UNIVERSITY OF CAMBRIDGE
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Response to Ministry of Justice Consultation Paper
Judicial Review: Proposals for Reform

1. The University of Cambridge Centre for Public Law submits this response to the Ministry of Justice's Consultation Paper, *Judicial Review: Proposals for Reform*.

Framing the approach to reform of judicial review

2. We begin by drawing attention to a number of important points which are relevant to the general approach to reform of the judicial review procedure.

The functions of judicial review

3. It is important to bear in mind the beneficial functions of judicial review, particularly those which lie in the wider public interest, in any proposal for reform of the procedure governing review, otherwise the importance of enabling access to the process may be undervalued or accorded insufficient weight.
4. The Ministry's Consultation Paper observes that "Judicial Review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions of public bodies to ensure they are lawful",[1] and that it "can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the Executive to account".[2]
5. These are central functions of judicial review. However, these are not the only functions of judicial review. For example, judicial review serves a basic and important dispute resolution function: an individual may be less concerned with the lofty aim of calling government to account than with the settlement of a genuine dispute which is affecting their daily lives, such as whether they are entitled to a disability payment under a particular statutory provision.
6. Importantly, judicial review serves a plurality of beneficial functions which operate for the benefit of society as a whole. For example, recent empirical research into the impact of judicial review on local authorities suggests that judicial review can form an important resource for authorities, "enabling change in response to judgments that are rooted in grievances arising from peoples' experience of services and giving expression to claims that might otherwise be neglected as being politically unpopular".[3] Judicial review can thus act as a spur

[1] Consultation Paper at [2].
[2] Consultation Paper at [11].
[3] L. Platt, M. Sunkin and K. Calvo, "Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales" (2010) 20(suppl 2) J Pub Admin Research & Theory i243.

for continuous improvement of public services in line with axiomatic principles of good administration, to the benefit of all who are affected by administrative action. A good example of this function in action is the developing duty of consultation,[4] which may arise in certain circumstances and require the government to consult those who may be affected by a change in policy or established administrative practice. This provides stake-holders with a voice in the process, which is beneficial for those stakeholders, giving them a say in changes which may have important effects on their daily lives. Significantly, it also serves a number of broader functions which lie in the public interest and enhance the legitimacy of government action, including promotion of open, transparent, deliberative, responsive, inclusive, and informed, evidence-based decision-making.

7. Once the plurality of functions performed by judicial review is made explicit, it becomes clear that *no* successful judicial review challenge entails a "pyrrhic victory".[5] To use the example from the Consultation Paper, where a "matter is referred back to the decision-making body for further consideration in light of the Court's judgment",[6] an administrative discretion or power will be exercised lawfully (for example after full consultation with interested parties) whereas it would otherwise have been exercised unlawfully. In a society committed to the rule of law, this cannot be considered an empty victory, given it vindicates society and government's commitment to this fundamental precept.

8. There may be further beneficial aspects of such a challenge:

    a. The court's judgment may enunciate an important general legal principle and/or clarify how an existing general principle applies within a particular administrative or factual context such that the decision-making body has concrete guidance as to how to exercise its powers lawfully in future.

    b. The successful application may facilitate a stronger commitment to legal compliance within the decision-making body, as well as prompting a reconsideration of administrative decision-making processes, resulting in the adoption of processes which more closely conform with principles of good administration and result in improved service delivery.

    c. Where public power is exercised in accordance with law it enhances the legitimacy of government action, and public trust and confidence in government and the administration of justice.

9. It is worth recording that even unsuccessful review applications can serve important functions. A good example is the recent Supreme Court decision in *R (KM) v Cambridgeshire City Council*.[7] While the claimant failed in his challenge to the Council's decision, the case provided the Supreme Court with the opportunity to set out detailed guidance for local authorities, building on earlier case law, in respect of the requirements of section 2(1) of the Chronically Sick and Disabled Persons Act 1970, which is a provision of singular importance in the field of community care. The Court also provided guidance for lower courts as to the intensity of rationality review that ought to be deployed in the community care context, while providing further guidance to local authorities as to the

[4] C. Sheldon, "Consultation: Revisiting the Basic Principles" [2012] JR 152.
[5] Consultation Paper at [32].
[6] Ibid.
[7] [2012] UKSC 23.

applicability and requirements of the reason-giving duty in this context. The decision would also have assured the claimant and his family of the lawfulness of the Council's computation of the disability benefit, while the proceedings provided the claimant and his family with an opportunity to air their concerns in an independent forum. Given that certain of the proposals for reform set out in the Consultation Paper relate to imposing greater restrictions on the ability of claimants to challenge initial refusals of permission, it is worth noting that in *KM* permission to apply for judicial review was declined by the Judge at first instance, only for permission to be granted on appeal.[8]

Existing restrictions

In considering any proposal for reform of the judicial review procedure, it is important to bear in mind that the existing procedure already deviates from ordinary civil procedure in marked ways, which serve to afford strong protection to interests in efficient and vigorous administrative decision-making.

