

## Response to IRAL Call for Evidence 16 October 2020

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### 1. Introduction: a problem of substance as well as process

1.1. The exercise of power by the executive does not occur in a vacuum. It forms part of a broader constitutional framework whereby executive power is vested in government and the government and all those exercising power on behalf of the state must exercise that power lawfully. **Judicial Review ('JR') constitutes an important accountability mechanism within this framework.** The scope of the independent review as it currently stands (which focusses on whether JR should be curtailed) could equally be framed as a review of whether or how to extend executive power. Any review of executive power, and whether or how it should be exempt from any existing checks and balances (including JR), must ensure both legitimacy in process as well as substance. Likewise, and because JR can act as an important accountability mechanism for violations of rights, any changes to the existing framework must include participation of citizens (rights holders).<sup>1</sup> Indeed, JR is a pathway to justice and access to justice in and of itself constitutes a common law right in the UK.<sup>2</sup> The terms and the scope of this particular review merits close scrutiny for the purposes of ensuring it is conducted in a methodologically sound way and in a way that engages in a substantive acknowledgment of how JR performs a key cornerstone of the UK's constitution.

1.2. **This evidence makes suggestions on how the current consultation process requires improvement, as well as responding to the substantive issues raised in the call for evidence. It is divided into the following five sections:**

1. Introduction
2. Summary of Recommendations
3. Part A: PROCESS, The Call for Evidence: Bias towards a particular outcome
4. Part B: PROCESS, The Survey to Government Departments: Lack in Methodological Rigour
5. Part C: SUBSTANCE, Scrutiny of the Subject of the Review

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<sup>1</sup> By citizens we mean the broadest interpretation of those who can currently access JR in the UK including those who do not meet the threshold of 'citizenship' in a legal sense for reason of immigration status. Interchangeable terms include 'rights holders' or 'litigants'.

<sup>2</sup> *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 (26 July 2017), para.104

## **2. Summary of Recommendations**

- 2.1. Legitimacy in the outcome of the review will depend on legitimacy of the process/methodology. The Call for Evidence ('CfE') and the questionnaire are not fit for purpose in their current format. The Panel may wish to revisit the methodology.
- 2.2. We recommend that the Panel reconsider the process of engagement with a view to ensuring best methodological practice. It may be helpful to include an expert in research methods as part of the review process to ensure the means of generating data to inform decision making is sufficiently rigorous to ensure both reliability and validity of data.
- 2.3. The survey included in the CfE, to be sent to specific stakeholders, i.e. government departments, will not provide reliable data for interpretation for those groups who are excluded from the survey population, in this case citizens themselves.<sup>3</sup> So, how will the participation of citizens be secured? We recommend genuine engagement with citizens and suggest the Panel work in conjunction with each of the national human rights institutions across the UK to co-design a methodology that can ensure genuine participation of citizens in any review process on JR reform.
- 2.4. We recommend that the Panel carefully consider which steps need to be taken to ensure that the survey instrument development process, implementation and analysis will adhere to best methodological practice. Involving an expert in research methods and survey research would help ensure that the survey instrument meets the minimum standards of good practice to safeguard the validity and reliability of survey results.
- 2.5. We are concerned that the current timeline of estimated completion by end of year 2020 is, at the very least, ambitious and potentially risks undermining the independent review process. Further time and resources should be deployed to ensure the methodology is rigorous, includes citizen engagement, and allows sufficient time for analysis, deliberation and dissemination in advance of any proposed reform.
- 2.6. The title of the review presents as an independent review of administrative law. However, the substance of the questions relate to the exercise of JR. JR is one component of administrative law. Whilst JR could be improved to make rights and remedies more effective, it would be antithetical to the development of human rights practice across the UK to remove or hinder access to JR as a route to remedy for violations of rights. It remains a key cornerstone of accountability in reviewing the exercise of power by the state.
- 2.7. The scope of the review simplifies the complexities of the devolved dimension. Scotland and Northern Ireland's devolved powers include the administrative law system in each jurisdiction, including courts and court processes, meaning any review or proposed reform relating to Northern Ireland or Scotland engages with devolved matters by default. Wales, on the other hand, does not have devolved power over the legal system. However, there is a process underway to consider further devolution in this regard.<sup>4</sup> The idea that devolution means the same thing in each jurisdiction ignores the complexity and huge jurisdictional divergences between each devolved settlement. We recommend that any curtailment of JR is a matter for the jurisdiction of England, or England and Wales only. Any proposed reform

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<sup>3</sup> C. Roberts, Mixing modes of data collection in surveys: A methodological review. ESRC National Centre for Research Methods Briefing Paper (NCRM/008) (2007), at 4-5

<sup>4</sup> Commission on Justice in Wales, <https://beta.gov.wales/commission-justice-wales>

relating to Scotland or Northern Ireland would require to undertake a completely separate and bespoke process for those separate legal jurisdictions.

- 2.8. We are concerned that the omission of the human rights dimension from the scope of the review will mean that important evidence does not come before the Panel for consideration. A review of administrative justice/ JR/ executive power cannot be comprehensively assessed unless the human rights dimension is considered. Citizens must be proactively included in any such process.
- 2.9. Devolved jurisdictions are on more progressive human rights reform trajectories than England (see for example the UNCRC Incorporation (Scotland) Bill; right to adequate housing incorporation in Wales; Ad Hoc Committee on Bill of Rights for Northern Ireland; First Minister's Advisory Group and National Task Force on Human Rights Leadership in Scotland incorporation economic, social, cultural and environmental rights). Any reduction or inadvertent tampering with the rights regimes in the devolved context would undermine access to effective remedies for violations of human rights within these emerging rights regimes.
- 2.10. We recommend that any review of JR, or of the rights deliberated under JR, includes those rights not contained in the ECHR, but can nonetheless form part of everyday court deliberations including economic, social, cultural and environmental rights. I.e., a review of JR as a route to remedy for human rights must include a broader definition of rights than contained in the ECHR.
- 2.11. The efficacy of JR as an important accountability mechanism can be framed as follows: it provides a means through which to ensure parliament's will is given effect to; it can ensure that Ministers, government departments and public authorities act lawfully; it can address 'blind spots' in legislative processes meaning rights that are inadvertently missed in legislative drafting or those concerning minority groups can be addressed; and finally it can act as a life-saving safety net for those facing destitution or a risk to life. There should be no curtailment in relation to the role JR plays in the protection of rights and as a route to a remedy.
- 2.12. There is scope to improve JR through expanding and enhancing JR as a route to remedy for a violation of a right. This can be supported through the following:
- Improve access to advice and financially support independent advice centres
  - Address the prohibitive costs of JR
  - Enhance access to legal aid to support those on low incomes
  - Expand reasonableness review to meet international human rights standards
  - Explore more innovative remedies, including the deployment of structural remedies to address systemic cases.
- 2.13. Finally, we recommend close scrutiny of the ouster clauses in the Internal Market Bill that seek to render Regulations made under the Bill exempt from JR on human rights grounds. Whilst the UK continues to be a party to the Council of Europe treaty, the right to an effective remedy (Art 13) will continue to apply thus leaving the door open to a remedy for a breach in the European Court of Human Rights. Notwithstanding the availability of remedies at the supranational level, the Panel may wish to consider the merit in removing domestic remedies

in the determination of rights, something that undermines the rule of law and changes the relationship between citizen and state to the detriment of the citizen.

