Judicial Review Reform
The Government Response to the Independent Review of Administrative Law
Consultation response from Wildlife and Countryside Link

Introduction and overarching points

1. Wildlife and Countryside Link ("**Link**") is a coalition of 58 organisations concerned with the conservation and protection of wildlife and the countryside. Its members practice and advocate environmentally sensitive land management and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together its members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

2. Link welcomes the opportunity to respond to this consultation paper. However, before addressing the questions, we wish to make some general observations about the basis for most of the proposals being consulted on.

3. The Report published by the Panel of the Independent Review of Administrative Law ("**IRAL**") drew on the practical experience of members of the Panel, senior members of the judiciary and the submissions of those who submitted evidence - most of whom were lawyers, and many of whom were well-qualified practitioners and highly proficient public interest groups practising regularly in the field. The Panel also drew on a review conducted by four distinguished public law practitioners on behalf of the Bingham Centre in the context of government proposals leading up to the Criminal Justice and Courts Act 2015[1] (which looked at every stage of Judicial Review ("**JR**") proceedings and contained a number of practical recommendations).

4. On the basis of this evidence, the Panel proposed just two reforms to substantive law: to reverse the effects of the *Cart* judgment and to introduce Suspended Quashing Orders ("**SQOs**") as a new remedy. The Report emphasises that any changes should only be made to JR after the most careful consideration, given the important role that it plays in the UK's constitutional arrangements and, in particular, in maintaining the rule of law. In particular, the Report maintains: "*the independence of our judiciary and the high reputation in which it is held internationally should cause the government to think long and hard before seeking to curtail its powers*".

5. In light of IRAL's measured, comprehensive and evidence-based Report, Link is deeply concerned about the majority of the proposals in this consultation paper. It is not simply that there is little or no evidence of the need for change – the IRAL Report provides cogent and compelling reasons *not* to proceed with proposals of such magnitude that may have significant unintended consequences. One such issue is the potential use of ouster clauses, noted by the Panel to have adverse consequences for the maintenance of the rule of law and the UK's compliance with the European Convention on Human Rights ("**ECHR**"). Another issue of concern is the possible use of prospective only remedies, which again has implications for the UK's compliance with the ECHR (as enacted by the Human Rights Act

[1] Fordham, Chamberlain, Steele and Al-Rikabi, Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre for the Rule of Law, Report 2014/01, 2014). Judge Michael Fordham QC is author of The Judicial Review Handbook, 7th ed (Hart Publishing, 2020)

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1998[2] ("**HRA 1998**")) and the UNECE Aarhus Convention ("**the Aarhus Convention**"), to which the UK is a Party.

6. JR is an essential foundation of the rule of law and the final mechanism for civil society to challenge potentially unlawful decisions affecting the environment and achieve a remedy in the courts. Any potential restrictions on JR are of constitutional importance. In *R (on the application of UNISON) v Lord Chancellor*[3], Lord Reed gave a powerful exposition as to why access to the courts was a core element of the rule of law, and why being able to bring a claim and have it determined was of a broader societal benefit than merely to the individual parties involved, holding:

> "*At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other… People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations*." (Link's own emphasis added)

7. Aarhus Convention cases are inherently in the public interest. The Claimant rarely has any personal financial interest in the outcome of the case and does not stand to profit from winning. Rather it is the environment, and therefore society as a whole, that stands to benefit (or lose) from the outcome of an environmental case - for example through the clarification of a point of law, the protection of biodiversity or through ensuring adherence to environmental standards. Rushed attempts to prevent unlawful decisions, acts or omissions with adverse environmental impacts from being justiciable, or being adequately remedied, seriously risk breaching international and domestic law.

8. The Government's decision to consult on changes of such magnitude, that go well beyond the considered conclusions of the evidence-based IRAL Report, is deeply unfortunate. We hope the Government will reconsider progressing these proposals in light of their repercussions for the rule of law and compliance with international and domestic law.

