



Ministry  
of Justice

IRAL SECRETARIAT

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

Call for Evidence

A call for evidence produced by the Independent Review of Administrative Law Panel



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## About this call for evidence

**To:** All listed parties.

**Duration:** From **07/09/20** to **midday (12.00) 19/10/20**

**Enquiries:** Independent Review of Administrative Law  
Email: [IRAL@justice.gov.uk](mailto:IRAL@justice.gov.uk)

**How to respond:** Please send your response by **19 October 2020** to [IRAL@justice.gov.uk](mailto:IRAL@justice.gov.uk)

*Given the current COVID-19 situation, access to office buildings is limited. If you would like a paper copy, or would prefer to mail a hard copy of your submission, please get in contact with the IRAL Secretariat using the email address above.*



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## Introduction

The Independent Review of Administrative Law (IRAL) panel invites the submission of evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally. The panel is particularly interested in any notable trends in judicial review over the last thirty to forty years. Specifically, the panel is interested in understanding whether the balance struck is the same now as it was before, and whether it should be struck differently going forward.

The panel would like to hear from people who have direct experience in judicial review cases, including those who provide services to claimants and defendants involved in such cases, from professionals who practice in this area of law; as well as from observers of, and commentators on, the process. The panel are particularly interested in receiving evidence around any observed trends in judicial review, how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by judicial review.

In accordance with the Terms of Reference, the IRAL are considering public law control of all UK Wide and England and Wales powers only. The panel are therefore interested in receiving evidence in relation to judicial review in its application to reserved, and not devolved, matters:

- The Panel of experts will not consider any changes to devolved policy. Instead, the Panel will look at judicial review in relation to UK-wide policy, and England and Wales policy. Any wider implications for the devolved administrations will be carefully thought through and we will continue to engage at all stages of the process, as appropriate.
- In addition to recommending changes to UK-wide powers, the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies. Any such recommendation would follow careful consideration of any relevant devolved law and devolution matters arising, and also engagement with the Devolved Governments and courts.
- The Lord Chancellor has asked the Panel of experts to look at these issues as part of a comprehensive look at Judicial Review. As you will see, we have an experienced Scottish law academic on the Panel who will be able to give us their expert view and ensure the Panel remains within the scope of the Terms of Reference.



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The terms of reference for the IRAL have identified the following specific areas for inquiry:

- 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.
- 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.
- 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.
- 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.

The full Terms of Reference are included on page 11 of this document.



## Questionnaire

The IRAL welcomes evidence under the terms of reference and seeks comments and evidence against the following questions. Where relevant, please make clear which jurisdiction your response is referring to.

### Section 1 – Questionnaire to Government Departments

Based on the Terms of Reference as set out in the Introduction, the IRAL has created the following questionnaire to be sent to Government Departments. The questions are as follows:

1. *In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?*
  - a. *judicial review for mistake of law*
  - b. *judicial review for mistake of fact*
  - c. *judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)*
  - d. *judicial review for disappointing someone's legitimate expectations*
  - e. *judicial review for Wednesbury unreasonableness*
  - f. *judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account*
  - g. *any other ground of judicial review*
  - h. *the remedies that are available when an application for judicial review is successful*
  - i. *rules on who may make an application for judicial review*
  - j. *rules on the time limits within which an application for judicial review must be made*
  - k. *the time it takes to mount defences to applications for judicial review*
  
2. *In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?*



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3. *Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?*

From this, we would appreciate your response to the following questions:

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?
2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

## Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?
4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?
5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

## Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?
7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?
8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the



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panel? How are unmeritorious claims currently treated? Should they be treated differently?

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?
10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?
11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?
12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?
13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?





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## Next Steps

The call for evidence will close at **12:00 noon on 19 October 2020**. Following the call for evidence, and in line with the Terms of Reference, Government then intends to publish a response to the IRAL's report.

## Contact details/How to respond

Please send your response by to [IRAL@justice.gov.uk](mailto:IRAL@justice.gov.uk)

### Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the following address:

**Ministry of Justice**  
**102 Petty France**  
**London**  
**SW1H 9AJ**

As well as this, you should also send your complaint and/or comments to [IRAL@justice.gov.uk](mailto:IRAL@justice.gov.uk).

### Extra copies

Alternative format versions of this publication can be requested from [IRAL@justice.gov.uk](mailto:IRAL@justice.gov.uk).

### Publication of response

The responses to this call for evidence will feed into the final report by the Independent Review of Administrative Law, which will be published online at [www.gov.uk](http://www.gov.uk).

### Representative groups

Where relevant, representative groups are asked to give a summary of the people and organisations they represent when they respond.



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### **Confidentiality**

Information provided in response to this call for evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the General Data Protection Regulations (GDPR), and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry of Justice will process any personal data in accordance with the GDPR.

## **Consultation principles**

For more information on the principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles:

<https://www.gov.uk/government/publications/consultation-principles-guidance>



## Terms of Reference for the IRAL

*Published on 31<sup>st</sup> July 2020 at <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>*

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.



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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.

H. 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.