### **3. PROCESS: scrutiny of the methodology (Parts A & B)**

- 3.1. The Call for Evidence ('CfE'), as produced by the Independent Review of Administrative Law ('IRAL') Panel, is not fit for purpose when measured against best practice in research methods. There are two distinct issues at stake that prevent the CfE from fulfilling its purpose in gathering views from a variety of stakeholders in an impartial manner.
- 3.2. The first concerns the CfE as a whole. The CfE is biased towards a particular outcome, i.e. that JR should be curtailed and this causes problems from the outset with regard to the scope and purpose of the review. In addition, the CfE excludes one of the most significant stakeholders from the discussion, namely citizens. This is made evident by inaccessible legal terminology in the CfE and by failing to secure any form of proactive participation of citizens in the review. This is discussed in Part A below.
- 3.3. The second concern is with regard to the questionnaire contained within the CfE. Again, this questionnaire is not fit for purpose from a methodological point of view, as it lacks a transparent plan for how the survey will be distributed and how survey data will be analysed. Furthermore, the design of the survey instrument shows significant flaws in question design. This is discussed in Part B below. Part C of the written evidence turns to the substantive issues in the review, namely problems with the definitions of 'administrative law' and 'devolution'; the omission of human rights from the CfE; the efficacy of JR as a route to remedy; and the potential to improve and enhance JR.

#### **3.4. Part A - The Call for Evidence: Bias towards a particular outcome**

##### ***3.5. Section 1: Inherent bias in the formulation of the CfE***

- 3.6. The Terms of Reference for the IRAL identify the areas for inquiry in a relatively open manner through the use of the word 'whether', although that term could be viewed as ambiguous and is generally used to assess a limited set of possibilities. The scope of the consultation document is much broader, however, in that it is (or should) be interested not only in agreement or disagreement, but also understanding questions of 'how' or 'why'.
- 3.7. Despite the open wording in the Terms of Reference, the consultation document does not iterate this neutrality, but phrases questions in a manner that is unbalanced and inherently biased towards a particular position. This is also a matter of concern in the questionnaire designed for government departments (IRAL, Section 1), which we will return to in Part B.
- 3.8. The CfE as a whole, as well as the survey in Section 1 of the consultation document, are designed using an open-ended question format, which allows respondents to answer in their own words. This is in contrast to a closed-question format where respondents must choose from a limited set of answers. One of the main advantages of open-ended questions is that it allows people to 'follow their own thoughts and are not forced in the frame of reference of the researcher'.<sup>5</sup> This only holds true, of course, if the questions meet the standards for good

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<sup>5</sup> E. Saris & I. Gallhofer, *Design, evaluation, and analysis of questionnaires for survey research* (2<sup>nd</sup> Ed.), (Hoboken: John Wiley & Sons, Inc 2014), at 99

(survey) questions, which at its most basic level means that 'a good question is one that produces answers that are reliable and valid measures of something we want to describe'.<sup>6</sup>

3.9. *Reliability* and *validity* are valuable constructs in qualitative research and important measures for assessing if questions are formulated in ways that meet the aims of the inquiry. Reliability generally refers to the extent that answers are consistent, meaning that if questions are consistent, answers are consistent as well.<sup>7</sup> The construct of validity is multi-dimensional, but for our purposes here, it will suffice to say that validity refers to the extent to which the measurements of the survey or inquiry provide the information needed to meet its purposes.<sup>8</sup> In essence, the legitimacy of survey results is wholly and critically dependent on the integrity and quality of the questions asked.

3.10. According to Glasow, well-constructed questions adhere to the following characteristics:

- clarity; questions do not include double negatives, for instance
- avoid ambiguity and preclude alternative interpretations
- the language used is consistent with the educational level of the intended respondents
- the tone of questions avoids biased wording that evokes an emotional response
- avoid biased wording, which include a predisposition either for or against a particular perspective
- avoid biased context results, which occur when questions are placed in a particular order, so that the respondent is already thinking along a particular line of thought based on preceding questions
- avoid double-barrelled questions where respondents may wish to answer affirmatively to one part of the question and negatively for another<sup>9</sup>

3.11. This is not an exhaustive list of characteristics, but a good indication of some of the minimum standard to be considered to produce questions that are fair. Each of these issues is considered below, as the following examples illustrate how the poor formulation of questions in the CfE violates neutrality and thus undermines the legitimacy of the exercise.

3.12. The overarching concern with the formulation of questions in the CfE is biased wording. Each of the following examples contain a form of bias, which unfairly directs the respondent towards a particular line of thinking. In some cases, biased wording is combined with other ambiguities or poor question formulation/ construction.

3.13. Excerpt 1 (Section 2 – Codification and Clarity, Question 3)

*'Is there a case for statutory intervention in the judicial process? If so, would statute **add certainty and clarity** to judicial reviews? To what other ends could statute be used?'*

3.14. As highlighted in bold text, the question asks whether statutory intervention would 'add certainty and clarity'. This phrasing contains bias, as it is inclined towards one particular

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<sup>6</sup> F. J. Jr. Fowler, *Improving survey questions: Design and evaluation* (Vol. 38), (London: Sage Publications, Inc 1995) at 2

<sup>7</sup> Fowler, 1995, at 2

<sup>8</sup> P. Glasow, *Fundamentals of survey research* (McLean: Mitre 2005) at 1-2

<sup>9</sup> Glasow 2005

perspective. To avoid bias, the question could read instead: 'What is the potential role for statutory intervention in the JR process?'

3.15. Bias is also evident in the following example (Excerpt 2), as indicated in bold text.

3.16. Excerpt 2 (Section 3 – Process and Procedure, Question 7)

*'Are the rules regarding costs in judicial reviews **too lenient** on unsuccessful parties **or applied too leniently** in the Courts?'*

3.17. In addition to containing bias towards costs being 'too lenient', the question is, in fact, comprised of two separate questions. In order to avoid confusion for respondents, the questions should be formulated separately, rather than as a singular question separated by the conjunction 'or'.

3.18. One way of phrasing the question(s) more fairly would be: 'How appropriate are the rules regarding costs in JRs for both successful and unsuccessful parties?' and 'How are these rules applied in the Courts?'

3.19. The following excerpt (Excerpt 3) contains one of the most extreme forms of bias, as it exemplifies an unbalanced request for an answer. A balanced request for an answer means that the question makes it explicit that both affirmative and negative answers are possible. However, if only one answer direction is provided, that request is called unbalanced.<sup>10</sup>

3.20. Excerpt 3 (Section 3 – Process and Procedure, Question 9)

*'Are remedies granted as a result of a successful judicial review **too inflexible? If so, does this inflexibility have additional undesirable consequences?** Would alternative remedies be beneficial?'*

3.21. The wording in this question imposes a particular assumption, in this case leaning towards the view that remedies granted as a result of a successful JR may be 'too inflexible' and furthermore suggests that this 'inflexibility' may have 'additional undesirable consequences'. This question is thus considered unbalanced, because only one side of the scale is indicated.

3.22. In order to avoid leading the respondent, a potential question could be: 'How flexible are remedies granted as a result of a successful JR? Please explain the consequences of this (in)flexibility? Feel free to include suggestions for alternative remedies'.

