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

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Introduction: The Scope of the IRAL and is Terms of Reference

1. We welcome the opportunity to submit evidence to the IRAL, but also wish to express some initial concerns about the process. Neither the Terms of Reference (ToR) nor the Call for Evidence (CfE) seek to define what the Government, or the IRAL Panel take either 'administrative law' or 'judicial review' to mean. The lack of definition of the scope of these key terms in the view of the IRAL risks undercutting the Review process, most especially the CfE.

2. It would have been beneficial to have a clear explanation of what the IRAL considers the terms 'administrative law' and 'judicial review' to mean and a specific account of matters considered within and outside the scope of the Review. The 'nod' in Note F to the ToR, noting that the issues raised in Paras 1-3 'affect all cases involving public law decision making, and not simply JRs' suggests that the IRAL has in mind to review the broad compass of both constitutional and administrative law principles, and not specifically the so-called 'grounds of judicial review'. The 'grounds of judicial review' can be understood narrowly to mean the legal principles justifying an Application for Judicial Review (AJR) in the Administrative Court, with reference to the 'grounds' required specifically by the N461 Claim Form. It is this specific action which has been a focus of our empirical research at Bangor Law School for some years.

3. We note also that since 1 November 2013 the Upper Tribunal (Immigration and Asylum Chamber) has been the appropriate jurisdiction for commencing most judicial review claims relating to immigration and asylum. The Tribunals Courts and Enforcement Act (TCEA) 2017 provides for the Upper Tribunal, in certain prescribed contexts, to conduct judicial review on the same 'grounds' as the Administrative Court, following the same procedures and with the power to grant the same remedies. The Upper Tribunal now determines significantly more judicial review applications than the Administrative Court.

4. Whilst the ToR note that what are referred to as 'grounds of public law illegality' apply to all public body decision-making, and therefore a failure to comply with these principles can be raised collaterally in private law proceedings, no further attempt is made to explain the scope of the Review. For example, neither the ToR nor the CfE explain whether (or not) the Review is specifically concerned only with the AJR in the Administrative Court (we assume it goes beyond this), or also with judicial review in the Upper Tribunal, various routes to statutory appeals and reviews challenging the lawfulness of public body decision-making (or failure to make decisions) in the county courts, magistrates courts, the First-tier and Upper Tribunal, and other bodies such as the Special Immigration Appeals Commission. The 'nod' in Note F to the ToR is insufficient to properly explain the scope of the Review. If the Panel is expected to review judicial review understood in this very broad sense of any circumstances where a judge is required to examine the lawfulness of public body decisions and actions, it cannot hope to complete its task in any meaningful way within the proposed timescale.

5. A related point is that there is also no explanation of what the Panel considers to be the meaning of 'administrative law'. We suggest it is a misinterpretation of comments made in *GMC v Michalak* [2017] 1 WLR 4139 to state that the Supreme Court 'noted that substantive public law is all judge made'. The Supreme Court did not state this. It made the point that the Senior Courts Act 1981 codified aspects of the procedure for seeking judicial review in the High Court (now specifically the Administrative Court) but that the constitutional basis of the procedure remains within the common law. Here, however, we can contrast judicial review in the Upper Tribunal under the TCEA which is founded in statute, and therefore based on 'an enactment'. Our point is that 'substantive public law' as we understand it includes all the law that governs particular areas of public decision-making such as; town and country planning and environmental law, the law in relation to education, housing, health, community care, prisons, the police, immigration and asylum, and so on. The vast majority of UK public law, be it substantive (impacting the substance of public body decisions) or procedural (governing public body decision-making procedures), is statute law, and related guidance. In this sense much administrative law is already 'codified' (depending on one's interpretation of that term). The vast majority of UK public law has not been made by judges; it has been enacted by Parliament.

6. The word 'Parliament' is not mentioned anywhere in the ToR or the CfE. This seems to disclose a fundamental misunderstanding, or misrepresentation of founding principles of the UK constitution. Administrative law, whether broadly understood, or narrowly limited to just the AJR in the Administrative Court, is not only about tussles between Government and the judiciary in which the role of Parliament is somehow superfluous. Parliament is central to judicial review. Parliament legislates to lay down principles of both substantive and procedural administrative law that condition the exercise of powers by the executive, by central and local government, and by other public bodies, or bodies exercising powers of a public nature. The role of the judiciary is to ensure that the executive, and other public bodies, have complied with the law as laid down by Parliament. It is true that there is some significant debate examining how judges do, and how they should, interpret legislation laid down by Parliament. The 'grounds of judicial review' and the more 'general' rather than 'subject area specific' (e.g., specific to planning law, education law and so on) administrative law principles, are largely principles of statutory interpretation that have indeed been 'developed' by the courts. There has been debate about how direct the link between Parliamentary intent and development of general principles of administrative law needs to be. In particular whether judges should 'presume' that Parliament intends to legislate in conformity with particular so-called 'rule of law' values (such as fairness, non-retroactivity, transparency and access to justice) even when Parliament has clearly not done so on the face of particular legislation, and even when it has both not done so and explicitly sought to 'oust' judicial review by stating that certain decisions

cannot be challenged in a court or tribunal of law. We can assume that an awareness of some of this background to the constitutional foundations of judicial review forms the basis for the Panel's interest in 'justiciability', and the apparent distinction between 'scope' and 'extent' of review. However, the terminology used throughout the ToR, and the Questionnaire seems to assume that determining whether a particular issue might be especially sensitive and complex in terms of say socio-economic impact, public health, or national security context, is purely a matter to be thrashed out between Government and the courts. Likewise in Note A to the ToR it is acknowledged that the Panel will consider statutory, non-statutory and prerogative powers, and the references to codification in statute also assume a role for Parliament, but the lack of any explicit reference to Parliament as core player in the constitutional justification for having judicial review is concerning. This matter is well put by Konstadinides, Marsons and Sunkin in a blog for the UK Administrative Justice Institute:

> the IRAL's work is expressly framed as an exercise to determine the appropriate balance between executive action and the individual's ability to challenge the executive, whitewashing Parliament from view. This neglects that the executive is the junior constitutional partner (as Lady Hale put it at [90] in Miller I) and that Parliament is sovereign. Government is not entitled to ignore the law as enacted by Parliament, even if this would substantially improve its efficiency and accomplish its objectives. This is basic Entick v Carrington (1765). The Review locates judicial review within a struggle between executive and judges when that is not necessarily its primary and exclusive place within the constitution – arguably, its basic and core role is to ensure that government acts within the powers granted by Parliament (Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997). This essential point has not even a footnote in the IRAL's extant documents.

7. It is not necessary in this response for us to set out the extensive material available examining the constitutional basis for judicial review, its inherent link to statutory intent (and with that its democratic credentials), this is all well documented. So too it is well documented that judicial review, generally in its broadest sense of whenever a judge examines the lawfulness of the decisions of a public body, exists significantly to ensure respect for the rule of law. Many core and largely well-accepted characteristics of the rule of law within the UK in particular are outlined in an influential book authored by Lord Bingham in 2010 (*The Rule of Law* (Allen Lane 2010)). Specifically:

   - The law must be accessible, intelligible, clear and predictable.
   - Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.
   - Laws should apply equally to all.
   - Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.
   - The law must afford adequate protection of fundamental Human Rights.
   - The state must provide a way of resolving disputes which the parties cannot themselves resolve.
   - The adjudicative procedures provided by the state should be fair.
   - The rule of law requires compliance by the state with its obligations in international as well as national laws.

8. It is true that the frontiers of the rule of law are contested, and that there is debate as to how much protection the rule of law concept should provide for specific substantive rights, as

opposed to more procedural aspects. But the fact that the concept itself is contested at its boundaries does not damage its core principles. The 'grounds of judicial review' or general principles of administrative law have been crafted based on these principles. These are not principles that have been fashioned by the judiciary alone, and only within the last 30 to 40 years, or even within the last two centuries. Principles of procedural fairness (natural justice) and reasonableness have extensive pedigree and have been widely used. After interrogating the record of prerogative writs (predecessor claims to the modern AJR in the Administrative Court) Paul Craig found that between 1220 and 1867 there were 6,637 mentions of certiorari, 5,563 to prohibition, and 7,111 to mandamus.[1] Of course these mentions do not each constitute individual cases, and the figures also do not include other historic actions where administrative decisions could be challenged either directly or collaterally such as in cases of trespass or trover against administrative officials. Craig concludes that whilst these figures may be crude estimates, they are 'a corrective to the view that we never had any administrative law before the 1960s, since "we" clearly were doing quite a lot of this activity that supposedly barely existed'. The work of political scientist Susan Sterrett also shows that whilst legal specialists in administrative law had a significant part to play in the evolution of the UK constitution in the 20th Century, the impact, on individuals and public administrators, of developing a rationally systematized set of principles through case law can be overstated. In *Reconstructing Judicial Review* (Hart Publishing 2016) Sarah Nason concludes that the so-called 'reformation of administrative law', which is in part aligned with concerns about an excess of judicial power (a likely driver of the IRAL) is empirically questionable.

9. We return later to the empirical context of administrative law and judicial review. Our point here is that it has a long pedigree, it has a constitutional foundation in the rule of law, there is plenty of evidence of both politicians, judges, lawyers and other professionals having clearly stated that judicial review may be a constitutional fundamental on which even the legitimacy of parliamentary democracy depends. The Review will be fundamentally flawed if it does not explicitly engage with this foundational constitutional context, but we consider more worryingly, that it would be impossible for such a small scale, short timescale process to fully and fairly engage with this context. We are concerned that a decision to focus purely on a seemingly narrow aspect of administrative law, under a tight timescale, is a purposeful attempt to obscure what would undoubtedly be the broader constitutional consequences of recommendations that could follow. Aside from the rule of law (in all its guises) there are many other values that judicial review can be variously seen to protect and reflect: democracy, equality, liberty, authority and expertise (both legal and administrative), rationality, justice and good governance. There is little to dispel the belief that the Review is a reaction to a comparatively small set of judgments where the current Government was dissatisfied with the outcome. The Review risks being seen as seeking to clothe an assessment of a core component of the UK's constitutional balance of power in the garb of examining minor technical adjustments.

The Call for Evidence and Questionnaire to Government Departments

10. Our response to the Questionnaire is that it is a poor research tool. Having extensive experience of conducting socio-legal empirical research into judicial review in the Administrative Court specifically, and into the broader compass of administrative justice systems, we have to express that the Questionnaire to Government Departments is not methodologically sound. The questions are generally unclear, either impossibly wide or inappropriately narrow, they also largely do not allow the Review Panel to answer the matters raised in the ToR.

[1] P Craig, *UK, EU and Global Administrative Law* (Cambridge, Cambridge University Press, 2015) 25-29.

a. For example, Question 1 seems to assume that the rule of law and administrative efficiency are fundamentally opposing and inconsistent concepts, and fails to account for the fact that adhering to rule of law principles may very well lead to more efficient and effective administration.
b. Any evidence gained by the Questionnaire is likely to be one-sided since Government departments are only asked to reflect on their perceptions of when judicial review has 'seriously impeded' their functions and not to provide evidence of when they may have found it to be beneficial, whether in the short term or on reflection in the longer-term, or where judicial review may have had mixed impacts, let alone wholly positive impacts. It is unlikely perhaps that Government departments will, of their own volition, volunteer information about the positive impacts of judicial review when they have not asked to do so by a process so closely connected to another department of central Government.
c. It also seems confusing that the Questionnaire in Question 1 refers to grounds of judicial review, procedure, and remedies, but also the time it takes Government departments to mount a defence. The latter does not seem to be an appropriate matter to juxtapose against an assessment of the legal grounds, procedures or remedies. It is not an issue inherent to the nature of the law on judicial review proceedings that it takes Government departments time to prepare a defence, if that time is lengthy that in itself may indicate poor administration (inefficiency, bad record keeping and so on). Taking these matters together suggests the potential for allowing Government to use its own poor administration as a reason for further restricting legal review of its actions.
d. Despite the background to the Review in a manifesto commitment to examine both administrative law and the Human Right Act 1998, the Questionnaire makes no explicit reference to judicial review on the basis of human rights, or to proportionality as a potential ground of review (despite the latter being an area of notable debate).

