

The Independent Review of Administrative Law – Call for Evidence

**Submissions
from
a group of Oxford University public lawyers**

25 October 2020

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Contributors

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Four Preliminaries

2. There are four important preliminary points concerning the Ministry of Justice’s Call for Evidence as part of the Independent Review of Administrative Law (‘IRAL’).¹ They are conceptual, empirical and temporal in nature.

Conceptual

3. The Call for Evidence is framed by the following inquiry: ‘*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?*’² The conceptual frame underpinning this question is important, but incomplete and hence inadequate, since it makes no mention of Parliament. Judicial review is not purely about contestation between individuals and the executive, wherein the balance is between the rule of law and executive efficiency. Judicial review is there to ensure, *inter alia*, that the executive complies with the limits to its authority that flow from the enabling legislation enacted by Parliament, and from the broader system of parliamentary governance.³ In this regard, there is no contest between the rule of law and efficiency. The overarching precept ensured by judicial review is the accountability of the executive. Unlawful administrative action forms no part of the business of government. There is no countervailing public interest in letting it go unchallenged, or in making otherwise triable issues non-justiciable.
4. Moreover, judicial review – properly conceived – is concerned with questions relating to legality rather than merits. Lord Kerr, with unanimous Supreme Court support, captured this clearly in *Michalak v General Medical Council: an appeal*

is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original

¹ Ministry of Justice, IRAL Secretariat, ‘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? Call for Evidence’ (September 2020) (hereafter ‘Call for Evidence’).

² *ibid*, 1.

³ The degree of common ground about this issue is evident in the otherwise strongly-opposed essays concerning the constitutional foundations of judicial review collected in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000). Subsequent contributors to this debate have emphasised the centrality of ‘consensus’ between the legislature and judiciary, irrespective of one’s starting point for analysis, see, eg., Alison Young, *Democratic Dialogue and the Constitution* (OUP 2017).

decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own. Judicial review, by contrast, is, *par excellence*, a proceeding in which the legality of or the procedure by which a decision was reached is challenged.⁴

A successful judicial review claim, even where proportionality was involved, was concerned only with whether the decision had been legally open to the decision-maker: ‘the High Court ... does not substitute its own decision for that of the decision-maker’.⁵

5. A graphic illustration is provided by *R v Somerset County Council, ex parte Fewings*,⁶ a case concerning the legality of restrictions placed by a county authority, within its geographical area of administration, on hunting (at the time, a highly contentious political topic). As Sir Thomas Bingham MR stated in the Court of Appeal:

The court has no role whatever as an arbiter between those who condemn hunting as barbaric and cruel and those who support it as a traditional country sport more humane in its treatment of deer or foxes ... than other methods of destruction such as shooting, snaring, poisoning or trapping. This is of course a question on which most people have views one way or the other. But our personal views are wholly irrelevant to the drier and more technical question which the court is obliged to answer. That is whether the county council acted lawfully in making the decision it did on the grounds it did [by reference to its underpinning statutory powers].⁷

Sir Thomas went on to approve Sir John Laws’ observation at first instance that a public authority – in contrast with a private citizen – was permitted to act only as the positive law expressly or impliedly justified, as opposed to possessing a discretion to do all save that which was prohibited;⁸ this position is clearly aligned with a desire to ensure the maintenance of the rule of law.

⁴ [2017] UKSC 71, [20].

⁵ *ibid* [22]. See also [21], [30].

⁶ [1995] 1 WLR 1037 (Court of Appeal).

⁷ *ibid*, 1042.

⁸ *ibid*, citing Laws J [1995] 1 All ER 513, 523-5.

6. It is important that this conceptual background, directly derived from underlying constitutional precepts, is constantly borne in mind as the IRAL Panel undertakes its evaluative work.

Empirical I

7. The IRAL Terms of Reference state in Note C that statutory codification might ‘*increase public trust and confidence in JR [judicial review]*’.⁹ The viability of codification will be considered below in Section 2. Suffice it to say here that insofar as the Terms of Reference imply that there is currently a lack of public trust and confidence in judicial review, there is no empirical evidence to sustain such a proposition. None is presented, and there is no such evidence. The IRAL should not therefore proceed on the basis that public confidence is lacking, unless it can demonstrate empirically that this is the case.

Empirical II

8. It is axiomatic that the Panel’s deliberations should be properly informed by empirical data about judicial review. This is acknowledged in the Call for Evidence.¹⁰ There is an important dimension to this: numbers matter. There is a tendency for those opposed to judicial review to fasten on particular high-profile cases that they believe to be wrong, and then extrapolate therefrom, the assumption being that such decisions characterise the entirety of judicial review and demonstrate a need for systemic reform.
9. This entails a leap from the particular to the general and is problematic for the following reasons.
 - 9.1. To fasten on certain high-profile decisions presents a misleading aggregate picture of the practical reality of judicial review – most of the daily business of which is routine – when seen across a longer time span such as a year, or a decade.
 - 9.2. A central feature of the precedent-driven system of common law decision-making in England and Wales is that case law from past decades or centuries plays an authoritative role, sometimes in light of reinterpretation, in contemporary

⁹ Ministry of Justice, ‘Terms of Reference for the Independent Review of Administrative Law’ (31 July 2020) (hereafter ‘Terms of Reference’).

¹⁰ Call for Evidence (n 1) 4.

judgments. Precedent emerges from across the judicial review field, and plausible analyses need to reflect this – as opposed to such occasional high-profile decisions. Put bluntly, to treat the outcome in a controversial case as proof of a general malaise in public law is a *non sequitur*, and invites a cure worse than any identifiable disease.

10. To be balanced and persuasive, it is important that any conclusions be informed by empirical data about the daily business of judicial review over a judicial year or years. This includes the number of claims, success rates, the grounds on which claims succeeded or failed, and another important dimension, judicial construction of the enabling legislation on which the executive acted. A common assumption is that courts routinely crab and confine the executive. This is not reality. When courts find against claimants, they routinely interpret the legislation purposively, so as best to effectuate the legislative schema, broadly interpreting and clarifying the executive power accorded by statute.
11. These concerns about empirical data are underscored when the Call for Evidence’s Questionnaire is considered. First, understanding how the grounds and procedures of judicial review (question 1) and the prospect of being judicially reviewed (question 2) influence administrative decision-making is important in understanding how judicial review contributes to effective *and* legal government. More judicial review does not *prima facie* lead to more ineffective government.¹¹ For there to be the ‘proper and effective discharge’ of administrative functions (question 1), decision-makers must be competent — and to be competent they must act within their legal powers.
12. While a questionnaire to government departments can yield some limited information about the influence of judicial review on administrative decision-making, it cannot provide a comprehensive evidence base for consideration of the issue. There is a small, but important, literature on the impact of judicial review on administrative decision-

¹¹ Elizabeth Fisher and Sidney Shapiro, *Administrative Competence: Rethinking Administrative Law* (CUP 2020) ch 1.

making in England and Wales.¹² There is also research that underscores the legal stability that judicial review brings to decision-making.¹³ There are studies that point to the contribution of judicial review to good decision-making.¹⁴ Other studies have pointed to the barriers that block the influence of judicial review on decision-makers.¹⁵

13. Any further work in this space would also need to take into account the following.

13.1. Judicial review is just one of several ways in which administrative decisions can be challenged in courts, tribunals or other adjudicatory forums. Any analysis of the impact of judicial review should be compared to these other forms of review and accountability.¹⁶ Many statutes create purpose-built procedural routes through which applicants can challenge decisions. Examples include the many rights of appeal to the First-tier Tribunal, and challenges to appeal decisions by the Planning Inspectorate/Secretary of State under section 288 of the Town and Country Planning Act 1990.

13.2. Given these many other routes, judicial review is often very much a remedy of ‘last resort,’ when there are no other routes of challenge.¹⁷ If judicial review is used routinely for particular clusters of decision, this may be an indication that legislation has failed to provide for an alternate adequate route of challenge.