3.23. The following example (Excerpt 4) can easily be remedied to avoid bias.

3.24. Excerpt 4 (Section 3 – Process and Procedure, Question 11)

*'Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? **If this happens often, why do you think this is so?***

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<sup>10</sup> Saris & Gallhofer, 2014, at 93-94

- 3.25. Again, this question would avoid bias by omitting the words in bold that make the, perhaps unsubstantiated, assumption of frequency that direct the respondent towards a specific answer.
- 3.26. The final example (Excerpt 5) in this section is biased, but also entails ambiguity and lack of clarity and definition.
- 3.27. Excerpt 5 (Section 3 – Process and Procedure, Question 8)
- ‘Are the costs of judicial review claims proportionate? **If not**, how would proportionality best be achieved? Should standing be a consideration for the panel? How are **unmeritorious** claims currently treated?’*
- 3.28. First, there is bias in the sense that the question is only followed by ‘if not’, which suggests that the default answer is that the costs of JR claims are **not** proportionate. This is a ‘leading’ question<sup>11</sup>, which should be avoided. The request would have been more balanced if the option ‘if so’ had also been included in the formulation.
- 3.29. Equally problematic is the term ‘unmeritorious’, which is deployed here as if it is a universal uncontested term, which it clearly is not. Who determines a claim lacks merit? How is this defined? This begs the question as to how a respondent is meant to interpret this term. Will each person reading the question interpret this term in the same way? We suspect that the answer is a resounding no, which violates the integrity of the question and therefore the consistency of the answers as well.
- 3.30. We recommend that the Panel reconsider the process of engagement with a view to ensuring best methodological practice. It may be helpful to include an expert in research methods as part of the review process to ensure the means of generating data to inform decision making is sufficiently rigorous to ensure both reliability and validity of data.**
- 3.31. Section 2: The exclusion of key stakeholders from the CfE**
- 3.32. The introduction to the IRAL consultation document invites contributions from ‘*people who have direct experience in JR cases, including those who provide services to claimants and defendants involved in such cases, from professionals who practice in this area of law; as well as from observers of, and commentators on, the process*’ (p. 4, par. 2).
- 3.33. However, the language used in the consultation document (CfE) is highly academic and legal, constituting a barrier to participation for observers or commentators whose expertise and experience fall outside the area of law. Given the impact of JR across a wide range of stakeholders, not least ordinary citizens, who have experienced an infringement on their (human) rights, this approach severely curtails access for who can access and participate in the independent review.
- 3.34. Furthermore, the survey included in the CfE, to be sent to specific stakeholders, i.e. government departments, will not provide reliable data for interpretation for those groups who are excluded from the survey population, in this case citizens themselves.<sup>12</sup> So, how will the participation of citizens be secured? We recommend genuine engagement**

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<sup>11</sup> Saris & Gallhofer, 2014, at 94

<sup>12</sup> See Roberts, 2007, at 4-5

with citizens and suggest the Panel work in conjunction with each of the national human rights institutions across the UK to co-design a methodology that can ensure genuine participation of rights holders in the review process.

#### **4. Part B - The Survey to Government Departments: Lack in Methodological Rigour**

4.1. The design of a good research instrument, such as a questionnaire, entails careful consideration of various criteria that concern not only the development of the research instrument itself, but also distributing, administering and managing the survey (execution), and the analysis of survey results. The different criteria to be reflected on include the *mode of data* collection (the type of questionnaire, for instance), *quality of the sample* (such as the frame, size, design and response rate), the *quality of the questions as measures* (how well the questions measure the content they are intended to measure) and the *quality of data collection* (such as supervision procedures). These intersecting components of survey design all have the potential to affect the quality of the resulting survey data.<sup>13</sup> Therefore, methodological rigour is of utmost importance to safeguard the quality and reliability of survey outcomes. Each of the criteria outlined here will be addressed in greater detail in the following sections.

#### **4.2. Section 1: Mode of data collection**

- 4.3. The consultation document's indication that the questionnaire will be 'sent' to government departments (Section 1 of the CfE) implies that the survey will be self-administered, distributed via postal or electronic mail. A self-administered survey is just one means of gathering data from an array of options, such as face-to-face administered surveys (interviews), telephone surveys, webcam interviewing, and so on.<sup>14</sup> It is important to note that each particular mode of data collection is limited and varies across a number of different dimensions with regard to suitability. These variations include the extent to which they provide access to different survey populations, differential administrative and resource burdens and the extent to which they are suitable to the administration of questionnaires of different types.<sup>15</sup>
- 4.4. One of the limitations of self-administered surveys is that the researcher does not have much control over how questions are interpreted. Respondents, for example, may not fully understand a particular question and do not have anyone to ask for clarification. Careful questionnaire design is thus particularly pertinent as there is no one present to exercise quality control over meeting question objectives, the quality of answers provided and ensuring all questions are answered.<sup>16</sup>
- 4.5. The decision whether to pose questions as open-ended or closed-ended is one of the most important decisions made, because it affects how respondents answer questions.<sup>17</sup> The questionnaire developed for distribution to government departments is an open-ended question format, which, as stated earlier, allows respondents to answer in their own words. However, some research also suggests that open-ended questions in a self-administered

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<sup>13</sup> F. J. Jr. Fowler, *Survey research methods*, (London: Sage Publications, Inc. 2014) at 150

<sup>14</sup> Roberts, 2007, at 4

<sup>15</sup> Roberts, 2007, at 4-5

<sup>16</sup> Fowler, 2014, at 72

<sup>17</sup> Pew Research Centre (2020). Questionnaire design available at <https://www.pewresearch.org/methods/u-s-survey-research/questionnaire-design/>

survey are not particularly helpful and should be restricted to closed answers.<sup>18</sup> Fowler explains that '[w]hen respondents are asked to answer in their own words, the answers usually are incomplete, vague, and difficult to code, and therefore they are of only limited value as measurements'.<sup>19</sup> This emphasises the point that researchers need to reflect carefully on why they are adopting one method of data collection over another and consider its limitations.

#### **4.6. Section 2: Quality of the sample through potential sampling frame bias**

4.7. How well a sample represents a population depends on a number of different factors that include the sample frame, the sample size, and the specific design of selection procedures.<sup>20</sup> A sampling selection procedure makes choices about which people have a chance of being included in the sample while excluding others. Those people that have the possibility to be included constitute the sample frame.<sup>21</sup> According to the details provided in Section 1 of the IRAL CfE, only those who work for government departments will constitute the sample frame. The CfE provides no further details on how many surveys will be distributed (sample size) nor how non-responses will be managed. Failing to secure data from a high percentage of those selected to be in the sample increases the potential for error, thereby compromising survey results.<sup>22</sup>

4.8. The ability to make generalisations from a sample is limited by the sample frame. Therefore, transparency about who was able to be selected to participate and who was not is crucial, and researchers must, to the extent possible, justify their methodological choices.<sup>23</sup>

4.9. Sending the questionnaire to government departments is highly problematic, as these public bodies are the operational arm of the government. How can the government independently provide input on review of a legal process designed to assess the government's compliance with its duties to the public? Without adequate balance to ensure all stakeholders have equal voice, the participation of government departments in the survey breaches the 'independence' aspect of the consultation process, constituting a conflict of interest.

4.10. Furthermore, as noted above and in Part A, limiting the distribution of the survey to government departments severely curtails the size and composition of the sample, and therefore diminishes the likelihood that survey results will be representative of a broad range of stakeholders.

#### **4.11. Quality of the questions as measures**

4.12. As already outlined in Part A with reference to the questions put forth in the CfE, questions should be formulated in ways that adhere to best practice, which means they avoid ambiguities and bias. Careful survey question design and pretesting are crucial to reducing measurement error. One constructive step that can be taken for good measurement is to create unambiguous questions that provide consistent measures across respondents.<sup>24</sup> This means that all questions should be sufficiently clear, so that each

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<sup>18</sup> Fowler, 2014, at 105

<sup>19</sup> Fowler, 2014 at 105

<sup>20</sup> Fowler, 2014, at 14

<sup>21</sup> Ibid at 15

<sup>22</sup> Fowler, 2014, at 42

<sup>23</sup> Fowler, 2014, at 1

<sup>24</sup> Fowler, 2014, at 97

person interprets them in the same way, and must be directed in such a way as to allow the researcher to measure the responses from multiple respondents. Misinterpretation through poorly formulated questions undermines the reliability and validity of the answers and thus makes it more difficult to assess or measure responses.