11. The Questionnaire, we submit, appears to narrow the CfE down purely to judicial review as a specific legal procedure (either within the Administrative Court alone, or the Administrative Court and the Upper Tribunal), there is clearly no call for evidence in respect of 'administrative law'. There seems to be no facility for Government departments to express views for example, on the comparative challenges, impediments, or impacts, of judicial review procedures as compared to statutory appeal processes either in the Administrative Court or in various tribunals. There is a suggestion that respondents should state what jurisdiction their response is referring to, but again it is not made clear what this means (whether it means either the Administrative Court, the Upper Tribunal, other judicial bodies; or whether it means legal jurisdiction in the sense of the UK or just England and Wales). The CfE seems to be almost entirely about the procedural aspects of judicial review, which is surprising given the ToR focuses so heavily on the substance of judicial reasoning, suggesting that it is judicial approaches that have had a significant effect on the balance between protection of individual access to justice and the efficient conduct of administration in central Government. The CfE then is not especially well suited to gathering the fullest set of data that would address the ToR.

12. The Questionnaire is addressed to Government departments, and is noted as 'to be sent to Government departments' yet general Question 1 (which we assume is addressed to anyone who wishes to respond) says that Questionnaire is for Government departments and other public bodies. It is therefore not clear whether the Review is concerned only with the impact of judicial review on central Government departments, or also the impact of judicial review on local government and other public bodies.

13. Question 2 is also confusing, it asks 'does the prospect of being judicial reviewed improve your ability to make decisions?' This seems bizarre, judicial review is not by definition an impediment to a Government department's ability to *make any decision at all*, but rather it is a means to ensure that legal conditions (often laid down by Parliament with some stemming from common law) are complied with in that decision-making process. Indeed, often judicial review is used to compel Government departments to make a decision where they have not done so in the case of an individual (commonly in the immigration and asylum context), and that omission is itself unlawful.

14. Confusingly again Question 3 refers to 'the law on judicial review'; it is not clear what this is supposed to mean as the Review is variously described as examining 'administrative law' and 'substantive UK public law'. The Review seems in fact to be only concerned with the grounds of review commonly referred to in the Administrative Court (and perhaps also the Upper Tribunal). If this was the Panel's intention it would have been straightforward to make this clear at the outset.

15. **To gain a balanced perspective the Review should also be seeking explicit responses from claimants and those who represent them, as well as other groups interested in the administration of justice in a public law context. It should also have made clear whether evidence is being sought from local government and other public bodies subject to judicial review in addition to central Government departments.**

16. We set out in later sections our thoughts on any improvements that could be made specifically to aspects of the judicial review procedure (in the Administrative Court). Commenting in general on the IRAL's ToR we point out here that they may be too narrow to provide a proper assessment of how judicial review could be improved. Although the ToR specifically note that the Review Panel will 'consider whether there might be possible unintended consequences from any changes suggested' this provides little succor to those concerned, as we are, with the scope of the Review itself and its timescale. Judicial review is just one small part of the UK's administrative justice landscape. A good working definition of the administrative justice system is that contained (though now repealed) TCEA 2007.

> 'the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including—
>
> (a) the procedures for making such decisions,
> (b) the law under which such decisions are made, and
> (c) the systems for resolving disputes and airing grievances in relation to such decisions.
>
> As Buck, Kirkham and Thompson note in, *The Ombudsman Enterprise and Administrative Justice*, a working definition of administrative justice includes:
>
> 1. All initial decision-making by public bodies impacting on citizens – this will include the relevant statutory regimes and the procedures used to make such decisions ('getting it right');
> 2. All redress mechanisms available in relation to the initial decision-making ('putting it right');

3. The network of governance and accountability relationships surrounding public bodies tasked with decision-making impacting upon citizens and those tasked with providing remedies ('setting it right').

As the Law Commission put it in its Consultation on Administrative Redress: *Public Bodies and the Citizen*, there are four pillars of redress within an administrative justice system:

The first pillar consists of internal mechanisms for redress, such as formal complaint procedures. The second pillar is composed of external non-court avenues of redress, such as public inquiries and tribunals. The third pillar consists of the public sector ombudsmen. Finally, the fourth pillar is formed by the remedies available in public and private law by way of court action.

17. Across the UK the devolved nations have developed their own systems of administrative justice including devolved tribunals, Commissioners, specific ombuds regimes, audit, inspection and regulation. What might be expressed as a procedural rather than substantive change only to judicial review in the Administrative Court is likely to have different implications for the practice of public law in different parts of England and Wales, as research into the *Regionalisation of Judicial Review*, and into *Judicial Review* and *Administrative Justice in Wales* has demonstrated.

18. The AJR in the Administrative Court is a mechanism of last resort. Applicants for judicial review are generally required to demonstrate that they have used all other avenues for redress reasonably open to them. Many of those resorting to judicial review do so because Parliament has failed to provide them with any other recourse to legal redress in relation to decisions that only affect them personally, and where decisions turn largely on their own facts rather than having broader implications for policy, or legal and administrative practice. As the legal equivalent of a 'last chance saloon' judicial review functions as a barometer of the accessibility and effectiveness of the broader administrative justice system. A comparatively larger number of judicial review applications stemming from a particular subject area of administrative decision-making can disclose a lack of access to justice or poor functioning of particular appeal and/or review mechanisms, and can also disclose systemic problems in particular areas of public administration. **Whilst the Review is right to consider the consequences of restricting access to judicial review (we assume in the Administrative Court and/or Upper Tribunal) it cannot hope to conduct a meaningful examination of the whole UK administrative justice system in such a short time frame. As such it is unlikely to form a full picture of how judicial review functions in particular areas of administrative decision making, and why it functions in such ways.**

19. When looking at particular subject areas of administration and administrative law, such as housing, education and community care, it can be seen that various statutory interventions have provided routes to redress in a court or tribunal for particular issues. However, these statutory interventions are not inclusive of all types of decision-making that can have a significant impact on people's lives. For example, in homelessness there are rights to statutory reconsideration and appeal, but this does not generally cover whether an offer of housing is suitable, whether grades or recommendations reached by a local authority's medical officer have been made lawfully, or some aspects of the applicant's priority for housing. In education some matters relating to special educational needs, school exclusions and school transport provision, do not specifically come with a right of appeal, and judicial review can prove powerful in ensuring that individuals have access to provisions and adjustments to which they are lawfully entitled. **A general theme of our evidence is that focusing on a very small number**

of cases that have been either legally, politically or practically notorious risks losing sight of the need for judicial review to fill gaps where individuals have no other access to challenge potentially unlawful (and perhaps also inefficient) administration. We would argue that to properly appreciate these gaps requires research from the ground up in particular areas of public administration, rather than a broad brush top down look at the decisions of the highest courts and the functioning of some central Government departments.

20. The extent time needed to conduct a proper review of administrative law is also clear from the fact that Law Commission projects examining comparatively small aspects of the England and Wales system of administrative justice have taken many years to complete and have involved much wider (and more coherent) calls for evidence and lengthy consultation periods. These include for example:

    a. *Administrative Law* (Law Com. No. 20, 1969)
    b. *Administrative Law, Judicial Review and Statutory Appeals* (Law Com. No. 226, 1994)
    c. *Administrative Redress: Public Bodies and the Citizen* (Law Com. No. 322, 2010)

21. The so-called JUSTICE/All-Souls project, *Administrative Justice, Some Necessary Reforms* (described by Professor Harlow as 'an unofficial Royal Commission') took some ten years from inception to publication. Though Harlow has, perhaps rightly, criticized the timescale, this demonstrates how extensive an exercise purporting to examine the broader compass on administrative justice is required to be. Harlow also criticized JUSTICE/All-Souls for is comparatively academic focus, and we would suggest the IRAL Panel heeds her concern that evidence should be taken from a broad range of organizations reflecting various levels of law and administration. We think, in short, that there is a case for an independent Law Commission project more broadly considering Administrative Justice in England, and in England and Wales.

22. It is somewhat difficult to answer the specific questions in the CfE in a logical order as there is some significant cross-over and duplication. It is comparatively clear that views are being sought on the procedural aspects of judicial review in the Administrative Court including the permission stage, remedies, costs and the prospects for Alternative Dispute Resolution. The questions on codification and clarity seem to be broad, they overlap with the questions about procedural reforms. We take Question 3 as referring to whether the grounds of judicial review could be codified in statute (as the ToR proposes) and Question 4 to refer to whether statutory provisions should be used to exclude some types of public body decision-making from the AJR in the Administrative Court, and the broader matter of justiciability. We begin with the initial procedural stages of making an AJR and consider statutory codification and other matters in their turn.

Process and Procedure: Legal Aid and the Decline in Judicial Review

23. The Review seems to be based on the premise that there are somehow 'too many' AJRs that seek to challenge primarily central Government policies, and that these claims have detrimental impacts on Government efficiency and effectiveness. Reference to striking the right balance between individuals and the Government, and the wording (very leading nature) of various questions clearly shows the Government (and perhaps with it the IRAL Panel) consider the balance currently lies in the wrong place. However, there is no background evidence of any sort referred to by the ToR or CfE to support his apparent contention. In our view this is largely because no such evidence exists, or at least that such (if it does exist) is not publicly available.

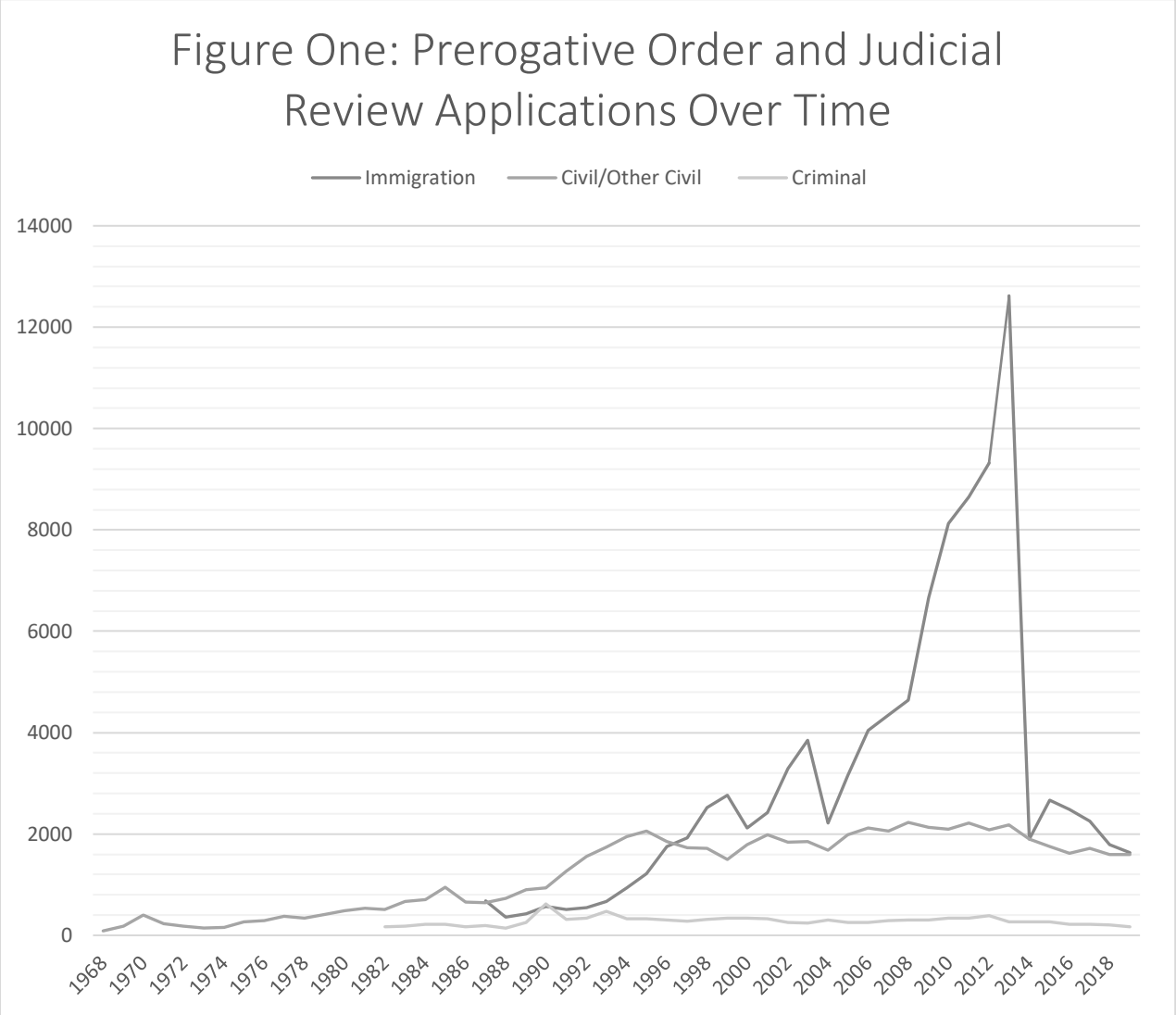
24. We would like to remind the Review Panel of the many different purposes/functions that can be performed by judicial review, especially within the Administrative Court, that go beyond the image of judicial review as a contest between an individual and the Government (as is expressed in the ToR). The following list is taken from Nason's book, *Reconstructing Judicial Review* and we note that the list itself is a development of a list to which Review Panel member Professor Harlow contributed (in her book with Richard Rawlings, *Law and Administration* (Cambridge University Press 2009):

