Response to the Call for Evidence Issued by the Independent Review of Administrative Law on behalf Public Law Wales

1. Public Law Wales (previously the Wales Public Law and Human Rights Association) ("PLW") is an organisation promoting, in Wales, discussion, education and research relating to public law and human rights and promoting expertise amongst lawyers practising in Wales in the fields of public law and human rights.

2. Public Law Wales was founded in 1999 in response to devolution. The President of Association is Lord Thomas of Cwmgiedd and the Patron of the Association is the Right Honourable Sir Malcolm Pill. The executive committee includes members of the independent bar, solicitors in private and public practice, academics from Wales' universities, and students. As such, this response has been prepared by those well placed to properly understand and comment upon the impact of changes to judicial review on the justice system, particularly as it functions in Wales and in the context of the devolution settlement.

Initial Observations

3. We would like to take this opportunity to set out some initial concerns regarding the framing and intent of the consultation. We see some fundamental matters that potentially undermine the consultation exercise. These are mainly methodological issues related to the lack of clarity and balance in the phrasing of the questions, the lack of empirical evidence underpinning the consultation (or being sought in evidence through the consultation), and an obscuring of the constitutional foundations of Judicial Review in England and Wales. We also observe some confusion regarding excluding devolved policy from the review that does not take into account that Judicial Review is not a devolved matter for Wales, and which we discuss in further detail below.

Methodological Design

4. We note that at the core of the review is in an investigation of central government and the boundary between law and politics. The Terms of Reference define this as confined to central executive decision-making, however, the detail of the consultations seem to have a much broader approach in also referring to local government, with particular reference to *Wandsworth LBC v Winder* [1985] AC 61.

5. We are concerned that the phrasing of the questions, particularly in Section 1, are not designed in a suitable methodological manner. Many questions seem designed as closed-ended questions that may only elicit closed answers. We are concerned that the phrasing of the questions does not encourage neutral responses, as would be required by good methodological practice.[1] Furthermore, the Terms of Reference highlight that the Review should examine trends. However, the temporal range of the questions does not explicitly refer to trends or past data from Departments and is designed to elicit subjective and attitudinal opinions on the impact of Judicial Review and not the objective trends that the review is designed to examine.[2]

Empirical Foundations

6. Section 1 of the Call for Evidence does not seek empirical data from Government Departments and there is no indication elsewhere of how the review will gain this data. As far as we are aware, and based on academic research undertaken by members of our executive committee, there is no empirical evidence to suggest a need to 'streamline' the Judicial Review process and any suggestion otherwise is currently anecdotal at best.

7. Ministry of Justice Data itself demonstrates a marked decline in civil (non-immigration) judicial review and criminal judicial review, with civil (non-immigration) claims down by one quarter and criminal claims having reduced by more than a half.[3] This reduction in

[1] Lesley Andres, *Designing and Doing Survey Research* (SAGE Publications, 2005) Chapter 5 (Example 5.21).
[2] Herbert F Weisberg, *The Total Survey Error Approach. A Guide to the New Science of Survey Research* (The University of Chicago Press, 2005) 82, 87-92.
[3] See Ministry of justice Civil Justice Statistics Quarterly, and for analysis Sarah Nason & Public Law Project, 'Judicial Review in Wales: Submission by the Public Law Project and Dr Sarah Nason' (2018) available at https://gov.wales/sites/default/files/publications/2018-11/submission-to-the-justice-commission-from-public-law-project-sarah-nason.pdf accessed on 14 October 2020; S. Nason, 'Justice Outside London? An Update on

caseload corresponds with the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012 and previous reforms to procedures and costs related to accessibility of judicial review.[4] Furthermore, we note that there is currently only fairly limited and subject area specific evidence on the impact of judicial review on public body defendants.[5] Research shows that whilst there might have been some increase in more policy-based challenges, the vast majority of claims (outside the immigration context) still involve individual claimant grievances, turning on their own facts, and concerning town and country planning, housing, professional discipline, tax and education (some 50% of claims).[6]

