution. But a regime such as that sketched here would meet the central problem in public law and would be fair overall."

A further solution would be the extension of the cost capping orders regime.[24]

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

Until we have seen proposals on what a new procedure would look like, we are unable to comment.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

This question does not take into account the reality and evidence surrounding judicial review. Our data shows that 73% of judicial review matters are settled without the necessity of issuing a claim. The availability of judicial review as a form of scrutiny

[24] Tom Hickman, 'Public Law's Disgrace: Part 2', U.K. Const. L. Blog (26 October 2017): https://ukconstitutionallaw.org/2017/10/26/tom-hickman-public-laws-disgrace-part-2/.

of the executive acts as a tempering factor, making settlement a real possibility without having to resort to litigation. Our understanding is that this data corresponds and corroborates with the broader picture of administrative law.

In terms of welfare benefits and housing law, one way that public bodies can minimise the need to proceed with judicial review is by their decision makers engaging fully with claimants and their lawyers. In the majority of the cases where we have had to take steps under the pre-action protocol for judicial review, it has been a matter where a decision maker has fundamentally misunderstood the law. Most of these cases were resolved without litigation, and, in each of the cases that progressed to litigation, our clients were successful in vindicating their rights. There is an issue of some decision making processes inhibiting claimants from explaining their legal rights to a decision maker. For example, the practice of closing Universal Credit claims, before a mandatory reconsideration can be sought, inhibits the ability of claimants and their lawyers to resolve matters prior to litigation. Child Poverty Action Group indicates that this issue has been raised with the Government[25] but we can see no steps that have been taken to resolve it. If political processes fail, and the system in place causes grave hardship infringing on citizens' rights, then litigation is the only option. This is the rule of law. A solution would be for the Secretary of State and other public bodies to take into account and engage with policy groups who raise these issues, and for the public bodies to resolve the problems promptly so that it is possible for citizens to engage fully in decision making processes or otherwise avoid injustice.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

We have extensive experience of settlement before trial. Most public law cases are settled in such a manner. Accordingly, this suggests the current system is well balanced, on the whole.

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?

In our view, ADR would inhibit the scrutiny and accountability of public bodies. Cases that proceed to litigation occur where a public body has dug in its heels and is unwilling to change its position. It is unlikely that ADR would change this. Rather, ADR would means cases are considered behind closed doors, offending the concept of open justice. Further, there is a risk that mandatory ADR would merely delay the vindication of individuals' rights and adjudications necessary for effective and good administration.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

[25] CPAG, *Computer Says 'no' Stage two: Challenging Decisions* (Report, July 2019), pp. 13-14.

Until we have seen proposals on what a new procedure would look like, we are unable to comment.

Final Comment: Legal Aid

It is well-recognised that the cuts to Legal Aid in 2013 has decreased access to justice and, thereby, reduced the ability of individuals to vindicate their rights, or for bad administrative practices to be rectified. LASPO removed Legal Aid from the majority of benefits law except appealing to an Upper Tribunal (UT1) and upwards, and limited housing matters to cases where: there is an immediate risk to the home; a person needs homelessness assistance; there is disrepair that poses a serious risk to life or health; and there is anti-social behaviour.[26] Post-LASPO, the Ministry of Justice reported a decrease of 50% for housing legal aid cases and welfare benefits cases went from 88,378 to 145.[27]

LASPO has had further, knock-on effects. Early specialist advice is no longer available: rather, individuals with resolvable legal issues (for example, benefits issues causing rent arrears) must wait until their problem has escalated, bringing them within the scope of LASPO.[28] Firms and charities working in the sector have become unsustainable and, for example, large parts of the housing advice sector have collapsed.[29] This has caused 'advice deserts', inhibiting access to advice and representation for individuals. Those providers that remain are unable to meet demand leading to people with legal problems either not being represented or being passed from one advice agency to another.[30] Combining the above with the complexity of both housing and benefits law,[31] there is a clear impediment to access to justice. An equality impact assessment conducted by the Government[32] and a report by the Equality and Human Rights Commission[33] confirmed that LASPO would/has disproportionately affected disadvantaged communities. It is within this landscape that we attempt to provide access to justice to disadvantaged client groups and resist further curbs to administrative law.[34]

Further, Legal Aid for judicial review is highly restrictive, not permitting claims which are brought in the public interest alone. The lack of engagement (or lack of action following engagement) between public bodies and advice agencies or NGOs means that, in many cases, the only recourse to justice and facilitation of good and effective administration is through the courts. An example of this is the closure of refused Universal Credit claims. However, due to the restrictive Legal Aid regime,

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[26] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 Sch. 1 paras 8, 33, 34, 35 36.

[27] 'Cuts that Hurt: The Impact of Legal Aid Cuts in England on Access to Justice', Amnesty International (Report) (October 2016) London 8.

[28] ibid 17; Equality and Human Rights Commission, *The Impact of LASPO on routes to justice* (EHRC No 118, 2018) 36-37.

[29] AI (n 24), 21.