    1. upholding the Constitution (constitutional symbolism and legal authority)
    2. protecting the individual (individual grievances)
    3. ordinary common law statutory interpretation (based on linguistic interpretation and interpretation of sections within the context of an Act or subject area of law as whole)
    4. determining inter-institutional relationships (constitutional allocation of powers, intra-state litigation)
    5. establishing general legal principles (rationality, proportionality, no-fettering)
    6. structuring deliberative and administrative processes (good administrative procedure, reasons, consultation)
    7. core values of good governance (freedom from bias, keeping promises (legitimate expectations))
    8. public interest litigation (alternative forum for discussion of competing conceptions of the public interest)
    9. elaboration and vindication of fundamental rights

25. We return to the different functions performed by judicial review, but note first that it is frustrating to find the Review seemingly premised on the inaccurate assumption that there is too much judicial review activity. The ToR state that the Panel should consider data and evidence, and we wish here to remind the Panel of existing evidence. It is well-documented that whatever one's view of the expanding remit of judicial review in terms of the developing articulation of common law principles, this has occurred alongside the practical reality of excluding people from the process. In general the concerns of individual claimants have not been central to judicial review, rather they are seen as a 'trigger' to ensure that poor administration is dealt with in the broader public interest. However, when considering the historical development and normative context of judicial review, the notion that the claimant somehow represents the public interest is just part of the story. This perception has caused particular problems around understanding the distinction between the public interest in a particular policy outcome (not the preserve of the AJR procedure), and the public interest in upholding the rule of law. It is often the public body which seeks to represent the public interest in administrative efficiency. There may well be a case for greater recognition of the balancing of interests (or, as Nason at least would say 'values') in judicial review claims, and more explicit and open judicial reference to how balancing exercises are performed in reaching judgments. But this does not seem to be something that could be addressed through procedural or remedial reforms, it is more in the nature of judgments and commentary. Codification of the grounds of review is unlikely, we suggest, to assist with gaining a greater, or more transparent appreciation of the matters being balanced either (we return to this below).

26. The stock view is of an expanding judicial review caseload and Figure One shows this to a degree, but we use this (alongside other data) to illustrate a key point in our submission, **it is essential that the Review does not generalize about the incidence of judicial review litigation, or about its value or its effects on administration. These matters must be looked at over a reasonable period of time and relative to the particular subject matter of review, by which we**

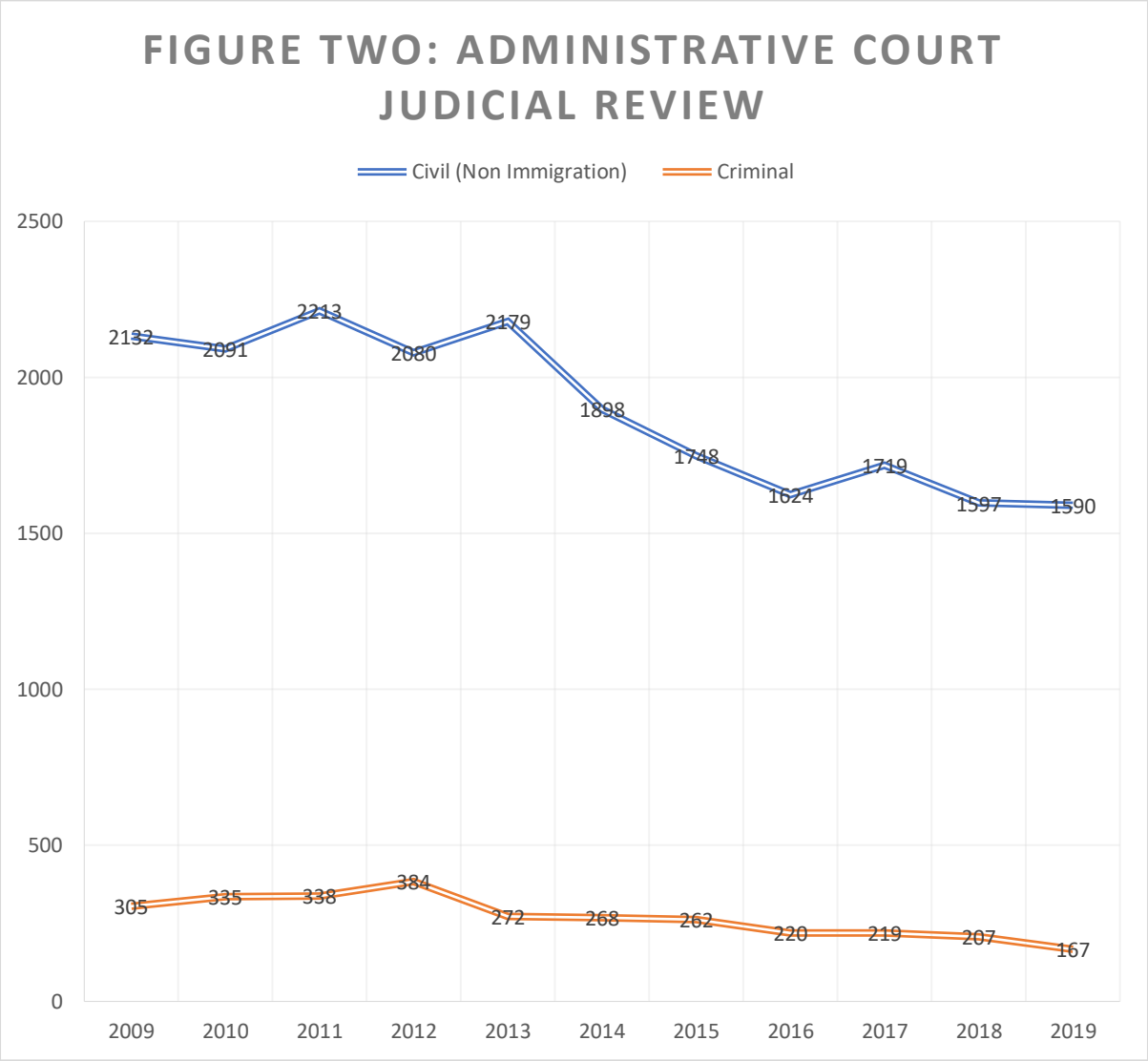
mean the 'topic' (for example, housing, education, prisons and so on). AJRs in the Administrative Court are characterized perhaps more than anything by their diversity, this sets them apart from other Administrative Court actions, from public law in the county courts, and from much of the workload of the Upper Tribunal. The claims are diverse because they fill in gaps across the administrative justice system as a whole.



27. The initial data in Figure One is taken from Ruth Dixon and Christopher Hood's study (which is itself data taken from the Lord Chancellor's Official Statistics); this shows that applications for the prerogative orders rose significantly in the late 1960s; from 87 in 1968 to 396 in 1970. The figures are then more variable up until the mid-1980s, from then on there was a period of sustained increase in other civil (non-immigration) judicial review (up until the mid-1990s). The immigration caseload has risen more dramatically, due to reasons which are well-explained in various research including that of Robert Thomas and Joe Tomlinson. The increase in immigration and asylum litigation relates variously to the limitation or withdrawal of appeal rights and serious concerns about the quality of internal administrative review processes as well as poor quality initial decision-making. Thomas and Tomlinson's Report was based on a 22- month research project (which demonstrates how much time is really needed just to begin to empirically understand only one area of judicial review activity). It was well balanced and

concluded that some claimants are being exploited by unscrupulous lawyers, and that a number of claims do lack merit. The Report made some valuable recommendations for reform of procedures, and advocated more communication between the parties pre-issue and pre hearing. Immigration and asylum is a classic example of where weaknesses elsewhere in the administrative justice system are a significant reason behind rising rates of judicial review, and Thomas and Tomlinson's Report also suggests situations where it might well be appropriate (and indeed more efficient and effective from the Government perspective) to reintroduce appeal rights.

28. A separate Figure Two highlights the more recent trend of decline in applications for civil (non immigration) judicial review and criminal judicial review in the Administrative Court over the last few years.



29. There are a number of reasons behind this decrease in caseload in civil (non immigration) and criminal AJRs in the Administrative Court. From our research, including interviews with solicitors, barristers and various representative organisations, alongside other data and evidence, we can conclude that the main reason for the decrease has been the impact of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012. After LASPO 2012, legal aid remains available for judicial review, but Tomlinson describes the process of application as

having 'byzantine complexity'. Despite some modifications, notably brought about by a judicial review challenge to the initial form of the regime, the general principle is that legal aid funded work done on a permission application will only be paid for if the claimant is successful at the permission stage. It was predicted that this could have a 'chilling effect' on lawyers, making them less likely to take on legally aided judicial review claims, and in particular making them reluctant to take on claims where the stakes (for both the rule of law and administration) are particularly high due to the complexity (and highly contested nature) of the issues and the potential impacts of any ruling. Our research generally suggests that this 'chilling effect' has indeed been significant. The overall number of different solicitors' firms issuing AJRs in the Administrative Court peaked in 2009 and has fallen since, notably so following LASPO and related Regulations. Fewer solicitors are now involved in judicial review litigation, and firms have closed down. The impacts have been felt most especially in the Regions (the Administrative Courts outside London in Cardiff, Birmingham, Leeds and Manchester). In Manchester especially the AJR caseload has dropped notably with hearings down from one to two per day to one to two per fortnight.

30. A much higher percentage of people are now conducting judicial review without legal representation. The proportion of civil (non immigration) AJRs issued by Litigants in Person (LiPs) increased from around 20% in 2007/08 to nearly 37% in 2017/18. Joe Tomlinson has revealed that the total number of applications for legal aid in judicial review reduced from 6,589 applications made in 2009/10 down to 3,131 in 2016/17. Crown Office Information Network (COINs) data shows that whilst in 2001, 36.7% of AJRs were supported by legal aid, in 2015 just 4.4% were; this reduction coincides with the increase in unrepresented litigation. Our point is that whilst the Review is concerned to examine process, procedures and costs, it should specifically have made reference to the legal aid context, which seems to have had the most significant negative consequences on access to justice for individuals in recent years. Although we have not heard of widespread evidence of LiP claims causing extensive delays in particular Administrative Courts, lawyers responding to our research have noted that appearing against an LiP is more time consuming, with the judge effectively having to provide some degree of advocate support to the LiP.

31. In criminal AJRs in particular, although legal aid remains available for judicial review, other types of public law procedure relating to the lawfulness of decisions in the criminal justice system have been removed from the scope of legal aid. We heard in our research that this has led to the closure of firms that would also have undertaken AJRs in the Administrative Court. We heard that especially in some areas of Northern England whole public law departments of leading firms have essentially been closed down or repurposed away from judicial review.

32. In our research we have also heard examples of how the difficulties of accessing judicial review for individual claimant clients, has led some solicitors and barristers to consider alternative means of essentially arguing the same general administrative law point. For example, in community care some lawyers say they are reframing cases that might previously be run as AJRs, as claims to the Court of Protection. We also heard of lawyers being increasingly asked to prepare submissions for a complaint to an ombudsman as the only practical means open to an individual to obtain any kind of remedy. This has the potential to distort ombuds processes which are expressed to be about maladministration not breaches of legal rights. Our point here is that, whatever concerns there might be about the process of accessing AJRs in the Administrative Court and whether particular aspects of those processes strike an appropriate balance, the AJR has become notably harder for individuals to access in recent years, and that this has primarily been due to legal aid reforms, and seemingly much less so due to reforms of

the AJR procedure itself. This has had knock on consequences for other aspects of the administrative justice system.