9. Finally, we wish to register our concern about the short timescales provided for a constitutional exercise of this breadth, complexity and importance. The IRAL Report opens by expressing sympathy for the view, which we would endorse, that the period of time given to the Panel was "*inadequate given the complexity, scope, and importance of the issues*". (This may explain why one of the Panel's only two recommendations - concerning the *Cart* judgment - appears to be founded on a statistical

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2 Section 1 HRA 1998 available here: https://www.legislation.gov.uk/ukpga/1998/42/section/1

3 [2017] UKSC 51

error, as has been widely reported). The Panel had a period of months to report. Those wishing to engage with the consultation have just six weeks, which is woefully inadequate. We therefore fully support the request[4] to Government for an extension of this period to at least 12 weeks. Failure to do this risks further undermining the process, such that any subsequent measures may themselves be unlawful. On this we note the Aarhus Convention requires that public participation procedures "*shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public … and for the public to prepare and participate effectively during the environmental decision-making*"[5]. It is our view that the time afforded to respond to this consultation is neither reasonable nor sufficient.

10. Please note that our response addresses only those questions in the consultation paper relevant to environmental (Aarhus) claims.

Responses to questions

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

11. The IRAL Report recommends that Parliament ought to provide a remedy of suspension to alleviate the bluntness of a quashing order. It would then be for the courts to develop principles to guide them in determining in what circumstances SQOs could be awarded.

12. We see the merit in giving judges the additional flexibility of SQOs, to be used in appropriate cases. We would strongly oppose any measure that may result in judges being *presumed or mandated* to use an SQO. The need for such a drastic step has simply not been demonstrated. As to establishing the principles for determining in what circumstances an SQO could be awarded, we have already recorded our concerns about the inadequate timescales for this consultation, and for the wider exercise of which the consultation forms part. For that reason, we favour these guiding principles being developed gradually over time, so that proper consideration can be given by judges, in the context of concrete factual scenarios and with the benefit of full legal argument, as to when an SQO might be justified. We therefore agree with IRAL that this should be left to judges, as opposed to the Scotland Act approach of legislating now to introduce mandatory considerations that would indicate when SQOs would be most appropriate.

13. Without wishing to prejudge the courts' development of these principles, we note the Report gives two examples of when SQOs might be justified. The first is 'high-profile constitutional cases' where it would be desirable for the courts explicitly to acknowledge the supremacy of Parliament in resolving disagreements between the courts and the executive over the proper use of public power. The second is cases such as *Hurley and Moore* (a Public Sector Equality Duty case) where it is possible for a public body, if given the time to do so, to cure a defect that has rendered its initial exercise of public power unlawful. In these categories of cases we can see merit in giving judges the *option* to make an SQO, should they consider it appropriate on the facts of the case.

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4 See https://www.bindmans.com/uploads/files/documents/Letter_to_Judicial_Review_Reform__Ministry_of_Justice_-_2021.04.08__1.pdf

5 Article 6(3) and 7, Aarhus Convention

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

14. JR is "devolved" in both Scotland and Northern Ireland by reason of not being reserved or excepted, but not in Wales in the absence of its own jurisdiction. As such, IRAL noted that any changes to the procedures by which JR may be obtained in Scotland or Northern Ireland will be a matter for the institutions of devolved government in Scotland and Northern Ireland.

15. The Panel received nineteen devolution-related submissions, including submissions from the Scottish and Welsh governments, the judiciary, and both branches of the profession in Scotland and Northern Ireland. Without exception, respondents were opposed to, or at best not persuaded of, the need for reform. The submissions attested to the importance of JR in the three devolved nations, and nowhere more so than in Northern Ireland in the absence of fully functioning devolved institutions for long periods in the past twenty years. It was also noted that there have been recent reforms to JR in both Scotland and Northern Ireland, following comprehensive reviews of their civil justice systems, which are said to be working well.

16. Respondents were concerned that the purpose of "reform" would be to exclude or otherwise limit JR in respect of certain matters; together with possible amendments to the HRA 1998, it might lead to a loss of judicial protection to which respondents would be opposed. Respondents were also concerned that statutory intervention might result in a "dual" or "fragmented" system in which "UK wide" reserved or excepted matters and "other" matters are treated differently. The panel concurred that this would be highly undesirable and also questioned whether the UK government can, as a matter of law, legislate to exclude or otherwise restrict JR in respect of (UK wide) reserved or excepted matters. Regardless of whether or not it can, the potential for statutory intervention to become a matter of serious dispute between the UK government and the devolved administrations should not be underestimated.

17. We agree with all of the panel's concerns as articulated above.

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

18. We do not support this proposal. The available remedies when an application for JR is successful, as set out in s.31 of the Senior Courts Act 1981 include: (a) "*a mandatory, prohibiting or quashing order*"[6]; (b) "*a declaration or injunction*"[7]; (c) "*damages, restitution or the recovery of a sum due*"[8]. The only recommendation the IRAL Report made in this area was that s.31 could be amended to give the courts the option of making a SQO (a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met).