4.13. The questions that constitute the survey for government departments in Section 1 of the CfE do not meet the standards of best practice, as illustrated in the following two examples (Excerpts 6 & 7).

4.14. Excerpt 6 (Section 1 – Questionnaire to Government Department, Question 1)

*'In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of JR **seriously impede the proper or effective discharge** of central or local governmental functions? **If so**, could you explain why, providing as much evidence as you can in support?'*

4.15. This question is formulated in a way that violates neutrality, as it is imbalanced towards one side of the scale, making a biased assumption that the various aspects in items a-k, may 'seriously impede the proper or effective discharge of central or local governmental functions'.<sup>25</sup>

4.16. Furthermore, the notion of 'proper or effective discharge' is undefined and ambiguous. How should these words be interpreted? Without a definition or explanation of the terms 'proper' or 'effective', the question is left open for individual interpretation and poses a serious risk of compromising the reliability and validity of the answers.

4.17. The follow-up question asks, 'if so', which is predisposed towards an affirmative response and omits the question 'if not' for balance.

4.18. Consideration should also be given to whether the appropriate follow-up question is to explain 'why' or 'how'. Framing the question in different ways may yield different answers.

4.19. An open question could be phrased in the following manner: '...do any of the following aspects of JR affect the proper or effective discharge of central or local governmental functions? By proper or effective, we mean... Please explain your answer, providing as much evidence as you can in support'.

4.20. The next example (Excerpt 7) is doubly prejudiced, not only because it contains reiterations of severe bias through an unbalanced request, but also because the questions are formulated in a way that evoke a negative emotional response from the reader.

4.21. Excerpt 7 (Section 1 – Questionnaire to Government Department, Question 2)

*'In relation to your decision making, does the prospect of **being judicially reviewed improve your ability to make decisions**? If it **does not**, does it result in **compromises which reduce the effectiveness of decisions**? How do the costs (actual or potential) of judicial review impact decisions?'*

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<sup>25</sup> Saris & Gallhofer, 2014, at 93-94

- 4.22. The first question, which asks, ‘does the prospect of being judicially reviewed improve your ability to make decisions’, contains bias. Firstly, this is a leading question, because the follow-up question begins with ‘if it does not’, pointing the respondent towards a negative response, i.e. the presumption that the prospect of JR does not improve [one’s] ability to make decisions.
- 4.23. Secondly, the wording ‘being judicially reviewed’ frames JR as an action taken towards the reader, rather than the more neutral term ‘judicial review’. Contextualised within the main question and follow-up question, it would be perceived as something negative done towards the reader. Evoking a (negative) emotional response in the reader is another example of biased wording that influences a respondent’s answer.
- 4.24. Given previous examples, it will be clear that the question ‘If it does not, does it result in compromises which reduce the effectiveness of decisions?’ is unbalanced in its formulation. The word ‘compromises’ evokes an emotional reaction, and to ask if something ‘reduce[s] the effectiveness of decisions’ is suggestive and potentially leads the respondent to answer in a particular way.
- 4.25. An open question might state: ‘What potential impact does the prospect of JR have on your decision-making? Please explain.’
- 4.26. It should also be taken into account whether or not to include the final question on cost, as it explicitly makes the cost dimension a relevant issue, whereas in an open question cost may not be a consideration for respondents. Potential question: ‘Do costs (actual or potential) of JR impact decisions?’ or ‘Do costs (actual or potential) of JR play a role in decision-making?’
- 4.27. We recommend that the Panel carefully consider which steps need to be taken to ensure that the survey instrument development process, implementation and analysis will adhere to best methodological practice. Involving an expert in research methods and survey research would help ensure that the survey instrument meets the minimum standards of good practice to safeguard the validity and reliability of survey results.**
- 4.28. Questions should be piloted to ensure they are unambiguous. This may be achieved through focus group discussions or individual cognitive interviews to assess the appropriateness and interpretation of survey questions. Pretesting of the survey can be done using an approximation of proposed data collection procedures.<sup>26</sup>
- 4.29. The choices and procedures entailed in the survey research should be made transparent in order to assess the integrity of the research instrument and the resulting survey outcomes. This transparency should also explain how survey results will be analysed, in order to avoid critiques of cherry picking to support a predetermined outcome.
- 4.30. One final point concerns the time line given for the CfE process and the entailed questionnaire to be distributed to government departments. We have recommended measures for improving the methodological approach to the CfE and survey to ensure procedural rigour, transparency and legitimacy of review outcomes. These processes also entail allocated time for evaluating the input received from the CfE and survey responses.

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<sup>26</sup> Fowler, 2014, at 112

4.31. **We are concerned that the current timeline of estimated completion by end of year 2020 is, at the very least, ambitious and potentially risks undermining the independent review process. Further time and resources should be deployed to ensure the methodology is rigorous, includes citizens engagement, and allows sufficient time for analysis, deliberation and dissemination in advance of any proposed reform.**

## **5. Part C - SUBSTANCE: Scrutiny of the Subject of the Review**

### **5.1. Definitions**

#### **5.2. – ‘Administrative Law’**

5.3. The definition of administrative law as constituting, or as synonymous with JR, is a problem of both process and of substance. From the process perspective, the review suggests a holistic review of ‘administrative law’ when the subject of the review is solely ‘judicial review’. From the substance perspective, this means the substantive focus of inquiry is much narrower than the title suggests. As above, we have also raised concern that the IRAL too narrowly focusses on a curtailment of JR, which could also be framed as an extension of executive power.

5.4. The title of the review presents as an independent review of administrative law. However, the substance of the questions relates to the exercise of JR. JR is one component of administrative law. Administrative law can be understood broadly as the sphere of decision making processes exercised by the state. Within that sphere is the realm of administrative justice, part of which is JR, and JR sits alongside other pathways or routes to remedy including tribunals, ombuds, complaint procedures and various hybrid processes including public inquiry-based decision processes.<sup>27</sup> JR cannot be assessed in isolation from other administrative law justice mechanisms. Nor can its efficacy be assessed unless placed within the wider context of administrative law and justice. One important point to note from an international human rights law perspective is that whilst alternative (non-judicial) administrative remedies are welcome, it is important that an ultimate right of JR of administrative procedures is available to satisfy the right to an effective remedy, in particular when human rights and equality issues are engaged.<sup>28</sup> Indeed, some form of judicial remedies are indispensable if human rights are to be made effective in practice.<sup>29</sup> **Whilst JR could be improved to make rights and remedies more effective, it would be antithetical to the development of human rights practice across the UK to remove or hinder access to JR as a route to remedy for violations of rights. It remains a key cornerstone of accountability in reviewing the exercise of power by the state.**

#### **5.5. ‘Devolution’**

5.6. A further concern regarding definitions within the IRAL call for evidence is the reference to devolution. The terms of the review seeks evidence on JR in relation to ‘reserved matters’. Reserved matters differ across each of the three devolved jurisdictions and so this terminology means different things across each UK jurisdiction. For example, employment law and equality law is largely reserved in Scotland, whereas both are largely devolved in Northern Ireland. Scotland and Northern Ireland’s devolved powers include the

