



Ministry  
of Justice

## Judicial Review Reform

### The Government Response to the Independent Review of Administrative Law

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### The Government Response to the Independent Review of Administrative Law

Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

March 2021

CP 408



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# About this consultation

**Duration:** 18/03/21 to 29/04/2021

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**How to respond:** Please send your response by 29/04/2021 by using the online portal: <https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform>

By mail to:

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Or by email to

[judicialreview@justice.gov.uk](mailto:judicialreview@justice.gov.uk)

**Additional ways to feed in your views:** A series of webinars is also taking place. For further information please use the “Enquiries” contact details above

**Response paper:** A response to this consultation exercise is due to be published by summer 2021 at: <https://consult.justice.gov.uk/>



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## Foreword

1. We are implementing our Manifesto commitment to “ensure that Judicial Review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.” The Independent Review of Administrative Law conducted by a panel of experts (the Panel) chaired by Lord Faulks QC was the first step. They have delivered a well-researched and closely argued Report which reflects the diversity of views on Judicial Review. I am very grateful to Lord Faulks and his colleagues for an impressive piece of work undertaken to a tight timetable.
2. The Panel’s analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision-makers has been replaced, in essence, with that of the court. We should strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament.
3. The Panel proposed two reforms to substantive law: to reverse the effects of the *Cart* judgment and to introduce suspended quashing orders as a new remedy. I agree with these proposals. I am also interested in exploring proposals beyond these, specifically on ouster clauses more generally, and further reforms to remedies, including a prospective quashing order and clarifying the principles which determine how the courts declare decisions null and void, and having never occurred (the principle of nullity). While expanding on the logic and reasoning of the Panel, these additional proposals are in the early stages of development. Nevertheless, at this point I think it is worthwhile to consult on them so we can take into account what I believe will be a very diverse range of views and ideas.
4. In pursuing the Review’s recommendations, and in proposing additional reforms, my aim as Lord Chancellor is twofold. Firstly, I want to use these reforms to restore the place of justice at the heart of our society by ensuring that all the institutions of the state act together in their appropriate capacity to uphold the Rule of Law. That means affirming the role of the courts as ‘servants of

Parliament', affirming the role of Parliament in creating law and holding the executive to account, and affirming that the executive should be confident in being able to use the discretion given to it by Parliament.

5. Secondly, I want to preserve the fairness that is inherent in our justice system, a fairness that protects the rights of citizens in challenging government or other public bodies and which affords them appropriate remedy. This means ensuring that the courts have available to them a flexible range of remedies, allowing cases to be resolved in a manner which is sensitive both to the rights of individual citizens and to the wider public interest.
6. I believe that the complexities inherent in Judicial Review, and in other constitutional areas, mean an iterative approach to reform is most appropriate. The Panel said in their Report that the Government should think carefully before introducing reforms. That is why I want to focus attention first on the most pressing issues, namely ouster clauses and remedies, before considering whether any broader reforms are necessary. At present, I intend these reforms to apply to one reserved matter (our proposal on *Cart*), and the jurisdiction of England and Wales only, but I am also concerned about the risks of fragmenting the legal jurisdictions of the UK. These reforms must act to strengthen the Union and I am very interested in views from across the United Kingdom. Bringing in views from all sides of the debate is essential in making sure our reforms are the right ones and I look forward to reading and listening to contributions to this consultation.



Robert Buckland

Rt Hon Robert Buckland QC MP

**Lord Chancellor and  
Secretary of State for Justice**



## 1. Introduction

7. The Independent Review of Administrative Law ('the Review') was established on the 31<sup>st</sup> July 2020 to examine trends in Judicial Review and to deliberate on any recommendations for reform. The Terms of Reference for the Review sought to direct the Panel's attention to certain key areas: codification, non-justiciability, the grounds of review and remedies, and procedure. The focus on these areas is reflected in the structure of the Review's Report ('the Report') and the Panel have made convincing recommendations on each area. This Consultation Document is intended to complement the analysis presented throughout the Report. While not all the issues covered in the Report have been taken forward to this consultation, readers are encouraged to read it in its entirety. The Report can be found on GOV.UK, along with evidence submitted to the Review.
8. The amount of attention the Review attracted and the wealth of evidence provided in response to the call for evidence was extremely useful to both the Panel's and the Government's deliberations. The call for evidence ran from the 7th September to the 26th October and asked respondents questions based on the terms of reference. There were 238 responses from a wide variety of organisations and individuals. The Government would like to thank each of the members of the Panel for their work, undertaken in difficult circumstances, and to all those who submitted evidence. The Panel and the Report itself benefited hugely from that evidence. The arguments and analysis show there is a very healthy level of debate on this topic.

### **The Independent Review of Administrative Law's recommendations**

9. The Independent Review of Administrative Law made two recommendations for change in the substantive law, as well as various recommendations for changes in procedure, as follows:
  - a. legislating for the introduction of Suspended Quashing Orders

- b. legislating to reverse the effect of the Supreme Court decision in *Cart*<sup>1</sup> and re-affirm that decisions of the Upper Tribunal to refuse permission to appeal are not subject to the supervisory jurisdiction of the High Court
  - c. changes in procedure to be considered and taken forward by the Civil Procedure Rule Committee (CPRC)
    - i. removing the requirement for a claim to be issued “promptly”, but retaining the 3-month time limit
    - ii. providing further guidance on intervenors
    - iii. providing for an extra step in the procedure of a Reply, to be filed within seven days of receipt of the Acknowledgement of Service
10. **The Government agrees with these recommendations and the reasoning behind them. It intends to take these measures forward in legislation at the earliest opportunity, or to ask the Civil Procedure Rule Committee (CPRC) to consider them, as appropriate.**

#### Further proposals

11. In addition, the Government is considering further reforms which build on the analysis in the Report, and on some of the options the Panel suggested but on which they did not make definite recommendations. The Government thinks there is merit in exploring the following areas to see whether practical measures could address some of the issues identified in the Report:
- a. legislating to clarify the effect of statutory ouster clauses
  - b. legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis
  - c. legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only
  - d. legislating for suspended quashing orders to be presumed or required

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<sup>1</sup> *R (Cart) v The Upper Tribunal; R (MR (Pakistan)) v The Upper Tribunal (IAC)* [2011] UKSC 28

- e. legislating on the principles which lead to a decision being a nullity by operation of law
  - f. making further procedural reforms (which would need to be considered by the CPRC)
12. Drafting to legislate on the above issues would not be simple, and the Government is open to considering whether other measures, either legislative or non-legislative, could be effective. Similarly, the risk of unintended consequences is one the Government is cognisant of and will explore.
  13. This document is split broadly into two parts. The first provides an exposition of the Government's understanding of the constitution and its aims with regard to Judicial Review, addressing some valuable points raised in the Review's call for evidence. We hope this provides both clarity as to our intentions and context for our proposals.
  14. The second part of the consultation explores the specific proposals by explaining the rationale in more detail and what each proposal is designed to achieve. This is accompanied by suggestions as to how the proposals may be implemented in fairly high-level terms.
  15. **We are consulting on these proposals at an early point in their development and are very aware that certain proposals will need further iteration, before we can consider bringing forward legislation.** Each proposal is also accompanied by specific consultation questions. We welcome responses on those questions. Submissions which do not focus on the questions, but deal with the subject of Judicial Review more generally, are also welcome.
  16. As part of the consultation, the Government will also be carrying out targeted engagement with interested parties to further understand stakeholders' perspectives.
  17. The Government has conducted an initial examination of the economic and equality impacts of its proposals. A final impact assessment will accompany any legislation brought forward following this consultation, and we will use views and evidence from consultees in developing any final impact assessments.

## 2. The Constitution and Judicial Review

18. The Rule of Law matters. It is a principle ingrained in the UK's constitutional arrangements. It underpins all of our national and local public institutions. The Rule of Law is given force by a democratically elected Parliament at Westminster, by the UK Government that derives its authority from Parliament, by our Devolved Administrations and by local government, by our statutory bodies and by our courts in their day-to-day work in civil, criminal and family matters in the three jurisdictions of England and Wales, Scotland and Northern Ireland. Judicial Review is one of the mechanisms which helps to give force to the Rule of Law, providing citizens with a further way to ensure that those holding public office or using public powers are subject to the law. Judicial Review helps to ensure that they are held accountable and use their powers according to the boundaries and the manner in which they should be exercised, as set down and as intended by Parliament. As Lady Hale put it "in the vast majority of cases, Judicial Review is the servant of Parliament."<sup>2</sup>
19. This understanding was, in general, echoed by the respondents to the Review's call for evidence. But as the introduction to the Report says, delving deeper into the current meaning, rightful application of, and the history of the Rule of Law, many differing viewpoints surface. This, as the Report points out, is no bad thing; a core feature of the UK's Constitution is oppositional debate, allowing "for dissent at every level."<sup>3</sup> The Government also considers the levels of debate around the Rule of Law, Judicial Review and other constitutional issues as symptomatic of the strengths of the UK Constitution – that public debate, reflected in the Houses of Parliament, has an impact on our laws, their enforcement and the way in which the country is governed. The Government believes the debate around the role and function of Judicial Review in the UK Constitution is one that we must have.
20. Our response to the Report should be seen in this context – as part of that debate, as well as a proposal to legislate to clarify some aspects of Judicial Review, in order to prompt change in how Judicial Review evolves.