8. In the Administrative Court in Cardiff approximately three quarters of substantive judgments relate to town and country planning or education. Research findings do not indicate the existence of widespread abuse of the system by claimants seeking to use Judicial Review for public interest or political purposes, in a way that seriously impedes administrative efficiency such as would justify a general restriction in access to the Administrative Court. Research in fact finds that there are a wide range of benefits resulting from judicial review, including increased trust and confidence in the legal system, and improved communication between parties, as well as improvements in administrative practice. These tangible and intangible benefits can accrue to both successful and unsuccessful parties in substantive legal action.[7] The statistics also show that public body defendants are successful in the majority of cases, though research also demonstrates that settlements achieved before a final substantive hearing are more likely to be reached in favour of claimants.[8]

'Regional' Judicial Review', U.K. Const. L. Blog (16th Nov 2016) (available at https://ukconstitutionallaw.org/); S. Nason, 'Plus ça Change: An Empirical Analysis of Judicial Review in Modern Administrative Law' in TT Arvind, R Kirkham, D Mac Síthigh and L Stirton (eds) *Executive Decision-Making and the Courts: Revisiting the Origins of Modern Judicial Review* (forthcoming Hart Publishing 2021).

[4] Ibid.

[5] See e.g., M Hertogh and S Halliday, *Judicial Review and Bureaucratic Impact* (Cambridge University Press 2004).

[6] S Nason, *Reconstructing Judicial Review* (Hart publishing 2016).

[7] V Bondy, L Platt and M Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (PLP, LSE, University of Essex 2016).

[8] V Bondy and M Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009).

9. What is particularly concerning about the empirical picture is that back in 2007 it was estimated that just over one-third of judicial review claims originated with claimants outside London and the south east of England. After establishing the out of London Administrative Court Centres, at its highest some 35% of the civil (non-immigration) caseload in judicial review was issued outside London. This has now fallen back to less than 25%. Fewer local firms issue judicial review and more claims involve unrepresented litigants. Reforms to legal aid and to the judicial review procedure have already had the consequence, whether intended or otherwise, of making judicial review disproportionately difficult for those outside London and the south east to access, and disproportionately difficult to obtain for those forced to resort to the procedure to access a benefit or service to which they are legally entitled. As legal aid restrictions have had a disproportionately negative impact on Wales, so too access to Judicial Review has suffered disproportionately in Wales.

10. We are therefore concerned that the design of this consultation is not the best way to gain the necessary data regarding the trends in judicial review or the impact on public body defendants. We encourage the secretariat to ask for quantitative empirical data from Government departments as part of its questionnaire in Section 1 of the Call for Evidence to enable better objective evaluation of the impact of judicial review.

Constitutional Background

11. We are concerned that the proper constitutional role of judicial review is not reflected in the terms of reference or call for evidence. Ultra vires, as the orthodox cornerstone of judicial review, is obscured by the portrayal of judicial review as a clash between individual and government. Centuries of constitutional history at the foundation of modern constitutional arrangements show that it is the courts, not the executive itself, that define the limits on executive action (see the *Case of Prohibitions* [1607] EWHC KB J23, (1607)

12 Co. Rep. 64 and the *Case of Proclamations* [1610] EWHC KB J22, (1611) 12 Co. Rep 74).[9] This function of the courts can be seen as an essential component of the rule of law.[10]

12. We note that there has been a recent trend towards challenging this aspect of the rule; not least in clause 45 (as introduced) of the UK Internal Market Bill. Adherence to the Rule of Law should not be considered as a one-dimensional confrontation between executive and judiciary. In fact, the Rule of Law plays a much broader historical role in the reputation of the common law system and modern role in market confidence and international reputation of the England and Wales legal system.[11]

13. Judicial review should be understood as a positive aspect of good governance. As the Government Legal Department note:

> '*Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful method of ensuring that the improper exercise of power can be checked*.'[12]

However, we are concerned that the constructive role of judicial review in securing good governance has been lost in the consultation document. Guidance such as 'Judge over your Shoulder' are designed to promote good decision-making. We note that there is some reference to this in Q.2 of Section 1 of the Call for Evidence but we encourage the review to give full attention to the good influence which judicial review has had on the large volume of first-time decisions made by Government and public bodies.