33. In relation to legally aided claimants we briefly note here some relevant conclusions of research into *The Value and Effects of Judicial Review*:

    - Legally aided claimants were more likely to have obtained tangible benefits from their claims than privately funded claimants
    - Higher cost to the legal aid fund was associated with greater benefit to claimants
    - Higher costs, including to the legal aid fund, may therefore lead to 'good value', especially from the claimant's perspective
    - Restrictions on legal aid to support JR claims are likely to have a disproportionately adverse effect on those forced to resort to JR in order to obtain services to which they are legally entitled

34. We do not look specifically at the costs of judicial review in our submission. We note briefly, however, and with some concern, the growth of 'crowd funding' (largely as a result of the loss of legal aid) and consider that this is something which warrants further research and consideration by the Panel. **Access to judicial review should not be dependent on either postcode lotteries or popularity contests.**

Process and Procedure: The Existing 'Balance'

35. We consider in later sections whether the grounds on which claimants can seek judicial review are clear. We first consider whether procedures are clear, and comment on the balance they strike between individuals (and groups) and public bodies.

36. The existence of a permission stage in Administrative Court AJRs already provides considerable protection to public bodies, and specifically to the need for efficient and effective public administration. The IRAL Panel will be well aware of the permission stage criteria of an 'arguable case' and 'sufficient interest' and also that reforms have already been proposed to these criteria. We first turn to some historical background to the number of prerogative, and now judicial review, applications and the permission stage.

37. Looking back to the 1940s to 1960s Susan Sterett cites the Lord Chancellor's statistics, showing that the number of applications for prerogative orders averaged approximately 100 per-annum; subsequently increasing from 1968 to 1970. During its consultative process in the 1960s and 1970s, the Law Commission had access to unpublished research into the Queen's Bench caseload. This research (conducted by Blom-Cooper and Drewry for Bedford College, London) showed that the prerogative caseload was increasing, and that just over one-third of applicants were refused leave (now permission). However, from 1971 the caseload fell, and did so up to and including 1973. It is from 1974 onwards that there was a sustained period of growth. Of course following introduction of the specific AJR procedure, the caseload quickly expanded much beyond the previous number of prerogative applications. This was because the AJR was specifically designed to subsume a wide range of other methods for bringing claims against administration. Some of the mid-1970s growth is likely attributable to litigation driven by the Immigration Act 1971 and the parallel expansion of relevant legal services. The number of immigration-related claims was not separately identified until 1987, but Maurice Sunkin's research notes that at least by the early 1980s applications to review decisions of the Immigration Appeal Tribunal (IAT) (which could not be appealed) were rising. Sunkin's empirical studies in the 1980s found that immigration claims made up 46% of the overall civil caseload

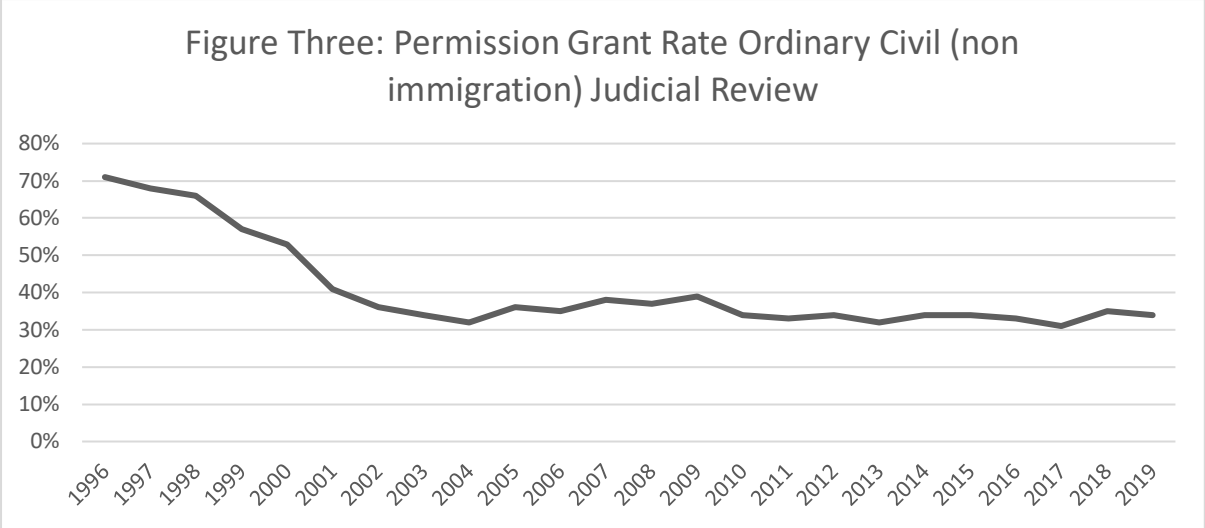
in 1981, increasing to 59% by 1985. By the mid-1980s Sunkin's research recorded a drop in other civil (non-immigration) cases; a reduction of nearly 32% at a time when, as he put it 'most of us would have assumed a continued general and uninterrupted increase'.

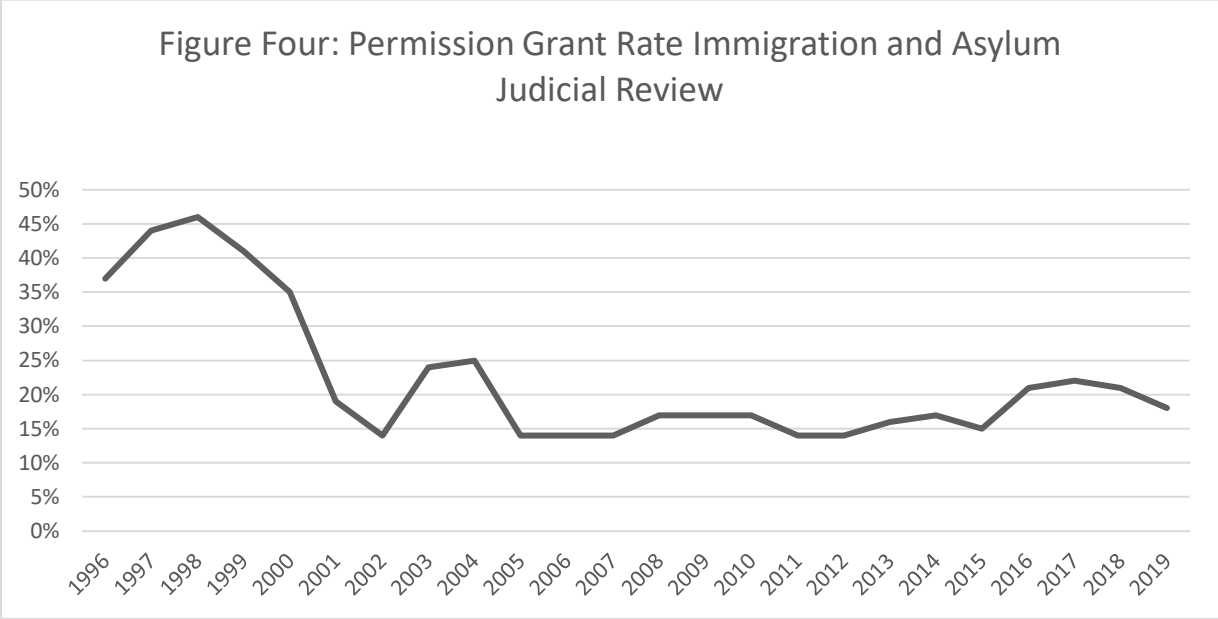
38. It is near impossible to say whether introducing the AJR led to an overall increase in litigation against public bodies. This is because there is no prior baseline data on use of the range of other mechanisms, such as applications for declaratory relief or what were then perceived as 'tort' claims against public bodies, subsumed into the AJR. There was also no estimate of the combined total number of statutory appeal applications through various mechanisms in various jurisdictions. We also have to consider this in the context of population growth and the changing nature of public administration. **In short, the significance of the AJR procedure to modern administrative law may be much less than is commonly supposed.**

39. Part of the significance of the AJR relates to the number of cases actually determined, and this is already partially controlled by judges using their discretion to develop the permission stage criteria, of sufficient interest and arguability, as a means to keep caseloads within a manageable level, but also to ensure cases with the potential to lead to incremental develop of the law are heard. Whilst many AJRs in the Administrative Court are 'individual grievance' claims (the application of existing law to the facts of individual situations) a significant number also relate to the need for judicial interpretation of comparatively recently enacted law and guidance provisions. The permission stage has allowed judges to select claims where there is a current and pressing need for legal clarification. This is an important function of judicial review, often, and perhaps even primarily, from the perspective of the efficient application or administration of the law by public (including Government) officials. The impact of judicial review is then often more due to the significance of the legal principles developed, than the proportion of all administrative decisions that are actually challenged.

40. The permission filter is regularly used to exclude individual cases from the system, and if Government concerns over efficiency simply relate to the number of claims they are required to defend, the permission stage has been an effective tool operating in favour of public bodies. As Sunkin noted in 1995, there is no presumption of a right of access to the court in the England and Wales judicial review procedure, and this is a significant factor weighing in favour of public bodies. As the caseload has grown the permission grant rate has reduced. Sunkin's research shows that from 1981 to 1985, approximately 27% of AJRs were refused leave, by 1986 this had increased to 38% (including immigration claims). More recent data distinguishes between immigration claims and other civil claims and shows a significant drop since the mid-1990s. See Figure Three (other civil judicial review) and Figure Three (immigration judicial review).

41. Some of the more recent decline in permission success is attributable to procedural reforms; including the Law Commission recommendations in 1994 and the Review of the Crown Office List (Bowman Review) in the year 2000. Bondy and Sunkin attribute the declining permission success rate post the year 2000 largely to the Bowman reforms, which they suggest may have increased access to justice despite fewer claims making it to a substantive hearing. They concluded that whilst the reforms 'heightened the de facto barrier facing claimants', a larger number of claims were subsequently being resolved in the claimant's favour prior to permission. They attribute the steeper decline in permission success between 1998 and 2000 to various 'deck clearing exercises' executed in anticipation of a large increase in cases post-HRA (an increase that did not in fact materialize).





42. As Bondy and Sunkin show, however, a significant decline in permission success rates occurred prior to these procedural and deck-clearing reforms and can be attributed to changes in judicial approaches to the discretion to grant permission, in particular increased emphasis on the need to proceed speedily, and concerns about judicial resources. Limiting permission success was achieved by re-fashioning arguability from a test of whether a case was not truly 'hopeless', to whether it was 'potentially arguable'; done in part to stem the tide of individual applications relating to immigration and homelessness, but this is much more to do with the number of such cases than judicial perceptions about imbalance in the breadth of substantive principles to be applied. We can summarise perhaps that many individuals seeking redress were being shut out of a system tailoring itself more to the resolution of pressing legal issues than remedying individual grievances. Whilst the caseload did fall for a time, it then picks up again and the bigger change becomes evident. This is that the permission grant rate reversed; whereas approximately two-thirds of applicants in civil non-immigration cases were granted permission pre- the mid-1990s, after this time the success rate fell to just one-third being granted permission. Permission success rates also fell in immigration AJRs, though from a lower starting point.

43. Further reforms to the permission stage have been implemented as a result of Government reform packages developed in 2012 (Judicial Review: Proposals for Reform) and in 2014 (Judicial Review: Further Proposals for Reform). The 2012 proposals led to the Civil Procedure (Amendment No 4) Rules 2013 which reduced time limits in planning and procurement cases, introduced fees for oral renewals, and introduced a new category of Totally Without Merit (TWM) applications, where a judge classes a claim as TWM the claimant loses their right to an oral renewal from an initial paper application. Ministry of Justice data suggests that some 21% of permission applications have been classed as TWM since the category was established.

44. The 2014 proposals led to implementation of section 84 of the Criminal Justice and Courts Act 2015, under which permission must be declined if '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'. **In civil (non immigration) judicial review the overall permission grant rate has not changed notably in the years since the 'no substantial difference' category or the TWM classification were introduced.** The changes in the immigration and asylum permission grant rate are due to the majority of claims being transferred to the Upper Tribunal. The classes of case that remain within the Administrative Court are those which tend to have wider implications for legal practice or principle, and/or public administration, so it may be telling that the permission grant rates in the Administrative Court have been higher since many individual grievance claims largely turning on their own facts have been moved to the Upper Tribunal.

45. The 2014 reforms also led to the changes in the legal aid regime and other reforms have effectively removed the discretion of the Administrative Court to grant permission unless the claimant provides certain financial information. The Government of the day noted that these reforms were generally intended to:

> Ensure that cases are dealt with more quickly – particularly significant planning cases – and to tackle the burden of judicial review by those seeking to generate publicity or delay implementation of decisions that had been properly and lawfully taken.

