

# HODGE JONES & ALLEN

## **The Independent Review of Administrative Law**

### **Call for Evidence**

***Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?***

**Response by Hodge Jones & Allen Solicitors**

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## Introduction

The Terms of Reference for the Independent Review of Administrative Law (IRAL / the Review) encompass issues of codification, justiciability and procedure. It is apparent from this that the Review is intended to be wholesale and the potential scope for reform extensive.

There are matters raised in the Terms of Reference which are not reflected in the questions posed in the Call for Evidence. They are nonetheless important and we address them below.

### The constitution of the panel

We are concerned that the panel members are not fully representative of those concerned about the future of judicial review and should include practising lawyers with expertise in claimant public law litigation and legal aid funded judicial review work. We echo the concerns expressed by law firms Leigh Day, Bindmans, Irwin Mitchell, Bhatt Murphy and Deighton Pierce Glynn in this regard.<sup>1</sup>

The chair of the Review's panel, Lord Faulks QC, has publicly stated his views on the need to curtail perceived incursions by the judiciary into political territory. In a comment piece for Conservative Home, he suggested that the government may choose to: *"legislate to settle authoritatively the non-justiciability of the prerogative power to prorogue Parliament and perhaps also impose further limits on the scope of that power. While they are at it, Parliament might want to legislate to protect other, related prerogative powers. Legislation of this kind may be the only way to limit the courts' incursion into political territory."*<sup>2</sup>

This comment was made in light of two recent high-profile government defeats, which, in turn, provide the context for this Review. In the first, *Miller (No 1)*<sup>3</sup>, the Supreme Court ruled that Parliament was required to pass legislation to give effect to the UK's withdrawal from the EU. In the second, *Miller (No 2)*<sup>4</sup>, the Supreme Court ruled that the prorogation of Parliament had been unlawful and void.

The current edition of *The Judge Over Your Shoulder*<sup>5</sup> reports a three-fold increase in judicial review applications between 2000 and 2013, from 4,200 in 2000 to over 15,600 in 2013. However, some 84% of these were Civil Immigration and Asylum cases, the majority of which moved to the Upper Tribunal for Immigration and Asylum Chamber following a change in the law in November 2013. Since 2015 there has been a steady decline in judicial review applications; by 8% in 2016, 2% in 2017, 14% in 2018 and 6% in 2019.<sup>6</sup> So it is not the case

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<sup>1</sup> <https://www.leighday.co.uk/News/Press-releases-2020/September-2020/Law-firms-call-for-review-of-judicial-review-proce>

<sup>2</sup> Conservative Home: *The Supreme Court's prorogation judgement unbalanced our constitution. MPs should make a correction*, 7 February 2020; <http://www.conservativehome.com/thinktankcentral/2020/02/edward-faulks-the-supreme-courts-prorogation-judgement-unbalanced-our-constitution-the-commons-needs-to-make-a-correction.html>

<sup>3</sup> [2017] UKSC 5

<sup>4</sup> [2019] UKSC 41

<sup>5</sup> Government Legal Department *The judge over your shoulder – a guide to good decision making* 2016, fifth edition;

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746170/JOYS-OCT-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf)

<sup>6</sup> Ministry of Justice *Civil justice statistics quarterly*; <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>

that the government is besieged by the courts and hamstrung by judicial intervention at every turn.

The Review, and the Conservative manifesto pledge which it seeks to realise, seems likely to be a response to a perception, particularly since the introduction of the Human Rights Act, both in the media and amongst Parliamentarians that we have entered a new period of judicial activism. A House of Commons Research Paper from 2006 contains a helpful discussion on this topic.<sup>7</sup>

These fears are not unusual to the UK. As the authors of the same research paper commented:

*“Complaints about “judicial activism” occur in most common law jurisdictions (in comparison to the civil law jurisdictions, such as France, where the judiciary is often organised along a bureaucratic civil service model, with career judges). The issue was considered recently by the Hon Judge Michael Kirby AC CMG (a Justice of the High Court of Australia). He identified that in Australia, following a closely divided decision of the High Court on ‘native title’ in favour of Aboriginal claimants<sup>8</sup>, the majority judges were accused of “activism”. Whilst in America, the majority decision of the US Supreme Court in Bush v Gore was denounced by its critics as “judicial activism”, as was the more recent decision in Lawrence v Texas<sup>9</sup> declaring that State sodomy offences were unconstitutional.<sup>10 11</sup>*

*In particular, Judge Kirby argued that:*

*“As the United Kingdom moves towards the creation of its own new Supreme Court – even if it is one very different from those of the United States and Australia – it is as well to be alert to the controversies that tend to beset such courts. The visibility, mode of appointment, functions and public role of the judges of such courts tend to make them and their institutions a lightning rod for those who resent their power and who challenge their decisions. Particularly where those decisions affirm the rights of the weak against the powerful. To defend our judiciary and legal system as they truly are, citizens must know more about them. They must learn that, contrary to myth, judges do more than simply apply law. They have a role in making it and always have.<sup>12”</sup>*

Should the panel be tempted to accept any premise that judicial review is routinely abused by claimants, and bearing in mind that there is no representative on the panel in a position to correct such a premise, we hope that they will first pause to consider the evidence as to whether there is, in fact, abuse of the judicial review process and/or judicial incursion into politics, or at least any that would merit such major constitutional change as is contemplated by the Review.

### Disclosure

The Terms of Reference specify that the Review should consider procedural reforms including: “(a) *the burden and effect of disclosure in particular in relation to “policy decisions” in government*” and “(b) *in relation to the duty of candour, particularly as it affects government*”.

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<sup>7</sup> House of Commons Research Paper *Judicial Review: A short guide to claims in the Administrative Court*, Research Paper 06/44, 28 September 2006

<sup>8</sup> Wik Peoples v State of Queensland (1996) 187 CLR 1

<sup>9</sup> 539 U.S. 558 (2003)

<sup>10</sup> The Hamlyn Lectures on Judicial Activism, University of Exeter, 19-20 November 2003 and University of Cardiff, 24 November 2003 available at: [http://www.hcourt.gov.au/publications\\_05.html#MichaelKirby](http://www.hcourt.gov.au/publications_05.html#MichaelKirby)

<sup>11</sup> See also Antonin Scalia, “Mullahs of the West: Judges as Authoritative Expositors of the Natural Law, The Sir John Young Oration”, Trinity College (University of Melbourne), 2005

<sup>12</sup> University of Exeter, *The Hamlyn Lectures on Judicial Activism*, 19 November 2003

Despite this, there are no questions in the Call for Evidence in relation to disclosure or the duty of candour. The above wording suggests that this is because the panel is only interested to receive evidence of the burden caused to government bodies by their disclosure duties, not as to the constitutional importance of the duty of candour.