Implications of the Review for Devolved Government in Wales

Context

[9] See also *M v Home Office* [1992] QB 270; "*The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is*."
[10] See para 18 below and (for example) the discussion in the 4th edition of Elliott & Thomas *Public Law* (OUP, 2020) para 5.9
[11] Niall Ferguson, *The Great Degeneration: How Institutions Decay and Economies Die* (Penguin, 2012) Chapter 3.
[12] Government Legal Department, 'Judge over your shoulder – a guide to good decision-making' (2018) 31.

14. The devolution of legislative and executive powers to Scotland, Wales and Northern Ireland has been a feature of the UK constitution for over 20 years. The three devolution settlements establish patterns of governance for the devolved territories which involve a delicate balance between the proper spheres of activity of devolved and UK institutions. Any major reform affecting the powers of one level of government inevitably impacts on the other. As the history of the implementation of the UK's decision to withdraw from the EU has demonstrated, failure to consider, from the outset, the impact on devolved government of proposed measures, on the misconceived grounds that those measures only strictly relate to matters reserved to the UK level of government, inevitably leads to unpredicted consequences, legislative complexity and an enhanced level of political controversy.

15. It is therefore disappointing to note the way in which the Terms of Reference of the Review, as qualified by the explanatory Note on the Scope of the Review, as well as the Introduction to the Call for Evidence, seeks to erect an artificial and arbitrary barrier, based on a distinction between reserved and devolved aspects of government, to proper consideration of reform to the institution of judicial review. Although judicial review is a procedure which applies, in principle, throughout the UK, the Call for Evidence rather naively suggests that the consequential effect of such reform on devolved governance can be limited to "minor and technical changes to court procedure" which will be capable of being disposed of by "careful consideration of any relevant devolved law and devolution matters arising" and an unspecified "engagement with the Devolved Governments and courts".

Why the approach of the Call for Evidence to devolution is wrong

16. The Call for Evidence's approach to this aspect of constitutional reform is regrettably unsound. The most that this part of the Association's response can do is to point out some of the ways in which this approach will inevitably lead to the Panel failing to take account of important ways in which any reform of judicial review, however constrained, would impact on devolved governance. In seeking to do so, its efforts are, unfortunately, undermined by the lack of clarity with which the Terms of Reference and the Call for Evidence seek to explain the scope of the Review's work.

17. Judicial review is not a substantive legal right but rather a procedure for testing the legality of executive actions against the requirements of legality, rationality and procedural propriety, which may or may not result in a remedy being granted. Neither the subject-matter of the decision nor the identity of the decision-maker affects the applicability of those requirements (except to the extent that the requirement of legality demands that the particular decision-maker must of course be shown to be exercising a legal power vested in him or her). The merits of the decision are irrelevant, as are those of any policy on which the decision were based (unless, of course, the adoption of that policy can itself be demonstrated to be unlawful).

18. It is puzzling, therefore, to see that the Introduction to the Call for Evidence presupposes that entitlement to judicial review could depend on *the nature of the power being exercised* which in turn implies (in particular because of the impact of devolution) that entitlement to judicial review might depend on the *identity of the decision-maker.*

Judicial Review and the Rule of Law

19. Before examining these implications further, with particular reference to the nature of devolved governance, it should be recalled that the availability of a legal remedy against unlawful action, irrespective of the nature of the power being exercised and the identity of the person exercising it has been seen for generations as one of the most revered elements of the UK constitutional principle of the rule of law. A. V. Dicey[13], for many years the unchallenged exponent of the law of the constitution identified "the idea of legal equality" as a keystone of the UK concept of the rule of law. He contrasted it with the continental civil law concept of *droit administratif*, under which the acts of government officials are subject to special rules different from those of the ordinary law, a state of affairs which was "totally different from the legal situation of servants of the state in England (sic.)" and "fundamentally inconsistent with … the due supremacy of the ordinary law of the land." Yet the way in which the Review appears to be intending to treat the impact of any reform to judicial review on the operation of devolution would inevitably introduce arbitrary differences in the amenability of different decision-makers, exercising identical powers,

[13] Dicey A V *Lectures Introductory to the Study of the Law of the Constitution* (London 1885)

to judicial review – such differences being generated solely on whether or not the power in question is devolved or reserved.

