

## Terms of Reference - Independent Review of Administrative Law

The Review should examine trends in judicial review of executive action, (“JR”), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law. It should consider data and evidence on the development of JR and of judicial decision-making and consider what (if any) options for reforms might be justified.

The review should consider in particular:

- 1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.**
- 2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.**
- 3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.**
- 4. Whether procedural reforms to judicial review are necessary, in general to “streamline the process”, and, in particular: (a) on the burden and effect of disclosure in particular in relation to “policy decisions” in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners.**

### NOTES:

- A. Scope of the Review: (1)** The review should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers.  
(2) The review will consider whether there might be possible unintended consequences from any changes suggested.
- B. Experience in other common law jurisdictions outside the UK.** The position in other common law jurisdictions, especially Australia (given the legislative changes made there), will be considered.
- C. Para 1.** In *GMC v Michalak* [2017] 1 WLR 4193 the Supreme Court noted that substantive public law is all judge made and would continue to exist, even if for example, the procedural provisions of the Senior Courts Act permitting JR were to be repealed. 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?

- D.** The Panel will focus its consideration of the justiciability of prerogative powers to the prerogative executive powers as defined in 3.34 of the Cabinet Manual.
- E.** Paras 2 and 3: Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between “scope” and “exercise” has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end (“scope”) to all of the conventional [JR] grounds and proportionality at the other (“exercise”). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?
- F.** **Paras 1-3:** These issues affect all cases involving public law decision making, and not simply JRs, since they would modify substantive law. So, they would apply, for example, to the tenant raising as a defence in private law housing proceedings the illegality of a rent increase by the council as in *Wandsworth LBC v Winder* [1985] AC 461.
- G.** **Para 4:** There are a number of procedural issues of possible concern that have been raised over the years. As part of this comprehensive assessment of Judicial Review, this is the time to conduct a review of the machinery of JR generally.
- F.** The panel will issue the report to the Lord Chancellor who will work with interested departments to determine the publication timelines as well as the Government response.