Nevertheless, the duty of candour is crucial to ensuring good governance. We hope that if the panel is minded to limit its scope, in an effort to lessen the burden it poses, that it will first bear in mind the following:

- As the current edition of *The Judge Over Your Shoulder*<sup>13</sup> puts it: “Neither a claimant nor the Court will be aware of the internal workings that led to the final decision under challenge. Therefore the onus is on the decision maker to explain it honestly and frankly so that it can assist the Court in reaching the correct decision... The Court’s development of the duty of candour over the years has been an attempt to ensure the highest standards of public administration are maintained.”
- Lord Justice Singh commented in *R (Citizens UK) v Home Secretary*<sup>14</sup>: “It is the function of the public authority itself to draw the court’s attention to relevant matters... This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”
- The duty of candour has existed for a long time. In *R v Lancashire County Council ex parte Huddleston*<sup>15</sup> Sir John Donaldson described its development as creating: “a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.”

### A wrong turning

As Brown J observed in *R v HM the Queen in Council, ex parte Vijayatunga*<sup>16</sup>: “judicial review is the exercise of the court’s inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law”.

This Review contemplates major constitutional reforms which would have profound implications for the courts’ ability to uphold the rule of law. These radical reforms are premised, at least in part, on the notion that basic judicial review principles may have taken a wrong turning over the last 40 years.

The Terms of Reference assert:

*“Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between “scope” and “exercise” has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end (“scope”) to all of the conventional [JR] grounds and proportionality at the other (“exercise”). Effectively, therefore, any unlawful exercise of*

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<sup>13</sup> Government Legal Department *The judge over your shoulder – a guide to good decision making* 2016, fifth edition

<sup>14</sup> [2018] 4 WLR 123 at [106]

<sup>15</sup> [1986] 2 All ER 941, 945

<sup>16</sup> [1988] QB 322

*power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?"*

In so far as this distinction between "scope" and "exercise" of powers did exist it was overridden in *Anisminic Ltd v FCC*<sup>17</sup>; that is, 51 years ago.

Undoubtedly, if a public body acts outside its scope of its powers, it acts unlawfully. However, it is not the case that until 40 years ago, any exercise of a power could not be challenged as long as it was within the scope of the public body's power.

35 years ago Lord Diplock set out the main grounds for judicial review in the GCHQ case<sup>18</sup>: illegality, irrationality and procedural impropriety.<sup>19</sup> An ultra vires decision; that is, one that is outside the scope of that body's powers, fell within a subcategory of the first ground, illegality. However, the remaining grounds and subcategories are all relevant to the exercise of power and were recognised by Lord Diplock as justiciable.

As Lord Diplock predicted, further subcategories have emerged under those broad headings. In addition the Human Rights Act 1998 has come into force, section 3 of which, in effect, permits judicial review of Acts of Parliament. This is not a frequent occurrence and the courts are not entitled to strike down legislation; they may only make rulings that legislation is incompatible with the European Convention on Human Rights.

In any event, Lord Diplock's analysis in GCHQ was only a summary of principles that have been developing over substantially longer than 35 or even 40 years. By way of example:

- 72 years ago Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corporation*<sup>20</sup> confirmed in relation to the exercise of discretion by public bodies: *"Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent"*.
- 94 years ago Warrington LJ in *Short v Poole Corporation*<sup>21</sup> confirmed that no public body had statutory authority to act in bad faith or from corrupt motives and, further, a decision performed in good faith and without corruption, could nevertheless be *"so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative"*. He gave the example of a public body dismissing a teacher because she had red hair being a decision that the court would declare to be void for being made for frivolous and foolish reasons.
- 122 years ago the courts in *Kruse v Johnson*<sup>22</sup> looked at the test by which the question as to whether certain by-laws were unreasonable or not was to be decided.

To suggest that basic judicial review principles may have taken a wrong turning over the last 40, 51 or indeed 122 years is a fundamental proposition. It shows that the aim behind the establishment of the Review is a radical retrenchment of the grounds for judicial review. It is

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<sup>17</sup> [1969] 2 AC 147

<sup>18</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

<sup>19</sup> He accepted that further development on a case by case basis may add further grounds, such as proportionality.

<sup>20</sup> [1948] 1 KB 223

<sup>21</sup> [1926] Ch. 66

<sup>22</sup> [1898]

not a simple exercise to examine some 122 years of jurisprudence and suggest remedies for those aspects that government bodies find uncomfortable, nor is it one that should be undertaken lightly. Moreover, the timetable allowed for it is short.

We would echo the comments in a paper by Kinsley Napley LLP as to the need for extreme care in proposing such wholesale constitutional reform: *“Any aspect of the law and the court system may be, and should be, subject to periodic review with a view to possible improvement. That being said, judicial review is an essential, even foundational, part of our constitution in facilitating judicial oversight and scrutiny of the exercise of executive power. As such, any attempt to reform or ‘streamline’ this procedure should be made with the utmost care. In the context of apparent hostility from the government towards the perceived meddling of the courts in the political realm and given the Review’s broad Terms of Reference and short duration, it is to be hoped that the Panel has that firmly in mind.”*<sup>23</sup>

## **Section 1 - Questionnaire to Government Departments**

### **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?**

The thrust of the questions in Section 1 of the Call for Evidence is an invitation for public authorities to say why judicial review is problematic or vexing to them. There is no corresponding invitation to NGOs and individuals to explain why judicial review has been important or valuable or led to better decisions.