19. The role of the Court in JR is to declare whether a decision is lawful or not. It is anathema to the rule of law that decisions found to be unlawful by the Courts are only to be treated as such from the date that the case happens to be ruled on by the Court, with the position up to that point "deemed valid", even though thousands of people could have been affected by the unlawful decision. Indeed, the

6 s 31(1)(a)
7 S.31(1)(b)
8 S.31(4)

consultation paper recognises that the introduction of prospective only remedies could lead to "*an immediate unjust outcome for those already affected by an improperly made policy*" but then (with no explanation as to how) asserts that "*this would be remedied in the long-term*". This proposal should not be brought forward in any of the guises considered in the consultation document - as a discretionary possibility, a presumptive approach or a mandatory requirement.

20. In our view, the introduction of prospective only remedies could go so far as to render the process of JR meaningless in those cases in which the remedy sought is to quash the decision on the basis of a prior illegality. This applies at every level of decision-making, be that a planning decision made by a Local Planning Authority or approval for a major infrastructure project by the Secretary of State. To deprive civil society of the appropriate remedy in this situation offends some of the most fundamental principles of the rule of law – namely the combined effect of Articles 6 and 13 of the ECHR, which serve to ensure that everyone is entitled to a fair trial and an effective remedy:

> ***ARTICLE 6, ECHR***[9]
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> *Right to a fair trial*
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> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> ***…***
>
> ***ARTICLE 13***[10]
>
> ***Right to an effective remedy***
>
> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

21. As mentioned above, the provisions of the ECHR are given effect in the UK through the Human Rights Act 1998 ("**HRA 1998")**. The issue of judicial remedies is covered by section 8(1) of the HRA 1998, which states[11]:

> *In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*

22. The introduction of prospective only remedies would also further undermine the UK's compliance with Article 9 of the Aarhus Convention, which concerns access to environmental justice:

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9 Accessible here: https://www.echr.coe.int/documents/convention_eng.pdf

10 Article 13 of the ECHR makes sure that if people's rights are violated they are able to access effective remedy. This means they can take their case to court to seek a judgment. The HRA 1998 is designed to make sure this happens

11 *Ibid*, available here: https://www.legislation.gov.uk/ukpga/1998/42/section/8

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

…

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible. (own emphasis added)

23. It is self-evident that prospective only remedies would be neither adequate nor effective for claimants seeking to quash an unlawful decision, act or omission. In such situations, the fair and just outcome is for the Court to quash the decision and for the decision-maker (should it so wish) to go back and re-make the decision on a properly lawful basis. To allow unlawful decisions to stand offends the rule of law in general terms but there are two important ramifications in environmental claims. Firstly, they unfairly deprive the successful claimant in an Aarhus Convention claim to timely and effective remedies. Secondly, there could be adverse and irreversible effects on the environment and human health by allowing improperly made decisions on matters as diverse as air and water quality, climate change and the protection of biodiversity to stand in the period between the decision and the granting of the prospective-only remedy.

24. The consultation paper justifies this proposal on the basis of legal certainty, but it is unclear why certainty - just one aspect of the rule of law - is promoted beyond other crucial elements: legal supremacy and accountability. Legal certainty for Government does not outweigh depriving citizens of effective remedies and, in any event, enhanced certainty would arguably be undermined by the introduction of prospective only remedies. Confidence that injustice will be corrected; that law will be applied consistently and that public authorities will be accountable for action taken and decisions made pursuant to laws will be eroded.

25. Contrary to what the consultation paper states, this proposal would seem to go far beyond the scope of the Scotland Act provision which (as above) is narrower in scope and largely concerned with potentially *ultra vires* pieces of legislation.

Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

26. We do not support the introduction of a presumptive or a mandatory approach with regard to impugned clauses in Statutory Instruments ("**SI**").

27. Firstly, we do accept that acts of a legislative nature (including secondary legislation) are inherently different from other exercises of power. Major laws in the UK pass through Parliament in the form of bills – and having been subject to scrutiny and debate by democratically elected politicians – may go on to become Acts of Parliament. Acts of Parliament often confer powers on Ministers to make more detailed orders, rules or regulations by means of SIs. The scope of these powers varies greatly, from the technical (e.g. to vary the dates on which different provisions of an Act will come into force) to much wider powers such as filling out the broad provisions in Acts. SIs are used to provide the necessary detail that would be considered too complex to include in the body of an Act. Secondary legislation can also be used to amend, update or enforce existing primary legislation.