[30] AI (n 24) 20-23; EHRC (n 25), 37-39. See also *Al-Ahmed v Tower Hamlets London Borough Council* [2020] EWCA Civ 51.

[31] EHRC (n 25) 35-36; JUSTICE (n 25) 10.

[32] AI (n 24) 14.

[33] EHRC (n 25).

[34] Majorie Mayo, Gerald Koessl, Matthew Scott and Imogen Slater (eds), *Access to Justice for Disadvantaged Communities* (Bristol University Press, Policy Press, Bristol 2014) 2.

clients, NGOs, and third sector organisations are unable to fund claims or risk the potential of an exorbitant adverse costs order. This inhibits good administration.

Finally, as noted by Professor Hickman, the majority of citizens are excluded by the financial means test, excluding them from remedy to arbitrary, unlawful or erroneous decision making.

Our recommendations is as follows:

- There should be an exemption to the "sufficient benefit" test where there is a public interest in public law litigation. This will allow the Courts to act a forum where disadvantaged or minority groups can have open and public discourse with the Government about the effects of a policy or practice with the judiciary as adjudicator.
- There should be an exemption to the financial means test for those who have been subjected to unlawful or illegal public decision making. This will allow access to justice for those whose rights have been infringed but who may not have the financial capacity to fund a judicial review claim themselves, while having too much income to be covered by Legal Aid.
- The reintroduction of Legal Help to assist with resolution of administrative decisions that are not subject to judicial review, such as reviews and appeals of welfare benefits decisions. This would allow increased effectiveness and efficiency of decision making (N.B. that from July to September 2019 HMCTS statistics show that 77% of ESA appeals, 76% of PIP appeals, 69% of DLA appeals, and 61% of UC appeals were resolved in favour of the appellant, strongly suggesting that the Secretary of State's initial decision making and reviews are inefficient, ineffective, and need to be resolved).

5. Summary of our Conclusions and Recommendations

1. The Government must be committed to upholding the rule of law. The judiciary and administrative law act as protector of individual rights and facilitator of good administration. This is a core feature of British democracy and inhibition to recourse to this system would undermine the rule of law. The green light model would not

be appropriate in the UK given the socio-political context, where the Conservative Party only represents 28% of the electorate but control Government and Parliament.

2. Surveying the data on our system of 47 judicial review cases, we show that 73% of matters are settled prior to issuing a claim. This is mainly because legal adviser for public bodies accept the decision making was deficient supporting our proposition that the Judiciary uphold good decision making. 68% of matters involved an error of law which further solidifies the link between judicial review and the rule of law.

3. The selection of cases presented shows that the judiciary facilitate good administration by resolving question of jurisdiction, clarifying questions of law, and protecting individual rights where deficient decision making has occurred. However, we note the inability of claimants to challenge Government policy as a result of restrictive Legal Aid rules, thereby undermining good administration.

4. While we welcome the panel's willingness to engage in comparative constitutional law, we recommend that, when reviewing foreign jurisdictions' administrative law, they take a methodologically sound approach. The panel should be cautious of "cherry picking" isolated elements of other jurisdictions to justify their conclusions and should take into consideration the fact that socio-political contexts may be the determining factor as to how different systems of administrative law operate. We recommend that a survey of a variety of different jurisdictions is conducted to ensure any conclusions reached are not flawed.

5. Codification of administrative law may not increase certainty or clarity, as evidenced by the recent line of cases in Canada following *Vavilov* where the Supreme Court of Canada interpreted codified standards of review. Rather. codifying judicial review will likely lead to increased costs on society due to the necessity of further litigation to clarify any legislation.

6. The UK has a developed, nuanced form of administrative law which is capable of reacting to a variety of circumstance taking into the competencies and expertise of different administrative bodies. It allows for the Judiciary to act as a balancing force between the rights of the individual and good administrative.

7. We recommend that, instead of changing administrative law, the Government and other public bodies engage more comprehensively with civil society and promptly take action to resolve any systemic issues with their policies. This would increase democratic legitimacy and reduce litigation.

8. We recommend that the Legal Aid regime is amended to allow individuals, charities or NGOs to bring judicial review claims where there is a broader public interest. This would allow a dialogue between Government and those affected by their policies with an independent and impartial judiciary applying universal principles of democracy.

9. We recommend that there be an exemption to the financial means test for Legal Aid for those who have been subjected to unlawful administrative decision making.

10. We recommend that Legal Help is reintroduced for administrative law matters such a welfare benefits. Between 61% and 77% of benefits appeals in the First-tier Tribunal (Social Entitlement Chamber) are resolved in favour of the appellant, suggesting that the Secretary of State's initial decision making and review are inefficient and ineffective. Allowing representation at an earlier stage will likely decrease costs overall.

11. We recommend that a qualified one-way costs shifting regime is applied to judicial review. The current costs system disproportionately affects claimants, who are unlikely to be able to afford an adverse costs order, whereas administrative or executive bodies have access to a deep pot of public funds. Access to justice would substantially benefit from a system as proposed by Professor Hickman.