46. As researchers noted at the time, many of these reforms were based on the false premise that there were abuses of the system, in particular by interest groups and organisations. A first point to note that is that only a very small proportion of Administrative Court AJRs are issued by interest groups or organisations, and very few claims actually have what we can refer to as 'wider public interest' consequences. The *Value and Effects* research classified 'wider public interest' cases as: AJRs 'brought by claimants for broader public interest reasons without seeking a remedy for themselves' and found that only 8% of the sample claims fell into this category. Research from the 1980s to the present day has consistently shown that only a small proportion, around 3%, of AJRs are issued by non-individual 'others' (including pressure groups and interest organisations). Whilst true public interest cases, under the *Value and Effects* classification, are comparatively rare, they tend to attract publicity to issues of local and national importance. AJRs also clearly play an important role in facilitating litigation aimed at settling wider constitutional questions. However, there is no evidence that using AJRs in this way is the central focus of the procedure, or that such use has increased exponentially in recent years. As the *Value and Effects* research concluded: 'Our findings do not indicate the existence of widespread abuse of the system by claimants seeking to use JR for public interest or political purposes, such as would justify a general restriction in access to the Administrative Court'.

47. We return to the impacts of judicial review in later sections, we note here that the 2012-2015 reforms seemed to be largely directed at tackling a problem that was proven empirically not to

exist, and it seems as such the reforms may either have had little impact, or some (unintended or otherwise), consequences of dissuading individuals with legitimate grievances from seeking judicial review. These reforms, taken together, are likely to have disincentivised some potential claimants from seeking judicial review. However, discussions with practitioners and our attendance at various practitioner round table events, suggests that the impact of these procedural reforms is not so significant in comparison to the impact of legal aid reforms. They have complicated the routes to accessing judicial review, making it harder for those with less social and economic capital to access the procedure, but it is questionable how much impact these reforms have actually had on dissuading the issue of the more 'policy centric' claims, or wider public interest claims, especially relating to central Government, that seem to be of particular concern to the IRAL. For example, it is claims against local government rather than central Government which have notably declined over recent years. **The Panel needs then to give serious consideration to the fact that pressing points of legal and administrative principle will find their way into the system somehow, as we argue they should, and seeking to limit these claims will have disproportionately negative impacts on individuals with legitimate, and often comparatively straightforward, grievances against public bodies.**

48. In our view there is no pressing need for the Review Panel to look at standing, and specifically with a view to narrowing standing, since there is no evidence that this is presently unbalanced in favour of individuals (or indeed groups) as against public bodies. It is clear that standing and the development of legal principles and remedies are connected (not watertight 'drainpipe' compartments). Broadened standing over the years has facilitated the development of legal principles, that may well have improved administrative efficiency in at least some areas of administration, with correspondingly flexible remedies to enable balancing between the range of interests at stake in judicial review. However, there is no specific reason to think that the current standing tests raise particular concerns. Our conclusion here is also supported by analysis of case law. Nason examined 482 Administrative Court Judgments (two seven-month samples from 2013 and 2015 respectively). Of this sample only four cases raised issues of standing, none related to the clarity of the standing test itself but rather its application to the particular claimants, in three of the four cases the claimant(s) were found not to have standing. Admittedly these are just substantive judgments and we would expect most questions around lack of standing to be determined at the permission stage. **A key point here is that permission decisions are very rarely published, we simply do not know what are the most common reasons for refusing permission in judicial review claims, and whether this relates primarily to standing or to arguability. We suggest that there would be value in the reasoning behind permission decisions being published, if not each specific decision then at least a regular digest summary of collated common reasons for refusing permission in recent Administrative Court cases.**

49. Research into the permission stage has shown there is evidence of inconsistency in permission grant rates between individual judges, and of concerns from litigants and practitioners. Regional Administrative Court outcomes (both at permission and substantive stage) have also proven less consistent than in London. To an extent this is to be expected given the much lower caseloads in the Regional Centres, the picture of judicial review in each Centre is different, with the topics of case being driven by matters of local concern, by the specialisms of local solicitors, by the availability of legal aid funded advice (generally more limited outside Greater London), but also, we suggest, by the approaches of the judges most likely to be listed to determine cases in particular locations. Publishing permission decisions as a matter of course might go some way to addressing inconsistency in decision-making.

50. Unmeritorious cases are already filtered effectively out of the system through the permission stage. There is no right of access to judicial review in the Administrative Court. Taken on its

own we might suggest that the permission stage itself is disproportionate protection to public bodies as against the right for individuals to seek access to justice, and that one could make the case for application of ordinary principles of strike out and summary judgment that are common to the civil justice system. A point that has been made by Professor Dawn Oliver among others. However, looking at the dynamics of judicial review shows how the permission stage has evolved over the years from being primarily about access to becoming a more substantive preliminary examination of the strength of the case; it is now a well-established facet of the dispute resolution procedure and this would be hard to reverse.

51. Ministry of Justice published data will be available to the IRAL. This will enable the Panel to see the progression of issued claims, data which clearly shows the proportion of claims (across various topic areas) that are withdrawn pre-permission, or after permission but before a substantive hearing, and the Review will of course be able to see the proportion of claims where review is granted or refused at final hearing. The Panel will also be able to see that judges do make significant use of the TWM category introduced in 2012/13. From this information they will see the number of claimants actually granted a remedy in an AJR. It will be clear from this data that whatever 'serious impediment' judicial review may cause to the efficiency of Government administration, is not due to any notable rise in the number of substantive judgments handed down against public body defendants. Government (and other public bodies) still win more claims than they lose, but research also shows that this is significantly due to early settlements and the weeding out of weaker cases.

52. Researchers such as Nason (in relation to the *Regionalisation of Judicial Review*) and Sunkin et al (in relation to the *Value and Effects of Judicial Review* and *Dynamics of Judicial Review*) have generally found it more difficult to collect data from central Government departments (including in relation to some projects, the Treasury Solicitors Office) on the impact of judicial review, than to collect data from claimants, and their lawyers, and local government as defendants. Although we consider the Questionnaire to Government departments to be extremely poorly framed, it does at least provide an opportunity to gain some valuable information about Government department perceptions of the impacts of judicial review. This should have been framed in a less leading way, and more as an exploratory piece of work to disclose some of the impacts, rather than a fishing expedition for examples only of detrimental impact.

53. Research into the *Dynamics of Judicial Review* litigation demonstrates that a significant proportion of claims are withdrawn after issue and pre-permission, and that a further significant proportion are withdrawn after permission and pre a substantive hearing. Loosely we can say that around 1/3rd of civil (non immigration) claims are issued but withdrawn prior to a permission decision, and around half of claims granted permission are withdrawn before a final substantive hearing. In the *Dynamics* research sample it was found that, of the cases which settled pre-permission, 46% of claimants obtained a particular benefit that had been sought and in a further 39% of cases the defendant agreed to reconsider decisions or carry through a decision-making process that they had failed to complete. Of the cases that settled post-permission 59% were reported to have settled in favour of the claimant, and this regularly involves individuals being granted a benefit or entitlement previously withheld or withdrawn.

54. **These rates of settlement pre and post permission have not changed significantly over recent years and there seems to be no specific evidence (that we are aware of when writing) to suggest that more recent procedural and costs reforms have yet impacted significantly on the proportion of cases which are withdrawn at various stages.** The *Dynamics* research gives a broad range of reasons behind settlement that includes; claimant and defendant solicitors are

generally conscientious about settling claims in a timely fashion, but there are barriers which include the persistence of a 'wait and see' attitude on the part of some public bodies hindering their willingness to consider settlement until permission is granted. Early involvement of lawyers (especially from the public body side) enables an earlier and accurate assessment of the merits of the case, and it is important for claimants to have skilled lawyers to negotiate through procedures and communicate with defendants. The *Dynamics* research also notes that greater use of written processes and greater involvement of defendants at the permission stage have enabled judges to be more discriminating in their assessment of the quality of claims for permission.

55. In relation to the importance of skilled lawyers to an efficient legal process we note in Figure Five below the increase in Litigants in Person in the Administrative Court over recent years. The *Dynamics* research suggests that the efficiency of the AJR procedure is much improved if both parties are represented and it may well be then that this growth of in person litigation could be causing some delays. That said, more research is needed into the category of Litigants in Person in the Administrative Court, in particular whether this is primarily a category including only individuals, as it also appears to include some organisations acting in person with representation from their own in-house lawyers who could be very skilled. Other evidence corroborating a rise in unrepresented litigation by individuals is that there has generally be an increase in the proportion of AJRs in which a claimant's address is recorded. The claimant's address is generally only recorded when they commence proceedings without legal representation, for represented claimants only the address of the solicitor and/or barrister is recorded.

56. The research evidence, and commentary during events specifically relating to the IRAL, such as the Justice Alliance Meeting and the Young Legal Aid Lawyers Association suggest that some public body attitudes, and particularly some central Government department attitudes, to litigation do cause unnecessary costs and delays, especially in relation to some of the most straightforward cases, handled by junior claimant lawyers. As we suspect will be clear in Responses to this CfE, a significant number of claims are settled 'at the door of the court' and this seems often to be due to lack of engagement by the defendant.

57. Whilst previous proposals to reform judicial review centred on whether claimants use judicial review as a 'delaying tactic', there also seems to be evidence that public bodies plan their response to claims sometimes on the basis of political expediency rather than legal merit. In research into the *Regionalisation of Judicial Review* Nason and Sunkin heard some concerns that claimants (and to a lesser extent defendants) could use the presence of local Administrative Courts as a means to 'forum shop' seeking listing in a particular location either to avoid, or to take advantage of, delays, and to try and increase the chances of a claim being heard by a particular judge. In practice there is not much evidence of this and it seems the main two reasons behind claimants issuing in an inappropriate region are; lack of awareness, and difficulties sourcing local legal advice, with non-local lawyers being instructed then preferring to issue in a location more convenient to them.

58. A range of matters could minimise either the need to proceed with judicial review and/or increase the efficiency of the process. These include; better processes within public bodies, adequate training and guidance to decision-makers especially in areas of administration where there is a high staff turnover, and more internal checks where appropriate, including ensuring that existing internal review processes are properly completed pre-litigation. Many judicial review claims relate to the interpretation and application of subject area specific guidance (such as in education, planning, and community care), more thought could be given to training

for officials who have to apply this guidance. In recent research into decision-making by Welsh public bodies in housing and education, we noted the common refrain that administrators 'are not legal experts they just apply the law' and that there is real confusion between what actually is 'the law' and relevant guidance, and what is the public body's policy on how that should be applied. Other means to improve the conduct of proceedings could be passing matters to public body legal teams as soon as possible, proper disclosure of documents from both sides, proper checking of all facts before proceeding, and the use of full and clear pre-action letters. We also consider that exploring the potential for further opportunities for mediation would be valuable. Whilst we do not think resort to mediation should be made compulsory, there could be more formal provision for considering mediation through existing processes or case-management activity. More generally there could be further examination of the extent to which administrative officials are being directly provided with training on *The Judge Over Your Shoulder*, as opposed to just being made aware of its existence.

Remedies

59. Our main reflection on remedies is that there has been little growth in the number of remedies actually being awarded in Administrative Court AJRs over the lifetime of the procedure's existence. Data cited by Harlow and Rawlings in *Law and Administration*, first published in 1984, states that 20 prerogative remedies were awarded in 1967, and 31 were awarded in 1978 (higher numbers were awarded in some of the intervening years).[2] This is just prerogative remedies, with there being many other diverse ways to challenge administration at that time. After the AJR procedure was introduced Harlow and Rawlings report that in 1981 there were 560 applications (165 of which related to criminal proceedings). In that same year 108 orders were granted (and 44 of these were in criminal proceedings); this includes both prerogative and other remedies. From 1987-1989 inclusive Sunkin's more specific 'cohort' data tracked particular cases and demonstrated that claimants were successful at final hearing in on average 214 claims per-annum (and that much of the increase from the early to late 1980s was due to immigration AJRs).[3]

60. For cases issued in 2002, after the Human Rights Act 1998 had come into effect, the number of other civil non-immigration substantive cases determined in favour of the claimant stood at 175, and has remained between 150 to 200 ever since, with notable lows of 154 (in 2017) and 158 (in 2018) (for closed cases – a small proportion had yet to be determined at the time of writing). Adding successful immigration and criminal AJRs, the total figures for claimant success were 201 for claims issued in 2017 and 203 for claims issued in 2018; very much in line with the late 1980s when claimants were successful at final hearing in on average 214 claims per-annum.[4]

61. In terms of flexibility of remedies, this seems to have been reduced by section 84 of the Criminal Justice and Courts Act 2015, which replaces a judicial discretion to refuse to grant a remedy with a requirement that the judge must not grant a remedy if it appears 'highly likely' that there would have been 'no substantial difference' had the conduct complained of not occurred. We have discussed this section above in relation to permission, but we note it replaced a common law approach that seemed to be working in a nuanced way. Two planning cases (in a sample of 482 cases analysed by Nason) show the flexibility of the previous common law discretion. *R*

[2] C Harlow and H Rawlings, *Law and Administration* (London, Weidenfeld and Nicolson, 1984) 256-263.
[3] L Bridges, G Mesaros and M Sunkin, *Judicial Review in Perspective* (London, Cavendish Publishing Ltd, 1995).
[4] Success should, however, be understood more broadly than being awarded a remedy at final substantive hearing.

