April 2021

Judicial review reform – Government consultation

ClientEarth submission

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Introduction

1. ClientEarth is an environmental law charity with offices in London, Brussels, Warsaw, Berlin, Madrid, Beijing, Luxembourg and Los Angeles. We use the law to fight climate change, tackle pollution, defend wildlife and protect people and the planet.

2. ClientEarth has extensive experience in domestic, international and EU environmental law as well as crosscutting issues such as human rights. Since its inception in 2007, ClientEarth has engaged in significant environmental litigation in the English courts. To date, we have filed eight judicial reviews in the courts of England and Wales. Of these cases, five were successful in establishing important legal precedents; one was issued protectively to allow the defendant additional time to respond to the pre-action correspondence and was withdrawn shortly after filing by agreement (and with no order as to costs); and two were determined at the permission stage. Perhaps most notably, we have commenced and won three cases against the UK government regarding its compliance with air quality laws.[1] In addition, we joined RSPB and Friends of the Earth in proceedings regarding reforms to costs rules under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus Convention').[2]

3. As an environmental NGO, our focus is on environmental cases, which are mostly captured by Aarhus Convention. However, we will also draw more broadly on our general experience of bringing judicial review challenges.

Opening statement

4. Before considering the specific proposals put forward by government in its consultation document,[3] we make some general comments on the consultation and, in particular, its relationship with the Independent Review of Administrative Law ('IRAL')[4] on which the consultation proposals are to some extent based.

5. The IRAL Panel was established by government following its manifesto commitment to consider judicial review. The manifesto set out an intention to ensure that "judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays."[5] This wording is reproduced on the IRAL webpage.

6. The Panel was established as an expert panel intended to inform government's thinking. It made two clear substantive recommendations. One in relation to so-called *Cart* judicial reviews and the other about the introduction of a new remedy in the form of suspended quashing orders. Overall, the Panel was measured and balanced in its approach. It recognised the incredibly broad scope of its work as

[1] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; *R (ClientEarth (No.2)) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 and *R (ClientEarth (No.3)) v Secretary of State for the Environment, Food and Rural Affairs and others* [2018] EWHC 315 (Admin).
[2] *RSPB and others v Secretary of State for Justice* [2017] EWHC 2309 (Admin).
[3] Ministry of Justice, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law' (March 2021) ('Government consultation document').
[4] Independent Review of Administrative Law (March 2021) ('IRAL Panel Report').
[5] The Conservative and Unionist Party Manifesto 2019, page 48.

indicated by its title and, sensibly, opted to take a more limited approach – focussing on its (admittedly also rather broad) terms of reference. As made clear in the IRAL Panel Report's introduction, "we would not claim or wish to be thought of as having undertaken the "comprehensive assessment" of judicial review or the "review of the machinery of judicial review generally" for which the terms of reference ask."[6]

7. It is concerning then that government has proceeded to make several significant recommendations beyond those advised by the IRAL Panel. Not only has government put forward proposals that go beyond the Panel's recommendations (e.g. mandatory prospective-only remedies and suspended quashing orders), but it has also included proposals the IRAL Panel expressly and clearly caution against (e.g. broader reforms intended to bolster the effect of ouster clauses). It is critical that any changes to the substance or process of judicial review are evidence-based. Government seems to be ignoring this and, in fact, considering changes which the IRAL Panel advised against. In this context, some seriously compelling evidence that counters the Panel's findings is required. We are also cognisant of potential proposals for change in related areas of public law – for instance, the ongoing Independent Human Rights Act Review. Rather than reforming connected areas incrementally, government must be careful to consider and consult on any proposed evidence-based changes in the round, allowing connections to be made and unintended consequences to be identified. Without this, there is a real risk of adverse and inadvertent knock-on impacts flowing from piecemeal change.