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<sup>27</sup> Tom Mullen, ‘Access to Justice in Administrative Law and Administrative Justice’, in E. Palmer et al (eds) *Access to Justice, Beyond the Policies and Politics of Austerity* (Bloomsbury 2016) at 70

<sup>28</sup> also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24 at para.9

<sup>29</sup> *ibid*

administrative law system in each jurisdiction, including courts and court processes, meaning any review or proposed reform relating to Northern Ireland or Scotland engages with devolved matters by default. Wales, on the other hand, does not have devolved power over the legal system. However, there is a process underway to consider further devolution in this regard.<sup>30</sup> In each jurisdiction there are legal volumes produced by eminent administrative law academics and lawyers and each jurisdiction operates as a separate administrative law system sharing many of the same principles.<sup>31</sup> The Panel reserves the right to recommend *'certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies'* (para.3). There is no clarification given for what would constitute 'minor and technical changes' and what conflict resolution procedures would be put in place to address conflicts between reserved and devolved policy. The idea that devolution means the same thing in each jurisdiction ignores the complexity and huge jurisdictional divergences between each devolved settlement.

- 5.7. Second, the CfE stipulates it will not engage with devolved policy but will look at 'UK-wide policy' and that it will facilitate *'careful consideration of any relevant devolved law and devolution matters arising, engaging with devolved governments and courts'*. Once again, this works on the premise that JR is open to curtailment through an executive decision, rather than being a matter for the UK or devolved legislatures exercising power on behalf of citizens, who are able to seek legal redress through JR as a means of holding the executive to account.
- 5.8. It is difficult to see how the Panel will reconcile UK-wide policy that seeks to regress or reduce the use of JR as an accountability mechanism when devolved administrations are, at the same time, on more progressive trajectories that are seeking to enhance and expand access to effective remedies, including through JR within their respective legal systems. Compare the rhetoric and constant oscillation on whether or not the the Human Rights Act 1998 ('HRA') be repealed or amended to the developments in each of the devolved jurisdictions that seek to enhance access to rights through incorporation of international human rights standards. In Scotland this is evident in the UNCRC (Incorporation) Scotland Bill and in the work of the National Task Force implementing the recommendations of First Minister's Advisory Group on Human Rights Leadership to incorporate economic, social, cultural and environmental rights. In Wales, in relation to proposals to incorporate the right to housing, and in relation to existing legislation that better embeds rights into administrative law practices. And finally, in Northern Ireland where an Ad Hoc Committee on a Bill of Rights for Northern Ireland is considering the means through which rights protection might be enhanced in accordance with the commitments of the peace agreements. JR forms a key accountability mechanism under each of these devolved legal regimes. Any reduction or inadvertent tampering with the rights regimes in the devolved context would undermine access to effective remedies for violations of human rights.

**5.9. We recommend that any review or proposed reform is focussed on the jurisdiction of England, or England and Wales only. Any proposed reform relating to Scotland or**

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<sup>30</sup> Commission on Justice in Wales, <https://beta.gov.wales/commission-justice-wales>

<sup>31</sup> On Scotland see Alan Page, *Constitutional Law of Scotland* (W. Green 2015), Chris Himsworth and Christine O'Neill, *Scotland's Constitution: Law and Practice*, (Bloomsbury 2015) and on jurisdictional differences in judicial review see A. Page, 'The judicial review caseload: an Anglo-Scottish comparison', *Juridical Review* (2015) and C. McCorkindale et al, 'Judicial Review at Thirt'y, (Special Ed.) *Juridical Review* (2015). On Northern Ireland see Gordon Anthony, *Judicial Review in Northern Ireland* (2<sup>nd</sup> ed) (Hart Publishing 2014). On England and Wales see Michael Fordham, *Judicial Review Handbook* (7<sup>th</sup> ed.) (Hart Publishing 2020).

**Northern Ireland would require to undertake a completely separate and bespoke process for those separate jurisdictions.**

#### **5.10. Omission of Human Rights from IRAL**

5.11. We are concerned that the omission of the human rights dimension from the scope of the review will mean that important evidence does not come before the Panel for consideration. A review of administrative justice/ JR/ executive power cannot be comprehensively assessed unless the human rights dimension is considered. As Konstandinides, Marsons and Sunkin have assessed:

*'Human rights are now fundamentally entwined into the life of JR and while surgical procedures may be used to try to separate them out, there is a real risk that the patient will not survive: that no sustainable reforms will be produced and that those reforms will ignore major issues at their core.'*<sup>32</sup>

5.12. The omission of the human rights dimension is of particular concern if the outcome of the review results in recommendations to curtail the exercise of JR. This will inadvertently result in a backsliding, or retrogressive measure, in terms of human rights compliance for the state because JR acts as an important accountability mechanism for the protection of civil, political, economic, social, cultural and environmental rights. Retrogressive measures are prohibited in international human rights law except in limited and controlled circumstances. Any deliberate retrogressive measures by the state requires the most careful consideration and the least restrictive approach (please see above with regard to our concerns around methodology).<sup>33</sup> Any violation of a right as a result of a deliberate retrogressive measure can only be justified in the most exceptional of circumstances and States must be able to explain that the action is reasonable, proportionate, non-discriminatory, temporary, that it does not breach the minimum core obligation and that all other potential alternatives were considered.<sup>34</sup>

5.13. Of course, courts are familiar with adjudicating ECHR cases, and JR is the route through which these cases are adjudicated. This helps support the UK meet its obligation to provide an effective remedy for a breach of the Convention.<sup>35</sup> JR also provides a forum for consideration of those rights not covered by the ECHR, including economic, social and cultural rights, albeit in a limited sense because the rights are not directly incorporated. The area of social rights law is often misunderstood and under-utilised in the public law domain across the UK's legal jurisdictions.<sup>36</sup> Whilst public law engages with social rights across areas such as health, social care, education, social security, housing and social services it does not traditionally embrace broader conceptual frameworks that encompass the full

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<sup>32</sup> Theodore Konstandinides, Lee Marsons and Maurice Sunkin, 'Reviewing JR: The constitutional importance of the Independent Review of Administrative Law 2020', UKAJI Blog 24 September 2020, <https://ukaji.org/2020/09/24/reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/>

<sup>33</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, para.9

<sup>34</sup> UN Committee on Economic, Social and Cultural Rights, 'Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis', 16 May 2012

<sup>35</sup> Article 13 ECHR is not directly incorporated by way of the HRA, nonetheless it forms part of the state's obligations under the treaty.

