IRAL Secretariat
By email only to: IRAL@justice.gov.uk

16 October 2020

Dear Sirs:

RE: Independent Review of Administrative Law – Call for Evidence

I write in response to the IRAL Call for Evidence on 7 September 2020 on behalf of the Planning and Environment Bar Association (PEBA), which represents barristers specialising in planning, environment and local government law.

A large part of PEBA members' work is acting for claimants, defendants and interested parties in judicial review claims, in addition to analogous reviews and appeals under statute, which proceed outside CPR 54. Many PEBA members are also members of the Attorney General's Panel of Civil Counsel and act frequently to defend decisions taken by the UK Government in their specialist fields.

With the co-operation and proactive support of PEBA, planning litigation has undergone substantial reforms over the last decade which has had success in speeding-up the adjudication of judicial review claims. These measures include:

- From 1 July 2013, CPR 54.5 was amended so as to require claims for judicial review under the Planning Acts (and Public Contracts Regulations) to be brought within six weeks (instead of the usual 3 months).

- From 6 April 2014, claims relating to decisions under planning legislation (as defined at CPR 54.21) must be issued in the Planning Court. The Planning Court is a specialist list within the Queen's Bench Division, led by the Planning Liaison Judge (presently Mr Justice Holgate) whose role is to allocate cases to judges with appropriate expertise.

- From 13 April 2015, by amendments to s.31 Senior Courts Act 1981, the Court must now refuse relief or leave, if it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. These legislative changes have been accompanied by development in the case law to restrain the circumstances in which the court will quash a planning or environmental decision. In ***Walton v Scottish Ministers*** [2013] PTSR 51 and subsequently in ***R(Champion) v North Norfolk District***

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Council [2015] 1 WLR 3710, the Supreme Court held that the Court retains a discretion not to quash a decision, even if a breach of an EU law derived provision is made out. This has had a restraining effect on claims.

- In 2019 a set of core and frequently cited authorities were collated into a single paperback volume, in collaboration between PEBA and the Judiciary, known as *Leading Planning Cases*. From 1 January 2020, the Planning Court expects practitioners to not reproduce authorities within the book within authority bundles. This has streamlined the preparation for hearings.

Terms of Reference

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

We do not consider there is a need to codify the grounds of judicial review in statute, for the following reasons:

Firstly, the great majority of public law decisions in the field of planning and environmental law are made pursuant to statutory powers/duties (i.e. rather than the prerogative or any other source). There is no doubt that such decisions are amenable to judicial review. Accordingly, there is no need for this to be codified.

Secondly, any attempt to exempt the discharge of certain statutory functions from judicial review would likely undermine public confidence in planning and environmental decision making, as well as likely reduce the present high quality of such decisions.

Thirdly, the category of decisions/actions by government or other public authorities which are amenable to review is necessarily open-ended (i.e. it includes everything that is ultra vires). Accordingly, no code, however detailed, could hope to detail in advance every type of decision/action that is, in principle, amenable to review.

Fourth, so far as the grounds for judicial review are concerned, it is hard to see how codification would bring greater clarity. For example, simply re-stating Lord Roskill's broad tri-partite division in ***GCHQ*** would be of limited utility. Conversely, a more detailed list setting out sub-categories would run the risk of either being unhelpfully long or failing to capture some of the grounds which are currently available (cf. the list of grounds in Q1 of the Call for Evidence itself which concludes with the catch-all "(g) any other ground of judicial review").

Fifth, however detailed the list, it would also still have to be interpreted by the courts, which would lead to more, not less, litigation, with an associated chilling effect on decision taking as the new legal parameters were clarified. This could have the undesirable effect of stifling the implementation of government policy, for example the objective of "significantly boosting the supply of homes" at paragraph 59 National Planning Policy Framework.

Sixth, in our experience judicial review does not, in practice, seriously impede proper or effective decision-making by central and local government or other public bodies. On the contrary, it helps supports it by ensuring that basic standards of public administration are adhered to.

2: Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government

As set out above, the amenability of review of decisions taken within the planning and environmental sphere is rarely, if ever, controversial. Moreover, the basis on which the Court is prepared to intervene is also well understood. It is settled, at the highest level, that judgments struck by decision makers within the legal framework properly understood, are not liable to challenge unless it is demonstrated the judgment was perverse (a very high hurdle). Given the highly fact-sensitive nature of planning and environmental decisions, and that often these require a site inspection, the Court applies that general principle with particular care in our field, see for example: ***R(Cherkley Campaign Ltd) v Mole Valley District Council*** [2014] EWCA Civ. 567 at [48]

We do not therefore consider there is merit in codifying these matters.

3: Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.

See above.

4: Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to

the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.

We consider that the correct balance is already struck and that any dilution of the duties of the parties would be liable to result in injustice and potentially further costs/delay if matters have to be re-opened once information that should have been disclosed comes to light later.

Indeed, the underlying reasoning of the duty of candour is that judicial review proceedings must be conducted in a candid and co-operative manner with "all cards face upwards on the table" and not "in the same manner as hard-fought commercial litigation" (see: ***R v Lancashire CC, ex parte Huddleston*** [1986] 2 All ER 941, 945 and ***Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment*** [2004] Env LR 38 at [86]). We consider that a step away from this approach would not improve public law proceedings.

Moreover, the present scope of the duty of candor means there is a limited need for the Court to adjudicate on specific disclosure applications (see *Administrative Court Guide,* para.6.5.3 and ***Tweed v Parades Commission of Northern Ireland*** [2007] 1 AC 650 at [29]-[31]). If the duty were to be curtailed or removed, there would likely be a consequential increase in specific disclosure applications under the CPR 31. We consider that would be undesirable and slow down the determination of claims.