(Silus Investments SA) v London Borough of Hounslow [2015] EWHC 358 (Admin) concerned a decision to designate an area within the Borough as a conservation area. It was conceded that the defendant's representation on its website that there would be a consultation on the proposed designation gave rise to a legitimate expectation that the claimant would be consulted. Lang J determined that the minimum standards for fair consultation were not met as emails to consultees were superficial and the seven-day consultation period was too brief, not least because it included a bank holiday weekend. Finally, the consultation could not have been conscientiously addressed because the decision had been made before all responses were received. Lang J was invited to exercise her discretion not to quash the designation as a conservation area, on the basis that the claimant would have had nothing to say on the merits of the designation and that any representations it proffered would have made no difference to the outcome. She did not accept that the claimant had nothing to say on the merits. The defendant expressed concerns that without the conservation area designation the claimant would immediately demolish a public house on the site—the public house being a listed building. Emphasising the comparatively equitable nature of judicial review proceedings, Lang J procured an undertaking from the claimant that it would not demolish the building for six months from the date of the order to quash the conservation area designation. This shows how judges can be flexible in the interests of efficient administration. In *R (Loader) v Rother District Council* [2015] EWHC 1877 (Admin) Patterson J found that the defendant had breached a specific statutory duty to consult English Heritage (as it was then known) but exercised her discretion not to quash the challenged grant of planning permission. The procedural error was relatively clear, the defendant was under a statutory duty to notify English Heritage of the application in a proscribed way and it did not do so. Having concluded that even if English Heritage had been given an opportunity to respond to consultation and had opposed the grant of planning permission, its response could have added nothing to the already extensive and conscientious scrutiny applied by Rother Council's officers. In addition, English Heritage had displayed no prior intention to respond to the consultation in a manner adverse to the defendant's plans. These cases are examples of many that suggest the common law approach was sufficiently flexible to strike the right balance between individual access to justice and the efficiency of public administration even in highly 'policy centric' areas such as planning. A key point to note is that it might well have been difficult to determine in advance what constitutes a mere 'technicality' in each of these planning cases. In hindsight the apparent flaws in the consultation process might have been seen as minor technicalities, but this was not clear until the matters were fully argued.

Clarity and Codification

62. By 2008, Professor Richard Rawlings had described a picture of the various routes to judicial review as 'spaghetti junction'. According to Lady Justice Cockerill in her address to the Public Law Project's 2019 Trends and Forecasts Conference, there are over 100 flow charts in use in the Administrative Court, showing the range of different procedures for seeking judicial review and the other actions determined by the Court, such as statutory appeals and appeals by way of case stated. The procedural (and costs) reforms introduced between 2012-2015 have already significantly increased the complexity of applying for judicial review in the Administrative Court. Past governments have already created a picture so complex as to be potentially detrimental to both sides trying to navigate through litigation. **Given this divergence and complexity, some of which has admittedly been developed for nuanced and principled reasons, a blunt across the board set of amendments to judicial review procedures would not be appropriate, but the picture does suggest a need for other means of simplification to be considered.**

63. Nason has argued that at least a partial reason for some of this growing procedural complexity is due to the nature of Administrative Court judicial review itself, it has yet to determine what it wants to become. In *Reconstructing Judicial Review*, Nason argues that there are both empirical and normative reasons to be sceptical about the so-called 'reformation', exponential growth or inexorable rise of judicial review in England and Wales. From examining Administrative Court data and substantive judgments Nason concludes that the proportion of Administrative Court claims, but not the number, that have wider constitutional ramifications (perhaps those with which the IRAL is particularly concerned) has increased. She argues that more 'constitutionally flavoured' claims can include applications involving the exposition of public law legal principles in light of constitutional values and rights, claims with wider impacts on the public good, and claims that address the balance of powers between institutions of state. Applications classed as constitutionally important in these ways, by litigants if not always by judges, formed an increasingly large proportion of claims issued in the Administrative Court during Nason's study (from 2007 to 2015). Nason nevertheless also concludes that a significant proportion (at least half) of Administrative Court AJRs turn on their own facts, are (in her assessment at least) relatively non-controversial in terms of the legal principles at issue and involve fact specific grievances often against 'street level' bureaucratic decision-makers where defendants have, sometimes unreasonably, resisted and prolonged proceedings. These individual grievance claims are not necessarily always so straightforward in legal principle that their hearing in the High Court might actually be seen as inappropriate (though sometimes this is the case and Nason found a significant proportion of cases turning on mistakes of fact that could easily have been handled by a county court judge). However, they are more 'routine' in the sense of turning on the application of existing law to the facts (even where this might be a very complex task) rather than relating to some novel or new question of law.

64. Nason takes this work further in a chapter for a forthcoming edited collection where she argues that 'plus ça change, plus ça reste pareil' - 'the more things change the more they stay the same' - is a fitting epithet for judicial review in the modern administrative law of England and Wales. In effect the more the breadth and depth of scope and 'grounds' has expanded, little has changed in terms of comparative access to the procedure, who is bringing claims, who is defending them, who is representing both sides, and what the outcomes are. Nason's conclusions arguably expose two tensions, the first is that while individual grievance claims, generally 'routine' claims, make up at least half the judicial review caseload, as a 'form of action', the AJR is generally ill-suited to the resolution of individual disputes, it is not designed to be accessible for individuals. The second tension is between a generalist approach to administrative law - one that seeks to articulate general grounds of review applicable across areas of administrative activity - and a more specialist, context specific approach.

65. The data and evidence, we argue, broadly shows that what has changed about judicial review (and its predecessor prerogative order procedures) is not that there has specifically been any exponential increase in litigation against the state (thus reconfiguring the balance between individual 'rights' and effective Government), but rather that a more clear, comprehensive and mature set of general principles of administrative law has been developed. It can be argued that, when viewed over a lengthy period of time, the concern of judicial review (in the Administrative Court) has indeed been less with providing effective remedies for individuals and more about developing a systematic account of general administrative law. A tension with this account is the extent to which AJRs are primarily used in fact, rather than perhaps by design, as a procedure to resolve individual grievances where the claimant simply has no other means of access to justice.

66. In Sunkin's sample of 1,106 applications made from 1983 to 1985 inclusive, 85% of claims were issued by individuals. Research into the *Value and Effects* of Judicial Review found that 77% of a sample of 502 cases from July 2010 to February 2012 inclusive were issued by individuals. Of these 502 cases 75% could be classified as own fact cases. It is worth noting however, that these types of case might have wider consequences as repeated own fact cases could have cumulative ramifications on policy or practice, or a single challenge might ultimately have wider consequences beyond the individual affected if it discloses a pattern of decision-making errors. In the *Value and Effects* research only 18% of sample cases were categorized as involving a specific challenge to policy, procedure or legislation itself rather than the application of such to individual cases.

67. Nason argues that own fact cases are generally (but of course not exclusively) more likely to be issued by litigants in person, or by generalist high street solicitors, and that these claims often turn on grounds that include basic procedural errors, factual mistakes or obvious examples of irrationality in its more traditional sense as an error of logic. In a sample of 482 Judgments she considered 65 to turn on obvious mistakes (of law or fact) and a further 53 to turn on basic procedural issues. Nason also noted that a large proportion of the sample (perhaps up to half) turned on ordinary statutory interpretation, for example as to the meaning of words such as 'high hedge' in a planning case or 'commenced education' in a particular case relating to local authority responsibility for the education of care leavers. The prominence of statutory context to many, likely the majority, of judicial review claims needs to be given more emphasis, in particular as it highlights how important Parliament is as a player in the background to judicial review claims.

The Subject Areas of Review and Codification

68. The IRAL's only real reference to the fact that the judicial review caseload is not homogenous is the mention in the ToR to whether the grounds of judicial review should depend 'on the nature and subject matter of the power'. We can perhaps assume that the nature of the power is intended as a reference to whether the public body's own powers stem from statute, common law or some other basis such as the Royal Prerogative. We assume the IRAL is particularly interested in review of the prerogative. This has not been a particular focus of our research, but it is worth noting in Nason's analysis of 482 cases from 2013 and 2015 only one appeared to directly relate to a challenge of prerogative powers.

69. How we understand the nature, and especially the subject matter, of powers under review relates to the legal subject area of the claim (i.e., planning, education, procurement, environment, taxation, immigration, policing and so on). Research over the years shows that the pattern of judicial review (claims issued, settlement, outcomes and so on) differs across these subject areas, and that increases and decreases in the overall caseload over time are often driven by events in particular subject areas. For example, cases could increase as a result of; a new planning Act and related guidance, determining the precise application of new legal duties in environmental law, clarifying the operation of new provisions governing the relationship between local and national bodies with educational responsibilities, and so on. Cases can decrease once an area of law is relatively well settled, or where Parliament has provided another means of redress through a statutory appeal or even a complaint mechanism. Research also shows that the activities of lawyers are part of this picture and that access to affordable (or free) legal advice and representation is often crucial to enabling challenges.

70. Early research into *Regionalisation of the Administrative Court* in particular showed that the nature of judicial review in each Region is affected by the availability of specialist and affordable

legal advice, as well as by particular local concerns. The Regions had been developing as local centres of expertise in particular areas of law; such as prisons and professional discipline in Northern England, community care and immigration in Birmingham, and education in Cardiff. This is a result both of local issues and legal specialists (the presence of a comparatively high prison population in parts of the North East, the General Medical Council (as a common defendant) in Manchester, specialist education lawyers and devolved aspects of education law needing clarification in Cardiff).

71. Outside the immigration context, eight topics have consistently accounted for close to half the AJR caseload. In Sunkin's analysis between 1987 and 1989 inclusive, on average 58% of the total civil non-immigration caseload concerned; disciplinary bodies, education, family, children and young persons, housing (including homelessness), local government, prisons, social security, and town and country planning.[5] In research by Nason and Sunkin these same categories accounted for on average 52% of the civil non-immigration caseload from 2007 to 2015 inclusive.[6] In 2018, these eight classes of claim made up 46% of the total civil non-immigration caseload, in 2019 they made up 50%. It is true to say that despite this the other roughly half of the caseload has generally become more diverse, with new categories added in most years (though for many of those categories there are very few claims). **It may well be that a broader range of Government departments are impacted by judicial review given the wider range of topics of claim, and it may be that these departments are impacted in a wider range of ways given the admitted growth in articulation of the 'grounds' of review (and there would be value in more research on these impacts), but nevertheless roughly half of judicial review activity, in terms of subject matter, has changed little since the late 1980s.**

72. Research into legal representation also corroborates the notion that many judicial review claims appear as fairly routine (if not easy) individual grievance claims, with a significant proportion of others being concerned with specialist areas of law such as planning. For example, Sunkin's research from a sample of cases in the early 1980s found that across the total AJR caseload (including immigration) on average 75% of solicitors who represented claimants acted in only one issued case per-annum,[7] rising to 77% in the late 1980s.[8] From 1 May 2007 to 30 April 2018, 65% of solicitors who represented claimants in civil non-immigration judicial review acted in only one claim in any given year (the figure barely fluctuated from 65% across the 11 years). In immigration judicial review the figures are more variable, but still on average around 55-60% of solicitors representing claimants in immigration AJRs are involved in one application per-annum. That said a significant proportion of the caseload is concentrated within a smaller number of firms. For example, from 2007/08 to 2017/18 on average in civil non-immigration AJRs, claimants in half of all the claims issued were represented by 11% of the total number of firms involved. The firms handling the highest proportion of cases have tended to be those specializing in a particular area of law, such as planning, not generalist public or administrative law practices. For immigration judicial reviews work is more concentrated with on average 7% of solicitors' firms acting for claimants issuing half of all Administrative Court AJRs in any given year. Sunkin's 1980s and 1990s research similarly exposed a high concentration of work among particular firms. The data shows that representation is concentrated among firms with subject matter expertise, such as immigration; town and country planning, land and the environment; tax; and education, family, children and young persons.