28. Whether an SI is subject to parliamentary procedure is determined by the parent Act. Some SIs are made before they are laid and as such are not subject to any parliamentary procedure and simply become law on the date stated in them. Those SIs subject to parliamentary control fall into one of two categories: (i) instruments subject to negative resolution procedure (such instruments become law within 40 days unless there is an objection from the House); or (ii) instruments subject to affirmative resolution procedure, which cannot become law unless they are approved by both Houses.

29. The vast majority of SIs are subject to the negative procedure (currently only around 10% of SIs are subject to the affirmative procedure in which more stringent parliamentary control is exerted). It is extremely rare for SIs adopted under either the negative or affirmative procedure to be annulled. The House of Commons last annulled a SI in 1979[12]. Similarly, the last time a draft SI subject to affirmative procedure was not approved by Resolution of the House of Commons was in 1969 when the House agreed to Motions that the draft Parliamentary Constituencies (England) Order 1969, the draft Parliamentary Constituencies (Wales) Order 1969, the Parliamentary Constituencies (Scotland) Order 1969 and the Parliamentary Constituencies (Northern Ireland) Order 'be not approved'.

30. SIs cannot, except in extremely rare instances where the parent Act provides otherwise, be amended or adapted by either House. Each House simply expresses its wish for them to be annulled or passed into law, as the case may be. The crucial point here is that the opportunity for Parliamentary (let alone public) scrutiny and participation in the making of SIs is very limited – and indeed in the case of SIs made under the negative resolution procedure (the vast majority) it is almost non-existent. One egregious recent example of this was last year's planning reforms[13]. The Prime Minister described these as the most radical reforms to the planning system since the Second World War. Despite this importance, government resiled on a promise it had made for further consultation. Not only did it do

[12] The Paraffin (Maximum Retail Prices) (Revocation) Order 1979 (S.I. 1979, No. 797)

[13] Through the laying of the Town and Country Planning (General Permitted Development) (England) (Amendment) (No 2) Order 2020 (SI 2020/755) and the Town and Country Planning (General Permitted Development) (England) (Amendment) (No 3) Order 2020 (SI 2020/756) and amendments to the Town and Country Planning (Use Classes) Order 1987 (SI 1987/764) introduced by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (SI 2020/757).

that, it also laid the instruments in July 2020, the day before Parliament's summer recess began, with them due to come into effect in August 2020, the day before Parliament reconvened. That meant Parliament had no opportunity to debate these radical reforms before they came into effect, with potentially very significant consequences for the environment.

31. One of the consequences of Brexit was that EU-derived domestic law was "rolled over" into domestic law by s.2 European Union (Withdrawal) Act 2018[14]. This process comprised 10,091 pages of technical legislation (a quarter of which came from Defra) and the rush of legislation meant that stakeholder engagement was severely limited. The idea that impugned provisions of this enormous volume of legislation (incorporated at pace and governing issues as wide ranging as the regulation of chemicals, the quality of the marine environment, procedures for assessing the environmental impacts of proposed developments and the protection of biodiversity) would not be subject to the usual discretionary remedies available to the court is deeply concerning.

32. Thirdly, the Planning Act 2008 created a new regime for granting planning and other consents for Nationally Significant Infrastructure Projects ("**NSIPs**"). These are large scale developments, both onshore and offshore, such as new harbours, roads, railways, power stations (including wind farms), and electricity transmission lines. Where the Secretary of State proposes to grant consent for a project, this will be through a Development Consent Order ("**DCO**") which is normally made as an SI[15]. While the process leading up to the granting of a DCO provides for public engagement, it would be entirely inappropriate if the DCO could not be quashed where it had been shown to be subsequently unlawfully made by the Secretary of State (this would be the case in any event, but it is particularly egregious where irreversible proposals of such magnitude and environmental impact are involved).