The artificiality of the proposed reserved / devolved distinction in relation to entitlement to judicial review

20. Turning to how the proposed distinction between "judicial review in its application to reserved and not devolved matters" would operate, in relation to the reform of judicial review, the starting point is to underline the constitutional equivalence between the position of UK Ministers on the one hand and that of Welsh Ministers and the ministers of the other devolved administrations on the other. Both UK Ministers and ministers in devolved administrations can only act in exercise of powers specifically conferred on them – usually by statute but occasionally under the royal prerogative. Devolution operates by allocating such powers to one set of ministers or the other by reference to (a) the subject matter of the power and (b) the geographical area in relation to which it can be exercised. Welsh Ministers can only exercise powers in relation to Wales and provided the power in question relates to a matter that has not been reserved to the UK. (The latter qualification is a simplification because of the continuing effects of the *ad hoc* way in which powers were originally devolved to Wales, but is broadly, and increasingly, correct.)

21. In the case of subjects which are not reserved, Welsh Ministers often continue to exercise, in relation to Wales, powers under Acts of the Westminster parliament, for example the Highways Act 1980 or the Town and Country Planning Act 1990. They do so in parallel with UK Ministers, who exercise the self-same powers, but only in relation to England. Even where devolved legislation (e.g. the School Standards and Organisation (Wales) Act 2013) has now superseded, in relation to Wales, the original England and Wales statute (the School Standards and Framework Act 1998) the general nature of the powers exercised by Ministers continues to be the same in the two countries. The prospect which the Introduction to the Call for Evidence appears to open up, however, is that the availability of judicial review as a procedure for challenging acts of Welsh Ministers might be materially different from that relating to acts of UK Ministers even though the nature of the acts was identical. That would clearly offend against the principle that legal remedies

should be equally available against all public officials unless the difference can be justified on rational grounds.

22. In addition to the usual situation in which UK Ministers and their devolved counterparts exercise identical or similar powers within the respective jurisdictions, there are, in relation to Wales, a significant number of powers exercisable *concurrently* by UK and Welsh ministers, in relation to Wales. Examples are s.185 of the Housing Act 1996 (definition of persons to be treated as persons from abroad and therefore ineligible for housing benefit) and ss.57 and 58 of the Landlord and Tenant Act 1954 (power to issue certificates relating to the occupation and use of land owned by certain public bodies). For the entitlement of a person whose rights are affected by the exercise of these and other concurrent powers *in relation to Wales* to depend on whether they had been exercised by one administration rather than the other would clearly be irrational and contrary to the principle of equality under the law.

23. A further class of case illustrating the unacceptable consequences of making the availability of judicial review dependent on whether the power being exercised is devolved or reserved relates to the exercise of powers *jointly*. This can arise where a power has been devolved in relation to Wales but its nature calls, from a practical point of view, for it to be exercised on a cross-border basis, using the powers of one administration in relation to England and those of the other in relation to Wales. Examples of regulations made jointly by a UK Minister and the Welsh Ministers include the Environmental Permitting (England and Wales) Regulations 2016 and the Water Resources (Abstraction and Impounding) Regulations 2006. It would be absurd, in such cases, if there were two different entitlements to seek judicial review of a single set of regulations depending on the claimant's choice to bring proceedings against the UK Government rather than the Welsh Ministers.

The right approach

24. If there is a case for reform of certain aspects of the judicial review process then this should be examined on a basis that enables its inevitable impact on the exercise of devolved powers to be given the same degree of rigorous scrutiny and public debate as its impact on

reserved powers. Whether it is practical or desirable to create, as a consequence of devolution, different rules affecting the availability of judicial review, depending on the subject-matter of the decision or the identity of the decision-maker are questions which should be integral to the Panel's deliberations. The topic is too important constitutionally, and the risk of unintended consequences too great for it to be treated as a question of mere consequential detail.

25. It should be recalled that Parliament has specifically reserved from the legislative competence of the Senedd Cymru (Welsh Parliament) "judicial review of administrative action". As far as the subject matter of the Panel's deliberations is concerned, the UK Parliament is therefore the only legislature that Wales has. For a reform of judicial review to be contemplated without full and proper consideration of how such reform might impact, even if only consequentially, on the exercise of devolved powers in Wales would mean that Parliament was being invited to neglect its responsibilities to Wales as the relevant legislature in relation to such matters.