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<sup>2</sup> Lady Hale, IRAL Submission, [2]

<sup>3</sup> IRAL Report, 0.23

21. The history of Judicial Review does not require restating here, but there are some aspects of the historical debate which are pertinent to the Government's conception of the role of Judicial Review and our understanding of the Rule of Law.
22. Firstly, the current system of Judicial Review is as much a creation of statute as it is the development of the law by the courts, through the use of prerogative writs and common law principles. It was the courts which clarified the principle, in *Case of Prohibitions*<sup>4</sup> and *Case of Proclamations*<sup>5</sup> in the seventeenth century, that the Crown and its servants served under the law, and had no power other than that which the law allowed. This was consistent with the affirmation of Parliamentary Sovereignty following the Glorious Revolution in 1688. In the following centuries, Parliament would directly intervene and be instrumental in the development of the judicial system and the idea of the Rule of Law as it stands today. The Acts of Judicature in the 1870s placed the courts on a statutory footing and combined the common law courts and courts of equity, thereby showing how Parliament could both define the jurisdiction of the courts and clarify the bounds of the Rule of Law. Aside from the Senior Courts Act 1981, which defined in statute the remedies available through Judicial Review, the most important recent statutory intervention in the field of Judicial Review was the Human Rights Act 1998 which gave further effect to the fundamental rights and freedoms guaranteed under the European Convention on Human Rights.
23. In the late 20<sup>th</sup> century, the courts also reinforced certain constraints on Ministers in relation to their exercise of power in cases such as *Ridge v Baldwin*,<sup>6</sup> *Conway v Rimmer*<sup>7</sup> and *Padfield*.<sup>8</sup> The courts also developed and refined the grounds of Judicial Review and the concept of standing with Lord Diplock making seminal statements in *GCHQ*<sup>9</sup> and *Inland Revenue Commissioners*<sup>10</sup> on these issues respectively.

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<sup>4</sup> *Case of Prohibitions* [1607] EWHC KB J23, (1607) 12 Co. Rep. 64

<sup>5</sup> *Case of Proclamations* [1610] EWHC KB J22, (1611) 12 Co. Rep 74

<sup>6</sup> *Ridge v Baldwin* [1964] AC 40

<sup>7</sup> *Conway v Rimmer* [1968] AC 910.

<sup>8</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

<sup>9</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

<sup>10</sup> *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617

24. The developments spurred on by the courts, and as set in statute by Parliament, exemplify the discursive, evolutionary and incremental nature of the UK Constitution. The Government does not perceive these historical developments to be in any way indicative of how the courts and the UK Constitution 'ought' to evolve in the future.
25. For example, while the standard grounds of Judicial Review are default conditions that Parliament intends to apply to the exercise of any power, these are just defaults and Parliament is completely free to add to or remove from them in specific cases. For example, Parliament can add duties to consult, to give reasons, to conduct impact assessments, to explicitly consider certain factors. But Parliament can also, explicitly or implicitly, take away from the defaults, i.e. create a body with plenary powers which is not subject to review on the ground that the decision is unreasonable or involved the taking into account of irrelevant consideration. Indeed, the Supreme Court has already accepted that Parliament has created a body which can act in such an unreasonable manner: the Scottish Parliament.<sup>11</sup> Such a grant of plenary powers is not an ouster clause: it does not deprive the courts of their jurisdiction. Rather it is merely Parliament not imposing particular duties about how the power it has granted should be exercised. For the same reason, this does not infringe the Rule of Law: a decision by the Scottish Parliament to do something unreasonable is a lawful one which it has the power to make. In the case of the Scottish Parliament, (the UK) Parliament had not made its intention to grant such plenary powers explicit, but the courts reached the conclusion that this was what Parliament intended. However, for another body, Parliament may very well want to explicitly grant such plenary powers. It would, however, be an unusual thing to do outside the context of creating democratically accountable devolved legislatures.
26. The second point is the tendency in the contemporary debate to see terms such as "the Rule of Law" as coterminous with the application of a range of moral and normative values.<sup>12</sup> Of course, any definition of the Rule of Law involves value judgements concerning the nature of law and the sources of legitimate authority within society. But there is a significant difference between defining the Rule of

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<sup>11</sup> *Axa General Insurance v Lord Advocate* [2011] UKSC 46, at [52] (Lord Hope) and [142]-[147] (Lord Reed)

<sup>12</sup> J. Tasioulas, 'The Inflation of Concepts', Aeon, 2021 (<https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason>)

Law as the idea that the powers granted by Parliament or through the prerogative should be enforced by the courts (or another body) according to Parliament's intent, and the idea that the courts should apply as a matter of course another source of authority such as their own concept of fundamental rights. As Professor Ekins put it:

“The rule of law does not mean the rule of judges (or the rule of courts). The rule of law requires judicial self-discipline and does not permit invocation of abstract or novel principles as a ground to depart from or to gloss settled law, including especially fundamental constitutional law. The rule of law is a sound principle of political morality, which is given shape and content in our constitutional tradition by way of specific constitutional choices and legal rules, including for example about justiciability, choices and rules that judges are not free to set aside.”<sup>13</sup>

This is not to say, however, that the courts should not have a role in developing the application of the Rule of Law in Judicial Review – for instance in the interpretation of statute, the courts will assume Parliament wishes decision-makers not to act unreasonably and be amenable to review on a range of grounds emanating from the Common Law, unless otherwise stated in the statute. But it cannot be emphasised enough that Parliament is the primary decision-maker here and the courts should ensure they remain, as Lady Hale put it, “the servant of Parliament”.

27. The ‘principle of legality’<sup>14</sup> is one such area the courts have developed, and there is a plethora of arguments on either side about how far the courts have, and should, go in applying this principle. Those arguments will not be re-stated here, but the Government finds the analysis provided to the call for evidence by Professor Varuhas<sup>15</sup> persuasive – that the principle of legality, broadly construed, gives the courts a way to go beyond the usual constraints of substantive review by imposing their own sense of fairness onto statute and essentially interpreting it according to what, in their eyes, Parliament's intentions

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<sup>13</sup> Richard Ekins, IRAL Submission, [28(a)]

<sup>14</sup> Over the past 20 years, the courts have developed a principle of interpretation called the principle of legality. At its core that principle “means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.” (*Axa General Insurance v Lord Advocate* [2011] UKSC 46, at [152])

<sup>15</sup> Varuhas, ‘The Principle of Legality’, [2020] *Cambridge Law Journal* 578

should have been. The Government is concerned by this and agrees with the statement, quoted by Varuhas, of Lord Browne-Wilkinson in *Pierson*:

“Parliament having chosen to confer wide powers on the Secretary of State intends those powers to be exercised by him in accordance with his standards. If the courts seek to limit the ambit of such powers so as to accord with the individual judge’s concepts of fairness they will be indirectly arrogating to the court the right to veto a decision conferred by Parliament on the Secretary.”<sup>16</sup>

28. The question is how to ensure that the doctrine of the ‘principle of legality’ remains within the appropriate bounds of Judicial Review, with Parliament being the ultimate decision-maker as to how powers should be exercised.
29. In understanding how the principle of legality may be used in a way which oversteps the mark, it is useful to bear in mind the cautionary tale of the implied fiduciary duty which councillors owed to ratepayers. In *Roberts v Hopwood*<sup>17</sup> the Appellate Committee of the House of Lords held that the powers which Parliament granted to Local Authorities had the implied condition that they should be exercised in accordance with a so-called fiduciary duty which elected councillors had towards ratepayers. Using this limitation of power that they had just discovered, the courts decided that a council could not set a minimum wage for its employees. In the 1980s, this doctrine was used to quash the Greater London Council fair fares policy.<sup>18</sup> These cases involved the courts quashing decisions by the Council on the basis that they did not align with a duty – the interpretation of which was highly political – to which the courts implied Parliament had subjected those councils. Those cases were criticised by Professor J. Griffiths in his celebrated book ‘The Politics of the Judiciary’.<sup>19</sup> This line of cases is no longer part of the law, but it is an important cautionary tale.
30. The principle of legality and ideas that the courts should be more expansive in determining the appropriate use of powers are especially important when considering areas of law where Parliament has given discretion to Ministers or other decision-makers, or where decision-makers use prerogative powers which

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<sup>16</sup> *R v Secretary of State for the Home Department, Ex.P Pierson* [1998] AC 539, 575-576 (Lord Browne-Wilkinson)

<sup>17</sup> *Roberts v Hopwood* [1925] AC 578

<sup>18</sup> *Bromley LBC v GLC* [1983] 1 AC 768

<sup>19</sup> J Griffiths, ‘The Politics of the Judiciary’ (5<sup>th</sup> ed, Fontana Press 1997)



are held to be non-justiciable, such as the making of international treaties or declarations of war. In the areas which are justiciable, the courts should continue to exercise a supervisory jurisdiction, making sure a decision-maker has properly exercised their powers, rather than determining how the decision-maker 'ought' to have acted in line with other principles.