10. These features of review (some of which are mentioned in the Consultation Paper) include:

    a. The requirement of the Pre-Action Protocol, which encourages settlement of the dispute other than via litigation;

    b. The very short three-month time limit, which serves to ensure challenges are brought in a timely manner, so as to avoid uncertainty and minimise administrative delay and disruption. The short time limit is coupled with a judicial discretion to refuse permission even where a claim is brought within the three-month limit, on the basis of a lack of promptness. Contrast the considerably longer time-limits for claims in private law (twelve years for real property claims, six years for claims in contract, and three years for claims in tort), which may equally be made against government defendants, and for the action against public authorities under the Human Rights Act 1998 (to which a one-year time limit applies);

    c. The requirement of permission to proceed to a full hearing. No such requirement exists within ordinary procedure, and as the statistics in the Consultation Paper demonstrate,[9] the permission stage has been a significant mechanism for filtering access to full hearings;

    d. The general absence of an oral hearing at the permission stage, which marks a considerable deviation from ordinary court procedure, where oral hearings are the norm. The time-period for requesting an oral renewal – seven days – is strict, again guarding against uncertainty and delay;

    e. Considerable restrictions on discovery, and provision for oral evidence and cross-examination. These features are, again, marked deviations from ordinary procedure, and serve to expedite proceedings considerably, avoiding undue delay, and saving litigation costs and administrators' time.

[8] Ibid at [3]. See also *R (KM) v Cambridgeshire City Council* [2011] EWCA Civ 682.
[9] Consultation Paper at [31].

11. To these procedural features one may also add various doctrinal features which operate to protect interests in efficient and vigorous administrative decision-making, such as the judicial discretion to refuse relief to a successful applicant so as to avoid administrative disruption,[10] and the principle that judicial review is a remedy of last resort, such that other possible avenues to redress ought to be exhausted before an applicant may have recourse to costly litigation.

12. It is important to bear in mind these existing features of review in any consideration of whether the procedure should be reformed in a manner which would mark further departures from ordinary court procedures and concomitant procedural safeguards, and whether further reform is strictly required so as to afford sufficient protection to governmental and other interests. In this respect it is pertinent to observe that other jurisdictions such as the United States, New Zealand and Scotland operate systems of review within the rubric of procedural regimes which do not provide for many of the restrictions which govern the English procedure, such as a permission requirement and short time limits, and more closely resemble ordinary procedure.[11]

Immigration and asylum

13. Under the heading "The case for change"[12] the Consultation Paper highlights the growth in judicial review applications, and the time and resources that are consumed by such proceedings. For example the Paper records that in 2000 there were nearly 4,250 applications and by 2011 this had reached over 11,000. As the Paper observes, "The increase has mainly been the result of the growth in the number of challenges made in immigration and asylum matters";[13] this is also made clear by Figure 1,[14] which demonstrates that non-asylum-and-immigration applications make up the minority of review applications, and that the number of such applications has remained relatively constant from 2005 to 2011.

14. Therefore, if there is a "problem area", in terms of steep growth in number of applications and concomitant increases in government resources devoted to defending judicial review challenges, it is asylum and immigration cases. The consultation paper records that a number of steps have been taken to address this issue:

> 24. The main area of growth of Judicial Review has been immigration and asylum matters. Since October 2011 the courts have had powers to transfer a limited category of these cases, those which challenge a decision not to treat further representations in an asylum or human rights claim as a fresh claim, to be heard in the Upper Tribunal. This, alongside the establishment of the Administrative Court centres in Birmingham, Manchester, Cardiff, and Leeds, has helped to reduce the pressure that have built up in the Administrative Court, particularly in London. However, we believe that these arrangements have also brought wider benefits through the swift and efficient conduct of proceedings by Judges who are specialists in this area of the law.
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> 25. Measures in the Crime and Courts Bill, currently before Parliament, will, if enacted, allow for all immigration, asylum or nationality Judicial Review to be heard

[10] For a recent example see *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] HRLR 13, [99].
[11] D. Oliver, "Public law procedures and remedies - do we need them?" [2002] PL 91, 106-109.
[12] Consultation Paper at page 9.
[13] Consultation Paper at [29].
[14] Consultation Paper at page 10.

in the Upper Tribunal, and will also allow the Lord Chief Justice to deploy Judges more flexibility across the courts and tribunals to respond more quickly to changes in demand.