Conclusion on context of devolution

26. The Association therefore believes that any Call for Evidence is premature and incomplete unless it spells out in detail the nature of the reforms contemplated and how these would be likely to give rise to differences in the availability (including any new procedural constraints) of judicial review in relation to the exercise of identical powers by UK and devolved administrations respectively, including the particular complexities to which the existence of concurrent and jointly exercised powers give rise.

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

27. We firstly question whether any statutory codification of the grounds for judicial review would be consistent with the UK's uncodified constitution arrangements and our system of checks and balances. It is difficult to comment without specific proposals to comment upon. It is also unclear if there would be any public appetite for such a change, there being a lack of any empirical evidence supporting such a change.

28. We would also question, in line with forceful pronouncements of the House of Lords in *R (Jackson) v. Attorney General* [2005] UKHL 56 at paragraph 103 (per Lord Steyn) and the Supreme Court in *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46 at paragraph 51 (per Lord Hope) whether any such code could (and indeed should) oust judicial review of prerogative powers on grounds which would fall outside of the code. It would not and could not *wholly* define the circumstances in which in which any executive decision may be determined to be unlawful by the higher courts. A code would, in effect, create a two tier system of judicial review, whereby exercise of prerogative powers could be held to be unlawful on the basis that it is not compatible with the terms of the code *and* on the basis that it breaches common law principles.

29. In any event, we would question whether any such code would bring clarity. Historically, statutory intervention in judicial review has been problematic, seeking to define a process which has developed in common law over hundreds of years, the uncodified nature of which provides the advantage of flexibility. As an example, we note s.31(2A) and (3C)-(3F) of the Senior Courts Act 1981 (as amended) and the introduction of the "no substantial difference" test, which sought to define an aspect of the judicial discretion to refuse to grant a remedy and refuse permission to apply for judicial review. We observe that these changes did little to bring clarity to the exercise of judicial discretion, and have required subsequent consideration and definition by the courts in a number of cases (see for example *R (Goring on Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, *R (Williams) v Powys County Council* [2017] EWCA Civ 427, and *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin)).

30. With regards to the scope of judicial review, we consider that the common law tests of legality are sufficiently clear, whilst not being so prescriptive as to act as an inflexible bar to judicial review as times change. Judicial review is the exercise of the supervisory jurisdiction of the higher courts which "*regulates the affairs of subjects vis-a-vis public authorities*" (*O'Reilly v Mackman* [1983] 2 AC 237 at 255).

31. The common law definition of a public authority is purposefully and properly wide with a view to ensuring that those exercising "*public functions*" (CPR 54.1(2)(a)(iii) and see also *R v Panel on Takeover and Mergers ex parte Datafin* [1987] QB 815) are subject to the supervisory jurisdiction of the courts. The flexibility of the common law tests are, in our

view, a necessary safeguard to ensure that all actions and decisions taken by a body on behalf of the public are taken lawfully.

32. With regards to the clarity of the procedure for making and responding to an application for judicial review, it is our view that the process is sufficiently clear as set out in Civil Procedure Rules Part 54 and would be unlikely to be improved if the procedure were to be moved to a statutory code. We further note that the Administrative Court publishes guidance annually on judicial review practice and procedure in the *Administrative Court Judicial Review Guide* (latest edition, 2020, published September 2020)[14]. We would observe that this guide does much to clarify the process and is set out in a user-friendly format, which is intended to be clear for lawyers and non-lawyers alike.

33. In summary, the principle of justiciability in its current form and the flexibility of judicial review as the instrument of the common law in upholding the Rule of Law through the Courts is an essential counterweight to balance the potential for unchecked abuse of power by the Executive within the UK's unwritten constitutional arrangements.

Whether the legal principle of non-justiciability requires clarification

34. We consider that a statutory definition of the concept of justiciability would be difficult. In any event, we would observe that the common law definition of the concept of justiciability has been well discussed and adequately defined, without seeking to inappropriately cap the concept, in *R (Miller) v The Prime Minister* [2019] UKSC 41 at paragraphs 28-52, as well as other important cases, such as *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508, *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513).

35. To the extent that it may be suggested that greater clarity is needed, we would suggest that the advantages of flexibility afforded by the common law far outweigh any potential for a clearer definition that may follow from a concrete definition in statute.