31. Another consideration to bear in mind is how Judicial Review is only one of the accountability mechanisms in the UK's Constitution, which together ensure the Rule of Law is upheld. In some circumstances, such as in areas of high policy (foreign affairs, defence etc.), those levers of accountability may lie elsewhere, such as with Parliament, or with Tribunals with the competence to adjudicate on more specialist public law issues. Ultimately, the merits of the Government's decisions will be tested through the democratic process, which is a far more appropriate arena for matters of moral value to be judged. The court is not designed or equipped to deal with such issues. It is there to answer a specific question.
32. The task of upholding the Rule of Law falls to all the institutions and agencies of the state, not to mention all of us individually. Judicial Review is just one of the ways in which we maintain checks and balances in our democracy. The courts have, and will continue to develop, the application of the Rule of Law through Judicial Review and quite rightly so. The elaboration of the Government's position above serves to show how we think Judicial Review should be conceived and where we have concerns over the potential direction of travel. This does not mean we think there needs to be a radical restructuring of Judicial Review at this point. Rather, there are aspects of the current system and the doctrine applied by the courts where it would be useful for Parliament to intervene and clarify how Judicial Review should give effect to statute. The analysis by the Review and their recommendations have been vital in forming our opinion of where intervention could be most effective. The next section of this document explores these specific areas where we agree change would be useful.

### 3. Targeted incremental change

33. The Review Panel were asked in their terms of reference to “examine the trends in Judicial Review of executive action, and 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.”<sup>20</sup>
34. Both the Panel themselves and many respondents to the call for evidence questioned the framing of the terms of reference, for not mentioning the role of Parliament and drawing what was described by some as a false antithesis between effective government and citizens’ rights. The absence of mention of Parliament is not indicative of the Government’s views on Judicial Review as a whole, as seen by the fuller elaboration above where the role of Parliament is fully emphasised. Given the huge breadth of topics concerning Judicial Review, the terms of reference were designed to focus the efforts of the Panel onto areas where the Government was most interested. The role of Parliament would, of necessity, be relevant to each of the topics outlined by the terms of reference, and the Government agrees with the Panel that the role of Parliament should be emphasised.
35. The distinction between the interest of the citizen in challenging decisions and effective Government does not suggest that these things sit in opposition to one another. Indeed, an effective Government is one which protects and upholds the rights of citizens, including the right of access to justice. Rather, the balance the Government is interested in is one articulated particularly well by Dr Jonathan Morgan in his response to the call for evidence<sup>21</sup> and Professor Stanley De Smith in his study of Judicial Review.<sup>22</sup> A Government which cannot be held accountable for its actions and a system of Judicial Review by which every Government decision may be assessed by a court on its merits are both undesirable extremes. The question is how to create a fair system by which citizens can challenge decisions and seek an appropriate remedy without unnecessarily impeding the conduct of public affairs. Judicial Review is a vital

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<sup>20</sup> Independent Review of Administrative Law, Terms of Reference:  
<https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf>

<sup>21</sup> Jonathan Morgan, IRAL Submission

<sup>22</sup> IRAL Report, 0.31

component of this system of accountability, within a system of democratic and Parliamentary accountability. It is ultimately for Parliament to decide how Judicial Review should operate, both in general and in relation to any particular power.

36. The Report engages with this idea and offers several recommendations as to how Parliament may intervene in legislation. The procedural reforms we propose, and the Review's recommendations, are covered in chapter 4 of this document. In terms of substantive legal reform, the Report's analysis of the trends in Judicial Review also offers further possibilities the Government considers are worth exploring in more detail.
37. Firstly, the Review's recommendation to remove certain decisions of the Upper Tribunal from the supervisory jurisdiction of the High Court identifies a particular area of law where both the resources of the Judiciary and Government are not being usefully engaged, and where the intention of Parliament requires restating in light of the court's judgment. The Panel argue that the proportion of applications for 'Cart JR' resulting in a judgment in favour of the claimant (0.22%) is so low that this kind of review is not proportionate, considering the use of judicial resources, and should be discontinued.
38. Secondly, the Review recommends the introduction of suspended quashing orders, an additional option designed to give the courts increased flexibility in deciding which remedies to grant. The Government is interested in examining ways this provision could be implemented, by legislating factors the courts must consider when, for example, making a determination. The measure maintains the effectiveness of remedies for citizens, while ensuring that those remedies do not impede effective government, by giving the decision-maker the opportunity to make good any errors, instead of bluntly quashing the decision.
39. The measure on 'Cart JR's brings into question the use of ouster clauses included in legislation by Parliament and their application by the courts. The Panel maintain that ouster clauses are not antithetical to the Rule of Law and are a legitimate instrument for Parliament to use to delineate the bounds of the courts' jurisdiction.<sup>23</sup> The Government considers that the doctrine followed by the courts since the *Anisminic*<sup>24</sup> decision, which has led to many ouster clauses

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<sup>23</sup> IRAL Report, 2.80-89

<sup>24</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

not being given effect to, is detrimental to the effective conduct of public affairs as it makes the law as set out by Parliament far less predictable, especially when the courts have not been reluctant to use some stretching logic and hypothetical scenarios to reduce or eliminate the effect of ouster clauses.<sup>25</sup> Some of the reasoning set out in *Privacy International*<sup>26</sup> illustrates this very point. The danger of an approach to interpreting clauses in a way that does not respect Parliamentary sovereignty is, we believe, a real one. That is not to say that the Government thinks the courts' approach is totally incorrect. It is not unreasonable to presume that Parliament would not usually intend a body to operate with unlimited restriction, and with no regard to any form of accountability. Therefore, depending on the wording of ouster clauses, the powers at issue may still be reviewable on some grounds. Further clarity is therefore needed to set out how the courts should interpret such clauses and the circumstances in which ouster clauses must be upheld. This would have the dual effect of affirming the sovereignty of Parliament and providing greater predictability on the application of such clauses by the courts.

40. In their arguments concerning the introduction of suspended quashing orders, the Panel discuss the common law doctrine of nullity. Suspended quashing orders would allow the courts greater flexibility to impose a stricter remedy, allow the Government the opportunity to rectify an error, or for Parliament to authorise such a use of a power.<sup>27</sup> The Panel argue that this would also go some way to moving the courts away from certain elements of what Professor Forsyth describes as the “metaphysic of nullity,” by giving more flexibility for the courts to find that an error of law in a case where a power has been exercised unlawfully does not automatically lead to a nullity.
41. The Panel go on to say this would be especially useful in “(a) 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, and (b) cases such as *Hurley and Moore* where it is possible for a public body, if given the time

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<sup>25</sup> See para 84 below

<sup>26</sup> *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22

<sup>27</sup> IRAL Report, 4.15

to do so, to cure a defect that has rendered its initial exercise of public power unlawful.”<sup>28</sup>

42. In these and other cases, the Government thinks intervention may be necessary to steer Judicial Review away from the theory that decisions affected by an error of law automatically amount to a jurisdictional error, thus making the decision an exercise of a power that body did not have, and thus a nullity. This is explored in more detail from paragraphs 71-78.
43. In addition, the Government is interested in exploring the introduction of prospective remedies, to be used at the discretion of the court, in accordance with certain principles. Again, the intention is to provide the courts with another option in much the same way as a suspended quashing order. A prospective remedy would allow the courts to apply a remedy in the future rather than retrospectively.
44. The Review Panel discussed at length the other broad substantive issues set out in the Terms of Reference: codification, non-justiciability and the grounds of review. The Panel did not recommend the Government take any action in these areas. The principal reason the Panel gave was the practical difficulties with legislating to set out broad principles on these complex areas. The Report argues that addressing particular issues as they arise would be more effective. The Panel did not oppose the proposition that Parliament could legislate to define the grounds of Judicial Review, or make areas of law or of the exercise of public power non-justiciable.
45. The Government agrees with this analysis, which was also reflected in many of the submissions to the call for evidence. Submissions which offered comparisons with states which have codified Judicial Review, such as Australia or South Africa, were particularly useful in drawing out potential unintended consequences, such as increased satellite legislation, or difficulties in such legislation adding any clarity. Similarly, the Oxford University Public Lawyers effectively summed up the two problems with legislating broadly<sup>29</sup> – namely that being too general leads to clauses that have little effect, while being too

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<sup>28</sup> IRAL Report, 4.18

<sup>29</sup> Oxford University Public Lawyers, IRAL Submission, at [27]

prescriptive risks defects in extremely complex drafting and the onset of satellite litigation.

46. If the developments the Review Panel point to (the courts recognising fewer and fewer areas as non-justiciable, or expanding the grounds on which decisions can be challenged) continue and go further, this may pull Judicial Review towards, as Professor Varuhas describes it, merits-based substantive, rather than supervisory, review.<sup>30</sup> The Government would then need to consider whether proposing legislation on these and other broader constitutional questions was needed.
47. At this time however, such a response would be premature, and as the Review Panel have identified, there are specific areas where reforms may be productive. Addressing the common-law doctrines regarding ouster clauses and nullity by providing more flexible remedies, or by adding clarity to how Judicial Review should operate in those areas, targets the issues we are most concerned about. This approach is mindful of the role of the courts in developing the application of the Rule of Law through Judicial Review, but seeks Parliament's involvement in areas where the Government disagrees with the direction of the evolution of Judicial Review.