Question 2 of Section 1 asks whether the prospect of being judicially reviewed improves government departments’ ability to make decisions. There is a fundamental ambiguity in what would “improve” decision making and whose perspective this would be judged from. It is unlikely that individual decision makers would perceive an improvement in their ability to make decisions in consequence of the prospect of being judicially reviewed. Indeed they may experience such a prospect as a source of stress, frustration or disruption. Equally, an authority which has its decision declared unlawful may nevertheless regard it as a good decision. Neither of these detract from the need for scrutiny to ensure those decisions are lawful, rational and procedurally correct.

The subtext of these questions appears to be that judicial review is problematic and uncomfortable. They suggest the true intention behind the Review is to prevent the inner workings of government decision-making from being exposed to judicial scrutiny. This would have profound implications for the rule of law and the health of our democracy.

### **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)?**

We have made some suggestions in answer to the questions below, namely:

- a) Extend the time limits to six months;
- b) Improve the costs and funding regime to allow a more level playing field between government bodies and claimants;
- c) Consider a more flexible approach to standing.

## **Section 2 – Codification and Clarity**

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<sup>23</sup> *Striking a balance or tipping the scales? The Independent Review of Administrative Law and the possible reform of judicial review*, 29 September 2020

**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 law can in appropriate cases help to provide clarity and certainty.

However, as explained above, the relevant principles in judicial review have been developed in case law over some 122 years.

One could envisage section 1 of the Judicial Review Act 2021 setting out the three heads of judicial review as defined by Lord Diplock in the GCHQ case, but such simplification would not lead to greater clarity; quite the opposite. The issues that have arisen and been considered by the courts over the last century would still arise and, presumably, fall to be decided again.

A statute aimed at reflecting the status quo would have to capture well over a century of jurisprudence including obiter dicta and minority judgments. Such a statute, at best, would be highly complex and incapable of providing clarity or certainty. At worst it would introduce confusion.

Question 1 of Section 1 of the Call for Evidence lists:

*a. judicial review for mistake of law*

*b. judicial review for mistake of fact*

*c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)*

*d. judicial review for disappointing someone's legitimate expectations*

*e. judicial review for Wednesbury unreasonableness*

*f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account*

***g. any other ground of judicial review***” (emphasis added)

Even the question in the Call of Evidence betrays that it is not straightforward to capture all of the grounds for judicial review. In reality, it is impossible to think of a modest or short list which captures all of the grounds whilst also providing any notable clarification.

The Terms of Reference ask: “***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***” (emphasis added). Were the intention to broaden the amenability of public law decision to judicial review, or the grounds of public law illegality, that too would not lead to clarification for the same reasons.

If clarity is the real aim, rather than radical reform, then the answer to the question posed is surely a resounding “no”.

In any event, it is clear that the statutory intervention contemplated is aimed at restricting the scope of judicial review, not clarifying it.

It is questionable whether the government can significantly reduce the grounds for judicial review or the justiciability of particular kinds of decision. On any analysis, the issue is not straightforward:

- Judicial review comes from the inherent jurisdiction of the High Court to interpret and apply the law.
- In *Anisminic*, the House of Lords in effect nullified an ouster clause which purported to render a particular body immune from challenge. It interpreted the clause so as not to cover acts of the body which were unlawful (i.e. as contrary to any ground for judicial review).
- *Anisminic* was recently followed in *Privacy International v Investigatory Powers Tribunal* <sup>24</sup>, and contains speculation about the ability (reflecting earlier dicta) about the approach to the court to a completely clear ouster. The logic can be applied to an attempt to “oust” grounds for judicial review which derive, ultimately, from the court’s interpretation of the particular statutory scheme.

Professor Mark Elliot, chair of the Faculty of Law at the University of Cambridge, has cautioned that the potential scope for reform of judicial review, as embodied in the Review’s Terms of Reference, “*that would significantly reduce the courts’ practical capacity to uphold the rule of law while attempting radically to recast its constitutional basis by rendering it a creature of statute.*” Professor Elliot argued that any attempt to ouster the courts’ public law jurisdiction, or limit the scope of judicial review via narrow codification, may ultimately be thwarted by the courts themselves, who, in abiding by constitutional principles, would be compelled to interpret any legislation in such a way as for judicial review to fundamentally remain intact. He argues: “*the constitutional capacity of the Government and Parliament to introduce such reforms is sufficiently open to question as to risk a constitutional crisis should they attempt to neuter judicial review to the full extent that the Review’s terms of reference appear to contemplate.*”<sup>25</sup>

There should be no doubt that to limit the grounds of judicial review or the justiciability of particular kinds of decision would constitute radical constitutional reform, with the attendant risks of undermining of the rule of law and the health of our democracy.

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

Notably, we are not asked whether certain decisions should be subject to judicial review. This lends further support to our view that the intention behind the Review is not to clarify the scope of judicial review, or introduce certainty, but to radically reform and restrict its scope.

There are already procedural safeguards to ensure that government bodies are not unduly troubled by attempts to challenge decisions that are outside the scope of judicial review.

Any application for judicial review must be granted permission before it can progress to a substantive hearing. The court now has enhanced powers to certify a claim as “totally without merit” under CPR rule 23.12, and may go on to make a civil restraint order against further such applications. The claimant is not allowed in that event to request reconsideration at an oral hearing. The costs consequences for an unsuccessful claimant in judicial review can be severe, still greater for claimants found to have brought unmeritorious claims. These measures all act as significant disincentive to bring judicial reviews in relation to non-justiciable matters.

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<sup>24</sup> [2020] AC 491

<sup>25</sup> Public Law for Everyone: *The Judicial Review Review I: The Reform Agenda and its Potential Scope*; <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/>



In addition, further disincentives were introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), as a result of which claimants in receipt of legal aid who are refused permission will not be paid their legal aid costs, and by the Criminal Courts and Justice Act 2015 (CCJA), which introduced further hurdles, particularly for NGOs wishing to intervene in judicial reviews relevant to their expertise. This acts as a significant disincentive for claimants and legal aid providers to bring judicial reviews.

For the reasons given in answer to Question 3 it is difficult to see how any attempt to define the decisions or powers subject to judicial review would achieve clarity. Restricting the amenability of certain decisions to judicial review would be a law reform task of monumental proportions, and raises extremely difficult issues of effectiveness given the central constitutional role of judicial review in our system.

