Submission by the Administrative Justice Council

to the Call for Evidence by the Independent Review of Administrative Law

October 2020

The Administrative Justice Council

The Administrative Justice Council (AJC) oversees the administrative justice system in the UK and advises government, including the devolved governments, and the judiciary on the development of that system. The Council's purpose is to ensure that the administrative justice system is accessible, fair, and effective. It shares learning and areas of good practice across the UK and provides a forum for the exchange of information between government, the judiciary, and those working with users of the administrative justice system. It also identifies areas of the administrative justice system that would benefit from research; and makes proposals for reform. The Council is chaired by Sir Ernest Ryder.

This submission is the response of the Administrative Justice Council to the Call for Evidence issued by the Independent Review of Administrative Law. However, it does not represent the views of either civil servants of the UK and devolved governments or judges who are also members of the Administrative Justice Council.

Summary

The AJC welcomes the opportunity to respond to the call for evidence issued by the Independent Review of Administrative Law (IRAL).

The overall view of the Administrative Justice Council is that judicial review is an essential remedy by which individuals can challenge and correct unlawful government decisions. It is a fundamentally important remedy for individuals seeking redress against government departments and other public bodies. Judicial review ensures that government acts according to the rule of law and that government bodies do not exceed the limits of their legal powers. Furthermore, judicial review is not solely a court remedy. An essential feature of a healthy democracy is the role of the courts in holding government and public bodies to account by ensuring that they do not exceed the limits of their legal powers.

We take the view that any changes to judicial review need to be informed by relevant evidence and data and must be fully justified. We do not wish to see any reduction in the protections provided by judicial review. We consider the current position to provide the basis to build upon in terms of widening access to justice for claimants and for enhancing the effectiveness of judicial review in terms of checking the legality of government action and its impact upon government. Given the importance of judicial review, our view is that any reforms should be undertaken with care, allowing sufficient time for proper consideration and with full consultation. In this respect, we note the relatively tight timescale of the IRAL's Call for Evidence. We would be concerned if there was a risk of reforms being hastily devised and thereby creating a risk of unintended consequences with potentially negative implications.

The starting point of the IRAL is 'whether … the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government.' We note that it may be thought that the questions in the Call for Evidence suggest that there has been an increasing imbalance with judicial review having become too much of an impediment to effective and efficient government has been given too little weight. If so, we would question this assumption given the fundamental role of judicial review. Further, we note that the materials published by the IRAL could have done much more to explain in detail the underlying reason or purpose of the review or the perceived problem that it is seeking to address.

Given the role of the Administrative Justice Council and its expert membership, which reflects a broad range of specialist knowledge about administrative law, we would welcome an informed discussion with the IRAL and ministers to better understand the reasons for the review so that the AJC could contribute constructively to the review process and an extension of timescales for this purpose.

1. **Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?**

   We would like to see more evidence-based understanding of how judicial review currently works. For instance, the IRAL's terms of reference refer to whether procedural reforms to judicial review are necessary given the burden and effect of disclosure and the duty of candour, particularly on government. We would like to see empirical evidence, collected through a robust and consistent methodology, about how judicial review affects the policy-making process within government. Given the expertise of the AJC's academic panel in this respect, the Council thinks that it is important for there to be systematic evidence-based empirical research into this and other important matters concerning the practical operation of judicial review. For this to happen, government must be willing to be more open and to allow such research. We doubt whether the IRAL's Call for Evidence questionnaire is an adequate or acceptable substitute for empirical evidence using a robust and consistent methodology. We would also like to see the evidence supporting the view that the current operation of judicial review is unbalanced against government.

We also note that government is considering further reforms to judicial review whereas the most recent set of reforms, introduced by the Criminal Justice and Courts Act 2015, have not yet been subject to a post-implementation review. We think that there should be such a review before any further changes are proposed.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

A major issue is the resourcing of legal aid. We think that any review of the balance between the rights of citizens to challenge executive decisions and effective government action should consider wider systemic factors that are likely to impact that balance. Such factors include matters such as access to specialist legal advice and funding, 'advice deserts' in public law generally and in particular fields (e.g. social care). We think it is important to consider such matters as they can limit access to judicial review in important areas of government.

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?

Codifying the principles of judicial review in legislation would be a complex task requiring considerable thought and discussion. There are a number of different models of statutory codification that could be pursued, ranging from relatively simple summary of the grounds of judicial review to a much more detailed code. The devil really would be in the detail about the precise objectives of such an exercise, the pros and cons of the range of options for achieving those objectives, and the degree the option selected would actually achieve its purposes. There would also be the need to build in evaluation from the outset.

We consider that while there is a case for statutory intervention to codify the principles of judicial review, it is a weak one. The principles of judicial review are well-established, and they provide the wider constitutional backdrop against which Parliament legislates. The principles are clear and certain. These principles were subject to a de facto "judicial codification" by Lord Diplock in the *GCHQ* case (1985). The principles have been summarised in case-law, practitioner guides and textbooks.

While statutory codification intervention might provide a degree of certainty and clarity, there is a risk that it would, in practice, be something of a mirage. This is because the application of those principles inevitably turns upon the specific circumstances of individual challenges. In any event, the courts have repeatedly noted that the principles are not written in tablets of stone, but that they necessarily develop over time in response to a variety of different factors, such as: the growth in administrative power; and the Human Rights Act 1998. This has been shown to be an appropriate means of developing judicial review.

Codification is arguably unnecessary and carries other potential risks and unintended consequences. There is the risk that any statutory codification would not necessarily add much by way of certainty or clarity, but that it could limit the development of judicial review and increase the complexity of the law. The purpose of judicial review is to ensure government acts according to the law, yet in practice the government dominates Parliament and has a major influence on the content of legislation. There is an obvious risk that codification could be the means by which government could unreasonably seek to limit or curtail judicial review. Yet, the purpose of judicial review is to provide an independent and judicial process for reviewing the legality of government policies and decisions. Judicial review has been developed by the courts on an incremental and gradual basis. Statutory

codification would partially replace this approach through a major and unprecedented statutory intervention by Parliament. This would be an important change that would require proper scrutiny. We do not see any case at all for reducing or weakening from the current position. We would be very concerned to see any attempt to limit or constrain the current principles of administrative law.

Even if statutory codification merely summarises the current grounds of review – legality; procedural fairness; and unreasonableness/irrationality – there is also the risk that placing the grounds of review on a statutory footing would set a unwelcome precedent; it could enable a future government to limit or curtail judicial review. This is an important point to highlight given that the principal purpose of judicial review is to ensure government acts and decides according to law.

As regards complexity, the courts have long held that they will "read-in" the legal principles of judicial review into legislation when it is silent on the matter. Statutory codification would not therefore prevent the courts from developing common law principles of judicial review. There would then be two potential groups of principles: statutory judicial review principles (which would be subject to judicial interpretation) and common law judicial review principles.

Another option would be to write a general code of good administration and procedure. Such codes are common in continental European and other jurisdictions. They have a much wider ambit and function than just placing in principles of judicial review on a statutory basis. We note that in practice the task of devising such a code has often been a lengthy and complex process undertaken over a number of years by expert committees, a somewhat longer period of time than that envisaged by the current review.

We wish to make two other points. First, it is well-established in the case-law that the application of judicial review principles very much depends upon the context in which a legal challenge has been brought. Second, it is also clear that the courts balance legality against other competing interests, such as administrative practicalities and the public interest. This is apparent from many decided judicial review cases applying principles such as irrationality and legitimate expectations. The best means of understanding judicial review in practice is to read court judgments.

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

Yes, it is clear which decisions and powers are subject to judicial review. The courts have developed the judicial review jurisdiction on a case by case basis. The range of decisions and powers that are subject to judicial review is clear from reading judicial decisions.

Our concern is that if the government did seek to legislate to make certain areas or powers non-justiciable, then this would increase the scope for unlawful government decisions, because such decisions could not be challenged by way of judicial review. The principle of the rule of law requires that government should not exceed the limits of its statutory powers conferred on it by Parliament or long-established legal principles (e.g. legality, procedural fairness, and irrationality) which promote good government. For this reason, we do not wish to see any restriction in the range of areas or government powers which are currently justiciable.

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?

The process for lodging a claim for judicial review is well-established and is well-known to experienced practitioners. However, we do have concerns as to whether the process is sufficiently clear for litigants in person. We think that there may be scope to improve the provision of information about the judicial review process for litigants in person.

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 judicial review process, in particular the requirement to be granted permission, operates efficiently. The process enables claims deemed by the court to be unarguable to be filtered out efficiently. Our experience is that there is a considerable amount of pre-litigation activity, such as letters before claim and pre-action protocol letters, which results in potential claims being resolved without resorting to a formal claim being lodged. Many potential cases settle out of court at the pre-action stage. Put together, pre-litigation correspondence and the permission requirement make judicial review an efficient process for resolving many disputes without the need for formal litigation.

As regards time limits, claimants must lodge judicial review claims within three months, and in any event promptly. In practice, the claimant's 'journey' can often include various delays, which are not of their making. These delays include:

- Efforts to try and resolve the practical problem that the public authority decision has presented them with;
- Lack of awareness in civil society of public law principles and the availability of judicial review to tackle daily life issues (we note that media coverage of judicial review cases focuses largely on cases which raise constitutional or high-level policy issues);
- The lack of awareness of the availability of legal aid pursuing judicial review cases and difficulties in securing legal aid;
- Difficulties in finding the right kind of legal specialist to advise potential claimants;
- The lack of information about how a public body has taken a decision and hence the need for substantial investigative work by the instructed solicitor in the initial stage of handling an individual's case; and
- The practical operation of the Pre-Action Protocol process.

These barriers can increase with the vulnerability of an individual client. In practice, AJC members who are practitioners note that it can be difficult to meet the three-month time limit in many cases. Extending the time limit might increase the proportion of cases that settle before the formal issuing of a judicial review claim thereby reducing costs. Conversely, shortening the three-month time limit could reduce the proportion of cases that settle at the pre-action stage and thereby increase the number of judicial review claims formally lodged with the Administrative Court.

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

As a matter of principle, we think it is important that potential claimants with properly arguable cases should not be deterred from bringing judicial review proceedings by the potential financial costs. The current costs rule, by which the losing party will normally bear all litigation costs, is likely to exert a deterrent effect which would impact on meritorious and unmeritorious claims alike. The courts already have the power to make costs orders in response to the inappropriate conduct of a case and use them in such a way that they do not

seem to have a deterrent effect. In most cases, legal aid will not be paid if a judicial review claim is refused permission. The 'playing field' between claimants and respondent public bodies is already unlevel when it comes to costs in that the risk of an adverse costs order does not impact on a public authority (or individual decision-makers within it) in the same way that it does on most claimants. There is little in the current system to disincentivise public bodies from relying on unmeritorious defences when responding to judicial review claims.

When there is a tension between the deterrent effect of costs and effective access to the courts, then we think the balance should fall in favour of the latter. This is because judicial review is not solely a means by which individuals can seek protection of their individual rights against government; it is also a means by which the courts uphold the wider public interest in ensuring government fulfils its public law duties on behalf of the public as a whole. It is in the public interest that government acts lawfully. Judicial review also has a related function in requiring public bodies to act in accordance with the principles of administrative law and of good administration. There is often a wider public interest at play in judicial review proceedings.

In this respect, the costs incurred by government when it is unsuccessful in judicial review proceedings should not be viewed as a burden, but as a necessary price worth paying because of government's wider responsibilities to act in accordance with the law and principles of good administration. The public interest in judicial review litigation reinforces our concern that the costs rule may deter parties with arguable cases from bringing judicial review claims.

As regards the operation of costs in practice, we think that there is a need for systematic empirical data concerning the operation of costs in practice. We think it is necessary to have more detailed information on the overall operation of costs and to have a better understanding of how it drives litigant behaviour.

We also think it may be useful to consider practices elsewhere. For instance, in the US, a litigant only pays their own costs irrespective of who wins the case. The rationale is that a party with a legitimate legal action should not be deterred from bringing their case to court. This is an important consideration when litigation concerns the lawfulness of government action because government is not just another private party. The courts have recognised that there is special responsibility on the government, for instance, to fulfil its duty of candour in the context of public law litigation.

We note the previous government's refusal to implement the proposal in the Jackson Report to introduce qualified one-way costs shifting. In the interests of evidence-based policy-making, we would favour such an approach being piloted and for the pilot to be subject to a full independent evaluation.

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?

As above, we would like to see more systematic data and evidence concerning costs before reaching a concluded view on the proportionality of costs. However, we have noted that the combined effect of pre-litigation letters before claim and the permission stage make the process operate efficiently in practice.

We address the issue of standing below.