8. Also worrying is government's apparent tendency to mischaracterise evidence and findings. For instance, the consultation document scrambles a quotation from Lady Hale.[7] The consultation document notes that "…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"".[8] What Lady Hale actually wrote in her consultation response is (emphasis added) "[i]n the vast majority of cases, *judicial review* is the servant of parliament."[9] This sort of misquoting at best indicates clumsiness and, at worst, reveals a deliberate attempt to mangle the content of established an figure's submission in order to better serve government's agenda. In addition, government will be well familiar with comments made by the Chair of the Review, Lord Faulks, to Joshua Rozenberg in which he very clearly expressed his disagreement with the way in which the IRAL's findings were presented by the Lord Chancellor in the Commons.[10] We cannot know whether the Lord Chancellor's comments belay a lack of understanding of the Panel's findings, or represent a deliberate attempt to skew the very foundations of the Panel's conclusions. What is clear, however, is that it is deeply problematic that government's proposals are based upon this significantly mischaracterised interpretation of its independent experts' conclusions.

9. Judicial review is a critical component of the UK's overall governance structure. It is an essential mechanism through which individuals can hold government and public authorities to account to ensure that they are acting lawfully. It plays a special role as an effective and independent check on the exercise of executive power and, as evidenced by the 'Judge Over Your Shoulder' guidance issued to civil servants, it is quietly influential in improving the quality of public decision-making. The

[6] IRAL Panel Report, Introduction, paragraph 11.
[7] This has been discussed by Joshua Rozenberg: Don't mess with the judges (28 April 2021).
[8] Government consultation document, paragraph 26. Also reflected in the Lord Chancellor's Foreword, paragraph 4.
[9] Lady Hale, IRAL submission, paragraph 2.
[10] Joshua Rozenberg, Faulks defends judicial review (23 March 2021).

value of judicial review and its role in securing the rule of law seem to be echoed by government. However, the way in which government has approached this project to date – with unnecessarily expedited time-frames; refusal to accept expert recommendations; and a failure to provide sufficient evidence bases for its assertions – leads to significant doubts about this government's commitment to maintaining proper administrative accountability and upholding all aspects of the rule of law.

10. As discussed in our response to the IRAL Call for Evidence ('ClientEarth IRAL submission'),[11] environmental judicial review cases are special and reform of judicial review could severely affect environmental litigation brought in the public interest. Such litigation has a particular quality because claims tend not to assert the claimants' personal financial interests but instead relate to general issues of public interest that matter to the whole of society. The environment cannot speak for itself. Only by allowing members of the public to make the case for clean air, unpolluted rivers and the protection of biodiversity, can these interests be protected. It is often members of the public who have the proximity, awareness and concern to identify public authorities' failures to fulfil their duties. It is critical that people can then use this information to seek to improve compliance through legal redress – by acting on behalf of the environment.

11. The special nature of environmental cases is reflected in the Aarhus Convention, which was ratified by the UK in 2005. The purpose of the Convention is to give members of the public (and groups of individuals who form environmental charities and other associations including NGOs) procedural rights in environmental matters. Its three pillars give members of the public rights to: access to information; participation in decision-making; and access to justice, all regarding environmental matters. Its primary focus is to empower individuals and NGOs to be able to defend the public's rights to, and interest in, a healthy environment.

12. The Aarhus Convention enshrines the right to access justice in environmental cases as an integral component of the "right of every person of present and future generations to live in an environment adequate to his or her health and well-being".[12] This is consistent with recent developments in international human rights law regarding the right to a healthy environment.[13]

13. A core aspect of the Aarhus rights is the ability to access the courts. The Convention is a critically important piece of international environmental law with which the UK should entirely comply. However, the UK has repeatedly been found to be in breach of certain aspects of the Aarhus Convention.[14] Compounding this, there is now a real risk that inadequately considered changes to judicial review could result in further non-compliance with the Convention as well as undermining both the rule of law and the critical role that individuals and NGOs play in protecting the environment.

[11] ClientEarth IRAL submission (October 2020), paragraphs 32-37.
[12] Article 9 in conjunction with Article 1 Aarhus Convention.
[13] See, for instance, John H. Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles' (January 24, 2018).
[14] See, for instance, Aarhus Convention Compliance Committee, Decision VI/8k (14 September 2017).

Impacts on devolved jurisdictions

Responsive to:

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

14. We agree with the submissions made to the Panel that, "without exception", opposed, or at best were not persuaded of, the need for reform within the devolved nations.[15]

15. We agree with the conclusions reached by the IRAL Panel on this topic. In particular, we emphasise our support of the IRAL Panel's conclusion which "underline[s] the fundamental importance of…consultation" in relation to reform in the devolved nations[16] and its conclusion that it is "for the institutions of devolved government in Scotland and Northern Ireland to decide whether to adopt any procedural changes that might be introduced in England and Wales in implementation of or following our recommendations."[17]

Remedies

Responsive to:

- 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 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?