¹² See, eg, Varda Bondy, Lucinda Platt, and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015) and Lucinda Platt, Maurice Sunkin, and Kerman Calvo, ‘Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales’ (2010) 20 (Supp 2) *J of Public Administration Research and Theory* i243.

¹³ See, eg Elizabeth Fisher, ‘Law and Energy Transitions: Wind Turbines and Planning Law in the UK’ (2018) 38 *OJLS* 528.

¹⁴ Richard Kirkham and Elizabeth A. O’Loughlin, ‘Judicial Review and Ombuds: a Systematic Analysis’ [2020] *PL* 680; Jerry Mashaw, *Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government* (CUP 2018); and Elizabeth Fisher, Pasky Pascual and Wendy Wagner, ‘Rethinking Judicial Review of Expert Agencies’ (2015) 93 *Texas Law Rev* 1681 (survey of how 45 years of judicial review improved EPA Clean Air standard setting).

¹⁵ Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004).

¹⁶ See also studies of Chris Gill and others, ‘Dysfunctional Accountability in Complaint Systems: the Effects of Complaints on Public Service Employees’ [2019] *PL* 644.

¹⁷ Joanna Bell and Elizabeth Fisher, ‘Exploring A Year of Administrative Law Adjudication in the Administrative Court (Working Paper, 21 September 2020) [Appendix A to these submissions].’

13.3. Question 1 asked about particular grounds of review, but the relevance of any ground will depend on the legislative frameworks for those decisions, and the issues at stake.

13.4. Analysis should look at the overall process of bringing judicial review actions, including the role of the Pre-Action Protocol.¹⁸

Temporal

14. The time frame for this inquiry is very short, and the questions posed are far-reaching. The danger is that conclusions will be reached that are not informed by data that withstand serious scrutiny. The remit of both significant Law Commission inquiries into public law matters was significantly narrower than that of IRAL, but nonetheless each lasted much longer. The Commission's highly-regarded (and influential) 1976 report on *Remedies in Administrative Law* concerned only procedural matters and resulted from a process lasting over six years.¹⁹ The 1994 Report, *Administrative Law: Judicial Review and Statutory Appeals* emerged from a process lasting two years, despite excluding the substantive grounds for judicial review to which the IRAL Panel is additionally required to pay attention.²⁰
15. Given the complexity of the issues discussed under the following four headings, the authors of this submission invite the Panel to reflect carefully on the ambit of the task they have been assigned, particularly given the very limited data available to them.

¹⁸ eg, Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation 2019) ch 5.

¹⁹ (Law Com No 73, Cmnd 6407, 1976). The remit and history is discussed in paras [3]-[5] of the report.

²⁰ (Law Com No 226, HC 669, 1994). The remit is discussed in Part I of the report.

Part 1: Codification

16. The first issue in the Terms of Reference concerns codification: *‘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’*.²¹ The Call for Evidence, in turn, asks whether there is *‘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?’*²²
17. Judicial review has been ‘codified’ in some other jurisdictions and is a process closely tied to regularising administrative process and procedure.²³ Codification can be valuable in providing a clear framework for review (just as section 31 of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules might be said to have done, within more limited remits).
18. The IRAL is said to be especially interested in experience in Australia and other common law jurisdictions. Professor Saunders and Professor O’Regan (the latter a signatory to this submission) have submitted evidence concerning the detailed workings of the statutory regimes in Australia and South Africa respectively, about which they have considerable expertise. The members of this group endorse the submissions that they have made.²⁴
19. What follows in this section is designed to address four more general considerations when thinking about codification. Supporting examples from the UK and elsewhere are used where relevant.

²¹ Terms of Reference (n 9) point 1.

²² Call for Evidence (n 1), Questionnaire, Section 2 (Codification and Clarity), question 3.

²³ Administrative Procedure Act 1946 (United States).

²⁴ Catherine O’Regan and Cheryl Saunders AO, ‘Submission by the Bonavero Institute of Human Rights, University of Oxford and the Centre for Comparative Constitutional Studies, University of Melbourne’ (October 2020).

Purpose

20. Codification of a given area of law might be attempted for a number of purposes, ranging from setting out existing rights and duties in clear form (a legal certainty-focused objective) or interpretation thereof in light of contemporary circumstances, through to ossification of the law's substantive development, limitation of its reach, or evisceration of its content.²⁵ Given this spectrum of possible objectives, it is important to be clear at the outset about the purpose in play.
21. Note C of the Terms of Reference is couched in terms of clarification, but it appears ambiguous and can be read in different ways.
22. The ambiguity arises in the following way. The opening sentence of Note C refers to the Supreme Court's recognition in *Michalak* (and, earlier, in *Cart*) that the foundations of judicial review lie in the common law, meaning that the substantive review jurisdiction, including the grounds, would remain even if the Senior Courts Act 1981 – which gives a statutory footing to the procedure – were to be repealed.²⁶ However, by then asking whether substantive public law could be placed on a statutory footing to promote clarity, Note C may also imply that it would be possible for codification to *overturn* the common law foundations, such that if a codification statute were later repealed or seriously curtailed, the scope of substantive judicial review would be commensurately reduced. Obviously, this latter understanding would run counter to the principle in *Michalak*, and beg the question whether legislation could operate in the fashion anticipated.
23. If the correct reading of Note C is in fact that it simply *notes* the unanimous decision in *Michalak*, a practical question arises concerning the usefulness of expending legislative time on a detailed codification exercise concerning principles which already exist. As a general point, the modern body of public law, complex as it is, has both a foundation of principle and a coherence of substance that it would be unwise to disturb.

²⁵ Stephen Cretney 'The Politics of Law Reform - A View From the Inside' (1985) 48 MLR 493.

²⁶ *Michalak v General Medical Council* [2017] UKSC 71, [31]-[35]. See also *R (Cart) v Upper Tribunal* [2011] UKSC 28, [37] (Baroness Hale).

24. More specifically, codification involves layering a general abstract legislative provision on top of existing legal doctrine and the legislative frameworks under which judicial decisions are made. That layering process is a complex one, and would not necessarily result in clarity, certainly not in the short term.
25. With regard to doctrine, while scholars and textbooks structure judicial review around a set of broad, general substantive grounds (such as that power must be exercised ‘fairly’ and ‘reasonably’), in many areas the courts have developed more refined versions of these tests which they apply in particular categories of commonly occurring judicial review challenges. This provides greater clarity. It also ensures that review is appropriately tailored to the decision in question, the relevant competence of the decision-maker, and the relative expertise of the court. Layering a new framework *on top of* that doctrine does not remove the value of that tailoring, but rather must interact with it.
26. Meanwhile, in regard to legislative frameworks, a survey of legal reasoning in judicial review cases in the Administrative Court in 2017 (undertaken by two of the signatories to this submission, and annexed as Appendix A) found that the legislation under which a decision was made dominated legal reasoning.²⁷ Out of 283 judgments, 131 were directly concerned with legal errors in statutory construction, and the vast majority of grounds relating to process and procedure also turned on the framework for decision-making created by the statute. Layering codified grounds of review would add a further layer of legal inquiry to these established review processes.
27. Codification in the UK more than likely would lead to a rise in judicial review challenges and appeals. The study of the Administrative Court’s work in 2017 revealed that in at least 50 of the cases, the legislative framework had changed since 2010 and in a further 83 cases since 2000.²⁸ Legislative and policy reform inevitably begets legal uncertainty and thus litigation. Lessons can be learned in this regard from elsewhere in the law. Examples abound from private and criminal law of common law and equitable principles

²⁷ Bell and Fisher (n 17).