As regards unmeritorious claims, the courts have the ability at the paper permission stage to refuse claims as unarguable and to certify claims as Totally Without Merit, with the

consequence that they cannot be renewed at an oral hearing. We consider this to be an appropriate and proportionate means of dealing with unmeritorious claims.

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?

When the court upholds a judicial review claim in favour of the claimant, the position is that the court will select the most appropriate remedy in the circumstances. Public law remedies are discretionary; they are not available as of right. The Criminal Justice and Courts Act 2015, s.84 introduced the "highly likely" test.

We think that there is scope for the courts to develop more flexible remedies in appropriate cases, such as requiring a government body to report to the court on, for instance, the development of a new policy or plan. Such ongoing judicial supervision is important in those cases in which the court has issued declaratory relief, for instance, on the discriminatory nature of regulations which are left in place to avoid administrative disruption, although disapplied for the claimant who brought the case. The regulations continue to have real life consequences on other individuals each of whom will have to find their own legal assistance to deal with it (and they may well encounter obstacles to that claimant journey).

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

We think that public bodies and government could do more to minimise the need for judicial review. This is borne out by the volume of potential judicial review claims that are resolved before formal proceedings are lodged. Further, individuals have, in some areas, experienced high levels of success when challenging public bodies before both tribunals and ombudsman schemes. This suggests that public bodies could do much to raise the quality of their own decisions and actions. They should increase their awareness and understanding of administrative law principles. Judicial review, alongside the work of ombudsman schemes and the tribunals, is a means of ensuring good administration. Public decision-makers should do more to learn from decisions of the Administrative Court, tribunals and ombudsman schemes. They should receive formal training in the principles of administrative law.

Government bodies could also improve their internal processes for reviewing administrative decisions. We note the Law Commission's current project on internal administrative review. We are aware that in the social security context, resort has increasingly been made to judicial review proceedings in response to delays by the Department for Work and Pensions in undertaking mandatory reconsiderations of initial benefit decisions. We think there is scope for improving such internal administrative review processes across government.

There is also scope for improving the dissemination of administrative law principles and important decisions cases within government. In judicial review proceedings, the courts often interpret legislation and such rulings will often affect many other similarly placed individuals in addition to the claimant. More effective internal dissemination of such rulings within government could promote better decision-making. There could also be better pre-action disclosure and better compliance by public bodies with the duty of candour, which could be more effectively policed by the courts if proceedings are issued unnecessarily.

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?

The AJC Advice Sector Panel, which is comprised of frontline advice sector organisations, has confirmed that the vast majority of judicial review cases settle in response to a pre-action letter. In the context of non-immigration social welfare cases, experienced members of the panel have estimated that around 80 per cent of cases settle following a Pre-Action Protocol letter, with the consequence that there is no need to issue a formal judicial review claim. The more obvious the flaw by a public body in its decision-making, then the more likely it is that a case will be settled.

The experience of panel members also indicates that cases most likely to require the formal issuing of judicial review proceedings include: (i) those in which there is a dispute concerning a matter of statutory interpretation or legal principle which requires authoritative resolution by the court; and (ii) cases in which the public body's legal team have not properly considered the judicial review claim at the pre-action stage.

In the context of immigration judicial review litigation, research has found settlement to be a common feature.[1] The settlement of immigration judicial reviews at the door of the court is common, largely because of the pressure on the Government Legal Department and claimant representatives and the volume of immigration judicial reviews. Upper Tribunal judges have highlighted the inefficiency of this. It might be possible to seek to ameliorate the negative aspects of late settlement through engagement by all of the parties involved.

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?

There has been a number of attempts to introduce ADR into the judicial review process, but they have not amounted to much. Various explanations for this may include a lack of will or interest between the parties and concern as to whether ADR is an appropriate mechanism in many types of cases. ADR can also be costly given that the availability of legal aid is not guaranteed other than that provided through 'Legal Help', but this is not a financially sustainable source of funding for practitioners. The risk with ADR is that without legal assistance, many claimants would be a serious disadvantage and may settle for less than what they would be entitled to had the case been decided by a court.

It is also the case that a great deal of work is often undertaken at the pre-action stage in order to resolve disputes without the need to issue formal claims. This occurs in the majority of cases and it in effect amounts to a form of ADR. As noted above, this work is often effective in a significant proportion of cases. However, in practice this pre-action work can often be hindered by the tightness of the three-month time limit, which can curtail what might otherwise be a productive discussion between the parties leading to an effective resolution without the need for court proceedings.