**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 processes of making a judicial review claim, responding to a claim and appealing a decision are clear. For the avoidance of doubt, should government bodies be unclear that would not be justification for radical constitutional reform.

Part 54 of the Civil Procedure Rules (and accompanying Practice Directions) set out the procedure to be followed. The Administrative Court Judicial Review guide offers comprehensive guidance. It is written in an accessible format that is clear to lawyers and laypersons alike.

In addition, *The Judge Over Your Shoulder* is produced by the Government Legal Department for the benefit of decision makers and sets out the judicial review processes in clear terms. It includes helpful flowcharts at pages 21, 62, 68 and 69, setting out the processes and potential variations. It also contains broader guidance on taking decisions in a lawful manner to obviate the need for judicial review proceedings.

### **Section 3 – Process and Procedure**

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

Judicial review is an essential tool for maintaining strong, effective government and good administration. It is not the enemy of good government. It helps to ensure that public authorities do not make irrational or unlawful decisions. Limiting the availability of Judicial Review via procedural gatekeeping may avoid short term disruption and delay, but is overall likely to make government less effective by reducing scrutiny and safeguards and therefore increasing the risk of poor or unlawful decisions going unchallenged.

A series of practical and structural barriers already restrict access to judicial review, particularly for disadvantaged groups.<sup>26</sup>

For anyone who does not have access to substantial financial resources the funding and costs regime is already a significant procedural barrier to accessing judicial review, not helped by LASPO and the CCJA. These issues are discussed below in answer to Questions 7 and 8.

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<sup>26</sup> See M. Cappelletti and B. Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective — A General Report' in M. Cappelletti and B. Garth (eds) *Access to Justice: Vol. 1, A World Survey*. (Giuffrè: Alphen aan den Rijn; Milan/Sijthoff and Noordhoff, 1978) especially pp. 10–21.

The current time limits pose another significant barrier to claimants. Presently, CPR 54.5 requires that the claim form must be filed promptly, and in any event not later than three months after the grounds to make the claim first arose, unless the Court exercises its discretion to extend time.

Three months is already a tight timescale in which to: become aware of the decision and the need to seek legal advice; instruct a solicitor; exhaust any other available remedies; engage in pre-action correspondence; apply for and obtain legal aid funding (if eligible) and issue an application for permission to bring a judicial review. Claimants also have to factor in: (1) the fact that many public authorities are slow to respond to pre-action letters; (2) the fact that time begins to run from the date when the grounds of challenge first arose, which is often some time before the claimant became aware of it; and (3) the fact that the Legal Aid Agency commonly takes in excess of a month to consider even urgent applications for funding.

Added to this, the requirement for claims to be filed promptly means that claims will not necessarily be brought in time, even if they are issued well within three months.<sup>27</sup> In *R (Sustainable Development Capital LLP) v SSBEIS*<sup>28</sup> the claim was issued within three months of the decision and five weeks after actual knowledge of the decision and was dismissed for lack of promptness<sup>29</sup>.

Were those time limits to be shortened further, claimants may be compelled to issue applications without waiting for a response to their pre-action letters. This would increase the number of avoidable applications being made, because of insufficient time being available to resolve disputes without recourse to the courts, with the resulting increase in costs and waste of court time.

In our experience a large proportion of claimants in judicial review are vulnerable, such as homeless people, victims of domestic violence, people with mental health problems and asylum seekers. Tighter time restrictions are likely to disproportionately disadvantage those categories of people.

The timing rules pose particular challenges to environmental interest groups. Section 288(3) Town and Country Planning Act 1990 requires review of planning appeals to be made within six weeks of the challenged decision. In *R v Secretary of State for Trade and Industry, ex p Greenpeace (No. 1) (Atlantic Frontier I)*<sup>30</sup> Laws J held that a public interest litigant such as Greenpeace was required to move “*in effect immediately*”. Kay J rejected arguments in *R v Secretary of State for Trade and Industry, ex p Greenpeace (No. 2) (Atlantic Frontier II)*<sup>31</sup> that the rules breached Article 6(1) of the ECHR, as they denied Greenpeace adequate access to the court.

We understand and accept the public policy reasons for the existing time limits: they provide certainty to administrative decisions and limit disruption and delay to administrative processes. However, the existing regime and the manner in which it is enforced already risk undermining the important role of claimants in judicial review in enforcing the rule of law, by overly inhibiting their access to the court. Tightening it still further would increase these risks and decrease the

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<sup>27</sup> see *Finn-Kelcey v Milton Keynes BC* [2009] Env. L.R. 17 at paragraph 21

<sup>28</sup> [2017] EWHC 771 (Admin)

<sup>29</sup> See also *R v Independent Television Commission, ex p TV NI Ltd*, *The Times*, December 30, 1991 and *R v Cotswold District Council, ex p Barrington Parish Council* (1997) 75 P & C.R 515 in which it was also held that the time for bringing a judicial review ran from the date of the relevant decision and not from the date of the subjective knowledge of the applicant

<sup>30</sup> [1998] Env LR 415. See comments by C. Forsyth, 'All Litigants are Not Equal: Delay and the Public Interest Litigant' [1998] *Judicial Review* 8 at [8].

<sup>31</sup> [2000] Env LR 221

ability of parties to resolve their disputes before issuing proceedings and increase recourse to the courts. It would also make the considerable challenges that this timetable already poses insurmountable for large numbers of often vulnerable people. Those people would be left with no remedy or protection from poor decisions, with the result that good administration would be profoundly undermined.

For these reasons we would propose extending the current limitation period to six months, but recognise that the consequences of such a change would have to be carefully considered.

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

The rules regarding costs in judicial reviews were considered by Jackson LJ in his Final Report on his review of civil costs published in December 2009, and specifically in Chapter 30, Part 5 of his report, pages 301-313.

Jackson considered that costs were disproportionate in some areas of civil litigation and this impedes access to justice. He proposed what he described as “*a coherent package of interlocking reforms, designed to control costs and promote access to justice*”.

The Review panel should start its consideration of the costs in judicial review matters by first of all having regard to the discussion and recommendations in the Jackson report, and considering the extent to which Jackson’s recommendations were implemented by the government.