²⁸ *ibid.*

which have been found to continue to exist, notwithstanding the creation of regulatory schemes by legislation, with consequent lack of clarity.²⁹

28. Whether the purpose of codification is clarification or limitation (for example, by including restraints on circumstances in which substantive review can operate, or by encouraging interpretive restraint on the part of courts), one need only take a cursory glance at United States (US) constitutional jurisprudence to see that neither of the above is guaranteed.³⁰ Although the US Constitution is perhaps the paradigm case of codification, it cannot be accurately understood without reference to over-arching principles, which are simply not present on the face of the text. Judicially developed principles central to the understanding of the instrument include the ‘separation of powers’, ‘checks and balances’, and the ‘rule of law’. References to such principles are contained within large bodies of jurisprudence generated by the interpretation of individual Articles of the constitution. Without such principles, it would be impossible to capture accurately how the US Constitution (or indeed any common law system) mediates questions of constitutional or public law.³¹
29. To bring the issue closer to home, a 2005 empirical study by Le Sueur on the head of judicial review known as ‘unreasonableness’ (or ‘irrationality’) demonstrated that generally well-understood heads of review had to be recalibrated across a range of contexts by altering the precise wording of the tests. Such recalibrations often used significantly different language from the original expressions in case law.³² For example, unreasonableness has been recast as ‘anxious scrutiny’³³ ‘perversity’³⁴ or even non-justiciability³⁵ according to the demands of the context. It is difficult to imagine how

²⁹ Classic examples in private law relate to the 1925 law of property legislation: for a detailed study, see J Stuart Anderson, *Lawyers and the Making of English Land Law, 1832-1940* (Clarendon 1992). Within judicial review, examples are provided by argument concerning the respective ambits of statute and prerogative: see, eg, *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] QB 26.

³⁰ See Akhil Reed Ahmar, *America’s Unwritten Constitution* (Yale UP 2012), Introduction.

³¹ *ibid.*

³² Andrew Le Sueur, ‘The Rise and Ruin of Unreasonableness?’ (2005) 10(1) JR 32.

³³ *Bugdaycay v Home Secretary* [1987] AC 514.

³⁴ *Secretary of State for the Home Department v Lord Alton of Liverpool & Ors (in the matter of the People’s Mojahedeen Organisation of Iran)* [2008] EWCA Civ 443.

³⁵ *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin).

such a complex reality might be accurately captured by a statute or code of practice without significant omissions, undue vagueness or even confusion. In short, ‘clause bound literalism cannot provide the infallible constitutional compass we crave’.³⁶ Neither would it ease the interpretive burdens which befall administrative lawyers.

Scope I

30. The impact of codification is also dependent on whether the codified statute contains the entirety of the regime of judicial review. It is noteworthy that in Australia, South Africa, and the US the statutes dealing with the grounds of judicial review subsist in legal systems wherein there is some foundation for judicial review that flows from the Constitution. The constitutional provision differs in the three jurisdictions, but the very existence of such a provision means that the comparative lessons that can be gleaned from such jurisdictions is thereby diminished. The statutory codification is therefore only ever telling part of the story.

Scope II

31. The Terms of Reference in relation to codification include consideration of whether the ‘*amenability*’ of public law decisions to judicial review, as well as the grounds of such review, should be codified.³⁷ It is unclear what precisely is intended by the term ‘*amenability*’. It could capture all or any of the following: justiciability; standing; ripeness; mootness; permission; time limits; or scope of public law procedures. The viability of any codification exercise will depend crucially on the more particular meaning that is ascribed to ‘*amenability*’. Clarity in this respect is therefore essential.

Abstraction v Specificity

32. A further important consideration when thinking about the value and impact of codification concerns the relative degree of abstraction or specificity of the codification. This choice is important with respect to both issues of amenability to judicial review, and the grounds of review. The following is indicative of the choice as it plays out in relation to the grounds of review, but analogous considerations pertain in relation to codification, so far as it relates to amenability.

³⁶ Ahmar (n 30) ch 1.

³⁷ Terms of Reference (n 9) point 1.

- 32.1. The more abstract the grounds of review, the less the projected statute will provide clarity, since each of the abstract grounds will be fleshed out by the judiciary, with the result that the lifeblood of judicial review will remain judicial decisions on the meaning of, for example, error of law, error of fact and the like. This is exemplified by experience in the US. The Administrative Procedure Act 1946 sets out the grounds of review in very general terms, with the consequence that the wording of these terms plays very little role in the judicial and academic debates as to the reach/standard of judicial review for matters such as error of law, error of fact, or abuse of discretion.
- 32.2. The more specific the grounds for review, the greater will be the potential impact of the codification. However, if the intent underlying codification is indeed clarification of the status quo through capturing the richness of the existing jurisprudence, then the statute will be considerably longer and more complex. The attendant danger is that this then generates satellite litigation as to the meaning of particular detailed provisions of the legislation, with a consequential increase in the overall body of law concerning judicial review: again bringing to mind the findings of the study of the Administrative Court's work in 2017, mentioned above.
33. Perhaps unsurprisingly, comparative evidence suggests that successful codification is the product of many years' work,³⁸ because it must capture adequately all the legal work of the courts (particularly at the lower levels) and how it relates to administrative decision-making. Any attempt to codify the grounds of judicial review must also contend with how codification interacts with the many other routes for legal challenge. In the UK, for example, the Administrative Court also applies the grounds of review in dealing with statutory appeals/challenges (sections 288 and 289 Town and Country Planning Act 1990). Other courts (for instance the county court, dealing with appeals on points of law from housing authorities, and criminal courts determining collateral challenges to decisions by the Crown Prosecution Service) and tribunals (most notably the Upper Tribunal) also frequently engage with the grounds of review.

³⁸ eg, work on the Administrative Procedure Act 1946 in the United States took over a decade and included the comprehensive *Attorney General's Committee Report on Administrative Procedure* (1941). See Fisher and Shapiro (n 11) ch 6.

34. We make further submissions about the difficulties of codification in later sections, where they are pertinent to the specific issues within the Terms of Reference.
35. Many lawyers owe their livelihood to the enduring fallacy known as the drafter's delusion – the belief that legislation can cover all eventualities. The Panel will need to consider, in light of the points raised in this section, whether codification can in fact bring anything of real value to judicial review.

Part 2: Justiciability

36. The Terms of Reference and Call for Evidence are not identical in their specification of the justiciability issue: the Call for Evidence appears to refer to the range of decision-makers which should fall within the ambit of judicial review, as well as to whether certain subjects/areas should be excluded, whereas the Terms of Reference appear to be concerned solely with the latter topic.³⁹ The former issue is complex, entailing description, analysis and normative evaluation of a large body of case law, and its relationship with background statutory developments and theories of the proper role of the state.⁴⁰ This being so, we will concentrate on the subjects/areas which should be amenable to judicial review, itself a large topic.
37. The Terms of Reference are predicated on:
- (i) historical assumptions concerning the reviewability of decisions that affected the manner of exercise of discretionary power;
 - (ii) the contention that the range of justiciable issues must be clarified; and
 - (iii) the assumption that any difficulties can be rectified through statute.

Re (i) The Historical Premise: Inaccurate Historical Assumptions Regarding Justiciability Concerning the Manner of Exercise of Power

38. First, the Terms of Reference frame the inquiry into justiciability against the background of Note E,⁴¹ which is also relevant to the grounds of review (considered in Part 3). The argument contained in the first two sentences of Note E is that historically courts did not control the manner of exercise of power, provided the public body acted within its scope

³⁹ Compare Terms of Reference (n 9), para. 2; Call for Evidence (n 1), Questionnaire, Section 2, Q 4.

⁴⁰ It would entail consideration of the corpus of case law concerned with amenability to judicial review. The case law and secondary literature are analysed in Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) ch 27.

⁴¹ Note E is as follows: ‘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 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?’

of authority. The assumption appears to be that this is relevant to current discussion concerning justiciability, because it reveals that courts are treading where their forbears did not.

39. The argument is clearly wrong. The distinction between scope and manner of exercise, with the former being reviewable and the latter not, applied only to review of prerogative power, prior to *Council of Civil Service Unions v Minister for the Civil Service*.⁴² There was no such limit on review of statutory power, which has always constituted circa 95% of the totality of judicial review actions. Judicial review from the late sixteenth century onwards routinely included manner of exercise of statutory discretionary power.⁴³ It was reviewed directly via tests framed in terms of rationality, and what was then called proportionability, wherein the normal remedy was *certiorari*. It was reviewed indirectly/collaterally via damages actions in trespass, trover, replevin, and action on the case, depending on the factual circumstances. The tortious remedy was sought when monetary relief was desired, but it would however issue only if the public body's action lacked legality, as manifest where exercise of discretion failed to meet the standards of rationality or proportionability.