More generally, we note that the effectiveness of ADR depends on the particular policy/administrative context, the attitude and approach of the parties involved, and the specific nature of the legal dispute between the parties. ADR is more likely to be able to work effectively if the parties are willing to engage sensibly and properly with each other. ADR is less likely to work well if the parties have deeply entrenched positions and/or adopt an adversarial stance. There may be scope for developing a set of best practice guidelines as to how ADR could be made to work more effectively in particular areas of public law litigation. If so, we would look to government to engage constructively with the Administrative Justice Council and practitioners in this respect.

[1] Thomas and Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation, 2019).

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?

We do not think that the rules of public interest standing have been or are being treated too leniently by the courts. We think that the rules of public interest standing should remain as they are.

The courts have, for many years, recognised that the law on standing allows not just individuals directly affected by a government to bring judicial review proceedings, but also challenges by informed interest groups. There have been cases in which the courts have adopted a very liberal approach to the issue of standing, such as: *R v Foreign Secretary, ex parte Rees-Mogg* [1994] QB 552. There have also been cases in which the courts have refused standing: *R (DSD) v Parole Board* [2018] EWHC 694 (Admin).

The courts have held that the issue of standing depends upon the context of the individual case and what best serves the purposes of judicial review in that context: *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [170] (Lord Reed). In some cases, an applicant has to demonstrate that she has a particular interest in the matter complained of. In other cases, where the claimed excess of power affects the public generally, the courts have been concerned that insisting upon a particular interest could prevent the matter from being brought before the court, and thereby prevent it from protecting the rule of law. There are other cases in which the courts have held that a party does not have standing to bring judicial review proceedings.

Although there do not appear to be any available statistical data on this point, the proportion of judicial review claims brought by campaigning groups that are granted permission is very small indeed compared to the total number of judicial review claims.

In those challenges brought by public interest groups in which the courts have found that a government policy or decision is unlawful, judicial review has served an important public interest by ensuring that government acts in accordance with the law, which includes legislation enacted by Parliament. This has been particularly important in those cases in which there was no alternative challenger to bring a judicial review challenge.

We consider that the current statutory test of standing to be appropriate and to strike the right balance. The courts possess the expertise and skills to make appropriate and informed judgments on public interest standing issues on a case by case basis. The importance of a wider "public interest" approach to standing is to ensure that legitimate and responsible bodies can bring well-prepared legal challenges against aspects of government policy. Given our oversight of the administrative justice system, we have seen this work well in practice. For instance, Detention Action brought a legal challenge against the operation of the detained fast-track asylum system, which the Court of Appeal found to be systemically unfair: *Lord Chancellor v Detention Action* [2015] 1 W.L.R. 5341.

We do not think it is accurate to categorise public interest litigation as "a form of politics by other means" or as a way in which public interest standing groups are able to defeat the wishes of the government. Government is free to act so long as it proceeds in accordance with the law enacted by Parliament and long-established common law principles. The courts are the established and independent arbiters in judicial review cases. If a court accepts the legal arguments of a campaigning group in judicial review proceedings, then it is the court, not the campaigning group, which is ruling that the government's actions are unlawful.

It is important in this respect to highlight the following points., First, there are multiple and complementary ways of holding government to account. Parliament undertakes political scrutiny of government. Ombudsman schemes ensure that public bodies follow their own

processes and procedures and the principles of good administration. Tribunals determine appeals against certain administrative decisions. The courts review the legality of government policies and decisions. Public interest standing enables legal challenges to be brought when there is either no-one else who could bring a challenge or such people lack funding to do so. Second, the courts are themselves very much alive to judicial processes being abused or manipulated by the parties and they have powers to prevent this. There is no evidence that the courts have allowed the judicial review process to be abused or manipulated by campaigning groups or that the courts are unable to prevent such manipulation. Third, when the courts apply a 'public interest' approach to standing, that alone does not, of course, mean that claimant succeeds. The claimant will still have to advance their legal grounds of challenge and will only be granted judicial review if they win on the law. Fourth, such litigation serves an important function in upholding public law principles when there is no alternative individual to bring judicial review proceedings and/or the case raises a wider matter of public law with wider implications for the public. This is a feature of public law litigation, which is concerned with the duties of government to accordance with the law. It is also a feature of public law litigation in many other liberal democracies around the world.

Many of the above points apply equally to intervenors.