Jackson LJ proposed one-way costs shifting should be introduced for judicial review, as a means of promoting access to justice and putting litigants on an equal footing. A publically funded claimant has the benefit of one-way costs shifting, but a privately paying claimant of modest means does not have the benefit of one-way costs shifting.

We regret that the government failed to accept Jackson’s recommendation for one-way costs shifting in judicial review to be introduced to put litigants on an equal footing. This unfairness remains and is an impediment to access to justice.

Conditional fee arrangements and After The Event insurance remain generally unsuitable costs frameworks for judicial review because they usually operate in damages claims and translating such arrangements into other areas is problematic.

Full two-way costs shifting remains in judicial review, and is an incentive on claimants not to pursue weak claims, and also an incentive on the state not to pursue weak defences. Costs generally follow the event, and unless there is good reason otherwise. It is therefore unclear as to why the consultation asks whether the rules are too lenient and/or applied too leniently in the courts. There is no explanation of the basis of the apparently perceived leniency and/or whether this arises out of one decision or a more general complaint.

Access to judicial review is of fundamental constitutional importance and without access to a court, the rule of law is fatally compromised. Regard should be had to how other jurisdictions afford access to judicial review. In the United States, there is a no costs rule. Jackson LJ notes that this rule facilitated seminal decisions such as *Brown v Board of Education of Topeka*<sup>32</sup> (which ended racial segregation in US schools), and many other great civil rights cases in the USA.

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<sup>32</sup> 347 US 483 (1954)

Jackson LJ recommended a modification in the *Boxall* approach to costs in judicial review. He accepted that *Boxall* may have made sense at the time but that the approach needed modification following the introduction of a mandatory pre-action protocol for judicial review proceedings.

The Court of Appeal gave effect to Jackson LJ's recommendations when it came to consider the proper approach to an award of costs in the case of *M v LB Croydon*<sup>33</sup>. This was a significant improvement in the law. The state had an opportunity to avoid costs by conceding the claim in its formal pre-action protocol response. If the state did not concede the claim in the pre-action protocol response but then after proceedings conceded the claim but before trial then it was only right that a successful claimant who had brought the claim should be entitled to their costs just as much as if it had brought a private law claim. The court has a duty to protect individuals from being wronged by the state, whether local or national government, and the fact the defendant is a public body should make no difference. They should not be in a more privileged position than other parties. This decision reduced the leniency which the *Boxall* approach had previously afforded to the state.

Any review of costs in judicial review matters has to also consider the impact of any change of legal aid funding. Currently the system of legal aid funding operates as a contribution to the costs of a claim, but falls far short of providing a sustainable basis of funding without the opportunity for claimant solicitors to recover costs at inter partes rates. There are many limitations on legal aid funding – as set out in the article by Peter Todd in Legal Action Group Magazine, April 2020, page 30-32 (attached for ease of reference). In particular legal aid rates of remuneration are “risk rates” if costs may exceed £25k. Risk rates are set below cost as a disincentive for practitioners to pursue unmeritorious claims. In the event that recover of Claimant costs was limited, it would be likely that the Legal Aid Agency would have to review its funding model, causing increased costs on the public purse.

The preliminary gate-keeping of all claims for judicial review by the permission stage means that there is only ever judicial review where it is properly arguable, and this is a key brake on the incurring of unnecessary costs in judicial review proceedings.

**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?**

CPR 44.4 sets out the factors to be taken into account when the court determines costs, including in judicial review proceedings. This includes (if it is assessing costs on the standard basis) whether the costs were proportionately or reasonably incurred or proportionate and reasonable in amount.

In the event that a party in judicial review proceedings incurs costs which are disproportionate then they do so at their own expense, since unless they can exceptionally persuade to award the costs on the indemnity basis they will be unable to recover costs from their opponent which are disproportionate.

Since only proportionate costs can generally be recovered from an opponent, the parties are already very aware of the need to limit costs only to those which can be demonstrated to be proportionate on assessment. The benefit of any doubt is always afforded to the paying party on assessment on the standard basis.

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<sup>33</sup> [2012] EWCA Civ 595

Costs management in judicial review proceedings could be considered by the IRAL panel as a possible additional support to proportionality. However we consider this would be very difficult and expensive to effectively administer.

Judicial review proceedings can be fast moving and costs management would be very costly to achieve without massive investment in the Administrative Court. The experience of introduction of costs management in the Queen's Bench has been that case management timescales went from a few weeks to many months due to the additional complexity and costs incurred by costs management. The timescales in judicial review proceedings are much shorter and the introduction of costs management would be unlikely to work. The costs of costs management in judicial review would probably not offset the likely benefits to be achieved by it.

We would welcome a review of the rules of locus standi in judicial review proceedings but we do not believe it should be done in the context of controlling costs. There are strong arguments that the current rules on standing inappropriately limit claims to be considered by the Administrative Court which may have serious and important constitutional and legal issues, and which warrant being considered. We do not consider it appropriate to seek to use locus standi to limit costs.

Unmeritorious claims are filtered out by the permission stage. As discussed above in answer to Question 4, the court now has enhanced powers to certify a claim as "totally without merit" under CPR rule 23.12, and may go on to make a civil restraint order against further such applications. The claimant is not allowed in that event to request reconsideration at an oral hearing. Given the court's power to award costs against an applicant, there are already sufficient powers available to deal with unmeritorious claims and they are already dealt with differently. As such there is no merit in further consideration of the issue.

**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?**

Judicial review offers limited remedies, namely: court orders (quashing orders, mandatory orders, prohibiting orders); injunctions; declarations; and, in rare cases, damages.

The Administrative Court has a discretion whether or not to grant a remedy, even if a claim is successful. While it would not normally be proper to refuse relief, the court may take into account various matters such as:

- a) The detriment to good administration;
- b) Any delay by the claimant in bringing the claim;
- c) Whether there were alternative remedies available; and
- d) Whether the eventual decision would have been the same.

The UK courts do not have the power to strike down statutes. Under the Human Rights Act, even if the court makes a declaration of incompatibility, it is then up to Parliament to decide what to do next: whether to amend the legislation, or press ahead with it regardless of the incompatibility. In contrast, many constitutional courts in other jurisdictions have the power to nullify laws as unconstitutional. The UK Government specifically did not grant this power to the Supreme Court under the Constitutional Reform Act 2005.