Re (ii) The Substantive Premise: The Contention that the Range of Justiciable Issues Must be Clarified

40. The Terms of Reference suggest that the range of issues that should be justiciable might require reform. This presupposes either or both of two things: that the current case law is insufficiently clear, and/or that courts are treading on issues that should properly be regarded as non-justiciable. In reality, following the Supreme Court's detailed consideration in *Shergill v Khaira*,⁴⁴ the boundaries of justiciability seem reasonably settled. There is no evidence that when justiciability is directly placed in issue, it is not dealt with appropriately by the courts.

⁴² [1985] AC 374.

⁴³ The seminal early decision was *Rooke's Case* (1598) 5 Co Rep 99b. The case law concerning direct and collateral challenge relating to discretion is analysed in Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 36-42, 59-62; Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective', in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law, European and Comparative Perspectives* (Hart 2017) ch 9

⁴⁴ [2014] UKSC 33.

41. In *Shergill*, a trusts case, two categories of justiciability were identified. In a joint judgment by Lord Neuberger, Lord Sumption, and Lord Hodge, considerations going to particular decision-making institutions and to the subject-matter in play were invoked. The first category concerns issues which are ‘beyond the constitutional competence of the courts’.⁴⁵ Examples within this first category include transactions with foreign states, proceedings in Parliament, or matters which would directly impact upon the United Kingdom’s foreign relations.⁴⁶ The second category is best described as issues which, by reason of their subject-matter, do not require legal intervention. This category includes ‘claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law’.⁴⁷ Specific examples include domestic disputes, transactions not intended to create legal relations, and issues of international law which do not generate private rights or reviewable questions of public law.⁴⁸
42. Three further points are significant in relation to this contention in the Terms of Reference.
43. First, the two categories of non-justiciability are well-grounded in normative terms, and they provide fairly generous tests for non-justiciability. *Shergill* also forms part of a pattern of frequent and careful consideration given to non-justiciability by the Supreme Court.⁴⁹
44. Second, non-justiciability is a blunt doctrine, which ignores the contextualisation that is central to judicial review. While it is rare for courts to regard matters as wholly non-justiciable, they routinely moderate and modulate the grounds of review, according deference and varying the intensity of review applied to the decisions challenged

⁴⁵ *ibid* [42].

⁴⁶ *ibid*.

⁴⁷ [2014] UKSC 33, [43].

⁴⁸ *ibid*.

⁴⁹ See, eg *Belhaj v Straw* [2017] UKSC 3.

(something which also applies to other grounds of claim touching on government action).⁵⁰ We return to this issue in Part 3.

45. Third, an attempt to demarcate the justiciability of decisions by statute would have important constitutional and normative implications. While parliamentary sovereignty lends formal authority to statute, it does not dispel normative concerns inherent in respect for separation of powers and the rule of law, about whether the legislature should tell the courts what is suitable for legal resolution. This is quintessentially a judicial task, whereby the courts decide whether there are no meaningful legal standards that can be applied to the salient issue. In reality, a statute purporting to exclude the courts through a non-justiciability clause is, in substance, doing the same thing as an ouster clause, inviting extremely close judicial scrutiny.⁵¹ The normative concerns expressed in *Privacy International* would *a fortiori* be applicable here.⁵²

Re (iii) The Statutory Premise: Statutory Intervention as the Answer

46. The third distinct issue is that the Terms of Reference seemingly assume that any identified problems can only be addressed through statute. However, it is important to reflect on the form that statutory intervention might take. In principle, there are two possible forms of statutory intervention, and both are problematic.

- 46.1. The first approach would entail legislation listing the *type/area of subject-matter* intended to be non-justiciable (for example, decisions affecting resource allocation or implicating foreign policy), across a range of decision-makers. There are two

⁵⁰ What Laws LJ has described as ‘a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake’ – *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115, [78] (ie irrationality review of varied intensity). For instance, in reviewing resource allocation decisions the courts ask whether the decision is ‘manifestly without reasonable foundation’ (eg *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [65] (challenge to ‘benefit cap’ introduced by Welfare Reform and Work Act 2016); *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 (challenge to local authority policy on the funding of home to school transport for children and young people with special education needs)). Similarly, the Court of Appeal has recently said that ‘when dealing with matters depending essentially upon political judgment, matters of national economic policy and the like, the court will only intervene on grounds of bad faith, improper motive and manifest absurdity’ (*R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004, [55]). For a classic discussion of limits to judicial review in a sensitive area (on the facts, national security), see *Council of Civil Service Unions v Minister for the Civil Service* (n 42) 406-7 (Lord Scarman), 408-11 (Lord Diplock) and 417-9 (Lord Roskill).

⁵¹ As classic authority, see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. For more recent analysis, see *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

⁵² *R (Privacy International) v. Investigatory Powers Tribunal* (n 51).

related difficulties. First, it requires a determination about the types of subject-matter which should properly be regarded as off-bounds for the courts. Secondly, there would be a real danger that the subject-matter on the excluded list would be defined in over-inclusive terms. These difficulties are illustrated by the potential formulation of statutory exclusions concerning foreign policy or resource allocation. Generally-formulated exclusions are likely to generate considerable litigation, as claimants and government alike contest the meaning and boundaries of the non-justiciable categories listed. Furthermore, an approach seeking to exclude the courts from these areas without any qualification or precise definition would clearly be unacceptable: many aspects of foreign policy have direct implications for individual rights, and a vast number of executive decisions have implications, whether direct or indirect, for resource-allocation.

46.2. A second approach would involve legislation purporting to render *specific powers* non-justiciable. However formulated, such a provision would give rise to significant legal complexities. Consider, for example, a clause which provided that ‘power X is non-justiciable’. Such a clause would be read against the background of the axiomatic principles that all legal powers have limits,⁵³ and that, in order to be meaningful, legal limits must be capable of being enforced.⁵⁴ These principles mean that it would be untenable to read the clause as preventing *any* judicial review of purported exercise of power X. Consequently, there would be complex legal arguments about what, precisely, ‘non-justiciable’ meant in this context. A drafter might seek to circumvent these challenges by defining the boundaries of the power extremely broadly: for instance, by providing that ‘power X can be exercised for any purpose whatsoever’. However, this would again create considerable legal complexity, with the outer boundaries of the power inevitably raising interpretive questions. Novel legal questions would also arise about how long-established extra-statutory principles of review might apply to a clause.

⁵³ *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997, 1029-1030 (statutory power). See also *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities & Local Government* [2020] UKSC 16, [23]; *Entick v Carrington* (1765) 2 Wils KB 275 (prerogative power).

⁵⁴ For this reason, Laws J in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) explained that effective judicial review is a logical necessity of Parliamentary sovereignty ([38]).

47. There are two further specific problems in drafting a statute intended to broaden the doctrine of non-justiciability: risks and unintended consequences. In a legal system respecting the rule of law, constitutional and other relevant legal constraints apply to governments regardless of their political complexion. Given the Supreme Court's rejection of a broad-brush 'political questions'-based approach to justiciability in *Belhaj*⁵⁵, an approach broader than that currently used would necessarily entail acceptance that it might be employed by any future government. Concerning unintended consequences, non-justiciability is not exclusively a judicial review/public law doctrine, as is illustrated by the fact that *Shergill*⁵⁶ was a trusts case. In reality, issues of non-justiciability cut across the legal system. Consequently, unless any reconsideration of non-justiciability in the judicial review/public law context *also* undertakes the complex task of considering how any redefinition might impact upon, and be made workable, across other branches of the law, any reform in public law might easily entail unintended complications in other areas.