In relation to rights of appeal, including on the issue of permission, again we consider that the correct balance is already struck. In particular, we consider that it is vital that claimants who are refused permission before the High Court should continue to have the right to appeal to the Court of Appeal against such refusals, at least on paper, given that a significant number of such appeals are successful. As you will know, since 3 October 2016, unsuccessful parties seeking permission to bring judicial review (or indeed permission to appeal) have no right to an oral hearing in the Court of Appeal, following refusal on the papers.

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Response to Call for Evidence

Section 1 – Questionnaire to Government Departments

Q1: 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?

Q2: 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)?
No.

Section 2 – Codification and Clarity

Q3: 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?

No, see above.

Q4: 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, in the planning/environment field it is clear which decisions/powers are subject to judicial review save in a small number of borderline cases, which it would be impossible to avoid through codification in any event.

We think it would be counterproductive to exclude certain decisions in our field from the ambit of judicial review. As we discuss above, this would likely reduce public confidence in those decisions and reduce the acceptance of, often highly controversial, land use decisions.

Q5: 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?

Yes, save that we consider the approach to replies could be made clearer. Presently, there is no provision in CPR 54 (or elsewhere) for a reply, yet they are frequently deployed by claimants, sometimes supported by additional evidence. It is not always clear whether this material makes its way to the judge adjudicating on whether to

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grant permission, or whether permission is required to adduce the further evidence. A clarification of the procedure for filing a reply would be helpful.

Section 3 - Process and Procedure

Q6: 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?

Yes. See above.

Q7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

No. The costs rules have become less, not more, favourable to claimants and interveners over the last 5 years, in the following respects:

- In order to benefit from the fixed costs regime at CPR 45 for claims which fall within the scope of the Aarhus Convention, claims must now file a schedule of their financial resources, which the public authority (and other resisting the claim) may challenge and seek to raise, or remove entirely, the caps on cost liability.

- As for claims which fall outside the scope of the Aarhus Convention, the ability to seek a cost capping order has been heavily curtailed by the Criminal Justice and Courts Act 2015. In particular, an order cannot now be granted unless and until permission to proceed with a judicial review claim has been granted, see s.88(3).

Q8: 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?

The costs of judicial review are usually smaller than they would be in comparable private law cases which lack the wider importance that public law cases often have. We consider the costs incurred are proportionate.

If a claimant has standing to bring a claim, it is unclear why they should not have standing to recover their costs if successful.

Unmeritorious claims are already dealt with more efficiently and quickly in judicial review than in ordinary civil litigation because of the requirement for permission.

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Moreover, where claims are filtered-out at the permission stage, the Claimant is liable to pay the costs of the Defendant and all other parties who have filed an acknowledgment of service (subject to the discretion of the court), see: ***Campaign to Protect Rural England v Secretary of State for Housing, Communities and Local Government*** [2020] 1 WLR 352. In that respect, the costs regime is more oppressive at the permission stage than it is at the final adjudication, where the normal rule is that a claim is liable to pay only one set of costs, see: ***Bolton Metropolitan District Council v Secretary of State for the Environment*** [1995] 1 WLR 1176. This has forced potential claimants to carefully reflect on the merit of their claims before issuing an application for permission to bring judicial review proceedings.

Q9: 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?

No. If anything, it is the other way around: it is statutory codification of remedy that can lead to undesirable inflexibility (for example, the limited remedies previously available to the courts when a local plan was successfully challenged).

The Planning Court has shown that it is prepared to be flexible to correct illegality but preserve the substantive decision in the public interest. For example, in ***R(Nicholson) v Allerdale BC*** [2015] EWHC 2510 (Admin), Holgate J adjourned the hand-down of a judgment after circulating the draft judgment, to permit a defective planning condition to be corrected but the substantive planning permission to be preserved.

Q10: What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

Q11: 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?

In our experience this is rare but not altogether uncommon. The main reason it does not occur more frequently, in our view, is that in most cases there is no possible compromise – the decision either stands or is quashed.

One particular problem in planning cases is that the power to revoke planning permission generally triggers a right to compensation (and is therefore rarely exercised). However, revocation without compensation would likely infringe the Art.1 of the First Protocol to the ECHR and the common law (cf. ***Burmah Oil v Lord Advocate*** [1965] AC 75).

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On the other hand, we have direct professional experience of the use of the power to make non-material amendments (s.96A TCPA 1990) in order to settle cases without the need for a quashing order, see: ***Nicholson*** (above).

Q12: 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?

We do not have a consensus on this issue.

Q13: 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?

Yes, we have experience of cases where standing issues have arisen. We consider that the rules of public interest standing are generally applied correctly. It is particularly important in the context of environmental judicial review that individuals or NGOs with a sufficient interest should be allowed to bring claims, otherwise, in some cases there may be no one at all with standing.

If the test of standing were to be fixed higher than "sufficient interest", that may conflict with Article 9(2) of the Aarhus Convention to which, of course, the UK is a signatory in its own right independently of its membership of the EU. Article 9(2) provides that "sufficient interest" must be interpreted "consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention". NGOs are to be considered to fall under Article 2(5) for the purposes of the question of standing under Article 9, which provides as follows:

> "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

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Conclusion
Overall, PEBA members consider that, in our specialist fields, the ambit and procedural requirements of judicial review strikes the right balance between ensuring public authorities act within the law but swiftly filtering-out unmeritorious claims at an early stage. We trust our contribution has been of assistance to your enquiry.

We wish the panel well with your important work.

Yours faithfully,

Dr Ashley Bowes
For and on behalf of PEBA

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