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<sup>30</sup> Jason Varuhas, IRAL Submission

## 4. The Independent Review of Administrative Law's recommendations

### Reversing *Cart*

48. The case of *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28 affirmed the principle that decisions of the Upper Tribunal concerning leave to appeal were amenable to Judicial Review on the basis of an error of law. In *Cart*, the applicants challenged the Upper Tribunal's decision to refuse permission to appeal a decision of the First-tier Tribunal. The case was comprised of two separate claims which touched on the same issue: one was concerned with the Social Security and Child Support Tribunal (which has since been taken over by the First-tier Tribunal) and the First-tier Tribunal (Immigration and Asylum Chamber). It was held unanimously in this case that Judicial Review in such cases can be used to review the Upper Tribunal's decisions on permission to appeal applications where it was alleged that the decision was made in error of law. The ability to lodge such claims was limited, as the Supreme Court held that permission for Judicial Review should only be granted where there was an important point of principle or practice or some other compelling reason to review the case.
49. In their report, the Review concluded that *Cart* Judicial Reviews were an area of Judicial Review that could be usefully cut back.<sup>31</sup> The Government agrees. The Panel conducted detailed analysis of the efficacy of *Cart* Judicial Reviews and found that such applications make up by far the largest proportion of Judicial Review cases, with (on average) 779 applications for *Cart* Judicial Review per year from 2015 to 2019. The next highest category of Judicial Review applications is those relating to Home Office decisions to detain foreign nationals, with an average of 733 applications for Judicial Review per year.<sup>32</sup>
50. As noted by the Report, the Supreme Court's justification for *Cart* Judicial Reviews was that they would provide "for some overall judicial supervision of the decisions of the Upper Tribunal, particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that errors of law of real significance slip through the system."<sup>33</sup>

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<sup>31</sup> IRAL Report, 3.35

<sup>32</sup> IRAL Report, 3.38

<sup>33</sup> IRAL Report, 3.40; *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 699 (per Lord Phillips)

51. The Government commends the aim of the Supreme Court's rationale. However, as clearly set out in the Report, this has come at a significant cost. The Review analysed 5,502 Cart Judicial Reviews (all the Cart Judicial Reviews since this avenue became available) and found that in only 12 instances (ranging between 0-3 per year) had an error of law been found – a rate of only 0.22%.<sup>34</sup> In 2017, there were 789 applications lodged, each having to be fully considered by a High Court Judge, without a single error of law being found. Further, the Government considers that rendering Upper Tribunal decisions justiciable by Judicial Review is contrary to the intention of Parliament. This is because the Upper Tribunal was originally intended to be broadly equal to the High Court. As stated in the explanatory notes to the Tribunals, Courts and Enforcement Act 2007, “the Upper Tribunal is a superior court of record, like the High Court.”<sup>35</sup> In declaring Upper Tribunal decisions amenable to Judicial Review, the Supreme Court effectively downgraded the intended status of the Upper Tribunal.
52. The Government therefore intends to implement the Review's recommendation to remove the avenue of lodging Cart Judicial Reviews, effectively reversing the outcome of the case. It is understood that this may cause some injustice to those few cases brought in circumstances similar to the 12 that have identified errors of law since 'Cart' reviews began. However, the Government considers the concept of diverting large amounts of public resources towards these cases to be disproportionate. The Government is of the view that continued use of Cart Judicial Reviews is unjustified, taking into account that they make up the biggest proportion of Judicial Reviews, that Cart Judicial Reviews involve judges reviewing decisions made by judges of the same level, and that the success rate, of 0.22%, is extremely low.

### **Suspended quashing orders**

53. The Panel further recommended that Parliament provide a remedy of suspension to alleviate the bluntness of a quashing order.<sup>36</sup> This would provide that a decision/exercise of a power will be quashed if, after a certain period of time, certain conditions set down by the court have not been met. This could, as the Review stated, mean that the quashing would occur “unless Parliament

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<sup>34</sup> IRAL Report, 3.45

<sup>35</sup> Tribunals, Courts and Enforcement Act 2007, Explanatory Note 52

<sup>36</sup> IRAL Report, 6.8(h)



legislated in the meantime to ratify the exercise of that power”, with the order also indicating in general terms what the legislation would have to say in order to successfully ratify the exercise of that power.<sup>37</sup> Government agrees with the Review on this measure. Quashing orders can sometimes have a disproportionate effect compared to the impact of the procedural error being reviewed, so giving the court the option to suspend the effect of a quashing order could achieve the best outcome for all parties in ensuring procedures are followed, while maintaining respect for the sovereignty of Parliament.

54. There is precedent for such a measure. Section 102 of the Scotland Act gives the court discretionary powers to suspend the effect of Scottish primary or secondary legislation, or a decision by a member of the Scottish Government, where the legislation was passed or decision made in excess of devolved competence. Suspending the effect of the legislation or decision allows the defect to be corrected.<sup>38</sup> The Review suggests an amendment to section 31 of the Senior Courts Act 1981 along similar lines, to provide to the effect that “on an application for Judicial Review the High Court may suspend any quashing order that it makes, and provide that the order will not take effect if certain conditions specified by the High Court are satisfied within a certain time period.”<sup>39</sup>

**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?**

55. The Government considers that providing the courts discretion to suspend a quashing order is eminently feasible. An additional consideration for consultees is in relation to mandatory considerations as to when use of such a discretion would be most appropriate. This is where a disparity arises between the section 102 Scotland Act precedent and the Report. On one hand, section 102(3) stipulates that “in deciding whether to make [a suspended quashing order], the court or tribunal shall (among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected.”<sup>40</sup> This therefore provides clarity in relation to when suspended

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<sup>37</sup> See IRAL Report 3.47 - 3.69 for a detailed discussion on this proposal

<sup>38</sup> s.102 Scotland Act 1998

<sup>39</sup> IRAL Report, 3.68

<sup>40</sup> s.102(3) Scotland Act 1998

quashing orders will be more appropriate than immediate quashing orders. Without dismissing section 102(3), the Review suggests that “it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded, as opposed to awarding either a quashing order with immediate effect or a declaration of nullity.”<sup>41</sup>

56. The Government believes it would be appropriate to set out in legislation factors or criteria that the court should take into account when considering whether a suspended quashing order is appropriate. Alternatively, criteria could also be set out in legislation which must be considered by the courts, and which, if met, mandate the court to use a suspensive order unless there was an exceptional public interest in not doing so. A combination of the two may also be appropriate. These approaches would provide parties with greater certainty over the outcome of Judicial Review proceedings. Appropriate considerations could include:
- a. whether the procedural defect can be remedied
  - b. whether remedial action to comply with a suspended order would be particularly onerous/complex/costly
  - c. whether the cost of compensation for remedying quashed provisions would be excessive
57. The Government is not committed to pursuing any of the specific proposals above, but invites consultees to evaluate and comment on each proposal to help it assess their merits.

**Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?**

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<sup>41</sup> IRAL Report, 3.69.

## 5. Additional proposals for consultation

58. The Government, in light of the excellent analysis in the Report, also considers it worthwhile to consult on measures that were not recommended by the Panel, but would complement their main proposals.
59. At present, we intend that the below proposals will only apply to one reserved matter (the proposal on Cart Judicial Reviews), and the jurisdiction of England and Wales. Notwithstanding our current intent, the Government is very keen to hear from stakeholders from Scotland and Northern Ireland to help us understand any impacts of these proposals on the devolved administrations.

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

### Remedies

#### Prospective-only remedies

60. The Government is considering whether to give discretion to judges to order a remedy to be prospective-only in nature. In effect, this would mean that a decision or secondary legislative provision could not be used in the future (as it would be quashed), but its past use would be deemed valid. This would provide certainty in relation to government action; if a policy has cost a considerable amount of taxpayers' money, for instance, it would mitigate the impact of immediately having to set up a compensatory scheme. In turn, this would mitigate effects on government budgeting, which would enable the Government to continue to spend on improving the lives of its citizens. Instead, a prospective-only remedy could use conciliatory political mechanisms to the fullest extent, to set up a compensation scheme that is appropriate and robust, rather than created in a reactive manner.
61. It is recognised that this could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy, but this would be remedied in the long-term. It is also recognised that the Report made no recommendations in relation to this measure. However, as with the suspended quashing order, there is precedent for such a measure. Alongside provisions to suspend the effect of the court's decision, section 102(2)(a) Scotland Act also gives the court discretion to make an order "removing or

limiting any retrospective effect of the decision.”<sup>42</sup> To stress, this would be a discretionary power for the court to order if it saw fit to do so, and is by no means the Government compelling remedies to be granted with prospective effect only.

62. Judges have recognised the benefit of prospective-only remedies. In *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills*,<sup>43</sup> Elias LJ held that:

“In my view ... I do not consider that it would be a proportionate remedy to quash the regulations themselves. While I have come to the conclusion that the Secretary of State did not give the rigorous attention required to the package of measures overall, and to that extent the breach is not simply technical, I am satisfied that the particular decision to fix the fees at the level reflected in the regulations was the subject of an appropriate analysis. Moreover, all the parties affected by these decisions – Government, universities and students – have been making plans on the assumption that the fees would be charged. It would cause administrative chaos, and would inevitably have significant economic implications, if the regulations were now to be quashed.”<sup>44</sup>

63. The idea that quashing some decisions or regulations may create administrative chaos and serious economic implications is by no means a new concern. Under this proposal, prospective-only remedies would be an extra tool for the judges to use to obtain a just outcome in such cases.