Conclusion to Part 2

48. In short, any attempt to legislate on the subject of non-justiciability would be likely to run afoul of important constitutional principles, to face significant drafting challenges, and to risk cementing a lack of accountability which could be abused by future administrations of various political hues. It would create considerable legal complexity, disrupting what is at present a clear, stable, and predictable body of legal principle, in turn generating litigation in every level of court. As we will explain in the next section, there is no need for anything as blunt as general non-justiciability provisions, given that the need for context-sensitivity is generally appreciated by courts across the board within judicial review.

⁵⁵ (n 49).

⁵⁶ (n 44).

Part 3: Grounds of Review

49. Although the Terms of Reference identify as issues for consideration
- (a) the *grounds* on which courts should be able to find a justiciable decision to be unlawful;
 - (b) the connection between those grounds and the *nature and subject-matter of the power* in issue, and
 - (c) the *remedies* available in respect of the various grounds,⁵⁷

the Call for Evidence makes no specific mention of these issues. Given their inclusion in the Terms of Reference, we consider it relevant to address such matters.

Grounds of Judicial Review: General Considerations

50. The grounds of judicial review have been elaborated by the courts. They have been refined and developed over time. It is of course legitimate to question the grounds of review to determine whether they are warranted. This is, however, a very considerable exercise, and raises once again the temporal concern expressed above (paras 14-15) concerning the compressed time scale within which the Panel is expected to complete its work. It would certainly not be possible within the confines of this submission to engage in detailed analysis of each ground of review. That would require a treatise in itself. Suffice it to say the following.

50.1. The list of grounds of review is very similar to that which exists in other jurisdictions, common law and civil law alike. There are of course differences concerning, for example, the precise scope of review for error of law or mistake of fact, but this should not conceal the similarities that exist across legal systems as to the grounds of review.

50.2. The fact that the grounds of review are replicated across common law and civil law jurisdictions alike show their centrality to the rule of law. Removal or qualification of any of the established grounds of review should be subject to a high justificatory hurdle. This is for two rule of law related reasons. First, given that a central aim of

⁵⁷ Terms of Reference (n 9) para. 3.

judicial review is to ensure that public authorities act within the scope of their lawful powers, changes which may confine the circumstances in which the legality of public authorities' actions can be challenged would dilute the maintenance of legality and public accountability. Secondly, the grounds of review are long-standing and have been relied upon by private parties and public authorities alike in planning their affairs.⁵⁸ Considerations of legal certainty therefore require that amendment or qualification not be undertaken without a suitably robust process of evidence-gathering and evaluation.

50.3. There has been some expansion in the grounds of review in the last forty years, as intimated in the Terms of Reference, Note E. This should be kept in perspective. New grounds of review evolve from existing grounds in order to establish clear conditions and requirements for different categories of case, the overall effect being to place boundaries around judicial review and ensure consistency between cases. Judicial review for error of fact has been expanded, but the current test is not overly broad when compared to its counterparts in other jurisdictions. The courts have recognized substantive legitimate expectations as a ground of review, but there are strict conditions that have to be satisfied by the claimant, and challenges are rarely successful. Rationality review has become more nuanced than hitherto, the principal driver in this respect being concern for the nature of the subject-matter – which, as noted above, is the very factor that the Terms of Reference state should be taken into account. Moreover, the evolution of judicial review cannot be described solely in terms of expansion. In some cases, the courts have sought to narrow and refine the grounds of review. In *Reprotech*,⁵⁹ the House of Lords rejected the use of the private law concept of estoppel when reviewing planning decisions, clarifying earlier case law. Review for error of law has been reined in, as exemplified by Supreme Court decisions such as *Cart*⁶⁰ and *Jones*,⁶¹ the catalyst being once again concern for the nature and subject-matter of the power. More

⁵⁸ It is noteworthy that the frequently-cited outline 'road map' of the grounds of judicial review was laid out (*obiter dicta*) by Lord Diplock in 1984: *Council of Civil Service Unions v Minister for the Civil Service* (n 42) 410-12.

⁵⁹ *R v East Sussex County Council (Appellants) ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8 [33]-[34].

⁶⁰ *R (Cart) v Upper Tribunal* (n 26).

⁶¹ *R (Jones) v First-tier Tribunal* [2013] UKSC 19.

recently, the Supreme Court clarified the law by holding that ‘substantive unfairness’ is not an independent ground of review.⁶²

Grounds of Judicial Review: Terms of Reference, Note E

51. Note E of the Terms of Reference suggests that over the last forty years or more, ‘*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 [judicial review] grounds and proportionality at the other (“exercise”). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity*’.⁶³ While Note E asks whether the claim in the latter sentence is correct (and, if so, whether the approach concerned is appropriate), that query rests on the ‘*arguabl[e]*’ characterisation in the first sentence. That characterisation is wrong, for the following reasons.

51.1. Viewed historically, the grounds of judicial review, when proven, led to the decision being a nullity, or null and void. The assumption in Note E to the contrary is wrong. Thus, from the seventeenth century onwards, the general rule was that reviewable errors when proven led to the decision being a nullity from the time at which the error occurred: errors relating to natural justice/bias rendered the decision null and void; so too did errors relating to rationality and proportionability.⁶⁴

51.2. The characterisation of voidness is warranted in normative terms. Consider the matter from first principle, by reference to rule of law considerations.⁶⁵ The grounds of judicial review are expressive of different kinds of legal reasons as to why a decision should be struck down, all of which are equally serious. The salient

⁶² *R (Gallaher Group Ltd and others) v Competition and Markets Authority* [2018] UKSC 25.

⁶³ Terms of Reference (n 9) Note E.

⁶⁴ Paul UK, *EU and Global Administrative Law* (n 43) 25-62; HWR Wade, ‘Unlawful Administrative Action – Void or Voidable?’ (1967) 83 LQR 499 (Part I) and (1968) 84 LQR 95 (Part II). There are exceptions to the general rule: see, Craig *Administrative Law* (n 40), ch 24.

⁶⁵ *Hoffmann-La Roche v Secretary of State* [1975] AC 295, 365; *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [26]–[27]; *Mossell (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations & Ors (Jamaica)* [2010] UKPC 1; *Ellerton, R (on the application of) v Secretary of State for Justice* [2010] EWCA Civ 906; *McLaughlin* [2007] UKPC 50; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [66].

point is that there is no sound normative argument as to why errors relating to abuse of discretion or natural justice should be regarded as less serious than any other error of law. The different types of error all lead to the decision being ultra vires and void. Courts control errors of law to ensure, inter alia, that the primary decision-maker does not stray beyond its remit, by, for example, adjudicating on a case that does not concern employees when its scope of authority is confined to employees. Courts control abuse of discretion through rationality review, because there should be some limit to the way in which broad discretion accorded to the executive is exercised. Courts impose natural justice because this accords with basic precepts of justice, and because a determination by a biased judge would undermine the very nature of adjudication. If there were legislation attempting to draw distinctions in this respect it would, moreover, almost certainly generate complex case law as to the metes and bounds of each category.

51.3. Voidness/nullity is, in any case, a relative and not an absolute concept. The decision will only be null and void if it is challenged by the correct person, within the established time limits, and there are no other bars to relief. This correctly circumscribes the force of the nullity principle.⁶⁶ There may, nonetheless, be instances where application of the concept of retrospective nullity can cause practical problems, by undermining the legal foundation of decisions that have been made on the assumption that the decision that has been annulled was valid. This has been recognized by courts and academics alike, and reflects reality.⁶⁷ This does not however mean that nullity is an incorrect starting point. Nor does it provide any foundation for a general argument seeking to restrict nullity to certain types of error of law; this would not obviate the problem, given that this concern can arise where subsequent decisions are undermined because they are predicated on an earlier decision said to be vitiated by an error of law. If this problem arises it can be addressed either by analysis as to whether the legality of the second order

⁶⁶ See, e.g., Wade (n 64); MB Akehurst, 'Void or Voidable? – Natural Justice and Unnatural Meanings' (1968) 31 MLR 2 (Part One), 138 (Part Two); Dawn Oliver, 'Void and Voidable in Administrative Law: A Problem of Legal Recognition' (1981) 34 CLP 43; Christopher Forsyth, "'The Metaphysics of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law', in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (OUP 1998); Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 CLJ 289.