[14] See - https://www.gov.uk/government/publications/administrative-court-judicial-review-guide.

36. Finally, we would question whether it would be contrary to the rule of law if ousting of the judicial interpretation of justiciability were attempted.

Whether procedural reforms to judicial review are necessary

37. Before turning to the specific points set out in the questionnaire on procedural reforms, we would generally observe that there is already a well-known and, in our view, appropriate procedure for judicial review claims, as set out in CPR Part 54. Useful and user-friendly guidance on the procedure is available in the Administrative Court Judicial Review Guide 2020 (published by the Administrative Court Office annually). It is our view and experience that, generally, the judicial review procedure is fit for purpose and is sufficiently "streamlined", incorporating a permission stage to filter out unarguable and unmeritorious claims at an early stage (which as observed above is an effective and working system). We now turn to the broad headings as set out in the terms of reference and will, in considering these headings, seek to address questions 6-13 of the call for evidence.

Disclosure and the Duty of Candour

38. In our view, disclosure and observance of the duty of candour is simply a principle of good governance and administration. The knowledge that there may be a need to disclose decision making documents as part of the Defendant's duty of candour (or as part of an order for disclosure) in Court proceedings encourages good first-time decision making. Any watering down of the principle of the duty of candour or removal of the ability of the Court to order disclosure would be contrary to that principle.

39. In any event, as observed in the Administrative Court Judicial Review Guide 2020 at paragraph 6.5, "*The duty of candour ensures that all relevant information is before the Court. The general rules in civil procedure requiring the disclosure of documents do not apply to judicial review claims… In practice, orders for disclosure of documents are rarely necessary in judicial review claims.*" The duty of candour, reinforced by the power of the Court to order disclosure of evidence, is as streamlined as it can be without removing a vital check on public decision making, contrary to the principle of good administration as

well as the rule of law. The persons to whom powers are entrusted to exercise on behalf of the public would be unaccountable, if there was no duty of candour.

40. We would also observe that the alternative would appear to be a system of standard and specific disclosure, which would likely be far more onerous.

Standing

41. In our experience, this is not an issue that troubles the Court often. Rather, issues of standing are few and far between. Nason examined 482 Administrative Court Judgments (two six-month samples from 2013 and 2015 respectively). Of this sample only four cases raised issues of standing, none related to the clarity of the standing test itself but rather its application to the particular claimants, in three of the four cases the claimant(s) were found not to have standing.[15] This suggests there are no issues with the administration of justice and good governance arising from this issue.

42. The law on standing is well defined and appropriate. It is based on a sufficient interest in the claim (see s.31(3) of the Senior Courts Act 1980). This is a test which ensures that, generally, only those directly affected by the claim or public interest groups may challenge the decision of a public body by way of judicial review, unless there is a genuine public interest in a claim proceeding. Given that it is impossible to list all decisions that a public body has in the past made or will in the future make, it is impossible to definitively define who may have a sufficient interest. It is for that reason that there is no test defined in statute or code (as recognised in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 and in the Administrative Court Guide 2020). It is a judgment made in all the circumstances which must be applied in a case by case basis.

43. Both the impossibility of definitively defining standing and a sufficient interest and the principle that executive action and public body decision making must not be inappropriately shielded from judicial scrutiny without good reason, favour the current common law principle of standing.

[15] *Reconstructing Judicial Review* (n x) ch.6

Judicial Review Time Limits

44. CPR 54.5(1) requires that claims are brought "*promptly and in any event not later than 3 months after the grounds for making the claim first* arose".[16] The Court has power to refuse permission to apply for judicial review should the claimant not have acted promptly, which ensures that claims are brought as expeditiously as possible.

45. We would suggest that there is a balance to be struck between allowing a claimant time to properly prepare their case and giving pubic bodies the breathing space to adjust or reconsider (on the one hand) and ensuring that public body decision making is not inhibited by delays (on the other hand). In our view, the balance is already appropriately struck.

46. We would observe that we are not aware of any evidence that the current time limits cause any problems with good public administration or the judicial process. Nor are we aware from our experience of working for, working with and representing public bodies of the time limits causing any such issues. In our view, reducing the time limit would require evidence of significant administrative difficulties such as outweigh the interests of justice in allowing claimants time to prepare their case.

47. We would observe that there are already difficulties for claimants and claimant practitioners in a 3 month time limit, especially in cases which involve vulnerable clients who may be slower to obtain legal advice and where delays in obtaining legal aid impact upon how expeditiously a claim can be prepared and issued.

Remedies and the principles on when relief is granted

48. The current remedies available in judicial review are based upon the centuries old common law prerogative writs system which were recognised in statute by s.7 of the Administration of Justice (Miscellaneous Provisions) Act 1938, and see ss.29(1) and (1A) and 31(1), (2) and (4) of the Senior Courts Act 1981 for the present statutory provisions. We would

[16] Albeit, it should be noted that shorter timescales apply in specific types of claim to ensure consistency with statutory time limits in similar areas (see, for example, CPR 54.5(5) for planning law judicial reviews and CPR 54.5(6) for public procurement judicial reviews).

observe that any amendment of the remedies available in judicial review is, therefore, not a procedural point which may be amended by the executive or the Civil Procedure Rules Committee.

49. We would also observe that we are not aware of any evidence and have no experience in practice which would suggest that the current remedies available to the higher courts are inflexible or have not delivered appropriate redress when granted by the courts.

50. We would further observe that inherent in the present system is a natural flexibility as all remedies are discretionary (see *R (Baker) v Police Appeals Tribunal* [2013] EWHC 718 (Admin) and, thus, where, for example, a remedy would serve no useful purpose or the claimant has suffered no prejudice or harm, none will be granted. The flexibility of the discretionary remedy allows the court to assess on a case by case basis whether a remedy is appropriate.

51. In our view, the present system of remedies is fit for purpose.

Permission and appeal routes

52. The procedural routes for judicial review, including permission to apply for judicial review and appeals thereafter are well set out in the Civil Procedure Rules, parts 54 and 52 and explained in accessible terms in the Administrative Court Judicial Review Guide 2020, parts 6-10 and 25. We consider that the current procedural framework is appropriate and there is no evidence of which we are aware of issues arising from the appeal framework which act as any barrier to access to justice or good administration.

53. We would also observe that it is our experience that the current system appears to act as an appropriate filter to remove unarguable and meritless claims and it is appropriately streamlined. Any apparent delays may well be down to lack of sufficient judicial resources, albeit we would observe that more recently statistics suggest that the Administrative Court Office and the Administrative Court are allocating, hearing, and concluding cases in relatively good time.

54. In 2019, 69% of applications for permission were considered within 3 months and 71% of substantive hearings were determined within 9 months (see Administrative Court User Group Meeting Minutes of Wednesday 27 March 2019)[17]. Delays appear, therefore, minimal, and do not, in our experience, act to inhibit proper access to justice or good administration.

55. In summary, we do not consider that any changes to the current procedural framework are necessary or desirable.

Interveners

56. We would note that interveners have a distinct role within judicial review proceedings, separate to that of the original parties. Interveners can be a useful tool for the Court and can bring evidence and perspectives before the Court which may not be available or apparent to the parties (as observed by Mr Justice Ouseley in *R (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change* [2010] EWHC 1554 at paragraph 8).

57. The current procedural regime on when an intervener may take part in proceedings already acts to prevent unnecessary intervention. Under CPR 54.17, an intervenor requires the permission of the Court to file evidence or make representations and any application must be made promptly. Further, the Court will not grant permission to intervene simply on the basis of an interest in the proceedings and the Court will not grant permission if the intervention would be unlikely to have a significant impact on the case (see *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin)). As such, intervention is controlled by the Courts on a case by case basis and is reserved for those cases where the intervention will have a beneficial impact on proceedings.

58. We would also note that in the rare cases where interveners are permitted to make representations in judicial review proceedings, they are doing so in the knowledge that no

17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831268/Administrative_Court_User_Group_meeting_minutes_27.3.19.pdf accessed on 19 October 2020.

other party can be ordered to pay their costs unless there are exceptional circumstances (per s.87(3) and (4) of the Criminal Justice and Courts Act 2015). Further, in the event that the intervenor has, in intervening, acted as a principal party, has not been of significant assistance to the Court, has submitted evidence the significant part of which relates to matters the Court does not need to consider, or has acted unreasonably, then the Court must order the intervenor to pay the costs of an applying party relating to the intervention (per s.87(5) of the 2015 Act). As such, where an intervenor decides to and is granted permission to intervene, they will almost inevitably have to meet their own costs and they run the risk of paying the costs of other parties associated with the intervention.