33. One such example is *Pearce v Secretary of State for Business, Energy and Industrial Strategy and Norfolk Vanguard Limited (Interested Party)*[16], in which the Hon Mr Justice Holgate quashed the DCO for the Norfolk Vanguard Offshore Wind Farm together with SI 2020 No. 706 dated 1 July 2020 on the basis that: (i) the Secretary of State had unlawfully excluded from consideration the cumulative landscape and visual impacts of the Vanguard wind farm and a further wind farm proposed to be developed nearby[17]; and (ii) the reasons given by the Examining Authority and the Defendant on the cumulative impact issue were legally inadequate. The imposition of a prospective only remedy in this situation would be no remedy at all, thus placing the UK in breach of Article 13 of the ECHR (as enacted by s.8(1) HRA 1998) and Article 9(4) of the Aarhus Convention.

34. There is also no evidence that this proposal is warranted. Research undertaken by the Public Law Project between 2014-2020 revealed that of the 1,500 SIs laid during that period, only 42 challenges concerning SIs were brought and only seven SIs were subsequently quashed[18]. This proposal is

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14 See: https://www.legislation.gov.uk/ukpga/2018/16/section/2/enacted

15 Section 114 Planning Act 2008 here: https://www.legislation.gov.uk/ukpga/2008/29/section/114

16 [2021] EWHC 326 (Admin). Judgment here: https://www.judiciary.uk/wp-content/uploads/2021/02/RAYMOND-STEPHEN-PEARCE-judgment-FINAL18-02-2021_.pdf

17 Counsel expressed this initially as a breach of regulation 3(2) of the 2009 Regulations, alternatively a failure to determine the application in accordance with policies in the NPSs (see s.104(3) of the PA 2008), or a failure to take into account an obviously material consideration (see the CREEDNZ line of authority)

18 Figures given during a webinar hosted by the Public Law Project on *The Government's judicial review consultation: Remedies and ouster clauses* held on 19th April 2021. Details here:

therefore wholly disproportionate in removing entire categories of subject matter from judicial scrutiny for only marginal change.

35. To summarise, SIs do not become discriminatory, irrational or otherwise unlawful simply because the Court declares it. In most cases, that would have always been the case from the date the SI was laid before Parliament. Either an SI is lawful or it is not. This proposal represents extraordinary Government overreach, seeking to put beyond JR large areas of Government policy. We also contest the underlying premise that SIs receive adequate parliamentary scrutiny. In that context, the prospect of judicial scrutiny, backed by remedies with teeth, takes on enhanced importance in order to identify and potentially undo unlawful policy making and legislating by ministers.

Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

36. We do not support the proposal to require SQOs to be used in relation to powers more generally (either on a presumptive or mandatory basis). For the reasons outlined in question 1, remedies should remain a discretionary issue for the Court.

Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

37. The IRAL report considered the issue of non-justiciability at some length[19]. The Panel set out the developments of the last 40 years and[20] assessed the current state of the law. However, its overall conclusions on this point are important and have arguably been mischaracterised in the Government's consultation document. The Panel accepted that "*...the doctrine of Parliamentary sovereignty means that Parliament has the power to legislate in such a way as to limit or exclude judicial review. The wisdom of taking such a course and the risk in so are different matters. Indeed the Panel considers that there should be highly cogent reasons for taking such an exceptional course".*

38. The Panel concluded that it would be legitimate for Parliament to legislate to correct certain developments in the past 40 years as regards what the courts have come to regard as justiciable[21]. However, it did not recommend that Parliament pass any comprehensive or far-reaching legislation in this area and also observed that the overwhelming majority of submissions from those outside the

https://publiclawproject.org.uk/events/the-governments-judicial-review-consultation-remedies-and-ouster-clauses/

19 See Chapter 2

20 The IRAL Report discussed four major developments considered to have had the potential to reduce the range of powers and issues that can be regarded as non-justiciable including: (i) the *QCHQ* case (*CCSU v Minister for the Civil Service* [1984] UKHL 9); (ii) the *Gillick* case (*Gillick v West Norfolk and Wisbech AHA* 1986] 1 AC 112); (iii) the enactment of the Human Rights Act 1998: and (iv) the decision in *Miller 2* (*R (Miller) v Prime Minister* [2020] AC 373)

21 The Panel observed that the potential in the Supreme Court's judgment in *Miller 2* to abolish all remaining common law limits on the justiciability of the exercise of public powers is unlikely to be realised. While noting that both Brexit cases –*Miller 1* and *Miller 2* – represented substantial setbacks for the government and were of considerable constitutional importance, it was unconvinced that the decisions in those cases, though novel, are likely to have wider ramifications given the unique political circumstances which provided the backdrop for those cases being brought

Government did not favour legislative intervention on the issue of non-justiciability in any form. Among the reasons given for not defining, or not redefining, what powers or issues are non-justiciable were:

- the importance of setting proper boundaries and limits to a government's powers;
- the risk of "freezing" the scope of JR when flexibility is of particular importance in an unwritten constitution;
- a reduction in public confidence in the government and the legal system; and
- the importance of not insulating politicians from proper legal (as opposed to democratic) accountability.