⁶⁷ See the material cited in (n 66).

decision is really dependent on the legality of the first order decision, or through the exercise of remedial discretion, whereby the remedy is limited to prospective impact.⁶⁸

Relation between Grounds of Review and Nature and Subject-Matter of the Power

52. The courts already apply the grounds of review mindful of the nature and subject-matter of the power, as noted in para 44 above. They have always done so, explicitly or implicitly. Sometimes commentators will disagree as to the application of a particular ground of review in a particular case, albeit no more so than is the case in relation to the frequent and analogous issues concerning meaning and interpretation that arise in private law. We note here that the Human Rights Act is not within the purview of the IRAL.
53. Courts have a long-established practice of giving weight to subject-matter when determining the application of grounds of judicial review.⁶⁹ The salient issue for IRAL is whether further steps might be taken to underscore the idea, and if so what these might be. To attempt to legislate concerning the relevance of a power's nature and subject-matter would almost certainly be either otiose or counter-productive. It would be otiose if the legislation were simply cast in very general terms, to the effect that '*courts when applying judicial review should take account of the nature and subject-matter of the power being reviewed*'. It would be counter-productive if such legislation sought to specify in considerable detail the factors that should be determinative in this respect: for it would be time-consuming and very difficult to draft such legislation, and the exercise could well generate unproductive satellite litigation.

Relation Between Remedies and Grounds of Review

54. The Terms of Reference link consideration of the grounds of review with that of the remedies available in respect of the grounds on which a decision may be declared unlawful.⁷⁰ There are several points to consider here.

⁶⁸ For further discussion of remedial discretion, see Part 4.

⁶⁹ See, e.g., *R. v. Ministry of Defence, ex p. Smith* [1996] QB 517, 554-6 (Sir Thomas Bingham MR); Michael Fordham, 'What is "Anxious Scrutiny"?' (1996) 1 JR 81; and Paul Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

⁷⁰ Terms of Reference (n 9) para 3.

- 54.1. Claimants and courts already have choices concerning the remedies to redress action that is in breach of one of the established grounds of review. There are five principal remedies available via section 31 of the Senior Courts Act 1981/Part 54 of the Rules of the Supreme Court: quashing, mandatory and prohibiting orders; declaration; and injunction.
- 54.2. The remedies are discretionary, such that the court can, if so inclined, take into account a range of factors (potentially including consequences for the respondent body) in deciding whether to grant a particular remedy.⁷¹
- 54.3. The legislature has already intervened via the Criminal Justice and Courts Act 2015, which requires courts, inter alia, to refuse relief and/or a monetary award if it appears to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (subject to a proviso concerning exceptional public interest).⁷²
- 54.4. It is then unclear what the content of any further reform would be. A more formal connection between each ground of review and the available remedy might be established, such that, for example, abuse of discretion would prima facie lead to a particular remedy, while mistake of fact would lead to a different remedy. This would generate strategic litigation – as for example was seen over the application of Order 53 of the Rules of the Supreme Court.⁷³ It would, moreover, make no sense for reasons that are readily apparent: the factual and legal circumstances in issue in cases to which a particular ground of review applies can differ very significantly, with no automatic connection to the factors determining the applicable remedy where an application is successful. To forge a formal connection between a particular ground of review and a particular remedy, such that the one

⁷¹ Lord Woolf remarks: ‘The existence of the discretion is of the greatest importance since it means that even if an applicant succeeds in establishing a ground for relief, that relief can be refused if his application is unmeritorious’ (*Droit Public – English Style* [1995] PL 57, 61).

⁷² s 84, Criminal Justice and Courts Act 2015, inserting supplementary provisions into s 31, Senior Courts Act 1981.

⁷³ *O’Reilly v Mackman* [1983] 2 AC 237.

always generated the other, would therefore create a Procrustean frame ill-suited for the plethora of cases that arise within every ground of review.

54.5. An alternative approach might be to specify that certain grounds of review should not have any formal legal consequence, such that the court judgment is purely declaratory. The existence of a category of decisions that would be unlawful, but would attract no remedial implications would be contrary to the rule of law. This would, moreover, be very undesirable for the following reasons.

54.5.1. It is unclear in normative terms why any of the established grounds of review should be limited to this exiguous remedial effect.

54.5.2. It would be extremely difficult, if not impossible, to draft any legislative rules that specified when this should occur.

54.5.3. It is unclear how this would fit with the remedial instruction to courts introduced by the Criminal Justice and Courts Act 2015.

54.5.4. It could cause a range of problems for public bodies, since the effect of such a remedial order could leave the public body uncertain as to the status of its existing decision, and what it should do next.

Part 4: Procedure and Remedies

55. The fourth issue in the IRAL Terms of Reference concerns a range of issues dealing with procedure, and remedies.⁷⁴ The Bingham Centre for the Rule of Law has produced some detailed practical proposals for streamlining procedures whilst ensuring the centrality of an effectively functioning system of judicial review to the rule of law, which we commend to the IRAL's consideration.⁷⁵ The remainder of this submission focuses on certain of the issues as identified in the Terms of Reference and the Call for Evidence.

Disclosure and the Duty of Candour

56. The Review should bear in mind the following.

56.1. The rules relating to disclosure are already limited, including by public interest immunity and closed material procedures. The rules were liberalised to some extent in 2006 in *Tweed*⁷⁶ for cases where proportionality was an issue. Even in cases concerning proportionality, disclosure should be carefully limited to the issues required, in a finely balanced analysis of the interests of justice. As the House of Lords noted in *Tweed*, disclosure is nonetheless more limited than in ordinary civil litigation, in part because judicial review cases often turn on issues of law rather than fact. The overriding factor determining disclosure is what is necessary to dispose of the matter fairly and justly. It would be undesirable if incursion on this case-sensitive principle by the recommendations of the IRAL were to mean that the court was deprived of what was necessary to reach a just and fair result.

56.2. Another reason why the rules on disclosure are more qualified in judicial review cases is because public bodies are generally subject to a duty of candour and cooperation that does not apply in ordinary civil litigation. The duty derives from Lord Donaldson MR's judgment in *Huddleston*. The public authority may resist

⁷⁴ We note that The IRAL Call for Evidence (n 1) is framed somewhat differently, with the remedial issues elaborated as 'Process and Procedure'. The questions relating thereto overlap with those in the Terms of Reference (n 9).

⁷⁵ Michael Fordham QC and others, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre for the Rule of Law, 2014).

⁷⁶ *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650.

the claim, but it must do so with ‘all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands’.⁷⁷ It is a self-policing duty, but there is an obligation on lawyers acting for public authorities ‘to assist the court in ensuring that these high duties on public authorities are fulfilled’.⁷⁸ It is also in some respects more demanding, since while disclosure might be satisfied by giving documentation to the claimant, the duty of candour and co-operation requires public authorities ‘to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide’.⁷⁹

56.3. The duty of candour is predicated on the sound normative premise that public authorities are engaged in a ‘common enterprise with the court to fulfil the public interest in upholding the rule of law’.⁸⁰ This premise should be incontrovertible.

56.4. The duties of candour and disclosure are thus directed at the proper administration of justice and hence should be altered only if they *impede* the administration of justice.

56.5. There is no empirical evidence that the duties of disclosure and candour do so. The Review’s Questionnaire to Government Departments about the impact of such duties will not generate sound empirical data, and is also asking the wrong question.⁸¹

56.6. By way of conclusion it is noteworthy that in many civil law systems, and in the EU, there is a right of access to the file, which is applicable both before the initial decision is made, and at the stage of challenge by way of judicial review. The right is enshrined in Article 41(2)(b) of the EU Charter of Fundamental Rights.