64. As with suspended quashing orders, the Government also considers it appropriate to provide in legislation factors against which the need for prospective-only remedy can be assessed, with a view to providing greater certainty for both parties. This could include requiring the courts to consider the following factors before imposing a remedy:

- a. whether such an order would have exceptional economic implications
- b. whether there would be a significant administrative burden

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<sup>42</sup> s.102(2)(a) Scotland Act 1998

<sup>43</sup> [2012] EWHC 201 (Admin)

<sup>44</sup> *R (Hurley and Anor) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) at [99]

- c. whether injustice would be caused by a prospective-only remedy
- d. whether third parties have already relied considerably upon the impugned provision/decision

65. Once more, the Government is not committed to any of these specific proposals per se, but welcomes views on factors that would make a prospective-only remedy appropriate, and help provide guidance to the courts to that effect.

**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?**

Presumption or requirement for suspended quashing orders or prospective-only remedies

66. The Government considers that, alternatively, a 'requirement' for prospective-only remedies as well as suspended quashing orders in certain circumstances could be developed.

Prospective-only remedies

67. For prospective-only remedies, as set out above, this would provide for the impugned clauses in statutory instruments not to be upheld in the future (as they would be quashed), while deeming their past use valid. This is because, as Sir Stephen Laws put it, acts of a legislative nature (including secondary legislation) are inherently different from other exercises of power.<sup>45</sup> Such legislation is intended, and considered to be, valid and relied on by others.<sup>46</sup> Therefore:

"Retrospective invalidation of legislation will, in almost all cases, impose injustice and unfairness on those who have reasonably relied on its validity in the past. The injustice and unfairness are capable of being imposed over a very long period – with the scale of both increasing the longer that period is. It is a form of injustice and unfairness that is wholly incompatible with even the narrowest versions of the concept of the rule of law."<sup>47</sup>

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<sup>45</sup> Stephen Laws, IRAL Submission, [112]-[117]

<sup>46</sup> Stephen Laws, IRAL Submission, [118]

<sup>47</sup> Stephen Laws, IRAL Submission, [119]

68. The Government considers that legal certainty, and hence the Rule of Law, may be best served by only prospectively invalidating such provisions. Because of their scrutiny, Parliament-focused solutions are more appropriate where statutory instruments are impugned. Ordering a prospective-only quashing of Statutory Instruments would focus remedial legislation on resolving issues related to the faulty provision, limiting the extent to which additional issues have to be rectified due to wide and retrospective quashing. Specifically, the Government considers the following two alternative proposals to be worth further exploration:

- a. **A presumption of prospective-only quashing in relation to Statutory Instruments.** This proposal would see the creation of a statutory presumption of prospective-only quashing of statutory instruments. The nature of the rebuttal of the presumption will be left to the courts to decide. This dampens the effect of retrospective quashing of a Statutory Instrument, and allows for flexibility in the provision of redress. The Government welcomes consultees' opinions on the efficacy of such a presumption.
- b. **Mandating that remedies granted in relation to Statutory Instruments will be prospective-only, unless there is an exceptional public interest requiring a different approach.** This proposal takes the logic outlined in (a) above further, and provides greater clarity in relation to the deference to be afforded to Statutory Instruments. The extent that Statutory Instruments can be retrospectively quashed would be constrained, unless there is an active assertion of an exceptional public interest not to. A mandatory approach therefore would give a clear and flexible administrative space for the Government to undertake executive actions as required by Parliament, while providing judges the means to review such powers on terms with which they are already familiar, i.e. through the assessment of exceptional public interest.

**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?**

## Suspended quashing orders

69. For quashing orders, the Government is considering a wider use of a requirement, whereby the default use of a quashing order in relation to any impugned power is that it is suspended. There would be merit in having a requirement over a discretionary power because there is a considerable time lag in understanding how and when a discretionary power will be applied by the courts, and to what extent. The Government considers that there is currently a wide array of possible outcomes when legal acts have been impugned. There is a risk that an entire policy has to be quashed because of a defect which can be remedied. This can be illustrated by *R (British Blind and Shutters Association) v Secretary of State for Housing Communities and Local Government*,<sup>48</sup> where a regulation banning certain combustible materials (which was enacted following the Grenfell tragedy) was held to be unlawful because of inadequate consultation. The Court quashed the regulations and the Secretary of State had to start the process of making new regulations afresh. In such a case, it would have been preferable to suspend this quashing order pending the completion of the process by the Secretary of State. A requirement to make a suspended quashing order when the defect can be remedied provides greater certainty to what rectification the Government will need to undertake if their regulation is successfully challenged. The Government further considers that legal certainty, and hence the Rule of Law, may be best respected by a suspensive quashing of such provisions. Suspended quashing by default would focus remedial action on resolving issues related to the faulty provision. Specifically, the Government considers the following two alternative proposals to be worth further exploration:

- a. **A presumption that any quashing order should be suspended.** This proposal would see the creation of a statutory presumption of suspended quashing orders by default. The nature of the rebuttal will be left to the courts to decide. This will offer flexibility in constructively correcting issues where possible. The Government welcomes consultees' opinions on the efficacy of such a presumption.

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<sup>48</sup> [2019] EWHC 3162 (Admin)

- b. **Mandating that quashing orders will be suspended, unless there is an exceptional public interest not to do so.** This proposal takes the logic outlined in (a) above further in providing for flexibility where quashing orders are used. All quashing orders would be suspended unless there is an active assertion that there is an exceptional public interest not to. A mandatory approach provides greater clarity for rectifying administrative faults, while providing certainty of administrative action. Again, judges will be allowed to disapply this requirement the exceptional public interest test, which they are familiar with.

**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?**

70. In both proposed approaches, legal certainty is given higher regard than the Government considers that it currently is, or would be with the use of a discretionary power. Both powers provide clarity and certainty to the use of executive powers, while also providing for clear safety valves by which the courts can find the appropriate and just outcome where required.

#### Nullity

71. As mentioned above, the application of the principle of nullity (i.e. the idea of declaring an act null and void by operation of law and thereby treated as never having occurred) is of concern to the Government. Writing in 2014 Professor Feldman said:

“Over the last half-century, English administrative law and theory have increasingly paid lip-service to three propositions. (1) All errors in the course of making a decision or rule are to be regarded as errors of law. (2) All errors of law make the decisions to which they relate null and void. (3) If a ‘decision’ is a nullity, it can have no legal effect.”<sup>49</sup>

72. He correctly points out that it would be “extremely inconvenient” if this were true.<sup>50</sup> He then points out that those propositions are not an accurate reflection

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<sup>49</sup> D Feldman, ‘Errors of Law and Flawed Administrative Acts’, [2014] *Cambridge Law Journal* 275, 275

<sup>50</sup> D Feldman, ‘Errors of Law and Flawed Administrative Acts’ (n 49) 275



of the law and that they are a misinterpretation of *Anisminic*.<sup>51</sup> Reining in the court's propensity to declare the exercise of power null and void is required for suspended quashing orders to operate successfully.

73. The Review Panel, in their analysis of nullity, note that "there are plenty of examples of cases where a finding that public power was exercised unlawfully does not lead to an ineluctable conclusion that the exercise of that power was always null and void."<sup>52</sup> Such examples include *Cheblak*<sup>53</sup> and the case concerning the Scottish 'Continuity Bill'.<sup>54</sup> Building from discussion of such cases, the Review concludes that:

"The common law's adherence to the "metaphysic of nullity" has never been more than half-hearted, driven as it has been less by considerations of principle and more by policy concerns to limit the operation of legislation ousting Judicial Review or to preserve people's abilities to mount collateral challenges under the civil and criminal law to the lawfulness of administrative action."<sup>55</sup>

74. The Government agrees with the Review, Professor Feldman,<sup>56</sup> Professor Daly,<sup>57</sup> Professor Adams,<sup>58</sup> and Finnian Clarke<sup>59</sup> that the best interpretation of the case-law is inconsistent with the view that all errors lead to a decision being

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<sup>51</sup> *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

<sup>52</sup> IRAL Report, 3.60.

<sup>53</sup> IRAL Report, 3.60: "In *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 the Court of Appeal held that the claimant could only seek a writ of habeas corpus where the Home Secretary's decision to detain him ahead of deportation under the Immigration Act 1971 amounted to a nullity. This would only be the case where the claimant was detained "without any authority or the purported authority [was] beyond the powers of the person authorising the detention...". Where, on the other hand, the decision to detain the claimant was affected by some error or impropriety that meant "it should never have been taken", the decision to detain the claimant, while unlawful, would not amount to a nullity and if the claimant wished to obtain a writ of habeas corpus, he would have to apply for Judicial Review to get the decision to detain him set aside

<sup>54</sup> IRAL Report, 3.60: In *re UK Withdrawal from the European Union (Legal Continuity) Bill*, [2019] AC 1022 at [26] the UK Supreme Court ruled that when considering the legality of legislation passed by the Scottish Parliament: "There is a difference between a want of legislative competence and more general grounds for Judicial Review on public law grounds. The result of a want of legislative competence is that a Scottish enactment is a nullity ('not law') ... A Scottish enactment which is held by a court to be unlawful on more general public law grounds is not necessarily a nullity."