<sup>36</sup> For a discussion on this see Paul Hunt, Social Rights Are Human Rights BUT THE UK SYSTEM IS RIGGED, Centre for Welfare Reform (2017) available at <https://www.centreforwelfarereform.org/uploads/attachment/584/social-rights-are-human-rights.pdf>

international human rights framework. When social rights are addressed in the public law sphere they tend to feature under the aegis of something else.<sup>37</sup> In other words, our discourse around social rights is dominated by existing domestic human rights structures and our existing domestic human rights structures marginalise social rights to the sidelines – such as forming aspects of civil and political rights, or featuring as part of formal equality.<sup>38</sup> **It is important that any review of JR, or of the rights deliberated under JR, includes those rights not contained in the ECHR, but can nonetheless form part of every ay court deliberations. I.e., a review of JR as a route to remedy for human rights must include a broader definition of rights than contained in the ECHR.**

#### 5.14. Efficacy of JR as an Accountability Mechanism

5.15. JR plays an important role in facilitating routes to remedy for those who experience violations of human rights. This has become all the more pertinent in the context of COVID where violations of rights are exacerbated. Indeed, COVID has acted as a lens revealing and exacerbating structural inequalities leading to increased poverty levels with the burden of COVID falling on the poorest resulting in economic and social rights violations.<sup>39</sup> **It is vital citizens have access to remedies when the executive either deliberately or inadvertently violate a right.** In some cases, JR can provide a lifeline for those facing destitution resulting in inhumane living conditions. The court can adopt both a deferential approach where appropriate, and offer more interventionist and immediate relief where appropriate. The courts must therefore strike a balance between what is termed weak form and strong form review.<sup>40</sup> It is important the rarer examples of the latter are not used to undermine the efficacy or prevalence of the former. Indeed, the UK statutory framework strikes a balance in favour of deference through the operation of the Human Rights Act 1998 meaning that parliamentary supremacy remains intact should it prove impossible to find a human rights compatible interpretation of incompatible legislation.<sup>41</sup>

5.16. By way of example, in the recent cases of *Johnson*<sup>42</sup> (22 June 2020) and *Pantellerisco*<sup>43</sup> (20 July 2020) the court found that the algorithm used by the Department of Work and Pensions ('DWP') to calculate social security eligibility was unlawful and irrational.<sup>44</sup> In each of these cases the JR litigants lost out on essential social security to help support them because of the day of the month on which they were paid.<sup>45</sup> DWP has been asked to change the algorithm to remove the inherent flaw and to ensure others do not face the same issue. On 10 August 2020 in the case of *O'Donnell*, the court found that the

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<sup>37</sup> Katie Boyle and Edel Hughes, Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights, (2018) International Journal of Human Rights Vol 22. 43-69

<sup>38</sup> Boyle and Hughes, *ibid*

<sup>39</sup> Devlin, H. and Barr, C. (2020). *Poorest areas of England and Wales hit hardest by Covid-19* – ONS. The Guardian, 12 June 2020

<sup>40</sup> For a discussion on weak v strong form review see Mark Tushnet, 'Weak Courts, Strong Rights' JR and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press, Oxford, 2008) at 238 and Katie Boyle, *Economic and Social Rights Law. Incorporation, Justiciability and Principles of Adjudication*, (Routledge 2020) at 23.

<sup>41</sup> Compare for example section 4 HRA with the strike down powers that are available under the devolved systems. Boyle, *ibid* at 99. See also Katie Boyle and Leanne Cochrane 'The complexities of human rights and constitutional reform in the United Kingdom: Brexit and a Delayed Bill of Rights: Informing the Process' Journal of Human Rights (2018) Vol. 16 (1) 23-46

<sup>42</sup> *Secretary of State for Work And Pensions v Johnson & Ors* [2020] EWCA Civ 778 (22 June 2020)

<sup>43</sup> *Pantellerisco & Ors, R (on the application of) v The Secretary of State for Work and Pensions* [2020] EWHC 1944 (Admin) (20 July 2020)

<sup>44</sup> *Johnson* at para.115

<sup>45</sup> In the case of *Johnson* the litigant was paid on a lunar cycle and in *Pantellerisco* the applicant was paid four weekly. The DWP calculated eligibility on a monthly basis.

Pension Act (Northern Ireland) 2015 was incompatible with the ECHR in excluding a bereaved father and his children from bereavement support because his deceased wife was unable to work before her death as a result of severe disabilities.<sup>46</sup> The court was able to interpret the legislation in compliance with the ECHR by reading in an interpretation of the Act that allowed the provision of social security to the deceased's family. This case essentially addressed a 'legislative blind spot' where the policy behind the legislation had failed to take into account that it would result in discrimination against those with severe disabilities unintentionally.<sup>47</sup> Addressing legislative blind spots by way of JR is an important function of our constitutional framework. Even the strongest critics of JR concede that majoritarian politics that inadvertently or deliberately ignore the rights of a minority is 'a real limitation to the argument for the legitimacy of legislation [over JR]'.<sup>48</sup>

5.17. On 7 July 2020 in the case of *Cox* the court found that Regulations made under the Northern Ireland (Welfare Reform) Act 2015 resulted in an outcome that was '*manifestly without reasonable foundation*'.<sup>49</sup> In this case Lorraine Cox was unable to avail of social security support without a form from a doctor confirming that she would die within six months as a result of her motor neurone disease diagnosis. The court found that there had been a violation of Article 14, Article 8 and Article 1 Protocol 1 ECHR. The court invited the parties to take time to digest the contents of the judgment and invite them to jointly present the court with an agreed draft final Order dealing with the questions of the appropriate remedies and costs.<sup>50</sup> Following the judgment, the Northern Ireland Assembly considered the case and passed a motion that the six month criterion for terminal illness be removed from the Regulations.<sup>51</sup> This is an example of the court acting as a key accountability mechanism, involving the participation of both litigants in discussing the remedy and ultimately encouraging the legislature to revisit the unlawful Regulations, hence ensuring deference to the legislature whilst respecting the rights of the citizen.

5.18. JR also facilitates access to emergency relief in emergency circumstances. For example, on 7<sup>th</sup> October 2020 the court found that a victim of trafficking who had given birth on 22 September should be provided with appropriate housing provision by 2pm on Friday 9<sup>th</sup> October.<sup>52</sup> In this case the mother and her baby were vulnerable and in crisis. The accommodation the mother had been provided with on a temporary basis was an unclean room used for storage with a broken fridge, broken window letting in cold air and an inadequate bed placed dangerously close to a boiler.<sup>53</sup> The respondent in the case had notice that suitable accommodation was required from as early as July 2020 and the claimant had been moved between six different locations between July and September (both before during and after giving birth). Without a permanent address, she was unable to register with a GP or have support from a midwife following a caesarean section and other health care workers had raised concern about the risk of infection. The judge emphasised her awareness that '*[c]ourts are always anxious to identify the appropriate division of labour between hard pressed public authorities, with their experience and expertise, who have the*

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<sup>46</sup> *O'Donnell v Department For Communities* [2020] NICA 36 (10 August 2020)

<sup>47</sup> Para.12 'Put simply the respondent did not evaluate the likely impact of the contribution condition on surviving spouses or civil partners with young children in circumstances where the deceased was disabled so as to be unable to meet the condition.'

<sup>48</sup> Jeff King, *Judging Social Rights* (Cambridge University Press 2011) at 165. R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) at 26-48 and J. Waldron, 'The Core of the Case Against Judicial Review', (2006) 115 *Yale Law Journal*, 1347 at 1404

<sup>49</sup> *Cox, Re Judicial Review* [2020] NIQB 53 (7 July 2020) at para.104

<sup>50</sup> *Ibid* para.109

<sup>51</sup> Official Report, (Hansard), Tuesday 6 October 2020, Volume 131, No 4

<sup>52</sup> *QH v Secretary of State for the Home Department* [2020] EWHC 2691 (Admin) (07 October 2020)

<sup>53</sup> Para.13

*bigger picture and aware of the constraints that they face. That court will always want to give great weight to an evaluative judgment that can be seen, that identifies the issue and that reasons out a conclusion in relation to them.*' However, in this case no evidence was provided by the Secretary of State explaining the decision making process around the suitability of the accommodation provided. In other words, there was no evidence that a decision maker had applied their mind to the circumstances at hand to ensure that the vulnerable mother and her baby were accommodated in suitable accommodation in accordance with the state's legal obligation to do so.<sup>54</sup> Given all of the circumstances, including the vulnerability of the mother and her child, and the risk posed to their lives, the court issued an interim order instructing suitable accommodation be provided before the end of the week whilst reserving the final outcome of the case to a future date.<sup>55</sup> Again, whilst providing this interim emergency relief the court has facilitated an opportunity for the decision maker to revisit and justify their approach at a later date.