⁷⁷ *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941, 945. See also *BACONGO v Department of the Environment* [2004] UKPC 6; *Application by Brenda Downes for Judicial Review* [2006] NIQB 77, [31]; *R (Mohammad Shahzad Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416, [71]; *R (Jet2.com Ltd) v Civil Aviation Authority* [2018] EWHC 3364, [47]-52]; *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508, [13]-[20]; *R (Citizens UK) v Secretary of State for the Home Department* [2018] 4 WLR 123.

⁷⁸ *Hoareau* (n **Error! Bookmark not defined.**) [18].

⁷⁹ *ibid* [20].

⁸⁰ *ibid* [20].

⁸¹ See paras 12-13.

Standing

57. The rules on standing determine access to justice by individuals claiming to be affected by executive decisions, and by public interest groups who are well placed to articulate the wider implications of such decisions. The Terms of Reference ask whether the law of standing should be changed. In the Call for Evidence the inquiry is more directed: whether those submitting evidence have experience of litigation where issues of standing have arisen, and if so whether such people think that the rules of public interest standing are treated *too leniently* by the courts. We confine ourselves to the following observations.

57.1. The issue of standing was considered in detail in the Ministry of Justice's investigation into judicial review in 2013-2014, concluding in June 2019.⁸² This exercise included a survey of other standing tests used elsewhere. The conclusion of this reform exercise was that changes should not be made to the law of standing, and in particular that the 'sufficiency of interest' test should remain the criterion.

57.2. The very great majority of judicial review cases involve no contestation as to standing.⁸³ They are brought by the individual affected by the contested government action. If the intent/concern behind this aspect of the IRAL is to reduce the incidence of judicial review in numerical terms, then changes to standing rules so as to circumscribe public interest challenges will have a marginal or interstitial impact on the aggregate number of challenges.

57.3. Public interest challenges serve an important function for the very reason recognized by the Supreme Court in *Walton*⁸⁴ and developed in the academic literature:⁸⁵ there are certain issues that do not affect any particular individual more than any other, and it would clearly be contrary to the rule of law if such issues

⁸² Ministry of Justice, *Judicial Review: Proposals for Further Reform (Government Response to Consultation)* (4 June 2019).

⁸³ Bell and Fisher (n 17), section 2.2.

⁸⁴ *Walton v Scottish Ministers* [2012] UKSC 44.

⁸⁵ Peter Cane, 'The Function of Standing Rules in Administrative Law' [1980] PL 303; Peter Cane, 'Standing, Legality and the Limits of Public Law' [1981] PL 322; Peter Cane, 'Standing Up for the Public' [1995] PL 276.

could not be subject to judicial review. Public law is concerned with abuse of power, even when no private rights are at stake.⁸⁶ Lord Reed also recognized that in other contexts, where a specific individual was the primary addressee of the contested measure, then that individual would normally be expected to bring the action. For example, in *DSD v Parole Board*,⁸⁷ the Administrative Court recognised that the law of standing should be tailored to find the most appropriate claimant, where there was a possibility that multiple claimants might have standing. In that case the Mayor of London was denied standing in favour of one of Worboys' victims. In short, the 'sufficient interest' test can be contextualised to screen out overtly political claims.

57.4. There are also group challenges, where the group acts as a surrogate for those directly affected. This is warranted because those directly affected, whose interests are represented by groups such as the Child Poverty Action Group, or the coalition of charities behind Violence against Women and Girls, cannot readily bring the action in their own name. There can also be cases where the group constitutes an association of those immediately affected by, or concerned by, the action. The rationale for the group challenge in this type of instance is somewhat different. The catalyst here is normally the logic of collective action to pool resources, draw upon overall expertise, and share the burdens of litigation. Trade associations and charities commonly perform this role.

57.5. It would be wrong, given the above, to preclude public interest challenges, as some have contended.⁸⁸ There is no evidence that any limitation is required or warranted. On the contrary, empirical research by two members of our group indicates the small number of cases that fall into this category.⁸⁹ In a survey of 283 judicial review judgments from the Administrative Court in 2017, there were just 18 cases (6%) where a public interest group was the main party. These groups represented

⁸⁶ Craig, *Administrative Law* (n 40) para 12-047.

⁸⁷ [2018] EWHC 694 (Admin).

⁸⁸ Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703 2013) 22.

⁸⁹ Bell and Fisher (n 17).

a range of diverse civil society interests including those relating to human rights,⁹⁰ environmental concerns,⁹¹ local interests,⁹² animal welfare,⁹³ recreational activities,⁹⁴ and privacy.⁹⁵ Generalising about public interest groups thus is problematic. This number compares to 48 judgments where the main party was a company and 21 cases where the main party was a public body.⁹⁶

57.6. Courts already have the jurisdiction to determine whether a body represents the public interest. Allowing public interest groups to bring actions (whilst small in number in the bigger picture of judicial review) is essential in upholding the rule of law. Many standards (including those provided by Acts of Parliament) do not confer benefits on individuals, but seek to promote the interests of the public as a whole. Limiting standing in such cases to, for instance, those whose ‘legal rights’ are being infringed would result in legislative duties, enacted to promote important public interests, becoming hollow.

57.7. Moreover, any such legislative change would almost certainly generate uncertainty and further litigation, as claimants and government alike would seek to test the boundaries of the new criteria, whatever they might be.

57.8. To conclude regarding standing, the corpus of judicial review judgments since the 1978 reform provides no foundation for amending the ‘sufficient interest’ test in the s 31(3) Senior Courts Act 1981. In the hands of the judges, this pragmatic test has worked well.

⁹⁰ See, eg *The Centre for Advice on Individual Rights In Europe v The Secretary of State for the Home Department & Anor* [2017] EWHC 1878 (Admin).

⁹¹ See, eg *R. (on the application of ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC (Admin) 1966.

⁹² All objecting to a planning permission. eg *Leckhampton Green Land Action Group Ltd, R (on the Application of) v Tewkesbury Borough Council* [2017] EWHC 198 (Admin).

⁹³ See, eg *Trail Riders Fellowship v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 1866 (Admin).

⁹⁴ See, eg. *The Ramblers Association v Secretary of State for Environment Food And Rural Affairs* [2017] EWHC 716 (Admin).

⁹⁵ See, eg *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin) (privacy).

⁹⁶ Bell and Fisher (n 17) section 2.2.

Time Limits

58. The Terms of Reference ask whether the judicial review process could be streamlined by changes concerning time limits; the Call for Evidence asks those submitting evidence to consider whether 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. We make the following points.

58.1. The current rules are contained in s 31(6) Senior Courts Act 1981 and 54.5 Civil Procedure Rules (CPR). The provisions are not identical, although the courts have interpreted them harmoniously. The persistence of two provisions framed differently is nonetheless regrettable, and the law could be clarified in this respect.

58.2. The core of the present time limit rules is that the application must be made promptly, and in any event within three months of the contested action. Applications for judicial review can therefore be rejected if they are not brought promptly, even if they are brought within three months. When an application for leave is not made promptly and in any event within three months, the court can refuse permission on the grounds of delay, unless it considers that there is a good reason for extending the period. The court, in deciding whether to extend time, will consider whether there was a reasonable excuse for late application, the possible impact on third-party rights, and the administration, and the importance of the point raised.

58.3. It is difficult to see how the current time limit rules could be further abridged. The government does have a legitimate interest to know the legal status of its action, but at the same time there may be unlawful government action which could go unchallenged. Three months is a short period of time for an individual to obtain legal advice and make a decision whether to bring an action for judicial review, especially given the costs and other implications of starting legal proceedings against the government. There are, moreover, already rules built into the system whereby the courts take account of third-party rights and the effect on the administration.

58.4. The rules concerning time limits should, moreover, be seen in conjunction with another question posed by the IRAL Call for Evidence (question 10): ‘*What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review*’ (also relevant to question 11 about settlements at the court door). It is unclear what potential actions are contemplated by the IRAL other than settlement discussions. There is a tension between short time limits and the desire to minimise applications for judicial review, because discussion between the affected individual and the public body does not prevent the clock running for the purposes of a judicial review application. So, lawyers are obliged to advise that it may be necessary to bring an action notwithstanding their clients’ desire to settle the dispute out of court. The very fact of filing the judicial review application may be a useful impetus for settlement discussions as indicating the claimant’s seriousness. The probable consequence of further abridging the application period would be to increase the number of judicial review applications filed.