The court may not grant relief if it appears to be highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. The court may only grant relief in such circumstances if, for reasons of "exceptional public interest",

it is appropriate to disregard the fact that it is highly likely that the outcome would not be substantially different.<sup>34</sup>

In any event it is important to recognise that even if the court does grant relief, it is unlikely to substitute its own decision for that of the public body unless there is only one possible lawful answer. Rather, the most likely form of relief is a quashing order. This would void the original decision but would allow (or, if a mandatory order is also made or if the public body has a continuing legal duty, in effect require) the public body to retake that decision in accordance with the law. For example, having undertaken a consultation process or having addressed its mind to a relevant consideration which it had originally omitted.

In practice, the Administrative Court is likely to be more willing to make a declaration or a quashing order than more compulsive sorts of orders such as a mandatory order.

In many judicial review claims it would in principle be open to the public body to reconsider any quashed decision and reach the same conclusions. Accordingly, even a successful claim for judicial review may not, in the long run, result in a favourable outcome.

This shows that the courts are able to grant appropriately flexible remedies, which enable public bodies to exercise their powers appropriately and effectively while reinforcing the need to follow the correct procedures in order to give effect to Parliament's intentions. Democracy, and good governance, is profoundly undermined otherwise.

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

We would recommend *The Judge Over Your Shoulder* as essential reading for all decision makers. More care over decisions, and proper engagement with proposed claims for judicial review at the pre-action stage, would result in less need to resort to judicial review proceedings unnecessarily when a claim should have been conceded. Once a letter before action has been received the Government Legal Department, in our experience, tend to delay before instructing counsel and in consequence do not fully engage with the issues in question until after proceedings have been issued, thus missing the opportunity to resolve the matter pre-action.

Proper compliance by public bodies with the statutory duty of candour is also material to this question. Public authorities hold far more material information than claimants, and responding to requests for the release of this, in a timely manner, provides both parties with the opportunity to make fully informed decisions about whether to proceed with litigation. For claimants, disclosure of documents at an early stage can enable them to reassess the merits of a claim and discontinue at an earlier stage if necessary.

HJA frequently has cases in which poor decision making by public bodies is only addressed following pre-action correspondence in which judicial review proceedings are threatened. Prior to approaching lawyers, claimants have often exhausted all other options for redress, routinely being passed within different departments of the same organisation and having to explain the issue from the beginning to a different person each time in an effort to find someone willing to listen to their concerns. All the while, they may be exposed to considerable hardship and disadvantage.

#### Case study 1

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<sup>34</sup> *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291

### *S (a child) v NHS England*<sup>35</sup>

We acted for a child who developed severe narcolepsy and cataplexy at the age of 12. Her condition seriously compromised her ability to reach her full potential. It also proved resistant to the usual medication for her condition. A drug, sodium oxybate, which has a trade name Xyrem, was likely to be effective, but was not routinely commissioned by the NHS. The funding decision therefore fell for consideration under the Individual Funding Requests (IFR) policy, through which evidence of a patient's exceptional clinical circumstances are examined.

An IFR was made and rejected on the grounds that our client did not meet the criterion of clinical exceptionality. The matter did not resolve by pre-action correspondence, and we brought judicial review proceedings against NHS England on grounds of discrimination and breach of the Children Act.

Hoffman J found that it was "*difficult if not impossible to see that the claimant should not be considered to meet the exceptionality test*" and that NHS England had taken too restrictive an approach.

### Case study 2

#### *R (SB) v NHS England*<sup>36</sup>

We acted for a seven-year-old child with Phenylketonuria (PKU) and severe autism with significant learning difficulties.

Without treatment, children with PKU develop profound and irreversible brain damage. One such treatment is sapropterin dihydrochloride (brand name Kuvan) which is not routinely commissioned by the NHS. The funding decision therefore also fell for consideration under the IFR policy, the outcome of which was that our client was found to meet the exceptionality test, but the IFR was rejected on the basis that there was insufficient evidence of clinical effectiveness.

Andrews J found that the IFR panel had either misinterpreted the phrase "*clinical effectiveness*" or they misunderstood or materially mischaracterised the evidence on that topic. She also found that, in effect, the panel's approach required our client to potentially sustain severe irreversible brain damage before they would decide that a case of clinical benefit was made out.

It is accepted that IFR panels are regularly faced with exceptionally difficult decisions. With the best intentions, those decisions will, on occasion, be wrong. In both the above cases an overly restrictive approach by the panel had deprived a child of life-changing medicine. Better care, or a more rigorous approach to the evidence, may have avoided the issue arising. But what is inescapable is that without recourse to judicial review those decisions would have been irreversible.

### Case study 3

#### *R (Peter and Elizabeth Skelton) HM Senior Coroner for West Sussex*<sup>37</sup>

We act for the parents of Susan Nicholson, who was murdered by her partner Robert Trigg in 2011. Her death was initially treated as non-suspicious and a verdict of accidental death recorded at her inquest. Following six years of campaigning by Susan's parents, Trigg was

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<sup>35</sup> [2016] EWHC 1395 (Admin)

<sup>36</sup> [2017] EWHC 2000 (Admin)

<sup>37</sup> [2020] EWHC 2813 (Admin)

eventually tried and convicted of Susan's murder in 2017, along with the manslaughter of an earlier partner, Caroline Devlin.

After Trigg's conviction the original inquest verdict was set aside. Our clients maintained that the fresh inquest should investigate whether the circumstances of Susan's death involved breaches by Sussex Police of duties imposed by Article 2 of the European Convention on Human Rights, including Sussex Police's investigation into the death of Caroline Devlin, whose death had also been treated as non-suspicious, as well as operational failings which meant that reasonable steps were not taken to protect Susan in the months before her death against a real and immediate risk to life posed by Trigg.

The Coroner decided that Article 2 did not require an investigation into the circumstances of Susan's death because she did not consider it arguable that Sussex Police had breached their Article 2 duties. She maintained her position in pre-action correspondence.