<sup>55</sup> IRAL Report, 3.59

<sup>56</sup> D Feldman, 'Errors of Law and Flawed Administrative Acts' (n 49)

<sup>57</sup> Paul Daly, 'David Feldman on the Effects of Invalid Decisions (the Void/Voidable Distinction): the Utility of Principles in Administrative Law', (2014) Administrative Law Matters Blog

(<https://www.administrativelawmatters.com/blog/2014/03/11/david-feldman-on-the-effects-of-invalid-decisions-the-voidvoidable-distinction-the-utility-of-principles-in-administrative-law/>)

<sup>58</sup> Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' [2017] 'Cambridge Law Journal' 289

<sup>59</sup> F. Clarke, 'Habeas Corpus and the Nature of "Nullity" in UK Public Law', U.K. Const. L. Blog (8th Oct. 2019) (<https://ukconstitutionallaw.org/2019/10/08/finnian-clarke-habeas-corporus-and-the-nature-of-nullity-in-uk-public-law/>)

a nullity and of no effect. Nonetheless, as Professor Daly points out, this interpretation surfaces “with astonishing regularity and vigour”,<sup>60</sup> so much so that Professor Adams calls it (before calling for it to be rejected) “the standard theory of administrative unlawfulness.”<sup>61</sup> Furthermore, as stated above, some of the case-law does provide some support to that theory while other cases reject it.<sup>62</sup>

75. This makes it sensible for Parliament to legislate to put it beyond doubt that this theory is not the law.
76. Nullity has two chief disadvantages. Firstly, it is contrary to legal certainty, which is an important aspect of the Rule of Law, in that it leads to a situation whereby an apparently valid legal act is actually null and void from the outset. This is a particular issue for third parties which might have to rely on it. Secondly, as the Supreme Court held in *Ahmed v HM Treasury (No 2)*<sup>63</sup> and *Unison*<sup>64</sup> a court has no remedial discretion when an act is a nullity. This Government considers this restriction to be inappropriate, and it is preferable to ensure that the courts do have discretion over the remedies.
77. At the same time, one must acknowledge that it might not be possible to completely remove the nullity doctrine. For example, if Parliament creates a tribunal and gives it the power to hear only tax cases but the tribunal starts handing out murder convictions, then those convictions have to be nullities. It would not appear to be acceptable to say that this conviction is merely voidable. But those instances are quite rare.<sup>65</sup>

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<sup>60</sup> Paul Daly, ‘David Feldman on the Effects of Invalid Decisions (the Void/Voidable Distinction): the Utility of Principles in Administrative Law’ (n 57)

<sup>61</sup> Thomas Adams, ‘The Standard Theory of Administrative Unlawfulness’ (n 58)

<sup>62</sup> Compare *Privacy International* [2019] UKSC 22 at [89], and *In Re Continuity Bill* [2018] UKSC 64 at [26] with *Ahmed v HMT (No 2)*, *Unison* [2017] UKSC 51 at [118]-[119] (Lord Reed) and *Miller/Cherry* [2019] UKSC 41 at [69]

<sup>63</sup> [2010] 2 AC 534

<sup>64</sup> [2017] UKSC 51 at [118]-[119] (Lord Reed). See also *Miller/Cherry* [2019] UKSC 41 at [69]; for doubts about the correctness of this see Paul Daly, ‘A Critical Analysis of the Case of the Prorogations’, SSRN, Feb 2021 at p. 20 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3787470](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787470))

<sup>65</sup> Though on the account proposed by Thomas Adams it would appear that it would still not be a nullity on the basis that the body has “the power to interpret their own jurisdiction” (‘The Standard Theory of Administrative Unlawfulness’ (n 58), 304) but the Court would have the power, indeed the duty, to quash it

78. However, even in such instances the courts should have the power to suspend the effects of that finding of nullity (under the suspensive quashing order proposal above).

79. Finnian Clarke states the law as follows:

“Where the error goes to jurisdiction (or competence), it appears that that act is automatically void. Where the error is non-jurisdictional, then that act is void in some less absolute sense. That is, the consequences of a finding of nullity in a non-jurisdictional case are a matter of discretion, whereas voidness follows from a finding of jurisdictional error as a matter of course.”<sup>66</sup>

80. The Government agrees but would prefer to formulate it by saying that non-jurisdictional/competence errors are voidable<sup>67</sup> with the court having a discretion on how to deal with it.

81. To this end, the Government is considering whether any or all of the following principles would have the intended effect:

a. **That only lack of competence, power, or jurisdiction leads to the power being null and void.** It is always accepted that government cannot use power that it simply does not have. Where there is no legal power, there can be no consequence of purported use of that power and therefore its exercise should be nullities.<sup>68</sup> However, based on the above proposal, the Court would have the power to suspend the effects of that nullity.<sup>69</sup>

b. **Presumption against the use of nullity.** In addition, the Government considers it important to provide greater clarity through legislating for a presumption against the use of nullity more generally. More specifically, this would mean that when faced with an error the court should err on the side of concluding that the error does not lead to the decision-maker having acted outside their competence – as opposed to acting in breach

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<sup>66</sup> F. Clarke, ‘Habeas Corpus and the Nature of “Nullity” in UK Public Law’ (n 59)

<sup>67</sup> Except for errors which consist merely in breaches of a directory requirement

<sup>68</sup> But see Thomas Adams’s argument above that it would not be automatically a nullity

<sup>69</sup> This way the practical effects would be similar as under Thomas Adams’s proposal even though conceptually they are slightly different

of duty – i.e. a presumption in favour of concluding that a flawed decision is voidable and not a nullity.

- c. **Legislating to state which other issues can be considered as going outside the scope of executive power, and others that are focused on the wrongful exercise of that legitimately held power.** Here, the Government hopes to further clarify the distinction between the Government acting without any power, and the wrongful use of a power that Parliament has granted it. In relation to the issue of nullity, only the purported use of power that the Government does not have would lead to a nullity, while the wrongful exercise of a power would lead to the decision being voidable. In particular, the Government proposes to legislate to provide that the following go to wrongful use rather than lack of power (i.e. the consequence of them would be voidable and not a nullity):

- i. **Breach of the principle of legality.** This has the effect of overturning the remedial aspects of *Unison*. It means that in those cases the decision would be voidable and not a nullity. Therefore, the court would have a discretion about what remedy to award<sup>70</sup> rather than falling into the one-way system conveyor belt of nullity.<sup>71</sup>
- ii. **All other standard public law grounds except lack of competence/power.**
- iii. **If a decision-maker has competence/power, no error however egregious can deprive one of that power.** This overturns an aspect of *Anisminic*.<sup>72</sup> Of course, such an egregious error is still unlawful and renders the decision voidable. In light of the egregiousness of the error the court might still conclude that the proper remedy is a retrospective quashing order. But the key point is that the court would have a remedial discretion.

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<sup>70</sup> As Varuhas points out this an issue: Varuhas, 'The Principle of Legality' (n 15) 609

<sup>71</sup> Although the principle of legality is sometimes said to go to the scope of the power, it is worth noting that *Miller/Cherry* speaks of it in terms of 'exercise of a power' ([2019] UKSC 41 at [49]).

<sup>72</sup> *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid), 179 (Lord Pearce)

82. As it was put in the Report:

“[I]t would be an impossible task for the courts to attempt to distinguish between (i) cases where public power has been exercised validly but unlawfully and (ii) cases where it has not been exercised validly and its purported exercise was therefore null and void. This is one of the reasons why the distinction between jurisdictional and non-jurisdictional errors of law has been excised from the law. However, the fact that it is practically impossible to distinguish between type (i) cases and type (ii) cases is no reason to treat all cases that fall into category (i) as falling into category (ii).”<sup>73</sup>

83. The intended effect of those proposals is to put almost all cases in category (i) and making sure cases falling in category (ii) are extremely rare.

84. We believe that legislating a range of these maxims will significantly improve the certainty of remedies and clarify the proper purpose of the doctrine of nullity. This would also push the courts to use the principle more consistently, thereby resolving the issues identified by the Review in its analysis. Nonetheless, this is just one way of providing clarity to when the courts declare the use of a power null and void; the Government is certainly interested in hearing thoughts by consultees on other ways that these can be refined.<sup>74</sup>

**Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?**

### **Ouster clauses**

85. An ouster clause is a clause in primary legislation intended to render a decision or use of a specific power non-justiciable, so that the courts cannot judicially review that decision or the use of that power. While ‘partial’ ouster clauses are generally given effect by the courts (for example, clauses which set a particularly short limitation period in which to file a claim, such as the time limit in CPR 54.5) the courts tend not to give effect to ouster clauses which purport to oust their

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<sup>73</sup> IRAL Report, 3.63

<sup>74</sup> As IRAL notes at 3.65 to 3.67, moving away from the metaphysics of nullity does not necessarily prevent collateral challenges

jurisdiction entirely. This has been the norm since the case of *Anisminic*,<sup>75</sup> and this principle was recently reaffirmed in *Privacy International*.<sup>76</sup>

86. 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.
87. Professor Ekins argues that the intensification of Judicial Review is due to a “loss of confidence in the competence of other (political) institutions and in the political process more widely”.<sup>77</sup> As he points out, this scepticism “about parliamentary government or electoral politics cannot be squared with sound empirical study or a proper understanding of our constitution, its historical record, or the institutional dynamics in which it consists.”<sup>78</sup> This is particularly true when it comes to the scrutiny Parliament gives to proposed ouster clauses. Because they involve a departure from the norm and replace ordinary forms of legal accountability with political accountability, Parliament will very anxiously scrutinise proposed ouster clauses. Indeed, as the saga of the Asylum Bill 2003 shows, even a government with a majority of 167 cannot get a broad ouster clause through Parliament.
88. The Review’s conclusions in relation to ouster clauses are clear and present a marked distinction from the status quo. They have two conclusions. First, that Parliament should not exclude Judicial Review generally as it would be contrary to the Rule of Law; and second, that Parliament *could* oust or limit the jurisdiction of the courts in particular circumstances if there is ‘sufficient justification for doing so’.<sup>79</sup> Briefly put, these conclusions were reached on the basis of affirming Parliamentary Sovereignty while simultaneously qualifying it with the Rule of Law.