15. Given immigration and asylum cases have been *the* driver for the growth of review in recent times, and given steps have been and are being taken to move a large portion of such claims out of the ordinary judicial review procedure, it would appear that the case for across-the-board reform of the review procedure premised on the "growth of judicial review" falls away. If this large class of cases is moved outside of the procedure, it would result in a drastic fall in the number of applications for judicial review, and also mean that those classes of case that continue to be streamed via the judicial review procedure would be determined far more expeditiously given the "freeing up" of judicial time brought about by the streaming of immigration and asylum cases via a different procedural route.

Evidence-based approach

16. Much of the case for reform in the Consultation Paper is based on perceived concerns with the operation of the current review procedure and also the effects of judicial review on government actors. However, in many cases empirical evidence is not provided in support of such concerns, and it is therefore difficult to discern whether these concerns are real or only apparent.

17. It is clearly always important that the claims underpinning any proposal for reform are well-founded. This is especially so in respect of the present proposals given that, although it is not their aim,[15] their effect would be to place *prima facie* restrictions on the Article 6(1) right of access to court,[16] and the common law constitutional right to unimpeded access to court.[17] For example, the European Court of Human Rights has held that "a limitation [on the right of access to a court] will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".[18] It is well-established that an assessment of the proportionality of limits on rights may entail searching judicial scrutiny of the robustness of the evidential foundations upon which purported justifications are based.[19]

18. Two examples will suffice to emphasise the importance of a robust, evidence-based approach to reform:

    a. The Consultation Paper states: "We believe that the threat of Judicial Review has an unduly negative effect on decision makers. There is some concern that the fear of Judicial Review is leading public authorities to be

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[15] Consultation Paper at [6].
[16] e.g. *Golder v UK* (1979-80) 1 EHRR 524.
[17] e.g. *Raymond v Honey* [1983] AC 1; *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198; *R v Lord Chancellor, ex p Witham* [1999] QB 575; *R v Secretary of State for the Home Department, ex p Anderson* [1984] QB 778; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, per Lord Bingham.
[18] *Ashingdane v United Kingdom* (1985) 7 EHRR 528, [57].
[19] Good examples, albeit outside the context of Article 6(1) include: *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621; *Smith and Grady v UK* (2000) 29 EHRR 493, [99]-[100]. Judges have similarly closely scrutinised the evidential foundations of purported justifications for interferences with common law constitutional rights: *Leech*, above, 212E-214F; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 127-129.

overly cautious in the way they make decisions, making them too concerned about minimising, or eliminating, the risk of a legal challenge".[20] No empirical evidence is proffered in support of this concern. This is particularly concerning given that, as recorded above, there is at least some empirical research to the effect that judicial review may have positive effects on public administration. Given there have been relatively few empirical studies into the effects of judicial review on administrative behaviour and practices it is not possible to reach general conclusions about the effects of the prospect of judicial review challenges on officials, while if a greater amount of research were available it seems unlikely that it would indicate that the effects on officials were uniformly or even largely negative. Whether the prospect of judicial review has a negative (e.g. resulting in overly cautious administrative behaviour), positive (e.g. encouraging officials to take seriously legal norms where they may not have otherwise), or no effect on administrative behaviour may depend on many variables, including the organisational culture of the particular public authority, whether the authority is one which commonly fields judicial review challenges, the degree of education about judicial review provided to street-level officials within the particular authority, and the personal risk characteristics of individual officers (e.g. whether they are risk-averse, risk-loving, or risk-neutral).

b. The paper states that: "Anecdotal evidence suggests that, in some cases, in the Judicial Review proceedings the claimant is seeking to reargue substantially the same points in a different forum in the hope that a different conclusion will be reached. Only a version small proportion of these cases are granted permission and even fewer ultimately successful".[21] It is difficult to assess these claims given that the anecdotal evidence is not provided. In any case, anecdotal evidence is not in general the most reliable evidential basis for policy-making, given the anecdotes may reflect random and infrequent deviations from a general trend rather than be representative of one.