Our clients brought judicial review proceedings. Popplewell J and Jay J quashed the Coroner's ruling and concluded that she erred in law in holding that no arguable violation of Article 2 had occurred, on the basis that the material currently available could, if taken at its highest, credibly suggest that such failings occurred, so that an inquest should look into whether that is so. As a result an inquest will scrutinise the actions of Sussex Police, which, it is hoped, will lead to better protection for victims of domestic violence in future.

The judges were critical of the Coroner's ruling, finding that her central conclusions were "*somewhat brief*" and that she failed to address the detail of the criticisms itemised in our submissions to her. They found force in our submission that she lapsed into the error of considering whether the failures were established rather than arguable. They identified certain paragraphs that amounted to little more than the stating of her conclusions without accompanying reasoning by reference to the detail of the evidence.

Better quality decision making would have avoided the need to have recourse to judicial review proceedings in this case.

### Housing

Our housing department regularly act for vulnerable individuals left homeless, or in inadequate or unsuitable housing, due to councils or housing authorities not following their own policies. It is often not until judicial review proceedings are threatened in pre-action correspondence and/or proceedings issued that these bodies acknowledge the need to follow their own policy and/or properly review their decision making.

Better training and supervision, and regular reviews to ensure that the relevant authorities are following their own policies and statute, would help avoid the need for recourse to judicial review in these desperate situations.

### Case study 4

Our client was a disabled single mother who was seeking an assessment of care needs and suitable accommodation for herself and her son, who had cerebral palsy.

Our client had sought to address these issues through traditional channels, including numerous appeals to Social Services on her own behalf and with the help of her health visitor and her son's SENCO. Her complaints to Cardiff City Council went unanswered and high staff turnover within the Social Services department mean that she was left without any Social Services input for a lengthy period of time.



Following exchange of pre-action correspondence a care needs assessment was arranged within weeks and immediate steps were taken to identify appropriate accommodation.

#### Case study 5

HJA obtained a housing panel decision to agree to transfer our client to a two-bed property. Following this, Waltham Forest Council offered our client a one-bed property, in breach of its own policy and panel. The Council maintained its position in pre-action correspondence.

We issued judicial review proceedings on the grounds that the decision was unlawful as our client had a legitimate expectation that the Council would comply with its own policy and panel. The Council offered a reasonable compromise prior to the grant of permission.

#### Case study 6

Our client acted for a very young child with autism. Peabody Housing failed to adhere to their own allocations policy in declining to recognise our client's autism as a disability. In doing so they were also in breach of the Children Act. Even after accepting that the client did suffer from a disability they decline to put the case to the panel. The matter did not resolve in pre-action correspondence but Peabody Housing offered settlement after proceedings had been issued, but pre-permission.

#### Cautions

We are frequently contacted by people who have been poorly advised as to the implications of accepting a caution. They have often been wrongly informed by police that a caution is a "*slap on the wrist*" that will not show up on their record. They may also have been administered with a caution despite not having admitted the offence.

There is a particular issue with victims of domestic abuse who report violence to the police then, due to manipulation, fear of repercussions including further violence and/or loss of custody of children, deny any violence when police officers attend. It is not uncommon for the perpetrator to then make counter allegations, and the victim induced to accept a caution without having admitted the offence and/or understanding the implications.

A caution can be expunged by application to the Criminal Records Office (ACRO). However such applications frequently take in excess of a year to be processed, during which time victims of domestic abuse are placed in a position of heightened vulnerability: the caution can be used against them in future legal processes including custody proceedings and criminal proceedings against the perpetrator; and they are frightened to contact police again.

Other applicants' lives can be put on hold and opportunities missed as they are unable to apply for or take up new jobs, travel to certain countries, work in a position of trust, adopt children or care for vulnerable people.

In our experience the quality of decision making at ACRO is not good, and the outcome is usually a rejection, despite clear evidence that a caution has been administered unlawfully. It is not until a pre-action letter is sent and/or judicial review proceedings issued that ACRO will be persuaded to look more carefully at the legality of the caution and agree to rescind it, usually pre-permission.

Without access to the judicial review process, unlawfully administered cautions would remain on our clients' records, with serious consequences for victims of domestic violence and lost opportunities for others.

These situations appear to arise due to: (a) inadequate training and/or supervision of police officers, resulting in cautions being administered unlawfully; and (b) inadequate care taken by ACRO at the application stage, resulting in the need to resort to judicial review to remove unlawful cautions. Better training and supervision and review of processes at both stages would reduce the need to resort to judicial review.

#### Case study 7

Our client was a vulnerable woman who called the police on being assaulted by her husband. When the police attended he denied the assault but she admitted flicking a tea towel at him. The officers arrested her and offered her a caution, without properly advising her as to the consequences, and without considering whether to do so was in the public interest, given the trivial nature of the offence, the surrounding circumstances and the mental ill health and vulnerability of our client.

We applied to ACRO for the caution to be rescinded and our application was rejected. We sent a pre-action protocol letter, which resulted in the caution being rescinded, before the need to issue proceedings.

#### Case study 8

Our client was stopped and searched at the entrance to a music festival. (S)he was induced to accept a caution for possession of drugs without being advised as to its consequences. In particular, (s)he was subjected to an unjustified interview under caution at a venue other than a police station, not offered the opportunity to obtain legal advice and not given time to consider whether to accept the caution.

Some years later our client was refused a visa to travel to the USA due to the caution. An application was made to ACRO for deletion of the caution from the PNC on the basis that the procedure used to administer it was unlawful. The application was refused. ACRO reversed this decision on receipt of a pre-action letter.

#### Case study 9

Our client accepted a caution for common assault against a taxi driver, despite not having admitted the offence and the implications of accepting the caution not being made clear to him/her. The caution could have potentially acted as a complete barrier to him taking up a new position in a foreign country.

The client's application to ACRO was rejected but ACRO reversed its decision in pre-action correspondence.

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

We have frequent experience of settlement prior to trial, as case studies 4 to 9 above demonstrate. A common theme in those cases is poor decision making and inadequate oversight. The following case study provides some further insight into why this occurs.