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<sup>75</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

<sup>76</sup> *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22

<sup>77</sup> Richard Ekins, IRAL Submission [13(a)]

<sup>78</sup> Richard Ekins, IRAL Submission [28(d)]

<sup>79</sup> IRAL Report, 2.89, 6.8 (e) and (f), emphasis added

89. We agree with the Review’s conclusions that ouster clauses should be effective where there is sufficient justification. This begs the question of how ouster clauses can be made to work in this way, and further, what constitutes a ‘sufficient justification’ for ousting the court’s jurisdiction. The Report leaves these questions unanswered, and the Government therefore wishes to look in more detail at how ouster clauses could be made more effective in those specific and limited instances where there is sufficient justification. As a core principle, the Government considers that ouster clauses legislated for by Parliament should not be rendered as of no effect, and invites consultees to put forward proportionate methods for achieving this. It has already considered some methods, set out below, and invites comments on these. These methods would consist in setting out principles of interpretation which the courts would have to apply when interpreting an ouster clause.
90. When considering the enforceability of ouster clauses, the courts sometimes consider a ‘worst-case-scenario.’<sup>80</sup> This approach sees the court considering the ouster clause not in relation to the specific circumstances of the case before it, but in relation to whether the ouster clause would be appropriate in a hypothetical and clearly unjust circumstance. It follows that, because this unjust circumstance ‘could’ occur, the court’s jurisdiction should not be ousted in that area, to safeguard against such potential injustice. The Government does not wish to uphold instances of injustice, of course, but to exclude ouster clauses on this principle in instances where there is already judicial oversight of a matter (for example, the Investigatory Powers Tribunal) or in areas of high policy (such as foreign affairs) seems to the Government to be inappropriate. The Government is therefore considering methods by which the court can be invited to construe any such worst-case scenarios narrowly, and instead consider what is required by the case at hand.

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<sup>80</sup> See , in the context of non-justiciability discussion at IRAL Report, 2.21 of *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349: “The Court observed that “it was clear that [if] the Home Secretary had refused to pardon someone solely on the ground of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.”. Having in this way made an inroad into the principle that the exercise of the prerogative of mercy was non-justiciable, the Court then proceeded to review the Home Secretary’s exercise of that prerogative in a situation that had nothing to do with its being exercised in a discriminatory manner.” This technique is also frequently used by legal academics, see for recent examples: A.L. Young, ‘The Draft Fixed-term Parliaments Act 2011 (Repeal) Bill: Turning Back the Clock?’, U.K. Const. L. Blog (4th Dec. 2020) ( <https://ukconstitutionallaw.org/2020/12/04/alison-l-young-the-draft-fixed-term-parliaments-act-2011-repeal-bill-turning-back-the-clock/>), and M Elliott, ‘Repealing the Fixed Term Parliament Act’, ‘Public Law For Everyone’ ( <https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/>)

91. The Government considers it most appropriate to legislate for a ‘safety valve’ provision in how ouster clauses are interpreted. This could work in a multitude of ways, but essentially would allow the courts to not give effect to an ouster clause in certain exceptional circumstances. An example of this would be, if there had been a wholly exceptional collapse of fair procedure,<sup>81</sup> the court could ask whether Parliament intended for this to be covered by the ouster. This ‘denial of procedural justice’ would, we propose, be a threshold far higher than the current ground of procedural impropriety. Another possibility is the sort of exceptional circumstances contemplated in *Sivasubramaniam v Wandsworth County Court & Ors*.<sup>82</sup> If a court determines that the impugned conduct of the body fell within that category then, as a general principle of interpretation, it would not interpret the ouster clause as covering that conduct. The decision would therefore be reviewable. The Government hopes that such a high threshold would defend against matters of outright injustice, while preserving the effect of ouster clauses and the certainty they can bring.
92. In their dissenting judgment in *Privacy International*, Lords Sumption and Reed said that it would ordinarily be Parliament’s intention, when creating a body of limited competence, that this body is subject to Judicial Review on the ground of lack of competence (in the narrow sense) unless Parliament made it clear that it intended for that body to have “unlimited discretionary power to determine its own jurisdiction”.<sup>83</sup> We would propose to enact this as principle of interpretation for future ouster clauses.
93. In *Privacy International*, the core underlying issue was the interpretation of s. 5 Intelligence Services Act 1994. The concern, which led the majority to construe the ouster clause as they did, was that if Judicial Review was not available this would run the risk of creating a ‘local law’,<sup>84</sup> and that this was contrary to the Rule of Law. There are a number of points to make in response to this. First, ‘local laws’ do already exist and have been upheld by the courts.<sup>85</sup> Second, ‘local laws’ did exist in the past prior to the Judicature Acts: the common law courts

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<sup>81</sup> See Laws LJ’s discussion in *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28 at [99], where he described a situation “where there has been a wholly exceptional collapse of fair procedure: something as gross as actual bias on the part of the tribunal.”

<sup>82</sup> [2002] EWCA Civ 1738 at [56]. See also *Sinclair Investments (Kensington) Ltd v The Lands Tribunal* [2005] EWCA Civ 1305

<sup>83</sup> [2019] UKSC 22 at [210]

<sup>84</sup> [2019] UKSC 22 at [139]

<sup>85</sup> See *R v Visitor of Hull University, ex parte Page* [1993] AC 682



had no jurisdiction over matters of Equity and vice-versa. It would be an odd thing to do, but Parliament could, consistently with the Rule of Law, re-create separate courts of law and Equity.<sup>86</sup> Third, it is the case that the widespread use of arbitration in certain legal fields, such as maritime salvage, has de facto created 'local laws' and while this situation has been deplored by some,<sup>87</sup> no one has suggested that arbitration agreements should not be upheld by the courts as a result.<sup>88</sup>

94. Nonetheless, the Government agrees that the creation of 'local laws' in a way which is not intended by Parliament is undesirable. The Government is therefore interested in consultees' thoughts on how the 'unintended local law' problem could be resolved while still giving effect to ouster clauses. One possible solution might be to clarify that the High Court retains the power to issue, in appropriate cases, a declaration about the correct interpretation of the law.
95. While the Government proposes that these measures work in tandem to give due effect to ouster clauses, we would welcome consultees' views on the efficacy of these proposals working together.

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

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<sup>86</sup> See Lords Sumption and Reed in *Privacy International* at [199]: The rule of law "is not concerned to protect the jurisdiction of the High Court in some putative turf war with other judicial bodies on whom Parliament has conferred an equivalent review jurisdiction"

<sup>87</sup> E.g. Lord Thomas, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration', (2016) Bailii lecture, (<https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>) at [5] "As arbitration clauses are widespread in some sectors of economic activity, there has been a serious impediment to the development of the common law by the courts in the UK." It is notable that Lord Thomas never suggested that this breached the rule of law

<sup>88</sup> Lord Thomas did suggest some changes that market participants and Parliament could make. But nowhere did he suggest that courts should no longer respect arbitration agreements and their limited role under the Arbitration Act

## 6. Procedural reform

96. The fourth of the Review's Terms of Reference gave the Panel the task of considering reforms in relation to a raft of procedural issues. Reform in this area is generally not in the Government's gift, and instead falls within the remit of the specialist Civil Procedure Rule Committee (CPRC). The Government therefore intends not to take these reforms forward in legislation, but instead will approach the CPRC to consider its proposals in detail.
97. We have included below certain proposals that were not considered by the Review. These have been gleaned from the responses to the Review's call for evidence, and we consider they merit further consideration.

### Time Limits

98. The Report recommends that the requirement for bringing a claim "promptly" as set out in CPR 54.5(1)(a) should be removed. We agree. The Panel concluded that "it is rare for a Court to dismiss a claim outright if it has been brought within the three-month period even if it can be argued that the claimant failed to act promptly".<sup>89</sup> In the Panel's discussion, it is clear that a hard timeline of three-months (notwithstanding that the Court can extend this deadline should it choose to) is the more useful element of the time limit. Accordingly, the Government is considering asking the CPRC to remove the promptitude requirement.

**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.**

99. Call for evidence respondents put forward two other suggestions in relation to time limits. Firstly, it was suggested that Judicial Review time limits could be extended. The extended time limit could stop claims being brought prematurely, and would give parties more time to seek resolution via Alternative Dispute Resolution. However, the Government acknowledges that an extended limitation period would have a knock-on effect for public authorities, increasing the period where a Judicial Review may be lodged. The Government considers the current three-month time limit to be an appropriate balance between the need for certainty for the Government, and the right to challenge decisions.