Summary

19. In approaching reform of the judicial review procedure cognisance must be taken of: (i) the plurality of important functions performed by judicial review, including functions that not only benefit specific individuals or groups in society, but also society as a whole; (ii) existing features of judicial review procedure which represent deviations from ordinary procedure, and serve to afford strong protection to interests in efficient and vigorous administrative decision-making; (iii) the implications for the case for reform of wider reforms addressing immigration and asylum cases; and (iv) the importance of ensuring that the concerns underlying reform are real rather than merely perceived, and based on concrete evidence.

[20] Consultation Paper at [35].
[21] Consultation Paper at [79].

Time limits for bringing a claim

General Remarks

20. The Consultation Paper is right to raise the question of the appropriate time limit for bring a "claim for judicial review". This is an important issue that deserves careful consideration and certainly more consideration than it has thus far received. However, it falls to be considered in the light of the fact that, as we observed above, the time limits for bringing claims for judicial review are already considerably shorter than for other legal proceedings. Judicial review, with a basic time limit of three months, already imposes exceptionally strict limits on access to justice.

21. Three observations may now be made. Two of them suggest that it would be appropriate to undertake more thoroughgoing reform than is proposed by the Consultation Paper; the third suggests that any reform should proceed with caution or else the Consultation Paper's intent of containing fruitless litigation may be frustrated.

First observation: a short time limit is not justified in all cases; time limits should be graduated according to the type of decision challenged

22. The current rule - that claims should be made "promptly and in any event not later than three months after the grounds to make the claim first arose"[22] – applies to all claims for judicial review, yet the policy considerations that justify a short period in some circumstances do not apply in others.

23. The case for a relatively short period where the decision is one on which many third parties will rely and who will suffer prejudice if the decision is afterwards found to be unlawful is stronger. Similarly, there may be a strong public interest in favour of the early implementation of a particularly important decision (e.g. a major infrastructural development). Judicial review of decisions to grant planning permission or to licence other important economic activities will generally fall into this category where a shorter time limit is justified.

24. On the other hand, where the decision affects only one individual and one public authority (for instance, a decision by the Criminal Injuries Compensation Authority to make a financial award to a victim of crime) and the consequences of delay are not acute, the public interest is not engaged in the same way. Particularly where the consequences are purely financial and other decisions do not hang on the outcome of the case, the case for a short time limit is much weaker and an appropriate time limit would be much longer than three months.

25. Yet the current rule treats these two cases – as well as all the intermediate cases - the same. A strong case could be made for the law to abandon this "one size fits all" approach and adopt a more complicated but graduated approach to time limits. But this would be a much more difficult reform. It would require careful consideration of the many different classes of case that may arise in judicial review proceedings and the assessment of what the appropriate time limit should be for each class of case.

26. Of course, the operation of the current rule is ameliorated by the requirement of promptitude which may justify the judge, where third party interests are

[22] Civil Procedure Rules, r 54.5.

pressing, in refusing permission even within the three month period. Similarly a judge may grant permission to an out of time applicant where there is no pressing public interest in sticking to the three month rule and a strong public interest in determining the lawfulness of the challenged decision (extending time under CPR 3.1(2)(a)).

Second observation: the "promptness" requirement undermines legal certainty and may undermine the rule of law

27. But such judicial discretion makes the application of the current rule difficult to predict. And this uncertainty is problematic. It is surely uncontroversial that "legal certainty… is one of the fundamental elements of the rule of law".[23] And as the Consultation Paper itself points out, the Court of Justice of the European Union in *Uniplex (UK)*[24] held that a "promptness" requirement in regulation 47 of the Public Contracts Regulations 2006[25] (in identical terms to CPR 54.5) failed the test of legal certainty. The CJEU said that "... a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of [the relevant directive]".[26]

28. There are practical difficulties with this state of affairs: it seems that in a particular application for judicial review the European law points (at least those to which the *Uniplex* principle applies) may not be subject to a requirement of promptness while the domestic points will be so subject.[27]

29. Moreover, the concerns of the CJEU are matched by Lord Steyn's doubts (which were shared by Lord Hope) in *R v London Borough of Hammersmith and Fulham and Others, ex parte Burkett*.[28] Lord Steyn said: "there is at the very least doubt whether the obligation to apply 'promptly' is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty".[29]

30. Lord Steyn thought that the promptness requirement might not comply with the European Convention but this has not been the view of some other judges. In *Hardy & Ors v Pembrokeshire County Council & Ors*, for instance, the Court of Appeal found promptness no more uncertain than the "undue delay" provision in section 31(6) the Senior Courts Act 1981.[30] Moreover, Lord Steyn had not been referred to *Lam v United Kingdom*, where the ECtHR rejected the argument that promptness in the context of a planning judicial review was a breach of article

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[23] *R v Secretary of State for the Environment, Transport and the Regions and Another, ex p Spath Holme Limited* [2000] UKHL 61; [2001] 2 WLR 15, per Lord Nicholls. .
[24] [2010] EUECJ C-406/08; [2010] 2 CMLR 47.
[25] SI 2006/5.
[26] Above n 24 at [39]-[41].
[27] *R (on the application of Berky) v Newport City Council & Ors* [2012] EWCA Civ 378.
[28] [2002] UKHL 23; [2002] 1 WLR 1593.
[29] Above n 28 at [53].
[30] [2006] EWCA Civ 240.

6(1).[31] It found that promptness was a proportionate restriction on the applicant's article 6(1) rights.

31. Whatever the rights and wrongs of this difference of view might be, a more structured rule in which the time limit applicable depended upon the type of case could provide that the judicial discretion to deny an otherwise well founded claim on grounds of lack of promptness should only be exercised in exceptional circumstances. This would make the law more predictable and certain for all involved. This would enhance the rule of law although it may be criticised for restricting judicial freedom of action.

Third observation: short time limits may encourage litigation

32. Reducing the time limit to make a claim is likely to be counter-productive if the purpose is to reduce the number of applications for permission. Any well advised claimant will bring their claim at once, instead of waiting for expert legal advice or trying to negotiate with the maker of the challenged decision. The likelihood is that this will increase, rather than decrease, the number of claims which are commenced, increasing the pressure on public bodies and the courts.

33. The crucial point is this: the shorter time limit will cut the time available to negotiate a settlement, so making resolution of the matter by litigation more likely. Professor Craig puts the point well when he says:

> The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted ultra vires now has the strongest incentive to seek a judicial resolution of the matter immediately, as opposed to attempting a negotiated solution, quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit….It is therefore unsurprising if legal advisers tell their clients that an application for judicial review should be made at once rather than attempting to negotiate a solution first. Negotiated solutions are possible when litigation has begun. However the existence of a formal suit can polarise positions.[32]

Answers to specific questions

Question 1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

34. There is force in the position that all challenges to procurement decisions whether brought by an "economic operator" under regulation 47 of the Public Contracts Regulations 2006 or whether brought by way of an application for judicial review should be subject to the same time limit. Similarly, there is force in the proposition that the applicant who challenges the grant of planning permission by way of judicial review should be subject to the same time limit (six weeks from the confirmation of the challenged order) as that imposed upon the developer or other interested party who challenges the validity of a planning

[31] Application 41671/98.
[32] Craig, *Administrative Law* (London 2012), 7th ed, p 873.

decision by an application under section 288 of the Town and Country Planning Act 1990.[33]

35. This equalisation of the time limits does put the neighbour who objects to a nearby development on the same footing a the developer challenging the refusal of planning permission - *but only as far as time is concerned*.

36. Important differences between the application for judicial review and the application under section 288 remain. The section 288 applicant need seek no permission but has a right to mount their challenge. Moreover, the applicant for judicial review needs to comply with the Pre-Action Protocol (of which more below) while there is no similar requirement on the section 288 applicant. Perhaps there is scope for greater equality here.

37. As things stand, therefore, we are not satisfied (bearing in mind our comments earlier in this paper about the need for evidence-based policy-making) that the Government has advanced an adequate case for the particular time limits proposed. This is no not least because the Consultation Paper fails to take due account of the differences referred to in the preceding paragraph.

Question 2: Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol? If not, how should these arrangements be adapted to cater for these types of case?

38. The Pre-Action Protocol for judicial review requires that a "letter before action" should be written to the respondent by the applicant and that some 14 days should be allowed for reply. Since the "letter before action" has to set out many details concerning the decision challenged and the facts on which the applicant relies, much of the preparatory work in making an application for permission will have to be done before the letter is sent. If the time limit for applying for judicial review in planning matters is reduced to six weeks, the practical effect of the pre-action protocol may reduce the time available to about one month.

39. The Consultation Paper is clearly aware that the shortening of the time available may stimulate litigation rather than encourage a negotiated settlement as explained above. It is our view what there will be such an effect, in this and other areas, and that this has the potential to frustrate the Consultation Paper's intent to restrict what it characterises as unnecessary judicial reviews.

Question 3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

40. While the power to extend time may provide a (partial) defence to a challenge based upon the denial of access to justice, it will not provide an answer to the doubts over legal certainty that have been raised above.

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[33] This latter suggestion has already been considered by the courts. Based upon certain remarks of Laws J in *R v Ceredigion County Council, Ex p McKeown* [1998] 2 PLR1 it was thought that the promptness requirement meant that any application for judicial review in a planning matter made later than six weeks after confirmation of the challenged order would not be "prompt". But this was rejected – but not on principled grounds - by Lord Steyn in *R v London Borough of Hammersmith and Fulham and Others, ex parte Burkett* [2002] UKHL 23; [2002] 3 All ER 97, [2002] 1 WLR 1593 (para 53).

Question 4: Are there any other types of case in which a shorter time limit might be appropriate? If so, please give details

41. Planning and procurement decisions are prime examples of such cases where, as the Consultation Paper recognises, there is a particular need for applicants to commence claims quickly. Important public or private interests are affected and the challenged decision will need to be acted on without delay. To these cases may be added licensing decisions of important economic activities (e.g. to explore for oil or gas) where there is a public interest calling for promptness. We reiterate, however, that we are not satisfied that an adequate case has been made for the particular changes to time limits proposed in the Consultation Paper.

42. As argued above, however, in other cases, there is no special need for haste. Indeed there is sometimes a strong case for the lengthening of time limits. It would be pointless to reduce time limits for all cases regardless of the impact of challenges on the implementation of different kinds of decisions.

Question 5: We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

43. The Consultation Paper give no concrete example of this difficulty about which it says it has only "anecdotal evidence". We do not even have the anecdote and do not comment further.

Question 6: Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

44. As we have argued consistently there is a significant danger that the widespread shortening of time limits would, far from restricting judicial review, encourage litigation by restricting the opportunities for negotiation.

Permission—oral renewal

45. An oral renewal of an application for permission is an important guarantee of fairness in judicial review. Research has established that the rate at which applications for permission on the papers are granted varies hugely between judges, with success ranges ranging from 11 to 46 per cent. [34] In these circumstances, an oral hearing on a renewed application is important in ensuring that a judge, after argument before making a decision, has a rounded view of the merits of the application before deciding whether to give permission to apply.

[34] Bondy and Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before Final Hearing* (London 2009) at 68.

Answers to specific questions

Questions 7-12

46. The premise underlying Questions 7-12 is that oral renewals should be restricted; the Consultation Paper merely asks about how that policy should be implemented. We make no response to those questions because we reject the premise on which they are based. We also wish to draw attention to the fact that consulting only upon the implementation of the proposed policy and not upon the proposed policy itself is inadequate.

Fees

47. An additional fee, if large enough to provide a disincentive to an applicant to renew an application, would weaken a safeguard against the risk that decision-making on applications for permission will be arbitrary.

48. Morover, an additional fee for oral renewal of applications for permission would be unlikely to raise significantly higher revenue than accrues at present, for two reasons.
    a. As the Consultation Paper notes,[35] , the main area of growth in judicial review applications has been in immigration and asylum cases. These applicants are particularly likely to be waived or remitted in whole or in part on the basis of a means test.[36]
    b. In addition, the Consultation Paper recognises[37] that there are proposals which would remove immigration and asylum cases from the High Court into the Upper Tribunal. If those proposals are accepted, they would take a very high proportion of judicial review cases out of the scope of the High Court's fee structure.

Answers to specific questions

49. In answer to Question 14, we do not agree with the proposal to introduce a fee for oral renewal hearings.

50. In the light of our answer to Question 14, we make no response to Question 15.

Concluding remarks

51. As noted in the opening section of our paper, judicial review fulfils a series of crucial and interlocking functions. In the light of that, any proposals to inhibit access to the courts' judicial review jurisdiction deserve close and critical scrutiny. The Consultation Paper fails to construct a defensible case based upon clear evidence for the changes it proposes.

52. We greatly regret that the Government has chosen to publish such ill-considered and poorly-justified proposals that, if implemented, would weaken the capacity of the courts to hold Government to account and enforce the rule of law, as well as the capacity of individuals to seek redress for abuses of power. None of this is

[35] Consultation Paper at [24].
[36] Consultation Paper at [96].
[37] Consultation Paper at [25].

to suggest that the present arrangements for judicial review are incapable of improvement. However, we doubt very much that the proposals contained in the Consultation Paper would constitute improvements—and it is beyond doubt that the Consultation Paper wholly fails to articulate a case for them.

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