39. The Panel also acknowledged that any reforms in this area would have to go hand in hand with reform of the HRA 1998 and that any ensuing flexibility could also mean uncertainty. The panel found that Parliament could address concerns about the current state of law on non-justiciability by either: (a) choosing to narrow the grounds for JR either generally or in relation to particular powers; (b) placing in statutory form various non-justiciable or no-go areas and/or various "restraining" factors already identified by the courts; or (c) legislating to state or restate constitutional principles in such a way as to restrict the powers of the courts generally in relation to JR, the panel did not recommend any of these broader options. However crucially it acknowledged the force of the submissions received and considered that Government disappointment with the outcome of a case (or cases) is rarely sufficient reason to legislate more generally. The panel also recognised that broader legislation amounting to "ouster clauses" is likely to face a hostile response from the Courts and robust scrutiny by Parliament. Finally, while recognising that the decision to legislate in this area is ultimately a question of political choice, the Panel concluded by recommending that the appropriate approach should reflect a strong presumption in favour of leaving questions of justiciability to the judges.

40. We would go further than this. The consultation paper states that 'partial' ouster clauses (e.g. clauses which set a particularly short limitation period in which to file a claim, such as the time limit in CPR 54.5) are generally given effect by the courts. However, in our view these are not true ouster clauses in that they do not remove entire subjects from justiciability.

41. The consultation paper also maintains that: "*ouster clauses are not a way of avoiding scrutiny. Rather, the Government considers that there are some instances where accountability through collaborative and conciliatory political means are more appropriate, as opposed to the zero-sum, adversarial means of the courts. In this regard, ouster clauses are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability*". We do not agree with this assertion. Legal and political accountability are not the same thing - ouster clauses are squarely a way of avoiding judicial scrutiny and, as such, they undermine the rule of law.

42. Finally, as cases involving ouster clauses are extremely rare, we struggle to see the need for this proposal. We also believe it will have unintended consequences in the form of a significant increase in unhelpful satellite litigation.

43. Our principled view (as submitted in our response to the IRAL call for evidence) remains that no-one is above the law, not even Government, and that it is a cornerstone of modern democracy that executive power is subject to control by the Court.

Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

44. The IRAL Report recommended that the requirement for bringing a claim "promptly" as set out in CPR 54.5(1)(a) should be removed. We agree with that recommendation and have, in fact, been pressing for the removal of the reference to "promptly" for over a decade.

45. In 2010, the Aarhus Convention Compliance Committee adopted its Findings and recommendations with regard to Communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland[22]. The Committee found that while the three-month requirement specified in CPR rule 54.5 (1) is not as such problematic under the Convention, the Courts in England and Wales have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a JR be filed "promptly"[23]. The Committee concluded that this may result in a claim for JR not being lodged promptly even if brought within the three-month period. The Committee found that in the interests of fairness and legal certainty it was necessary to set a clear minimum time limit within which a claim should be brought and that by failing to establish clear time limits within which claims may be brought, the UK is failing to comply with the requirement in Article 9(4) that procedures subject to Article 9 be fair and equitable.

46. Consequently, the Compliance Committee recommended that the UK review its rules regarding the time frame for the bringing of applications for JR to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework. The UK's continued non-compliance with the Convention's requirement in this respect was recognised in 2011, 2014 and 2017 in subsequent Decisions of the Meeting of the Parties to the Aarhus Convention[24]. For these reasons, we fully support the removal of the promptitude requirement in JR claims.

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

47. We are of the view (as were others responding to the Panel's call for evidence) that any shortening of the current time limits would be counterproductive. Our experience is that there are circumstances where justice requires the three-month period to be extended, however, those instances are rare and such extensions can be considered as a matter of judicial discretion pursuant to CPR 3.1(2). We consider that in ordinary circumstances the three-month period strikes the right balance and provides sufficient time for the parties to attempt to reach a pre-action resolution (although we recognise other areas of law may require a different approach depending on their circumstances).