Introduction

16. Before considering government's specific proposals in relation to remedies, it is valuable to consider the role and purpose of remedies in the judicial review context. The critical significance of the availability of relief is demonstrated through requirements for effective relief in international law

[15] IRAL Panel Report, Chapter 5, paragraph 5.38.
[16] IRAL Panel Report, Chapter 5, eighth conclusion.
[17] IRAL Panel Report, Chapter 5, ninth conclusion.

including in the Aarhus Convention[18] and the European Convention on Human Rights (the 'ECHR').[19] These legal obligations give clear expression to the court's role to see that justice is done.

17. In this light, government's willingness to propose changes that could deprive people of relief and, in its own words, "lead to an immediate unjust outcome"[20] is deeply concerning and, if realised, could amount to a clear violation of international obligations.

Suspended quashing orders

18. Creating the possibility for courts to grant suspended quashing orders following judicial review is an interesting proposal worth real and careful consideration. In the ClientEarth IRAL submission, we noted that the "practical value of judicial review could be improved if the scope of potential remedies was expanded to include more nuanced and constructive options such as the ability to modify a decision."[21] Government's proposal is different from this but we recognise it has potential merit – although whether this is realised depends on precisely how this new remedy is introduced.

19. As we see it, suspended quashing orders could be positive if they enable the court to be more flexible in the grant of remedies. As noted in government's consultation document, suspended quashing orders could allow the courts greater flexibility to impose stricter remedies. They may also enable the courts to be more constructive in their approach to cases by providing more of a steer on a recommended course of action than is generally available now.

20. There has been some discussion about whether the current possibility of being granted liberty to apply following a judicial review is effectively equivalent to the proposed suspended quashing order. We are not convinced that this parallel is well drawn. ClientEarth has benefitted from liberty to apply in our clean air litigation.[22] However, in granting liberty to apply in our third case Mr Justice Garnham recognised that this was "a wholly exception[al] course for the Court to take."[23] The route is not frequently used. In any event, the nature of an order for liberty to apply is quite different from a suspended quashing order. Liberty to apply requires the claimant to continually and closely monitor the defendant's actions following judgment, and relies on the claimant possessing the wherewithal and inclination to take the matter back to court. A suspended quashing order – as we understand it – would function differently. Instead, if certain conditions established by the court were not met following a specified period of time, the relevant decision would be quashed. A suspended quashing order could be more automatic, and certainly not reliant on the position of the claimant to apply to the court. In this sense, although liberty to apply remains helpful in certain situations, suspended quashing orders will provide a different and completely new form of remedy.

21. Our view is that neither a presumptive nor a mandatory approach to introducing suspended quashing orders would be appropriate. Instead, the court should have the necessary discretion to ensure that it

[18] Article 9(4) requires that the procedures under Articles 9(2) and 9(3) "shall provide adequate and effective remedies, including injunctive relief as appropriate…"
[19] Article 13 requires that people whose rights and freedoms set out in the Convention have been violated "shall have an effective remedy…"
[20] Government consultation document, paragraph 61.
[21] ClientEarth IRAL submission, paragraph 62.
[22] *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 and *R (ClientEarth (No 3)) v (1) Secretary of State for Environment, Food And Rural Affairs (2) The Secretary of State for Transport and (3) Welsh Ministers* [2018] EWHC 398 (Admin).
[23] At [16].

can grant adequate and effective remedies – particularly in matters connected with environmental and human rights issues. Currently, judicial review remedies are, on the whole, discretionary. Existing and proposed encroachments onto the court's discretion are already concerning. A restriction on the court's ability to grant remedies following the new environmental review process established through the Environment Bill, for instance, has been hotly contested by senior lawyers.[24]

22. Attempts to fetter the court's discretion in the field of remedies risk offending the rule of law. When granting remedies, courts take into account whatever factors they deem relevant in order to reach an appropriate and just resolution. The court has the expertise, not only in judicial review process and precedent, but also in the facts before it to come to a suitable decision and appropriate position on relief. To remove this flexibility by a presumptive or mandatory requirement for a particular type of order would seriously undermine the role of the court and risk adversely affecting the quality and appropriateness of remedies.

23. Further to this, the suggested considerations that the court might take into account when considering whether a suspended quashing order is appropriate are cause for concern. In particular, those which tie the potential availability of a remedy to the cost and / or burden of granting such a remedy are problematic. For instance, government suggests that judges might consider "whether remedial action to comply with a suspended order would be particularly onerous/complex/costly" when determining what remedy should be applied.[25] To give this consideration such weight is deeply worrying as it would undermine the courts' ability to ensure that justice is done. More broadly, it is inappropriate for government to legislate to prescribe when a suspended quashing order should be granted. As above, if this new form of remedy is introduced, it should be left to the courts to determine and develop approaches for its appropriate use.

24. We do not agree that s.102 Scotland Act 1998 provides an appropriate precedent for the creation of a new remedy of suspended quashing orders in judicial review. We note that the IRAL Panel Report – although making reference to this provision – does not seem to suggest that the precise language be used as a precedent. We welcome some aspects of s.102 – for instance, the power to suspend a decision is discretionary. However, we do not agree that mandatory considerations should be legislated for as is the case in s.102(3) where the court is directed to "have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected". In addition, s.102 seems to have a narrower scope and is perhaps envisaged to be used in exceptional circumstances – it is limited to ultra vires legislation; secondary legislation and actions by the Scottish Government. This clearly does not cover the range of issues that might be subject to a judicial review challenge.

25. It is important that this proposal, if brought forward, is done so appropriately. We are concerned by comments made as part of the Lord Chancellor's statement to the House of Commons on the IRAL. In rationalising the suspended quashing order proposal, he stated "*[i]nstead of the sledgehammer of remedies that demand immediate resolution and lead to rushed policy, I want to create a system that encourages solutions to be found through political will rather than legal dispute, so that policy making as an exercise can be much more collaborative and better informed.*"[26] The tension at the heart of this statement – political will versus legal dispute – is concerning. It perhaps indicates that this proposal is intended to tackle a perceived concern by government reflected in the Conservative

[24] For instance at a webinar co-hosted by Greener UK and Leigh Day held March 2021.
[25] Government consultation document, paragraph 56.
[26] HC Deb 18 March 2021, vol 691, col 505.

manifesto that judicial review is at risk of "abuse… to conduct politics by another means." Perhaps the intention is more radical: to remove issues from the legal arena and reframe them as political questions. In response, we emphasise that suspended quashing orders – if introduced – must be granted by the court, exercising its usual unfettered discretion, and on terms the court determines. The suspended quashing order is inevitably the product of legal dispute – it only exists because the court has made a finding through judicial review proceedings of subsisting unlawfulness. This new remedy must not be established as a political lever, masquerading as a judicial power.

Prospective-only remedies

26. Government's proposal to introduce prospective-only remedies is concerning. This was not considered or recommended by the IRAL Panel.

27. As the consultation itself recognises, the imposition of prospective-only remedies "could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy".[27] It is deeply disturbing that this eventuality is acceptable to government.

28. Government seeks to rationalise prospective-only remedies (at least in the context of statutory instruments) on the basis that this would "best serve" "legal certainty, and hence the Rule of Law". This assertion, however, is not well-made. Rather than enhancing legal certainty, certainty would be undone: people could no longer be sure that only lawful laws will have effect.

29. In addition to this, government fails to reflect that the rule of law is generally considered to consist of a variety of values, principles and concepts. There is no one definition or 'thing' that is the rule of law. Sometimes, the different components that make up the rule of law may seem to be in conflict or inconsistent. Government's failure to recognise this and its consequent implication that prospective-only remedies would *only* benefit the rule of law is dangerous.

30. As government recognises, there will be cases where individuals have no remedial recourse. This outcome itself offends the rule of law. Not only this, but it is inconsistent with the international legal obligations outlined above under the Aarhus Convention[28] and the ECHR.[29]

31. Further, decisions unlawfully made will continue to have effect, thereby undermining the role of the law and, with this, the incentive for decision makers to reach decisions made in the public interest and requiring use of public money lawfully first time around.

32. This proposal must not be brought forward in any form – applicable to challenges of statutory instruments or otherwise; as a discretionary option; as a presumption or as a mandatory requirement.

Nullity

33. Both the IRAL Panel Report and the government's consultation document go to some length in attempting to determine ways for reconciling the concept of nullity with the recommendation to

[27] Government consultation document, paragraph 61.
[28] As above, Article 9(4) requires that the procedures under Articles 9(2) and 9(3) "shall provide adequate and effective remedies, including injunctive relief as appropriate…"
[29] As above, Article 13 requires that people whose rights and freedoms set out in the Convention have been violated "shall have an effective remedy…"

introduce the possibility of suspended quashing orders and, in the case of government's proposals, prospective-only remedies.

34. As has been suggested by other commentators, our view is that this discussion may be unnecessary. It is well-accepted that judicial review remedies are granted on a discretionary basis. There is no obligation for the courts to quash an unlawful decision. For instance, in our second clean air case, the parties agreed (and the court ordered) that the 2015 Air Quality Plan should not be quashed and that, instead, it ought to remain in place until it was replaced by a new Air Quality Plan. As such, in spite of decisions such as *Ahmed (No. 2)* [2010] UKSC 5, it is not clear that any changes are required to enable and empower courts to grant new sorts of remedies.

35. The evidence-base for the sweeping and extensive legislative clarification proposed by government simply does not currently exist. Significant further thinking, research, evidence-gathering and analysis is required before these proposals can be legitimately progressed.

Ouster clauses

Responsive to:

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

36. Government's intention to introduce means for giving effect to ouster clauses is very concerning. The consultation document fails to ask the most important preliminary questions: whether and, if so, why this objective is valuable, necessary or positive.

37. We are particularly concerned about the way in which government has presented certain of the IRAL Panel's conclusions in this context. Government draws attention to the Panel's "two conclusions" which are "clear and present a marked distinction from the status quo".[30] These conclusions are that:

- Parliament should not exclude Judicial Review generally as it would be contrary to the Rule of Law; and
- Parliament *could* oust or limit the jurisdiction of the courts in particular circumstances if there is 'sufficient justification for doing so'.

38. It is troubling that the government consultation does not reflect in any meaningful way the cautions and caveats the Panel draws out in particular in relation to the second conclusion. Whilst Parliament might technically be able to limit the courts' jurisdiction, "[t]he wisdom of taking such a course and the risk in doing so are different matters."[31]

39. In addition, discussion of these complex issues is somewhat muddied. The overlapping and unnecessarily complicated discussion which ensues is an unfortunate and inappropriate basis on which to found potentially significant constitutional changes.

40. Following consideration of some of the possible ways in which Parliament *could* legislate to limit justiciability the Panel notes that it would (original emphasis) "*not* recommend any of the broader

[30] Government consultation document, paragraph 88.
[31] IRAL Panel Report, paragraph 2.89.

options set out in the previous paragraph."[32] The Panel goes on to state that "[t]he decision to legislate in this area is ultimately a question of political choice. But when deciding whether or not to do so, the Panel considers that Parliament's approach should reflect a strong presumption in favour of leaving questions of justiciability to the judges."[33]

41. Government's approach to consideration of the concerns raised and reflected by the Panel is, in many ways, similar to the instances in which it proposed ouster clauses could be more effective: "specific and limited".[34] This selective analysis is a deeply misguided way of arriving at the development of reform proposals and must be revisited and considered in the full context in which any implemented proposals will be operating.

42. Government's rationale for these proposals is not fully nor coherently explored, nor is it justified beyond the broad assertion that ouster clauses should have greater effect and that this is connected with parliamentary sovereignty: "ouster clauses are a reassertion of Parliamentary Sovereignty".[35] The Panel made very clear that legislation which has the effect of limiting or excluding judicial review ("an exceptional course") must be grounded in the existence of "highly cogent" reasons.[36] Government's response and consultation document fails to make a sufficiently robust case that such reasons exist.

43. Government's ultimate goal here seems to be to enable an increase in the matters, decisions and actions which are beyond the scope of judicial review. Without a compelling case for this – without the "highly cogent" reasons the Panel requires – it is impossible to justify this goal. As others have noted compellingly, the current proposals seem intended to extensively reduce the scope of what is judicially reviewable.[37] This raises serious concerns in the context of the UK's compliance with international law obligations under the Aarhus Convention, which require that Parties provide access to review procedures to challenge certain decisions, acts and omissions of public authorities.[38]

44. Government has proposed to legislate for a 'safety valve' provision on the interpretation of ouster clauses. Unfortunately, little detail is provided on the "multitude of ways"[39] in which this might work. This seems to support the argument that the 'safety valve' would serve as little more than window-dressing to apparently alleviate a severely curtailed judicial review remit.

45. Whilst, as set out above, we do not support this proposal as the underlying rationale has not been adequately interrogated or demonstrated, we emphasise that any such provision, if introduced even contrary to expert and practitioner opinion, must be general – with the courts able to interpret and develop the meaning of 'exceptional circumstances' as it sees fit in line with the rule of law.

46. Overall, we reiterate the point made above: Government has failed to provide sound rationale or compelling arguments as to why changes in the way in which ouster clauses function is required. These proposals, if progressed, seriously risk undermining the rule of the law; severely narrowing the scope of public decisions susceptible to judicial review and, thereby, weakening public accountability.

[32] IRAL Panel Report, paragraph 2.98.
[33] IRAL Panel Report, paragraph 2.100.
[34] Government consultation document, paragraph 89.
[35] Government consultation document, paragraph 86.
[36] IRAL Panel Report, paragraph 2.89.
[37] Professor Mark Elliott, Judicial review reform II: Ouster clauses and the rule of law (11 April 2021).
[38] Aarhus Convention, Articles 9(1), 9(2) and 9(3).
[39] Government consultation document, paragraph 91.

Procedural matters

Responsive to:

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

Promptitude requirement

47. We welcome the Panel's recommendation and government's proposal to take steps to remove the promptitude requirement from judicial review claims. This move would assist all parties to litigation by increasing clarity and certainty around time limits and deadlines. In addition, it is necessary in order to comply with international law and, as such, we fully support it.

48. In 2010, the Aarhus Convention Compliance Committee (the 'ACCC') found that the promptitude requirement failed to meet the obligations set out in Article 9(4) of the Aarhus Convention. The ACCC recommended that "…in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought…".[40]

49. We appreciate recognition by the IRAL Panel and government of the issues raised by the promptitude requirement and urge government to take steps to secure its removal.

Extension of time limits

50. We very much welcome the IRAL Panel's finding that it would "certainly not favour any tightening of the current time limits for bringing claims for judicial review".[41] As set out in the ClientEarth IRAL submission, a clear time limit of 3 months with the scope for this to be extended in certain cases is reasonable and fair to all parties.[42]

51. We do not agree with the suggestion in question 10 that consideration should be given to extend the time limit generally in order to encourage pre-action resolution. However, we welcome the proposal to invite the CPRC to consider the possibility of allowing parties to agree to extend time limits. To

[40] ACCC, Findings with regard to Communication ACCC/C/2008/33 concerning compliance by the UK (October 2010), paragraph 138.
[41] IRAL Panel Report, paragraph 4.149.
[42] ClientEarth IRAL submission, paragraph 59.

ensure enhanced certainty in the process and incentivise proper compliance with pre-action steps, this proposal should be refined. One option might be to enable parties to agree to an extension of up to one month if they are engaged in pre-action discussion or negotiation on substantive issues and only where the defendant has filed a full response to the claimant's pre-action letter. In any event, we note that, pursuant to CPR 3.1(2)(a), the court has discretion to amend the time for compliance with any rule.

52. Separately, and as noted in the ClientEarth IRAL submission, the six week deadline for planning cases is far too short and should be extended.[43]

Viability of a 'track' system

53. The possibility of developing a 'track' system for judicial review claims was not formally put to, considered or recommended by the IRAL Panel.

54. Government's consultation document contains no meaningful discussion of why this might be helpful; no real detail on how this system might work and makes no suggestions about how allocation could function. As Government recognises "Judicial Review claims are not as easily allocated as civil cases…"[44]

55. The consultation document contains a brief assertion that a track system "could increase efficiency"[45] with no analysis. In fact, there is a risk that a rigid framework of tracks could lead to unnecessary inefficiencies as a result of uncertainties or disagreements about the appropriate track. We struggle to see a positive case for the introduction of a track system and therefore caution against further consideration.

Interveners

56. Interveners can play an important role in judicial review challenges, assisting the court by providing valuable evidence and fresh but highly relevant perspectives on matters.

57. The possibility of introducing a requirement to identify potential interveners was not formally put to, considered or recommended by the IRAL Panel.

58. We have several concerns about this proposal. For instance, it could create unnecessary pressure and lead to inefficiencies and delays in the progress of cases as parties take time to consider whom they might identify. In addition, it is not clear whether an individual or organisation not identified by a party at the outset would be able to apply to intervene in a case down the line. Limiting interveners only to those identified by the parties risks limiting the court's power to hear from any persons who may provide valuable assistance.

59. In addition, the court already acts as gatekeeper to potential interveners. Through the existing approach established in CPR 54.17, the court has ultimate control as to from whom it will hear; through what medium (written evidence or oral submissions); and to what extent (number of pages or

[43] ClientEarth IRAL submission, paragraph 56.
[44] Government consultation document, paragraph 101.
[45] Government consultation document, paragraph 101.

length of time). The consultation document does not provide any explanation as to why the existing approach is unsatisfactory or requires reform.

60. This proposal risks compounding existing provisions that have had a chilling effect on the role of interveners. The Criminal Justice and Courts Act 2015 introduced new rules, which increase the risk of adverse costs being awarded against an intervener.[46] Rather than considering the introduction of further obstacles to interveners in judicial review cases, government should instead revisit and revaluate the value of existing barriers.

Formal Reply step

61. As noted in the consultation document, the IRAL Panel recommended the introduction of a formal Reply step in the Civil Procedure Rules. We support this suggestion and agree that the CPRC should be invited to consider the introduction of provision for this.

62. This proposal would formalise what is already a relatively common practice. In doing so, as acknowledged in the consultation document, this would provide helpful certainty that the Reply would form part of the court's reading.

Detailed Grounds of Resistance

63. The proposals suggested here regarding changes to the obligations around the Defendant's Detailed Grounds of Resistance ('DGoR') were not formally put to, considered or recommended by the IRAL Panel.

64. We are not certain that the proposals are so different from the procedure currently adopted: it is not the case that a public authority will always file a DGoR. For instance, in our recent challenge of the Secretary of State for Business, Energy and Infrastructure's decision to approve development at the Drax gas power plant in North Yorkshire, the defendant did not file a DGOR, instead relying on its summary grounds. As such, we are not sure that there is any need to amend the CPR in the terms suggested.

CPR 54.14 time limit

65. The proposal suggested here to extend the time limit for the filing of a DGoR from 35 to 56 days was not formally put to, considered or recommended by the IRAL Panel. If a defendant requires more time, they can ask the court to grant this under its CPR 3.1(2)(a) powers. We therefore do not consider that there is a clear need to establish a longer time period as the usual course.

66. Beyond this, our only comment is that any change to the time limit must be accompanied with a right to seek expedition in the event of an urgent matter, requiring a speedier timetable.

Pre-action Protocol ('PAP') procedure

67. The Government's consultation document invites comment on the functioning of the PAP procedure.

[46] Criminal Justice and Courts Act 2015, s.87.

68. We welcome the introduction of further guidance on the PAP procedure, particularly aimed at improving the quality of replies to pre-action letters and compliance with the duty of candour. As noted in the ClientEarth IRAL submission, the defendant's duty of candour and co-operation is an extremely important element of judicial review proceedings.[47] This duty – and its distinction from the disclosure process applicable in other forms of litigation – is crucial to the effective functioning of judicial review. It reflects that judicial review exists to improve the quality of public decision-making. In order to do this, it is imperative that the court is cognisant of all of the relevant information.

69. We have recent experience of a defendant failing to respond to certain proposed grounds and therefore fully explain its case until after proceedings had been commenced despite having the opportunity to do so in pre-action correspondence. This is deeply frustrating and can result in wasted time and resource.

70. Increased engagement at an early stage will improve would-be claimants' abilities to assess issues and determine whether or not to progress a matter to litigation. This, in turn, should result in fewer, better cases being commenced.

Assessment of impacts

Responsive to:

- 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?