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<sup>89</sup> IRAL Report 4.135

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

100. An alternative suggestion by respondents was to enable the parties to agree between themselves to extend the time limit for bringing a Judicial Review; this would mean that parties could consent to having more time to resolve issues out of court. The Review considered this proposal and concluded that “while we were also attracted to this suggestion, we think that it may be very difficult to implement without creating undesirable side effects for third parties, including other government agencies.”<sup>90</sup> The Government agrees with this concern, but considers it appropriate for the CPRC to consider this issue in greater depth. Mutual agreement to extend time limits could also encourage early resolution.

**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?**

Tracks

101. Another idea not discussed by the Review, but proposed by call for evidence respondents, was to look into the introduction of a ‘track’ system, similar to that used for general (Part 7) civil claims. This would allocate Judicial Review claims to different ‘tracks’, which would have different procedural requirements proportionate to the complexity of the case. This could increase efficiency in the Administrative Court. While it is recognised that currently very important cases can be expedited, we consider it a worthwhile exercise to see whether a more comprehensive track system is possible. In civil claims, the amount claimed acts as a factor to be considered in allocation. This does not apply to Judicial Review. Acknowledging that Judicial Review claims are not as easily allocated as civil cases, the Government invites consultees to recommend factors that can be used to allocate Judicial Review claims to differing tracks.

**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?**

Interveners

102. The Review recommend that criteria for permitting interventions should be developed and published, perhaps in guidance. The Government believes that

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<sup>90</sup> IRAL Report, 4.144

this proposal has merit, but does not believe it appropriate to be taking it forward in primary legislation or rules of court. It will therefore be considered separately.

103. A call for evidence respondent suggested 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. This would assist in identifying potential interveners proactively. We consider this an appropriate measure to invite consultees' thoughts on. Giving the court and Defendant's notice of the potential for interveners could also be useful in estimating cost and length of litigation.

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

Bringing a claim

104. The Panel suggest in their Report that the CPR should include formal provision for a Claimant to file a 'reply' within seven days of receipt of the Acknowledgement of Service (AOS).<sup>91</sup> This would remedy a gap in the current procedure and add much needed clarity on whether and how the court must take into consideration material submitted by a Claimant after an AOS. The Government agrees that this is a proposal worthy of consideration.

**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?**

105. Among the submissions to the call for evidence, further proposals were suggested in this area, including:
- a. amending the CPR so that the Defendant is only obliged to submit Summary Grounds of Resistance where: (i) the Pre-action Protocol was not followed; or (ii) the Claimant has raised (without sufficient notice) new grounds not foreshadowed in the Pre-action Protocol correspondence
  - b. amending the time limit for service of Detailed Grounds of defence and evidence (CPR54.14) to 56 days
106. The Government considers these proposals meritorious as, in relation to (a)(i) above, it links the requirements of the Defendant (i.e. to undertake the lengthy task of writing Detailed Grounds of Resistance) to the conduct of the Claimant.

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<sup>91</sup> IRAL Report, 4.153

If the Claimant has failed to follow the Pre-Action Protocol, which could have obviated the need for a Judicial Review to be filed, then it seems disproportionate for Defendants to be compelled to draft detailed grounds before permission is granted.

107. This is equally applicable to (a)(ii), as the requirement for detailed grounds to be drafted is disproportionate when a Claimant could have provided the opportunity for the Defendant to explain their position at the pre-action stage, but chose not to do so.

**Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?**

108. In relation to paragraph 105(b) above, the Government considers that greater time for submitting detailed grounds will give public authorities greater time to appropriately consider the merits of the case, and provide a detailed account. This helps the court, as submissions will be better argued, thus making the Judicial Review process more effective for all court users.

**Question 16: As set out in para 105(b) above, is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?**

109. It was also suggested by respondents to the call for evidence that there could be greater guidance on the Pre-Action Protocol (PAP) procedure. The Government invites consultees to submit 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.”<sup>92</sup> The Government considers it likely that greater clarity as to the working of the PAP could reduce the need for Judicial Review claims to be brought when they could have been resolved pre-proceedings.

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<sup>92</sup> IRAL Report 4.74

## 7. Economic impacts

110. At this stage we have not carried out a full assessment of the economic impact of the proposals in this consultation document because of the lack of information available to us. However, we have summarised below the impacts that we have been able to identify in specific areas where we have information on which we can draw, specifically in relation to removing Cart Judicial Reviews (see paragraphs 48-52 above). We would welcome information and views on this to help us improve the quality of our assessment.

- a. **Cart:** Removing Cart Judicial Reviews would remove 779 cases per year. We anticipate this would reduce HMCTS income through court fees but also, at the same time, reduce the number of High Court Judge sitting days required. We will work to calculate the net impact on MoJ/HMCTS finances.
- b. **Ouster clauses:** As our reforms aim only to give effect to ouster clauses which already exist in other legislation, the impacts of these clauses should have already been accounted for in the Impact Assessments for the legislation they are enacted under.
- c. **Remedies:** As our proposals concerning remedies are discretionary, it is difficult to predict the economic impact of these proposals and further information would be required.
- d. **Procedure:** Our proposals in relation to procedure are merely to take them forward as suggestions to the CPRC where they will be subject to further scrutiny.

111. We will publish a government response to this consultation in due course which will set out those reforms we intend to implement. We will produce a full impact assessment at that stage that sets out the economic effects of our policy and summarises the costs and benefits of the proposals. In the meantime, we will work to uncover additional sources of information to identify potential impacts. As such, we are keen to benefit from the knowledge and experience of the respondents to this consultation to further develop our understanding of those costs and benefits to help up develop a comprehensive assessment to accompany the Government response.

**Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?**

## 8. Equalities impacts

112. Under the Equality Act 2010, public authorities have an ongoing duty to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between those with different 'protected characteristics'. The nine protected characteristics are: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity. In response to this obligation we have made an initial assessment of the impact of our proposals on people with protected characteristics.
113. Based on our initial evaluation of the policy options, we do not believe that there is any direct discrimination from these proposals. However, the majority of Cart Judicial Reviews relate to immigration and asylum matters. It is therefore reasonable to anticipate that our proposals may have a differential impact on individuals with the protected characteristics of race and religion/belief. We consider that this could constitute indirect discrimination but that any such impact is likely to be extremely limited given that, as identified in the IRAL report, only 0.22% of Cart Judicial Reviews actually result in a finding that there has been an error in law. Therefore we think the policy is justified and that there is a good case for the proposed reforms. Further, removing Cart is not being pursued just in relation to immigration and asylum claims, but will render the whole Upper Tribunal not amenable to Judicial Review.
114. We acknowledge however that we do not collect comprehensive information about court users generally, and specifically those involved in Cart proceedings, in relation to protected characteristics. This limits our understanding of the potential equality impacts of the proposals for reform.
115. To help the Government fulfil its duties under the Equality Act 2010, we would welcome information and views to help us gain a better understanding of the potential equality impacts that our proposals may have.



**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?**

**We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about Cart Judicial Review Claimants, and their protected characteristics.**

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

## 9. Conclusion

116. We hope this consultation and the Report will stimulate productive debate on our proposals, and recent trends in Judicial Review.
117. The Government believes there is a case for targeted, incremental change, and the Report provides a convincing analysis of a steady expansion of Judicial Review, and growing trends where Judicial Review is used in a way which seems to go beyond its traditional role as a supervisory jurisdiction. As explained in the first sections of this document, the Government agrees with the Panel that these developments have been spurred on both by Parliament and the courts themselves, and indeed it is right for the courts to have a part in such developments. The Government does not think the time is right to propose far-reaching, radical structural changes to the system of Judicial Review.
118. Instead, the Government intends to focus on specific and discrete areas for reform such as ‘Cart’, ouster clauses, or doctrines such as nullity in order to renew the operation of Judicial Review. This will maintain the courts’ discretion in regard to remedies, but make very clear that the courts act to apply what Parliament considers appropriate, and in circumstances where this may be ambiguous that they should strive to discern Parliament’s intent.
119. In their concluding remarks, the Panel emphasised that “one theme which we would like to emerge from our review is the continuing need for respect by judges for Parliament”. And similarly that “respect should be based on an understanding of institutional competence. Our view is that the Government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.”
120. The Government wholeheartedly agrees and hopes the reforms we are proposing would help renew the clear delineations as to the roles and relationship between these three institutions of state.

## 10. Summary of consultation 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?

**Question 2:** Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

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

**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?

**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?

**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?

**Question 7:** Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

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

**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.

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

**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?

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**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?

**Question 15:** As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

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

**Question 17:** Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

**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?

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

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable)	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## 11. Contact details/How to respond

**How to respond:** Please send your response by 29/04/2021 by using the online portal: <https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform>

By mail to:

Judicial Review Reform  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

Or by email to

[judicialreview@justice.gov.uk](mailto:judicialreview@justice.gov.uk)

**Additional ways to feed in your views:** A series of webinars is also taking place. For further information please use the “Enquiries” contact details above

**Response paper:** A response to this consultation exercise is due to be published by summer 2021 at: <https://consult.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 above address.

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

### Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond

## Confidentiality

Information provided in response to this consultation, 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 Data Protection Act 1998 (DPA) 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 will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Consultation principles

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>

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