59. We would suggest that a costs regime which is weighted so heavily against intervenors will already do much to reduce intervention to only those cases where the intervenor has significant resources and where the intervenor is satisfied that their intervention is absolutely necessary and can add a necessary perspective for the Court.

60. Considering the above, we do not consider that any changes to the procedural and costs regime relating to intervenors is necessary. There is no evidential basis to suggest that intervenors cause a particular issue for the Court or the parties. Further, the regime is already weighted so heavily against intervention that we consider it more likely that intervenors who could genuinely add useful perspective for the Court will already be dissuaded from intervention. Attempts to put in place procedural reforms to further dissuade intervenors would disproportionately prejudice such intervenors and risk genuine and useful evidence and submissions from perspectives that may be relevant but not shared by the parties from coming before the Court.

Costs

61. We would observe that question 7 of the call for evidence appears to concentrate on and be informed by the implicit suggestion in the call for evidence that "*the rules regarding costs in judicial reviews* [are] *too lenient on unsuccessful parties or applied too leniently in the Courts*". We would observe this suggestion is directly contrary to the actual law on costs in judicial review. The general rule in judicial review proceedings is that the unsuccessful party will pay the costs of the successful party (see CPR 44.2(2), *R (M) v*

Croydon London Borough Council [2012] EWCA Civ 595 at paragraphs 58-65, and the Administrative Court Judicial Review Guide 2020 at part 23).

62. We would observe that there is an element of uncertainty as to which party will be awarded costs, if any, where a claim settles without a determination by the Court. This is not to say that there is not an established and appropriate process in place for dealing with such scenarios. The procedure is well set out in the Administrative Court Judicial Review Guide 2020 at part 23 and the ACO Costs Guidance of April 2016 and anticipates short submissions and a decision on the papers to minimise further costs. *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595 sets out the principles as to when costs will be awarded after settlement, which maintains the point that the claimant must have succeeded in terms of the relief sought before costs can be recovered. The uncertainty comes from the inevitable fact that it is often difficult for the parties and the court to establish if the claimant has obtained relief as a result of the proceedings or not. This is, in our view, a qualitative judgement that is best taken by a judge and it is appropriate that the procedure is kept to a minimum to reduce further costs. In summary, the present system is as effective as it can be, taking into account the need for such proceedings to be proportionate.

Alternative Dispute Resolution

63. In our experience ADR is sometimes, but seldom used in judicial review proceedings. That is not to say that negotiations do not often take place between the parties to settle proceedings, they do (as evidenced by the statistics as referred to above). In our experience the parties often comply with their duties to consider their case when permission is refused or granted before proceeding.

64. However, formal ADR is seldom embarked upon. This is, in our experience, in part due to the tight time limits which often do not allow for any form of ADR before a claim must be filed. In part this can be, but is not exclusively, because the remedy sought focuses upon a point of law, such as statutory interpretation or the lawfulness of a policy, rather than a specific outcome sought by the claimant. This is not to say that there may not be a proper place for ADR, it is simply that its appropriateness will be case specific.

65. In any event, we would encourage and expect any such changes to be implemented after proper investigation of options and to be evidence based. We would also suggest that any such recommendations by the panel would be best considered and implemented by the Civil Procedure Rules Committee.

Conclusion

66. In conclusion, we would reiterate that we have concerns as to the manner in which this review is being conducted and, in particular, the lack of proper consideration of devolution. There also appear to be potentially grave consequences arising for the rule of law in Wales and England and our system of checks and balances.

67. Where evidence is called for in relation to practice and procedure, in general, it is our view that the current judicial review procedure operates in a streamlined and balanced manner and changes are not just unnecessary, they are undesirable.

68. We thank the panel for considering this submission and would welcome the opportunity to respond to a more specific consultation.

The Executive Committee of Public Law Wales