Flexibility and Range of Remedies

59. In relation more generally to the Call for Evidence question 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?*’, we make the following points.

59.1. Remedies are awarded in judicial review on a highly flexible basis.⁹⁷ The courts’ remedial flexibility is important. It enables the courts to address unlawfulness, while taking into account the factual and institutional context. The courts take care to tailor orders in order to ensure that decisions which are best left to public authorities are taken by public authorities (and not the court), and that public authorities are afforded realistic time periods in which to address unlawfulness.⁹⁸ The court may refuse relief where there has been ‘undue delay’ in the making of an application and the granting of relief ‘would be likely to cause substantial hardship to, or substantially prejudice the right of, any person or would be

⁹⁷ As Lord Roskill put it in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617,656: ‘the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary’.

⁹⁸ For a recent example see *Roadpeace v Secretary of State for Transport* [2018] 1 WLR 1293.

detrimental to good administration'.⁹⁹ Courts may also refuse relief where an order would serve no practical purpose,¹⁰⁰ or where the legal error was not 'material' to the decision.¹⁰¹

59.2. After the 2015 inclusion of s 31(2A) in the Senior Courts Act 1981,¹⁰² the Act now directs courts to refuse relief if, in the absence of an exceptional public interest,¹⁰³ 'it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'. As the Court of Appeal recently put it, refusal of relief is no longer a matter of discretion, but 'one of duty, provided the statutory criteria are satisfied.'¹⁰⁴

59.3. The operation of this (presumptive) duty can be difficult to justify. Consider breaches of the public sector equality duty¹⁰⁵ ('PSED'). The courts must refuse relief if satisfied that it is highly likely that, had the public authority had 'due regard' to the equality considerations,¹⁰⁶ the outcome would not have been substantially different. There are numerous problems with this. First, the test relies on a counterfactual scenario (what would have happened if the authority had complied with its duty), which is difficult to assess. Second, the courts are not institutionally, nor constitutionally, well-placed to assess the likelihood of the relevant equality considerations making a difference to the outcome: this can come close to inviting the courts to judge the merits of a decision (a point to which we return in paragraph 59.7). Third, if relief is regularly refused on this basis in PSED cases, this might undermine the effectiveness and perceived importance of the duty.

⁹⁹ s 31(6), Senior Courts Act 1981.

¹⁰⁰ *Baker v Police Appeals Tribunal* [2013] EWHC 718 (Admin), [32].

¹⁰¹ *ibid* [31]

¹⁰² Amendment introduced by Criminal Justice and Courts Act 2015.

¹⁰³ s 31(2B), Senior Court Act 1981,.

¹⁰⁴ *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [272].

¹⁰⁵ s 149, Equality Act 2010.

¹⁰⁶ Namely, the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that it prohibited under the Equality Act, (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and (c) foster good relations between persons who share a relevant characteristic and persons who do not share it (s 149(1), Equality Act 2010,).

- 59.4. If the Panel is considering ways of expanding the courts' remedial flexibility, reversal of the 2015 reforms would be an effective way of achieving this.
- 59.5. There is further possible reform of remedies in judicial review. Any reform would, however, require very careful thought, and some of the options are highly problematic. The Call for Evidence asks whether alternative remedies would be beneficial. We have addressed in Part 3 the very serious problems with introducing a declaration of unlawfulness that had no legal consequences. To summarise, such a reform would undermine the rule of law, raise serious drafting difficulties, give rise to difficult questions about its relationship with the changes introduced in 2015, and cause practical difficulties for public authorities.
- 59.6. As the Panel will be aware, there is extensive literature, including a Law Commission report,¹⁰⁷ which advocates broadening the availability of monetary damages in judicial review, beyond those with a Human Rights Act 1998, European Union, or private law dimension.¹⁰⁸ Introducing the possibility of a monetary award would meaningfully expand the courts' remedial flexibility.
- 59.7. An alternative to introducing further remedies could entail introducing new directions to courts as to the exercise of remedial discretion, or adjusting those now contained in section 31(2A). However, this could have serious unintended consequences. Consider, for instance, the possibility of lowering the 'highly likely' threshold in section 31(2A). Such an amendment would have serious constitutional implications. The 2015 reforms direct the court to determine whether it is highly likely that the outcome would not have been substantially different. Where a decision-maker has failed to consider a relevant matter or receive representations from a party, the court must thereby determine whether it is 'highly likely' that the overlooked factor would have tipped the scales the other way. This comes close to an assessment of the merits of the decision, a judgment the courts are not well-

¹⁰⁷ Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, HC-6, 2010).

¹⁰⁸ See especially Peter Cane, 'Damages in Public Law' (1999) 9 Otago L Rev 489; Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2003) 2(8) JR 104.

placed to make.¹⁰⁹ The ‘highly likely’ threshold has in general enabled the courts to avoid altering ‘the fundamental relationship between the courts and the executive’¹¹⁰ by intervening only where it is clear that the unlawfulness made a difference. Lowering the threshold of the test would considerably exacerbate the problem. The courts would effectively be directed to conduct their own weighing exercise of the respective factors, even in decision-making contexts (such as planning¹¹¹ and resource allocation¹¹²) where they explicitly steer clear of doing so in determining whether unlawfulness has occurred in the first place. In other words, not only would lowering the ‘highly likely threshold’ further diminish, rather than expand, remedial flexibility it would detrimentally alter the role of the courts.

Some Procedural Reform Proposals

60. The Call for Evidence, Questionnaire, Section 1 question 2 asks ‘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 one proposal, which we believe would do much to enhance public understanding of the operation of government departments and executive decisions.

60.1. Like any accountability mechanism, for judicial review to promote good decision-making and to send a clear message to citizens of what they can expect of decisions, the judgments of the courts need to be accessible. In jurisdictions such as Australia this is done as a matter of course. Judgments, including of many tribunals, are issued with catchwords and summaries on freely accessible websites. Some

¹⁰⁹ See for instance *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 where the Court of Appeal was asked to determine whether it was highly likely that, had the government considered the Paris Agreement on climate change, it would still have finalised a National Policy Statement expressing commitment to the building of a third Heathrow runway.

¹¹⁰ *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [273].

¹¹¹ As Lord Reed famously explained in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, while questions of the interpretation of planning law and policy are resolved by the courts, questions of the weight to be ascribed to factors are primarily matters of planning judgment for the decision-making.

¹¹² As the Court of Appeal put it in *R (Drexler) v Leicestershire CC* [2020] EWCA Civ 502: ‘the courts recognise that they are not well placed to question the judgment made by either the executive or the legislature in relation to matters of public expenditure... The allocation of scarce or finite public resources is inherently a matter which calls for political judgment. This does not mean that the courts have no role to play but it does mean that they must tread with caution.’ ([56]).

specialist courts also organise decisions so they can provide guidance for decision-makers and the public.

60.2. In contrast, not all judgments of courts in England and Wales are easily accessible. For example, while the Ministry of Justice’s website directs those interested in the judgments of the Administrative Court to BAILII, a survey of 801 judgments for 2017 (statutory appeals, judicial review, permissions, interim matters etc) found only 541, with a further 260 transcripts (including 37 judicial review judgments) found on the non-open access database Westlaw UK.¹¹³ In tracing cases on appeal, it was also clear that there were other cases that had gone unreported.

60.3. The efficacy of judicial review, as well as the accessibility to, and the clarity of, the law could be much improved through comprehensive publication of decisions. Publication should extend beyond judicial review decisions to include all aspects of the Administrative Court’s work (including statutory challenges/appeals, permission decisions, and other decisions such as whether to authorise the holding of a closed material procedure under section 6 of the Justice and Security Act), as well as judicial reviews determined in the Upper Tribunal. Better organisation of decisions (such as by inclusion of keywords) would also considerably aid the collection of evidence and evidence-based reform in the future.

¹¹³ Bell and Fisher (n 17).