5.19. JR can therefore perform an emergency backstop for those vulnerable to destitution or where there is a risk to life, and this in turn can help the decision maker avoid potentially lethal errors. JR can provide a life-saving safety net. The failure to secure interim relief such as in the example above can prove fatal.<sup>56</sup> This is evident, for example, in the case of Mercy Baguma who was in extreme poverty and found dead next to her starving baby shortly following her right to work being revoked as a result of her failed asylum claim, or the death of Errol Graham, who starved to death in his apartment in circumstances where DWP's safeguarding policies fell short.<sup>57</sup> Indeed JR may help identify and remedy such circumstances earlier on, hence helping the decision maker fulfil their statutory obligations and avoid unnecessary hardship and in some circumstances saving lives.<sup>58</sup>

**5.20. We recommend that there should be no curtailment in relation to the role JR plays in the protection of rights and as a route to a remedy.**

**5.21. Improvements: enhancing and expanding JR**

5.22. The Panel may wish to turn their focus to how best to ensure JR is enhanced and expanded as an accountability mechanism. Research suggests that there are several areas in which practice can be improved for the citizen. First, there is the issue of access and prohibitive costs. As outlined in the *UNISON*<sup>59</sup> case, prohibitive fees can undermine access to justice and, whilst that particular case was concerned with the cost of tribunal fees, similar concerns apply in connection with the cost of JR proceedings.<sup>60</sup> Research also suggests that

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<sup>54</sup> Para.17

<sup>55</sup> Para.19

<sup>56</sup> Compare for example the case of *QH* where interim relief was granted to the case of the Mercy Baguma in Glasgow who was found dead next to her starving baby in Glasgow. Mercy was an asylum seeker who lost her right to work (and her job) and was living in extreme poverty. <https://www.bbc.com/news/uk-scotland-glasgow-west-53904251>

<sup>57</sup> Mercy Baguma, *ibid.* Errol Graham, see <https://www.leighday.co.uk/News/Press-releases-2020/July-2020/Family-of-Errol-Graham-granted-permission-for-Judi>

<sup>58</sup> For example, the family of Errol Graham (who starved to death in his flat) has been granted JR into the circumstances surrounding his death, including legality of DWP's safeguarding policies and why it has not to reviewed and revised those policies as it undertook to do so at the inquest into Mr Graham's death. See <https://www.leighday.co.uk/News/Press-releases-2020/July-2020/Family-of-Errol-Graham-granted-permission-for-Judi>

<sup>59</sup> *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 (26 July 2017)

<sup>60</sup> Costs can be significantly reduced or applicants not liable for costs if you have (a) access to legal aid, (b) low income, or (c) in environmental proceedings subject to Art 9 Aarhus Convention. However, for citizens who do not meet these criteria costs can cost £30,000 or more meaning prohibitive costs put JR proceedings beyond the reach of many. See <https://publiclawproject.org.uk/wp-content/uploads/2019/02/Intro-to-JR-Guide-1.pdf> at 15

access to advice and support for the advice sector is crucial for access to justice.<sup>61</sup> Likewise, legal aid support has been decimated undermining access to justice in its entirety.<sup>62</sup> **A focus on improving legal aid, supporting the advice sector and reducing the prohibitive costs of JR will help to support access to justice in the UK.**

5.23. Second, the intensity of review in determining JR proceedings could be expanded to help support access to justice for the citizen. JR proceedings include a number of grounds of review and intensity of review that help guide the court in deliberations. The grounds of review are as follows:

**Table Grounds of Review<sup>63</sup>**

Ground of review	What does this mean?	What kind of review might be employed?
<b>Illegality</b>	Was the decision lawful?	A court will look at whether the decision maker is within the power of the decision or whether it is <i>ultra vires</i> (outwith the power of the decision maker). This is a substantive form of review that goes beyond looking at fair process.
<b>Irrationality</b>	Was the decision reasonable?	A court will look at the decision making process and assess whether the outcome of the process was reasonable (rational).
<b>Procedural Impropriety</b>	Did the decision maker follow the correct procedural rules when making the decision?	The court will look at the fairness of the decision making process and the type of review will be concerned with the procedural aspects of the decision.

5.24. The following table contains the intensity of review deployed by courts:

**Table: Intensity of review<sup>64</sup>**

Intensity of Review	Definition – what must the judiciary ask itself?
<b>Reasonableness</b>	Was the decision making process reasonable and rational? If not, would no other sensible person applying logic have

<sup>61</sup> See the work of UCL Centre for Access to Justice, <https://www.ucl.ac.uk/access-to-justice/>

<sup>62</sup> Equality and Human Rights Commission, *The impact of LAPS0 on routes to justice* (2018) at 7

<sup>63</sup> This table is an excerpt from Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020)

<sup>64</sup> *Ibid*

	arrived at the same outcome? (This is UK threshold, more expansive forms of reasonableness are discussed below).
<b>Proportionality</b>	In the context of human rights, was the decision the most proportionate way to achieve a legitimate aim when balancing out the alternatives and taking into account the necessity of the action?
<b>Procedural Fairness</b>	Did the decision making process follow due process, was it fair? Were all of the decision making procedures followed correctly?
<b>Anxious Scrutiny<sup>65</sup></b>	In the context of fundamental rights decisions, does the particular area and severity of the decision merit the judiciary taking a closer look at the substantive and procedural aspects of the case?
<b>Substantive Fairness<sup>66</sup></b>	Over and above whether the process was fair, was the decision itself fair based on an independent examination of the evidence? Whilst this type of review is in its infancy <sup>67</sup> there is potential for courts to develop review that takes into consideration the fairness of substantive outcomes in terms of rights compliance. In other words, over and above reviewing the decision making process or the power ( <i>vires</i> ) to make the decision, or the proportionality in meeting a legitimate aim, is the outcome itself both fair and in compliance with human rights?

5.25. There is more scope for the widening and deepening of intensity of review in JR proceedings in the context of rights. This can be understood as both encouraging consideration of the merits of administrative law decision making when reviewing human rights compliance (beyond procedural review or proportionality) and second, expanding our domestic definition of what is considered 'reasonable' in relation to human rights compliance.

<sup>65</sup> Anxious scrutiny is employed in asylum cases where the court has held that only the highest standards of fairness will suffice, *Secretary of State for the Home Department v. Sittampalam Thirukumar, Jordan Benjamin, Raja Cumarasuriya and Navaratnam Pathmakumar*, [1989] Imm AR 402, United Kingdom: Court of Appeal (England and Wales), 9 March 1989; *Kerrouche v Secretary of State for the Home Department* [1997] Imm. A.R. 610. In the case of *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* 2015 UKSC 19, the court noted that the tests of anxious scrutiny and proportionality may produce very similar results (the tests are not the same but when engaging with fundamental rights the tests may reach the same outcome).

<sup>66</sup> As per Lord Steyn, 'the rule of law in its wider sense has procedural and substantive effect' para. Secretary of State for the Home Department, *Ex Parte Pierson*, R v. [1997] UKHL 37. Whilst in this case the issue in question was the *vires* of the decision of the Home Secretary to retrospectively increase a tariff (a power the court decided he did not have) there is potential scope for the court to move beyond this assessment to consider the substantive outcome of decisions (and whether the decision itself is fair - or complies with rights). In other words, the courts may begin to develop review of the outcome of the decision based on an independent examination of the evidence. See the *UNISON* case where the court examined evidence in establishing what constituted a social minimum, *R (UNISON) v Lord Chancellor* [2017] UKSC 51. This type of review would be required to assess components of ESC compatibility, particularly on an assessment of the minimum core. The *Hartz IV* case is a comparative example where the court assesses both the procedure and the substantive outcome of the decision, BVerfGE 125, 175 (*Hartz IV*).

<sup>67</sup> For a discussion of the development of evidence based JR in cases engaging with systemic unfairness see Joe Tomlinson and Katy Sheridan, 'Judicial Review, Evidence, and Systemic Unfairness in the UK' IACL-AIDC Blog (3 September 2018) available at <https://blog-iacl-aidc.org/blog/2018/9/3/judicial-review-evidence-and-systemic-unfairness-in-the-uk>. Courts may well start to develop substantive based review of outcomes moving beyond an assessment of *vires* in and of itself. See for example the court's approach to tribunal fees in which they considered evidence on what constituted a social minimum based on criteria set by academics and the Joseph Rowntree Foundation: *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

5.26. In relation to the former, addressing the substantive fairness of decisions, or consideration of the merits of a decision, should be engaged when the seriousness of the violation undermines the dignity of the litigant.<sup>68</sup> For example, lessons can be learned from other jurisdictions such as in the case of *Hartz IV* where the German Constitutional Court reviewed the provision of social security and found that the process for calculating social security was flawed (procedurally unlawful) as well as considering the provision of social security itself and finding that the amount provided in the particular circumstances could not guarantee the dignity of the persons impacted, thus rendering the outcome of the decision making process incompatible with Art 1 of the Constitution (substantively unlawful on the grounds of dignity of the litigant).<sup>69</sup> **In cases where individuals face serious breaches of rights that impact their dignity, renders them subject to destitution, or endangers their life, there is scope for JR proceedings to be more interventionist than deferential (see for example the cases of QH, Mercy Baguma and Errol Graham discussed above).**

5.27. Second, *Wednesbury* reasonableness (irrationality) is insufficient to meet the international test utilised in the review of international human rights compliance. The UK *Wednesbury* reasonableness test requires an action (or omission) to be ‘so outrageous and in defiance of logic...that no sensible person who had applied his mind to the question ... could have arrived at it.’<sup>70</sup> This degree of review means that the onus of proving ‘unreasonableness’ rests with the applicant and that the court requires a high degree of ‘irrationality’ to find a matter unreasonable. It is a high threshold. Reasonableness review of ECHR compliance is a test that sets a threshold of ‘manifestly without reasonable foundation’ in a way that is ‘manifestly disproportionate to the legitimate aim pursued’.<sup>71</sup> Reasonableness review in ECHR case law has therefore been expanded to include a degree of proportionality, or what is understood as a balancing exercise between the action or mistreatment and the legitimate aim pursued. Reasonableness review in international human rights law (IHRL) is broader again. According to IHRL, reasonableness review of human rights compliance may include whether the decision maker acted in a way that is coherent, balanced, flexible, comprehensive, non-discriminatory, participative, transparent, effective, efficient, adequate (with reference to quality of service), within a reasonable time frame, in a way that prioritises the most marginalised, and deploying the maximum available resources to achieve the aim. **We recommend further consideration on adopting a wider definition of reasonableness beyond *Wednesbury* reasonableness as a more appropriate intensity of review in the determination of human rights cases, in particular economic and social rights cases.**

5.28. **Another means through which to improve JR is to expand our understanding of what constitutes an ‘effective remedy’ for a violation of a right.** In international law, effective remedies can include, amongst other things: restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition. Specific remedies beyond compensation include: public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and

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<sup>68</sup> See Boyle, *Economic and Social Rights Law*, at 28-36

<sup>69</sup> *Hartz IV*

<sup>70</sup> *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374

<sup>71</sup> *Blecic v Croatia* (2005) 41 EHRR 13, para 65, applied in *In re McLaughlin* [2018] 1 WLR 4250, Lady Hale at para.38–39 and Lord Hodge, para.83

supervising compliance post-judgment. Research suggests that there is scope to deploy more effective remedies for cases that deal with systemic issues, such as through the use of structural remedies. Structural remedies are deployed in cases where many citizens are facing the same systemic issue. Structural remedies can include multiple orders directed at different duty bearers to address a systemic violation.

- 5.29. These type of structural cases tend to:
- (1) affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
  - (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and
  - (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.<sup>72</sup>
- 5.30. If systemic issues arise in human rights cases it would not be beyond the reach of the legislature, executive and judiciary to work together to remedy the matter.<sup>73</sup> For example, if a systemic problem arises in relation to human rights protection then there could be a role for the court to supervise whether the legislature and/or executive could take steps to remedy this through a form of structural injunction (structural interdict in Scotland). **We recommend consideration of how to address systemic issues, particularly for vulnerable groups in a post-COVID world, where a structural response is required. Addressing violations of rights through a structural approach to remedies facilitates a form of rights adjudication that can positively impact on the lives of poorer citizens and prioritise the most vulnerable where there is a route to remedy to address a systemic issue such as in housing, social security, education, employment, or health care provision.**<sup>74</sup>
- 5.31. Finally, the Panel may wish to focus their attention on the recent attempt to render Regulations made under the Internal Market Bill exempt from review on human rights grounds.<sup>75</sup> Suffice to say the legality of the ouster clauses contained in the Bill are yet to be determined. The use of such clauses reduce the rights of ordinary citizens to ensure the legality of decisions (or in this case Regulations) on human rights grounds thus undermining the rule of law.<sup>76</sup> Regardless of the approach taken domestically the UK continues to be party to a number of international agreements, including the European Convention of Human Rights. Any attempt to remove a right to remedy in domestic law does not change the obligations of the state in international law. And in the case of ECHR cases, and whilst the

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<sup>72</sup> César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, (2011) 89 *Texas Law Review* 1669-1698 at 1671

<sup>73</sup> Such as the response by the executive and legislature to introduce emergency legislation to deal with the fall out of systemic human rights violations following the *Cadder* judgment. See *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 (26 October 2010) and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

<sup>74</sup> David Landau, *The Reality of Social Rights Enforcement*, *Harvard Journal* (2012) 53 *Harvard International Law Journal* 189-247. See also Mantouvalou in Conor Gearty & Virginia Mantouvalou, *Debating Social Rights*, (Hart 2011)

<sup>75</sup> For a recent discussion on the human rights dimension see Ronan Cormacain, <https://ukhumanrightsblog.com/2020/10/15/the-uk-internal-market-bill-mother-of-all-ouster-clauses-ronan-cormacain/?shared=email&msg=fail> and

<sup>76</sup> For a discussion on the case law and the central importance of JR see Paul Craig, 'Ouster clauses, separation of powers and the intention of Parliament: from Anisimic to Privacy International', *Public Law* (2018) 570-584 and Paul F. Scott, 'Ouster clauses and national security: JR of the Investigatory Powers Tribunal' *Public Law* (2017) 355-362

UK continues to be a party to the Council of Europe treaty, the right to an effective remedy (Art 13) will continue to apply thus leaving the door open to a remedy for a breach in the European Court of Human Rights. **Notwithstanding the availability of remedies at the supranational level, the Panel may wish to consider the merit in removing domestic remedies in the determination of rights, something undermines the rule of law and changes the relationship between citizen and state to the detriment of the citizen.**