48. In that respect, we were pleased to note that the IRAL Report did not favour any tightening of the current time limits on bringing claims for JR and, indeed, noted that time limits are "*a notable bone of contention in planning cases*". The introduction of a six-week time limit for planning cases makes it extremely challenging for Claimants to find lawyers, fundraise and secure legal opinion in sufficient time to issue proceedings. In our view, the need for certainty in planning matters is not sufficiently distinct from that of other areas of public policy to warrant a period of only six weeks as opposed to three months.

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22 Available here: https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf

23 See paragraphs 113–116

24 See Decision IV/9i (para 3(c) here, Decision V/9n (para 2(c) here and Decision VI/8k (para 2(c) here

49. We also note an increasing tendency for Defendants to delay responding to Pre-Action Protocol correspondence until after the limitation deadline. This is prompting Claimants to have to issue proceedings "blind" (i.e. without any response from the Defendant on their likely defence) and then apply to the court to stay the proceedings to avoid any risk of costs. There have been cases in which Defendants have opposed a stay. For these reasons, we favour reversing the limitation period for the issuing of claims concerning decisions under the Planning Acts to the usual three-month period.

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

50. We are of the view that the Court should retain the discretion to allow late applications. We are concerned that extending the time limits without recourse to the Courts could lead to unhelpful satellite litigation (as has occurred in the field of employment law for example).

51. We would, however, support the CPRC being asked to look at categories of JR claims for which limitation is considered to be problematic. For example, this could include cases in which an application for legal aid has been submitted (and for which limitation should not expire until the application has been determined).

Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

52. The IRAL Panel did not consider a track system and we are of the view that it would not in practice improve efficiency (which is the stated aim of exploring a track system in the Government's Response).

53. A core characteristic of JR claims is that the Court has discretion to make directions appropriate to the complexity of the matter at hand. As noted in the Government's Response, urgent cases can already be expedited on request. There are also already separate procedural routes for truly distinct cases, such as planning JRs which are heard by the Planning Court[25]. We consider that any additional rigid "tracking" would, rather than increase efficiency, lead to increased burden on the Court (and we note that the Government acknowledges that *"Judicial Review claims are not as easily allocated as civil cases")* as well as satellite disputes between the parties as to the correct allocation.

Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

54. IRAL recommended that criteria for permitting interventions should be developed and published, perhaps in guidance. We consider this to be a sensible proposal that should be considered further.

55. The consultation paper instead canvasses views on imposing a duty on parties to identify to the court not just the named challenger, but any organisation or wider group that that individual represents or is affiliated with, who might assist (as this would assist in identifying potential interveners proactively) on the basis of just one response to the Panel.

[25] See Practice Direction 54E available here: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54/practice-direction-54e-planning-court-claims

56. We do not agree that this would be helpful. The existing duty on parties to identify potentially Interested Parties to a case[26] is sufficient. It is much harder to identify who may be able to assist the Court through an intervention (not least because the parties would have different views on who might be of assistance) and particularly before all of the issues in a case will have crystallised.

57. This proposal would create unnecessary and unhelpful pressure at the beginning of litigation to identify potential interveners. It is also unclear whether an individual or organisation would be able to apply to intervene in a case had they not been so identified by a party to the case. Prohibiting people from intervening if they were not identified at the start of the proceedings potentially deprives the Court of the assistance others may be able to contribute and thus has the potential to undermine access to justice still further.

58. Our greater concern around interventions is that, as we understand it, applications to intervene have dropped considerably following changes to the costs rules around intervening in s.87 Criminal Justice and Courts Act 2015. We urge the Government to examine this issue.

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

59. Where a defendant has opted to file Summary Grounds of Resistance ("**SGoR**") (as is the current practice), it is common practice for claimants to file a Reply. It is rare (although not unheard of) for defendants to object to the filing of a Reply and the Court maintains discretion as to whether to take such submissions into account. The filing of a Reply is now such common accepted practice that we consider it appropriate for it to be recognised formally and that the CPRC should consider doing so. The format for a Reply should be that it is brief, not duplicative of the claim form and respond to the points raised in the defendant's SGoR.

Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

60. This question also invites feedback and comments on (a) what issues are currently being faced in relation to the PAP; and (b) how to best clarify this. The Report concluded that the "pre-action protocol procedure is operating as a significant means of avoiding the need to make claims and for valid cases to be considered and settled by defendants, as well as identifying claims which were not arguable".

61. The IRAL Report recommended the Government revisit the guidance it currently follows in determining how to discharge its duty of candour to the court hearing a claim for JR. We have concerns around the way in which the duty of candour operates during the PAP for JR.

62. The duty of candour ensures transparency in decision-making, is cheaper than full disclosure and in technical environmental cases, where the court gives great deference to the public authority's expert, the duty of candour allows the court and the claimant to rely on such evidence. It is also important in planning cases. In our experience, Local Planning Authorities routinely rely on (and seek to extend) the statutory time period of 20 working days to provide information under the Environmental Information Regulations 2004. Given the six-week limitation period for issuing claims concerning

[26] CPR 54.17

decisions under the Planning Acts, this makes it extremely challenging for potential claimants to obtain the information they need in order to comply with the Pre-Action Protocol for JR and decide whether to issue proceedings or not. The possibility of obtaining documents under the duty of candour at an early stage of the JR proceedings can therefore be an important factor in determining whether the claim proceeds on an informed basis.

63. The importance of the duty of candour was articulated by the Court of Appeal in *R (on the application of Citizens UK) v Secretary of State for the Home Department*[27], in which the Court of Appeal held that *" … It is the function of the public authority itself to draw the Court's attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify 'the good, the bad and the ugly'. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."*

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

64. Research has shown that some of the poorest in our society are often disproportionately affected by the adverse effects of pollution and poor quality of environment. A failure to provide the under-represented and marginalised in our society with the fullest access to environmental justice has a direct impact upon the protection of their rights, including the achievement of an environment adequate to their health and well-being[28]. The proposals in this consultation paper increase the access to justice deficit for those sectors of society. For these proposals to be progressed in the absence of any form of evidence base (let alone a robust one) is deeply concerning.

Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons

65. These proposals sit within a wider range of other reforms to JR and administrative law (including a review of the HRA 1998) currently being progressed. We would accordingly urge the Government to ensure that the cumulative impact of these proposals is considered and that any proposals are only considered further (and progressed in a structured manner) where there is evidence of a genuine problem.

<u>Conclusion</u>

66. While we do not agree with absolutely everything in the IRAL Report, we strongly support the conclusion that fundamental change of the magnitude contemplated in this consultation paper requires a robust evidence base as to why JR is not fit for purpose.

67. Many of the proposals in the consultation paper (some of which can be characterised as a "solution in search of a problem") appear to be based on nothing more than conceptual academic opinion. The JR process is not "broken" and while relatively minor improvements could be made, the scale of

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27 [2018] EWCA Civ 1812, paragraph 106(3)

28 Environmental Law Foundation and BRASS (2009). Costs Barriers to Environmental Justice. Available here: https://unece.org/DAM/env/pp/compliance/C2008-33/correspondence/FrELF_Report2009.pdf

change envisioned by these proposals is unwarranted and evidentially unsupported. The proposals do not flow from the findings of the IRAL panel or any other accepted evidence base, but they are potentially very damaging to fundamental tenets of UK democracy – notably the principle of wide access to justice and respect for the rule of law. Indeed, as has been noted in one of the many recent events discussing these changes, these proposals "conceptually eat away at the heart of administrative law"[29].

68. The Conservative Party Manifesto committed to Government in power to: "*ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays*[30]". In (amongst other things) seeking to carve out whole categories of Government policy from judicial scrutiny and depriving civil society of remedies for unlawful behaviour, these proposals actively work against that commitment.

69. We are aware that a wide range or civil society organisations and professional bodies are deeply concerned about the majority of these proposals. We urge the Government to pause and reflect before progressing them further.

Link Legal Strategy Group

28.04.2021

This consultation response is supported by the following Link members:

RSPB

Client Earth

Friends of the Earth

CPRE

WWF

Marine Conservation Society

Wild Justice

LACS

Bat Conservation Trust

Butterfly Conservation

Buglife

Open Spaces Society

[29] Webinar hosted by the Public Law Project on The Government's judicial review consultation: Remedies and ouster clauses held on 19th April 2021. Details here: https://publiclawproject.org.uk/events/the-governments-judicial-review-consultation-remedies-and-ouster-clauses/

[30] See page 50 of the Manifesto here: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf