Submission to the Independent Review of Administrative Law

Introduction

LawWorks (the Solicitors Pro Bono Group) welcomes the opportunity to make a short submission the Independent Review on Administrative Law (IRAL). In making this submission, we do not claim to have the same level of expertise or evidence that specific public law interest groups can offer. Bringing a judicial review (JR) on a pro bono basis is relatively rare due to the cost implications; it does sometimes happen but it requires very careful planning between claimants and their lawyers. However, we are also interested in the issue of judicial review and administrative law from a wider access to justice perspective. Judicial review serves as a useful (and often deterrent) "backstop", providing a last, rather than first, resort process for remedying public bodies' unlawful decisions, and an important mechanism to uphold and re-enforce the rule of law. In our view, judicial review needs to be more rather than less accessible.

About LawWorks

LawWorks (the Solicitors Pro Bono Group) promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. We champion pro bono because of the positive contribution and difference it makes for individuals, communities and society. We work (in England and Wales) with the solicitors' profession and with our members, the Law Society, law schools and law students, law centres, advice agencies and others to develop and support pro bono legal services, and to promote access to justice for all.

Our key programmes include:

- **Clinics** - we support a network of around 290 independent pro bono legal advice clinics across England and Wales, providing training, resources and guidance, and professional indemnity insurance. 70,261 people were helped by clinics in 2019, 37,551 clients (53%) received legal advice, and 32,710 were given information or referred to other services.[i]

- **Not-for Profits-programme** - we broker pro bono advice for smaller charities and social enterprises on a broad range of legal matters;

- **Bespoke casework and representation** ('secondary specialisation') - our in-house solicitors triage and supervise cases, including social security tribunal appeals, unpaid wages cases and support for the parents and carers of children with life-limiting conditions;

- **Online platforms** – we have been developing websites (such as free 'Legal Free Answers') to facilitate pro bono legal volunteering and access to free legal advice.

We work collaboratively, for example with our partners in the Litigants in Person Support Strategy (LIPSS). In addition, LawWorks promotes, supports and facilitates pro bono by providing training, knowledge sharing events, pro bono awards, and engaging in policy - working with the regulators professional bodies and stakeholders to encourage a favourable environment for pro bono within a strong access to justice infrastructure.

Sections 1 – 2: Terms of reference, scope of judicial review and its impact on the discharge of central or local governmental functions

We will answer these questions (1 to 5) together, as we regard these as linked issues which relate to underlying legal policy matters which this review is bringing into question.

We do not accept that any of the aspects of judicial review highlighted by Question 1 and IRAL's terms of reference, including the grounds for review, impede the proper or effective discharge of central or local governmental functions. Public bodies should always operate under the rule of law and within the framework of their legal powers and responsibilities; indeed we would argue that judicial review supports good governance and clarifies the law – this is its important constitutional purpose.

As well as restating this, it is important to demystify and challenge misconceptions. The procedure and costs regime in the Administrative Court mitigate heavily against unmerited claims progressing. The Public Law Project (PLP) can supply robust data on this, but not only is the number of JR applications low (less than 5,000 annually and has been reducing) in relation to the number of public law decisions taken on a daily basis, a significant proportion do not even reach permission stage, and of those that do around 30% of cases are then withdrawn following offers of settlement.[ii] Also notable from PLP's research, with reference to IRAL's concerns over fettering prerogative powers, fewer than ten cases decided in the last eight years concern the use of prerogative powers and most were decided in favour of the executive.

As noted in our introduction above, undertaking JR casework does not easily lend itself to pro bono programmes; public law initiatives that do draw on pro bono such as the Public Interest Law Centre (PILC run by Camden Law Centre) do so by combining the resources of legal aid, crowdfunding and pro bono, and seeking protective cost orders. Over 95% of PILC's cases are resolved/settled at the pre-action stage, with public bodies accepting that they had acted inconsistently with their legal obligations. On the rare occasion that proceedings are issued, a further 3% are resolved either prior to, or shortly after, the permission stage.

In respect of LawWorks programmes, the work that pro bono clinics do is focussed primarily on early advice with some also doing civil or family representation, and we not aware of clinics taking on public law cases at any significant scale.[iii] Our more in depth ('secondary specialisation') pro bono casework programmes focus largely on tribunal representation. Our project (in partnership with the charity Together for Short Lives) supporting the parents and carers of children with life-limiting conditions, often involves challenges to housing and social care decisions. This can include issuing warnings about breaches of statutory duties where other actions (such as referring to Ombudsman schemes or internal complaints) are insufficient. Often it can be the implied threat of judicial review (i.e., as a backstop) that ensures public bodies respect their legal duties.

Questions 3 – 4 raise the issue of whether some elements of judicial review could be codified to provide greater clarity, transparency and certainty about the scope of judicial review. Whilst we can see the argument that a clear and well communicated statutory framework could demystify and assist transparency for non-lawyers, it is important to recognise that the very basis of judicial review in our common law system is that administrative law comes under the High Court jurisdiction as developed through case-law, with an important role for judicial discretion. Doctrines and concepts such as '*Wednesbury unreasonableness*' have developed over time as approaches to public law and administration have changed, and judges are highly aware of the limits of their competence to decide on policy questions. Statutory codification could risk narrowing the justiciability of public/executive powers, which is a crucial check and balance on the government and public bodies, to ensure that powers are exercised lawfully. It would pose access to justice issues if justiciability were narrowed, since certain decisions may then not be subject to scrutiny by the courts. Whilst the issue of awareness and transparency is important, this is best approached through public legal education.

Section 3: Process and procedure of Judicial Review

Rather than going into detail on each and every question, we would highlight that the process is already extremely challenging from an access to justice perspective, so we would not favour any reforms that could present further barriers - such as shorter time limits, additional cost barriers, or restrictions/stricter tests on parties' "standing" to bring a claim.

Costs

In our view the combined costs of pursuing a judicial review, including court fees, expert reports and disbursements, are a significant deterrent and can prevent meritorious cases from going forward. The cost of litigation should never be so excessive so as to frustrate citizens' ability to bring a claim and have their rights realised; however the disparity between the resources available to claimants (i,e., those who may have a need to bring valid claims), and respondents (i.e., public bodies with in-house legal teams) is in itself a significant access to justice issue. 'After the Event Insurance' is generally not available in judicial review. Whilst legal aid is available for judicial review claims, it is highly restricted and many potential claimants find themselves just above the threshold for legal aid – despite being on low incomes. Until recently regulations made it difficult to claim any legal aid remuneration for pre-permission work, this often had to be undertaken pro bono.

The courts can use Cost Capping Orders (CCOs), for public interest cases which can be important in helping to mitigate some of the financial barriers to access justice, but claimants will still normally be exposed to some financial risks of litigation. CCOs are subject to criteria which are strict and narrowly defined; they can only be awarded if permission is granted, but by this stage the claimant is already at risk of exposure. As usually costs are incurred before a decision is given on permission, even if a claimant's lawyers are acting pro bono at this stage, the defendant won't be, and will often seek the costs associated with compiling their evidence in response to the claim and drafting their summary grounds of defence. So even where CCOs are granted, claimant organisations are not protected from any adverse costs up to and including the permission stage. Therefore, any further disproportionate costs risk for claimants at the permission stage (as implied by question 8) would pose a real access to justice detriment, since claimants would be deterred from bringing meritorious claims.

The onus should be on defendants to keep costs down at the permission stage, and there is there is a strong argument for extending cost protection up to and including the permission stage. On the issue of the proportionality of costs in general, the Jackson [Civil Litigation Costs] Review concluded that the costs of JRs were often "more manageable" than the costs of private law litigation.[iv]

Standing

It is concerning that the IRAL appears to suggest (in questions 8 and 13) that public interest standing is currently treated too leniently by the courts.

Public interest standing for charities and civil society organisations is vital to the proper functioning of the UK's rule of law and the accessibility of the justice system. For example, an often used aphorism in the field of environmental law is that "trees can't litigate", so environmental interest groups do so instead; by analogy it needs to be understood that vulnerable individuals with legal needs are often in no position to litigate without being able to tap into the support of civil society.

Pre-action steps and ADR

The IRAL legitimately raises the question of what more can be done to resolve matters at the pre-action stages. Whilst it may be understandable that Government may want to see the number of judicial review cases reduced, approaches it could consider include issuing more comprehensive guidance to public bodies around legal compliance, rather than restricting access to justice and restricting the means by which the rule of law is upheld. PLP make the point that strengthening public authorities' obligations of candour and disclosure could assist in earlier resolution. There are also ways that public sector Ombudsman schemes and administrative law could work together more effectively, for example: in 2011 the Law Commission proposed a mechanism by which the public service ombudsmen can ask a question of the Administrative Court on a point of law.[v]

A recent roundtable of stakeholders organised by the National Council for Voluntary Organisations (NCVO) and a leading law firm, which brough together a group of charities and civil society organisations, discussed issues around early resolution. From the experience of participants settlement is often achieved following good use of pre-action correspondence highlighting the issues at stake. This re-enforces the importance of allowing sufficient time in the judicial review procedure, especially at the early stages, to facilitate good pre-action engagement. PLP estimate that a significant proportion of cases - up to 60% - are in fact settled prior to formal commencement of proceedings.

Remedies

Finally, IRAL suggests that judicial review remedies can be "inflexible" (Question 9), however, consistent with our previous responses, it is important that these remain within the sphere of judicial discretion. There is a risk that by regulating or limiting the remedies that are currently at the courts' disposal this could weaken the role of the court and make judicial review less effective, which could be a retrograde step. Remedies available should not only be "declaratory," but also include orders that can effect change (e.g., quashing orders).

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Endnotes

[i] Lawworks Clinics Network report 2019 https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-clinics-network-report-2019
[ii] https://publiclawproject.org.uk/ (Draft response)
[iii] https://www.pilc.org.uk/ (Draft response)
[iv] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf
[v] https://www.lawcom.gov.uk/project/public-services-ombudsmen/