#### Case study 10

We acted for the son of an asylum seeker who had lived in the UK for 11 years. In 2016/17 he commenced the Foundation Year of a BSc in Computer and Information Security at Sheffield Hallam University. He did extremely well, and obtained Firsts in all six modules at the end of his Second Year in 2019. He had, until that date, funded his degree through student loans

provided by the Student Loans Company (the SLC). In July 2019, however, the SLC realised our client was not entitled to student loans as he did not satisfy the eligibility requirements. The error was that of the SLC, which subsequently sincerely apologised for it.

Following discovery of the error the SLC refused funding for our client's final year and revoked the funding paid to him and the university until that date, so that he became a debtor to the university and the SLC in the total sum of £47,000. He had no means to pay this, nor to fund his final year.

Our client sought to resolve the dispute via the complaints system, but his complaints were rejected. He then sought legal advice. In the meantime he was forced to defer his final year. Throughout this period he continued to receive phone calls and letters demanding repayment of the sums paid to date.

Following pre-action correspondence the Secretary of State for Education (SSE) agreed to reinstate our client's funding for past years. In the meantime our client had become eligible for funding but in order to complete his degree he would have had to commence a fresh three year degree course, as a student must be eligible prior to the start of a course to receive funding. The SSE maintained his decision to refuse funding for his final year, despite this development.

We applied for a judicial review of this refusal and for expedition so that the matter could be resolved before the start of the 2020/21 academic year.

In granting expedition Holman J commented that:

*"... it seems crazy even to contemplate the C. embarking upon, and being loan-funded for, a fresh 3 year course... I sincerely hope that common sense will prevail."*

Following this, the SSE offered an ex gratia payment to enable our client to complete his final year.

Through no fault of his own, our client faced a situation in which he was both unable to repay his debts and to complete his degree. Without recourse to judicial review his life chances would have been severely hampered. Both the SSE and SLC had discretion which they should have exercised, given the intolerable position in which our client had been placed, but they chose not to do so. It took a judge to remind them that common sense should prevail. The situation could have been avoided had common sense prevailed sooner.

**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?**

Litigation should be a last resort: the Pre-Action Protocol requires parties to set out and respond to proposals for ADR, and indicates that costs consequences may follow any unreasonable refusal to engage in ADR. We always propose ADR as standard in our pre-action correspondence but in our experience, defendants often do not take up offers to engage in this. On occasion they will only do so close to trial when, presumably they have instructed counsel and considered the issues better. This has sometimes led to resolution, but it is regrettable that this could not have been reached earlier in the process. Were mediation to be compulsory (as it was temporarily in the Central London County Court) it might encourage defendants to engage with the issues and resolve the matter sooner.

A 2009 study by the Nuffield Foundation and the Public Law Project found that only 6% of lawyers interviewed had experience of mediation in public law disputes<sup>38</sup>. The same study observed the potential that mediation could have in empowering lay claimants and giving them “any opportunity to take part in negotiations and present their own narrative”<sup>39</sup>. We welcome proposals aimed at giving ADR a more prominent role in judicial review and/or encouraging parties to engage in ADR. In our experience ADR usually results in a swifter resolution.

However, the suitability of ADR in cases of judicial review does vary depending on factors such as the urgency of the matter in issue, the tight time limits which judicial review proceedings are subject to, the associated expense of engaging in ADR, the nature of the dispute itself, and the need to resolve a point of legal principle. Should the use of ADR be expanded in judicial review proceedings, any proposal should be mindful of these factors, especially to ensure that funding arrangements are sufficient to prevent imbalances of power or finances between the parties.

**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?**

Notably, we are not asked whether the rules of public interest standing are treated too harshly by the courts.

First LASPO, then the CCJA already made it more difficult for potential claimants to obtain standing and exposed public interest groups to greater risks on costs. It may be that these statutes are the reason for the steady decline in judicial review applications since 2015. We fear that further narrowing of the rules of standing could overthrow the balance between the legitimate business of government and the need for accountability and transparency.

There are examples of harsh decisions. By way of example:

Although the natural environment should be of legitimate concern to everyone, and the environment cannot speak for itself, Lord Hope in *Walton v Scottish Ministers*<sup>40</sup> found that those wishing to bring environmental proceedings need to demonstrate genuine interest in the particular area of the environment they are seeking to protect and display sufficient knowledge of that subject to qualify them to act in the public interest.

In *Crawford-Brunt v Secretary of State for Communities and Local Government*<sup>41</sup> which concerned a statutory environmental challenge rather than a judicial review, the claimants were refused permission on the basis of standing because they had not made representations to the planning inspector holding the appeal, even though one of the claimants had objected to the planning application to the local planning authority. Supperstone J applied the reasoning of Lord Reed in *Walton* in finding that the applicable test was merely whether the claimants had objected to the planning inspector. Since they had not, they did not have standing. Supperstone J rejected the claimants’ arguments that other passages in *Walton* permitted a more flexible approach.

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<sup>38</sup> Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (The Nuffield Foundation and the Public Law Project, 2009), p.28 n 6

<sup>39</sup> Varda Bondy and others, *Mediation and Judicial Review: An empirical research study* (The Nuffield Foundation and the Public Law Project, 2009), p.37-38

<sup>40</sup> [2012] All ER (D) 173 (Oct)

<sup>41</sup> [2015] EWHC 3580 (Admin)

In *Walton* Lord Reed reiterated the approach to standing set out in *AXA General Insurance Ltd v The Lord Advocate*<sup>42</sup>, emphasising that the court’s constitutional function of maintaining the rule of law should not be ignored in favour of presuming that the court’s only function is to redress individual grievances. Reaffirming the use of the words “*directly affected*” as a key part of the test of standing, Lord Reed emphasised that these words enable the court to draw a distinction between “*the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates*”.

Importantly, Lord Reed reiterated that: “*The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it*”.

In recognition of the difficulties already faced by those bringing challenges on behalf of vulnerable groups or the environment, we would suggest allowing a more flexible approach to standing in those cases.

If further details or information are required, please contact:

Alice Hardy, Partner, Hodge Jones & Allen [ahardy@hja.net](mailto:ahardy@hja.net)

Or

Denise Kitchener [dkitchener@hja.net](mailto:dkitchener@hja.net)

Telephone: 020 7845 8345

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<sup>42</sup> [2011] UKSC 46