[5] Bridges, Mesaros and Sunkin, 'Judicial Review in Perspective' (n 5).

[6] This research was based on an analysis of data extracted from the Administrative Court IT system, the Crown Office Information Network (COINS) from 1 May 2007 to 30 April 2015 inclusive.

[7] M Sunkin, 'What is Happening to Applications for Judicial Review?' (1987) 50 *MLR* 432. 462-463.

[8] Bridges, Mesaros and Sunkin, 'Judicial Review in Perspective' (n 5).

73. Whilst more research is needed, that which has been conducted seems to show that the structure of legal practice and subject matter of claims issued is reflected in how the grounds of judicial review operate in practice. The majority of substantive judgments concern interpretation of statute and guidance (often reams of material) in the specialist context of planning, care homes, immigration, the environment and so on. It is telling that many of these cases are determined by specialist planning or environmental law barristers etc sitting as Deputy High Court Judges and not full-time Administrative Court ticketed judges. In many of these claims matters of interpretation do not go much beyond the meaning of particular words in statutory context, albeit that the consequences of particular interpretations are sometimes part of the picture as well. But this is, as Nason has termed it, ordinary common law statutory interpretation, it does not imply any sense of so-called 'judicial activism' in relation to more policy centric areas. More free-standing grounds of review such as a substantive legitimate expectation are extremely rare, and both *Wednesbury* unreasonableness and *ultra vires* (in their traditional and stricter senses of illogicality and clear lack of statutory authority) remain prevalent. It is quite possible to slice up much of the Administrative Court's caseload as including (for example); slices of specialist planning law turning on statutory interpretation including interpretation of policy; slices relating to the lack of a fair hearing in prisons/parole; slices relating to fairness in professional discipline and fitness to practice; slices relating to interpretation of various legislation affecting children and young people; and slices relating to the application and interpretation of immigration and asylum law and policy. It is, on the other hand, we would argue, near impossible to slice up the cake of judicial review based on grounds argued, or the nature of the power under review. Our point here is that whilst it is possible to connect particular grounds of judicial review to particular commonly occurring subject areas of decision-making it would be neither practically possible, nor we think constitutionally acceptable, to legislate (codify) the law along these lines.

74. There is already evidence in case law of judges taking a nuanced approach to the development, articulation and application of public law principles more widely and grounds of review specifically. For example, judicial review of decisions of county court judges is generally limited (by precedent) to decisions in excess of jurisdiction or otherwise disclosing a miscarriage of justice; a form of domestic 'manifestly without reasonable foundation' test is applied to cases raising possible discrimination in some social welfare contexts. A particular recent example is *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, where Hickinbottom LJ found certain so-called 'right to rent' provisions were not an unlawful and discriminatory interference with human rights in the context of a scheme that includes an Act of Parliament implementing socio-economic policy against the backdrop of an EU Directive requiring the imposition of sanctions. In planning, the case of *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, is cited regularly and with positive judicial consideration. Especially Lord Hoffman's expression that:

> The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

75. Whilst this point has been distinguished in some cases, it is still regularly cited in planning law as a means to show due consideration to the specialist expertise of planning authorities and a lack of appetite for activism on the part of planning law judges. In each of these situations, and in many others, the courts adapt more general grounds such as error of law, relevant/irrelevant considerations, and proportionality to the legal and policy context, oftentimes imposing restrictions on the extent of review through applying principles of deference and respect. **We are not aware of any extensive empirical studies that seek to determine, one way or another, whether these nuances of respect for the expertise of decision-makers are deployed any more or less often specifically in relation to the decision-making of particular Government departments (though there is narrative evidence of nuanced respect for national security and immigration policy). A related concern, however, is that we believe these nuances are too intricate (and necessarily so given the diversity of administrative and executive decision-making) to be given statutory formulation (to be codified).**

Codifying the Grounds of Judicial Review

76. We wish to draw the Panel's attention to the extent to which administrative law in England and Wales is already codified in various ways, and argue that much care needs to be given as to what is intended to be codified in future. Many legal jurisdictions (likely most) have some form of general administrative law code or general administrative procedure code applying general principles of procedural and substantive legal fairness to administrative activity. Often these codes are divided between principles that apply to administrative rule-making, administrative decision-making, and administrative adjudication respectively. This is quite different to the potential codification of grounds of judicial review, particularly of executive as well as broader administrative action. In jurisdictions where these codes operate there is invariably also access to a broader form of judicial review based on 'legality' (in effect the rule of law) whether as a right in a written constitution or as a common law constitutional right where the grounds of review are articulated over time by the judiciary.

77. In England and Wales, the principles most often referred to as general principles of administrative law (which are better understood perhaps as grounds of judicial review in the current context) are found in common law precedent of varying longevity. By way of rationalisation (a codification of sorts), Lord Diplock's judgment in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 listed three principles; illegality, irrationality and procedural impropriety. These are regularly still cited as the three central principles of general administrative law; that administrative decisions must be in accordance with the law (illegality), they must be rational (reasonable), and they must be procedurally fair. It is questionable whether there is much to gain from a simple statutory restatement of these principles or grounds. Professor Mark Elliott considers that codification of this kind would be no more than 'cosmetic' and Professor TH Jones considers it banal. The IRAL ToR include: 'Should substantive public law be placed on a statutory footing? Would such legislation promote clarity and accessibility in the law and increase public trust and confidence in JR [judicial review]?' We note here that there is no research that we are aware of examining current public awareness of judicial review and attitudes to it, it is not clear whether public trust and confidence in judicial review is currently weak, excellent or somewhere in between. What we do know from the *Regionalisation research* suggests that public awareness varies across England and Wales, and that it is generally higher in locations with a significant complement of public lawyers. What we can discern perhaps from Wales, is that a significantly increased profile of public law, due to new publications, research, seminars, events, Senedd activity and to the increased prominence of devolved Welsh administrative law generally, has not led to any increase in the number of judicial review

claims issued against public bodies operating in Wales. The establishment of Administrative Courts outside London did lead to an initial increase in 'regional' judicial review, but this has since fallen back to pre-regionalisation levels, and we conclude that this is largely due to legal aid reforms and their impacts on public law practitioners.

78. On the question of whether codification of general administrative law increases awareness and confidence, there may be evidence of this in some jurisdictions. The Québec Act Respecting Administrative Justice aims to 'affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens', and this framing can be said to have had an impact on the culture of public administration and tribunal practice.[9] The Netherlands General Administrative Law Act (GALA) is said to have had some empirically provable positive impacts on the teaching and practice of administrative law more generally.[10] However, each of these Acts is quite different to a proposal to codify the grounds of judicial review that currently operate in England and Wales; a better comparator here is the Australian Administrative Decisions (Judicial Review) Act 1977 (ADJR Act).

79. Like the AJR procedural codification in England and Wales, the ADJR Act was intended to overcome technical issues associated with antiquated common law procedures. However, the ADJR Act also contains a codified statement of grounds of review, and provides an additional species of judicial review proceedings as a supposedly simple alternative to the route to judicial review already extant under the Australian Constitution.

80. Some relevant issues are that the ADJR Act applies to 'decisions of administrative character made, proposed to be made or required to be made (whether in the exercise of discretion or not…)'. There is no definition of the phrase 'administrative character'. The ADJR Act is narrower than the common law grounds of judicial review in England and Wales in that it requires a decision to be made under an enactment thus excluding decisions made under executive or prerogative powers. The ADJR Act sets out 17 specific grounds of judicial review, and a further two open-ended grounds. Leading Australian academic Janina Boughey argues that whether setting out such precise grounds has stunted further judicial development of common law administrative law in Australia remains open to debate.[11] Whilst it is often argued that common law development has been slowed by the ADJR Act, Boughey concludes that limited development of common law (in comparison to England and Wales as one example) may be as much due to the specific constitutional separation of powers in Australia, and the Australian High Court's interpretation of this constitutional principle, as it is due to explicit statement of grounds in the ADJR Act. In particular, the ADJR Act has two open-ended grounds onto which the judiciary could craft new developments if so minded.

81. A related concern is that the extensive list of grounds led to the provisions of the ADJR Act becoming buried under technical interpretive problems, which have little impact on improving

[9] http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/J-3 and Prof Dr Pierre Issalys, Université Laval (Québec) 'Codification of Administrative Law' workshop, Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

[10] Prof Dr Tom Barkhuysen (Universiteit Leiden) 'Codification of Administrative Law' workshop, Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

[11] Janina Boughey (University of New South Wales) 'Codification of Administrative Law Workshop' Universität Zürich, 23rd & 24th January 2020 (publication forthcoming).

administrative decision-making or administrative practice more generally.[12] On the other hand, whilst the grounds are indeed lengthy, they are still far from comprehensive. As TH Jones puts it, that 'the bare text of the 1977 Act does not even provide an accurate guide to the grounds of judicial review, let alone the details of their application'. Boughey also notes the jurisdictional and procedural issues caused by the ADJR Act. It did not outright replace the Constitutional route to judicial review. In practice there has been a greater drive to use the Constitutional avenues, not least because cases run under the ADJR Act have stumbled over technicalities of statutory interpretation that are not relevant to Constitutional and inherent common law claims. Similar problems have been experienced in South Africa where a right to administrative justice has been enshrined in section 33 of the Constitution, and a subsequent Promotion of Administrative Justice Act (PAJA) was enacted to give practical effect to that right, by codifying various grounds for seeking judicial review. The PAJA is not regarded as an exhaustive statement of legal principles and this has clearly given rise to complex issues. For example, the PAJA states that an administrative action is one that must 'adversely affect the rights of any person', whereas the courts have interpreted this as meaning that the decision must 'have the capacity to affect legal rights'. Use of the word 'adversely' also appears to have been no barrier for finding that a decision which conferred a benefit on an individual qualified as administrative action under PAJA.[13] The PAJA definition of 'administrative action' also seems to be inconsistent with the meaning attributed to the same concept by the South African Constitutional Court prior to PAJA's enactment.[14] In addition, the judicially crafted principle of legality, echoing a similar constitutional principle in England and Wales common law, has developed as a means to replicate many grounds within the PAJA. The principle of legality has broader application and less onerous procedural requirements than PAJA, and it has been argued that its basis in the common law constitution parallels or even supplants the PAJA's legislative democratic pedigree.[15] This sets up a conflict with constitutional law, and a phenomenon, also now being experienced in other jurisdictions such as Australia, of a twin-track realm of judicial review based respectively on the Constitution and on the relevant codified administrative law/justice statute.

82. Codification of administrative law in South Africa was preceded by recognition of a constitutional right to administrative justice. In the UK, the former Administrative Justice and Tribunals Council (AJTC) proposed that a right to administrative justice be included in a British Bill of Rights. The AJTC proposed that such a right should be 'founded not only on the rule of law and the general principles of legality and legal certainty but also on the principles of good administration, democratic accountability, equality of treatment and citizen empowerment'.[16] Mark Elliott and Christopher Forsyth have since argued that a right to administrative justice already exists, 'embedded deep within the common law constitution and reflects a wide range of principles of good administration that condition the relationship between the individual and the state'. Elliott and Forsyth's summary of the potential advantages and disadvantages of including a right to good administration or a right to administrative justice in a codified UK

[12] Matthew Groves, 'Federal Constitutional Influences on State Judicia Review' (2011) 39 *Federal Law Review* 399.

[13] G Penfold, 'Substantive Reasoning and the Concept of "Administrative Action"' (2019) 36 *South African Law Journal* 84, 109.

[14] C Hoexter, 'The Constitutionalisation and Codification of Judicial Review in South Africa' in F Forsyth, M Elliott, S Jhaveri, M Ramsden and A Scully-Hill (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 55-56.

[15] C Hoexter, 'A Rainbow of One Colour? Judicial Review on Substantive Grounds in South African Law' in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015) 178-184.