71. It is very difficult to provide or point to specific information which government should consider in developing its full impact assessment because which proposals will be taken forward and precisely how those proposals will be formulated is not yet clear for many of the topics covered. In several areas, government is – through this consultation – seeking views as to how certain ends might best be achieved or proposing multiple alternative possibilities for reform. Without further clarity, it is difficult to be specific in terms of how government should go about assessing impacts. This leads to, as the IRAL Panel put it in their conclusions on devolution-related issues, a degree of "shooting in the dark" in attempting to understand and assess matters.

72. However, it is crucial that proposals made are all entirely evidence-based. Some of the topics considered in this consultation document are incredibly complex, technical and, at times, abstract. This does not mean they matter less, but it does mean it is all the more important to be clear and certain about the full rationale and objectives as well as real-world consequences. This includes those consequences that may not be initially apparent such as damage to our extremely delicate constitutional balance; maintenance of all aspects of the rule of law; and trust in, and the international reputation of, our legal system.

73. In addition, government must ensure compliance with its obligations under international law including the Aarhus Convention and the ECHR.

[47] ClientEarth IRAL submission, paragraphs 53-55.

Responsive to:

- 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?

74. People's access to, and understanding of, judicial review should be at the heart of reform proposals. The IRAL Panel recommended that "[m]ore should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals."[48] It is deeply concerning that this recommendation does not appear to have even been considered by government.

75. In relation to environmental justice more specifically, it is broadly accepted that environmental issues disproportionately affect some of the poorest people in our society.[49] Because of this, it is critical that constitutional processes and institutions facilitate and support those who are marginalised and under-represented in holding government and public authorities to account in this area. And yet, the overall impact of government's proposals would be to limit the scope of judicial review; to narrow access to justice.

Responsive to:

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

76. The proposed reforms to judicial review cover a broad range of areas. Some amount to welcome procedural tweaks, others go the very heart of the judicial review mechanism. But these are not the only changes to our laws and justice system that government is currently considering or implementing.

77. The post-Brexit legal framework is, in some areas, still being established. In other areas, although in place, its full ramifications are yet to be understood. This means ongoing uncertainty. The Independent Human Rights Act Review Panel is preparing its report. The Police, Crime and Sentencing Bill which would make significant changes to our criminal justice system is progressing through Parliament. The CPRC has made proposals on interventions before the Supreme Court.

78. Any new potential changes need to be fully impact assessed not only as discrete proposals but also cumulatively. There is a significant risk of unintended consequences as a result of so many changes taking effect simultaneously. In this sense, the Lord Chancellor's preference for an "iterative approach to reform" is worrying.[50] Proper consideration of the proposals *taken together* which includes assessment of unintended consequences must be completed before any of the ostensibly separate changes can be progressed.

Conclusions

79. As reflected above, our view is that the IRAL Panel was measured, pragmatic and balanced in its approach to the huge task it was set. Whilst we support some of its conclusions, there are others

[48] IRAL Panel Report, paragraph 4.173.
[49] See, for instance, Joanna H. Barnes, Tim J. Chatterton, James W.S. Longhurst, 'Emissions vs exposure: Increasing injustice from road traffic-related air pollution in the United Kingdom' (2019), Transportation Research, 56 and Environmental Law Foundation and BRASS, 'Costs Barriers to Environmental Justice' (2009).
[50] Government consultation document, paragraph 6.

about which we have reservations. Overall however – and perhaps most importantly – we welcome the tenor of its overarching concluding observations.

80. We are very concerned that the broad scope and extensive nature of some of government's proposals entirely ignore the Panel's recommendation that government should "think long and hard" before seeking to curtail the powers of our independent and highly-regarded judiciary.[51]

81. Government has failed to make an evidenced case that there are problems requiring the type and extent of solutions proposed. As the IRAL Panel comments, "[o]n one view, a degree of conflict [between the judiciary, the executive and Parliament] shows that the checks and balances in our constitution are working well".[52]

82. At the heart of this debate is a legal process that helps to ensure public accountability and access to justice for people and their environment. Judicial review is a central part of our constitution. Its effective functioning is essential to maintenance of the rule of law and to the proper organisation and functioning of society. Some of government's current proposals could serve to fundamentally alter judicial review. The results of rushing through these changes without a thorough and diverse evidence base and without proper consideration for unintended consequences could be catastrophic.

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[51] IRAL Panel Report, Conclusions, paragraph 10.
[52] IRAL Panel Report, Conclusions, paragraph 11.