[16] AJTC, British Bill of Rights and Responsibilities: A Right to Administrative Justice.

constitution is instructive of the broader concerns relating to codification of general administrative law:

> A blandly expressed right to good administration in a bill of rights would be unlikely to do much damage, and its omission from a catalogue of rights might create a misleading impression as to its fundamental importance. But any attempt to lay down the principles of good administration in detail, or to define with precision the reach of the right, might well add needless layers of complexity and uncertainty while making little by way of a positive contribution.

83. In the European context, Article 41 of the EU Charter of Fundamental Rights (CFR) provides a 'right to good administration'. On its face this is limited to where individuals deal with EU institutions, however, the right combines general principles of EU law, and may be capable of enumerating principles of good administration not specifically listed in the text (though Harlow and Rawlings consider it to be highly legalistic, adding little to good administration more broadly). The presentation of good administration in the form of a right derives from the case law of EU courts articulating rule of law requirements. In this regard, Margret Vale Kristjansdottir concludes that Member States must 'respect the right to good administration, not because of article 41, but in spite of its wording', suggesting again that whilst the codified right gives added status to underlying principles, it should not be taken as an authoritative interpretation of their content.[17] The EU CFR has not been incorporated into domestic law post-Brexit, but the general principles of EU law seemingly have been (under the status of 'retained EU law').

84. To conclude this discussion it may well be said that in none of these comparator jurisdictions is there any clear empirical evidence of the extent to which codification of the grounds of judicial review, or of the right to administrative justice, has achieved aims of enhancing access to justice (in the longer term) by improving legal clarity, legal certainty, and the accessibility of law. However, seeking to codify grounds of judicial review, or general principles of administrative law in a way that excludes or restricts the operation of currently accepted principles would mark the UK out as an 'exceptionalist' jurisdiction.

85. In terms of the broader European context, recent work has examined the impact of the Council of Europe on the domestic administrative law of member states. This work shows that there are developing 'pan European principles of good administration' that are broadly similar across Council of Europe States. In many jurisdictions a large proportion of these principles have been incorporated into domestic law and are stated in administrative law codes. In the UK, the development of domestic common law largely mirrors these pan-European principles, and common law has to some extent (though not nearly as much as in other jurisdictions) been influenced by Council of Europe sources. In this regard there is far more that unites these Member State jurisdictions than divides them, and any attempt to restrict the grounds of review may well set the UK apart as 'exceptionalist' in its approach to administrative law. There are already some areas where the UK is notable in its different approach, one of these is that there is no general access to a financial remedy in damages for unlawful administrative action, such as exists in the many other Council of Europe member state jurisdictions. Other UK 'exceptions' seems to be the absence of proportionality as a generally applicable principle of administrative law, and the absence of a general duty to give reasons for administrative decisions.

[17] Margret Vale Kristjansdottir, 'Good Administration as a Fundamental Right' (2013) 9(1) *Icelandic Review of Politics & Administration*. 237, 251.

Codification of Administrative 'Rule Making'

86. There are areas of administrative law that can already be seen to have a high degree of codification, slightly different to the extent to which planning law and other categories noted above are primarily creatures of statute and guidance. For example, in practice, as opposed to in formal legal rules, there are many special aspects of public authorities' contracts which though interpreted and enforced according to ordinary contract law, have tended to coalesce as a distinctive body of principles. Government departments have drawn up various guides to common form clauses for particular types of contracts to ensure a degree of consistency (this could be described as codification if interpreting the term broadly).

87. Another matter for consideration could be so-called 'administrative rule-making'. Administration is conducted not only through individualised adjudication but also through the application of pre-determined rules which can strongly influence or even be determinative of an issue. Delegated legislative rules come with a wide variety of labels, from Orders in Council, rules, regulations, byelaws and directions, however, in practice little really turns upon the labelling. Outside delegated and sub-delegated legislation, there is a further category where there is no express legislative mandate to make rules, but where the administration nonetheless makes rules of a legislative character. Such rules are of general application and would be indistinguishable if juxtaposed to true statutory instruments (e.g., the latter having been made on behalf of a Minister and having undergone some form of Parliamentary scrutiny). There are various types of such 'rules' including; codes of practice, circulars, directions, rules and regulations; some are procedural rules others are interpretive guides, instructions to officials, prescriptive/evidential rules, commentary codes, voluntary codes, rules of practice, management and operation, and so on. The precise legal status of these 'rules' may vary but some general points can be noted. First, the fact that an administrative body does not have express delegated power to make the rules does not automatically invalidate them. Second, the precise legal status is likely to be found primarily by examining the relevant statutory background to the particular area of law. Finally, even if a 'rule' is not specifically related to primary legislation it can still have legal consequences by being dispositive of an individual person's case, and the rule's existence may generate a common law right to consultation if the administrative body seeks to depart from applying that rule in particular circumstances. A court will be able to decide first if the specific 'rule' is subject to judicial review, and if so, it will also be the judiciary that provides an authoritative meaning of the substance of the 'rule' itself. It is likely that the existence of a 'rule' will generate a general administrative law (common law) obligation that there should be a degree of consistency in its application, which may go as far as creating a legitimate expectation that the 'rule' will not be departed from.

88. There seems to be a perceptible trend across jurisdictions, referred to as the proceduralisation of administration (and with it, administrative law), that provides more conceptual space for potentially less contentious codification. Proceduralisation can have normative connotations in various directions; for some it is a negative development associated with rigidity, for others it guarantees the rights of citizens and by assigning administrative activity is to predictable legal forms and functions through known rules and procedures. The proceduralisation of the administrative state in the UK has various sources. It is most often associated with so-called 'New Public Management (NPM)'; designed to reimpose political control over public administration and to reorganize bureaucracy and push it into self-control through the use of managerialist methodology. NPM emphasises procedural tools at various stages of the administrative process. Risk-analysis has also been increasingly prominent with emphasis on cost-effectiveness. The use of 'impact assessments' has grown extensively; and has also been

influenced by increasing concern for human rights values and principles, including equality; the so-called regulatory state has also expanded. We note that Carol Harlow and Rick Rawlings then suggest the combined effect of these developments could lead to increased calls for the something like the American Administrative Procedure Act that provides a more generalised statement of principles applying to administrative rule-making and regulatory type activity. This could also apply to so-called 'integrity' institutions which sometimes do not have a high level of independence from government (in effect bureaucratic regulation of government by other bodies with varying degrees of connection to government). As Harlow and Rawlings conclude:

> statutory public regulators are themselves in an ambiguous position, acting on the one hand as enforcers of good governance standards and fair procedures, on the other as targets for them. There have, for example, been complaints that regulators are insufficiently open and suggestions that the UK should adopt an equivalent to the American Administrative Procedures Act.[18]

89. Aileen McHarg has also argued that developing case law governing administrative rule-making and other species of soft-law is becoming more extensive, and that it could potentially be more coherently rationalised.[19] This could perhaps pave the way for agreed codification of general principles, although this is not McHarg's proposal.

90. It should be noted that the American APA is not without its own controversies. The APA was a compromise between Neal Deal and Anti-New deal, Democratic and Republican positions which some argue made more political than legal sense. Some of its provisions were deliberately left ambiguous with each side hoping the courts might later resolve them in their favour. **As TH Jones notes: 'The language is general setting out the "principles" of judicial review. The statute does not – and could not – settle the ideological disputes which accompanied its gestation'.[20] The same concerns may well characterise any attempt to pass any codification of general administrative law or grounds judicial review act in England and Wales/the UK.**

The IRAL and Devolution to Wales

91. After an extensive assessment of the *Form and Accessibility of the Law Applicable in Wales*, the Law Commission recommended bringing together legislation whose subject matter is within Welsh competence, but which is scattered across various sources, and reforming that law where appropriate. We commend the Law Commission work here to the IRAL Panel, in particular for its extensive examination of the meaning of codification and how such sits within the legal traditions of England and Wales. In a process since described as 'ground-breaking' for a UK jurisdiction, the Law Commission proposed that the ultimate goal should be the organisation of primary and secondary legislation into a series of codes dealing comprehensively with particular areas of Welsh law.

92. The Welsh Government's first step to implementing the Law Commission recommendations was to propose, and through the Senedd enact, the Legislation (Wales) Act 2019. This places the Counsel General for Wales under a duty to keep the accessibility of Welsh law under review.

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[18] C Harlow and R Rawlings, 'Proceduralism and Automation: Challenges to the Values of Administrative Law' forthcoming in E Fisher and A Young (eds), *The Foundations and Future of Public Law* (in honour of Paul Craig (OUP 2019) p.11-12.

[19] A McHarg, 'Administrative Discretion, Administrative Rule-Making and Judicial Review' (2017) 70(1) *Current Legal Problems* 267.

[20] TH Jones, 'Judicial review and Codification' (2000) *Legal Studies* 517, 533.

For each Senedd term, the Welsh Ministers and Counsel General must prepare a programme of what they intend to do to improve the accessibility of Welsh law. This must include proposed activities 'to –(a) contribute to an ongoing process of consolidating and codifying Welsh law' and '(b) maintain the form of Welsh law (once codified)'. Codification here is then related to the felt need to crystallise an emerging legal identity that is distinctive from England, alongside the goal of rationalising (primarily through consolidation) a plethora of sources of devolved and non-devolved law that are often impenetrable for lawyers let alone the public. The Welsh Government has consulted on a *Draft Taxonomy of Codes of Welsh Law* which includes a proposed *Public Administration Code*; this seeks to bring together existing legislation but specifically does not seek to codify common law principles.

93. Wales may provide an example test bed of what can be achieved through a particular form of codification, but more generally we think that the IRAL ToR and CfE do not properly appreciate the context of Welsh devolution to administrative law. Note A to the ToR says that the Review is to consider 'public law control of all UK wide and England and Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers'. The CfE says that the Review is to consider 'public law control of all UK Wide and England and Wales powers only'. This suggests there is no interest in examining review of the exercise of powers by devolved Welsh bodies, or by the Welsh Ministers. We note, however, that there are circumstances where UK Government and Welsh Ministers may exercise concurrent powers out of practical necessity, for example relating to cross-border issues, and it is not clear whether or not such is contemplated by the Review. There is a real risk of developing reforms that would see the availability of judicial review diverge depending on whether the decisions challenged are those of Welsh Ministers or UK Ministers, even where the nature of those decisions are identical. It is also not clear whether the Review is interested in situations where the UK Government is exercising powers that relate only to England. We also question why the Review appears to be interested in the impacts of judicial review on local authorities and other public bodies (in England and Wales, although this is not expressly stated), but only when the powers exercised by these bodies stem from the law applying to the whole of the UK, or from England and Wales law that applies in both England and Wales identically, but not the law applying to England only or to Wales only. There is much confusion here that needs clearing up by the IRAL Panel, and these issues go way beyond matters of mere consequential or procedural detail.

94. We also remind the IRAL Panel of the recent amendments to the Civil Procedure Rules. The Civil Procedure (Amendment No. 3) Rules 2020 amend Part 7 of the Civil Procedure Rules 1998, as of 1 October 2020, by including the following provisions:

    Claims against Welsh public bodies to be issued and heard in Wales

    7.1A. Unless required otherwise by any enactment, rule or practice direction, any claim against Welsh public bodies which challenges the lawfulness of their decisions must be issued and heard in Wales.

    Claims against Welsh public bodies to be forwarded for issue in Wales

    7.1B. If a court or centre in England receives a claim which should pursuant to paragraph (1) be issued in Wales a court officer shall forward it for issue in the Administrative Court Office in Wales or other appropriate court office in Wales.

Further, by way of 122nd Update to the Practice Directions supplementing the Civil Procedure Rules 1998, Civil Procedure Rule Practice Direction 54D, which sets out the considerations as to which of the Administrative Court Offices a judicial review claim should be filed, will be amended to include the following provision:

1.3 This Practice Direction is subject to the requirement in rule 7.1A that any claim against Welsh public bodies which challenge the lawfulness of their decisions must be issued and heard in Wales.

As a result, from 1 October 2020, all Administrative Court claims, including judicial reviews, which challenge the decision of a Welsh Public body must be issued and heard in Wales. If they are not, they will automatically be transferred.

95. Our general comments on procedure, both in the context of devolution and regionalisation, are that changes which might be seen as purely procedural, can and do have an impact on access to judicial review, on the subject matter of claims issued, on the consistency of permission and substantive success rates, and potentially also on the development of case law principles. How access to judicial review is structured, both in terms of the general procedures to be followed, and how localised or regionalised access to the procedure is, can go to the heart of expressing and facilitating what are considered to be the constitutional purpose and values of judicial review.