Garden Court Chambers Public Law team:
response to the Ministry of Justice's proposals for reform of judicial review

1) Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

A. Summary of response

For the detailed reasons given below, we do not consider it appropriate to use the precedent of section 102 of the Scotland Act 1998 or for there to be a discretion to issue a suspended quashing order.

Our reasons are founded on the fact that section 102 of the Scotland Act 1998 serves a very specific constitutional purpose in respect of the constitutional considerations specifically of the legislative competence of the Scottish Parliament within the UK and is rarely if used at all.

Secondly, we rely on the concerns expressed by the Supreme Court in *Ahmed (No 2) v HM Treasury* [2010] UKSC 5 with which the Review agreed. It is our view that the IRAL and the Government has relied on a strained and unsubstantiated concept of "nullity" in order to justify its proposal. Our clear view is that the proposals will likely undermine the rule of law and principles of legality with Government and public bodies being able to rely on unlawful acts and policies and render the remedy of a quashing order ineffective. It is our view that this proposal will undermine the principle of the Government acting under the law. The Government clearly either misunderstands this legal and constitutional principle or is seeking to be enabled to act unlawfully.

We do not agree with this proposal.

B. Outline of the law as to the use of quashing orders by the Court

The role of quashing orders is described in detail in Chapter 6 of "*Judicial Remedies in Public Law*" 6th Edition 2020 by Sir Clive Lewis at 6-002 – 6- 036, and at p. 24 of the Judicial Review Handbook 7th Edition 2020 the Rt Hon Sir Michael Fordham and paragraph 11.4 of the Administrative Court Guide 2020. The power of the court to make these orders are set out in section 31 of the Senior Courts Act 1981. A quashing order is a prerogative remedy and it can be used in combination with other orders such as declarations.

The primary purpose of a quashing order is to quash an *ultra vires* decision by a public body, namely an unlawful decision made beyond the powers of that public body. The order is basically to enable the High Court to determine whether the decision is valid. Where a decision is ultra vires the quashing order confirms that the decision is a nullity and is deprived of any legal effect (*Grafton Group (UK) Ltd v Secretary of State for Transport* [2017] 1 WLR 373 at [19]).

Thus, the quashing order is the means of controlling unlawful exercises of power and the House of Lords in *Cocks v Thanet DC* [1983] 2 AC 286 has clearly stated that a quashing order is the primary and most appropriate remedy of achieving a nullity of a public law decision. Following the making of a quashing order the court will generally remit the matter to the public body and direct it to reconsider afresh in accordance with the judgment of the court (section 31(5)(a) Senior Courts Act 1981 and CPR 54.19(2)(a)). The Court does have the power to substitute its own decision for the decision which has been quashed (s 31(5)(b) Senior Courts Act 1981 and CPR 54.19(2)(b). This power is only exercisable against the decisions of the inferior Courts or Tribunals, only on the grounds of error of law, and only where there is only one possible decision now open to the decision maker.

It is clear that the present jurisdiction for judicial review and prerogative remedies are available against anybody exercising public law powers, whether they be derived from statute, the prerogative, or other no-statutory powers. A quashing order may be available in respect of non-binding acts and would establish that an illegality has occurred, and confirm that a non-binding act such as a report or circular or guidance or parts of guidance should not be relied on (see supplemental judgment in *R (Independent Schools Council) v Charities*

Commission [2012] Ch 214). It is also possible to quash part of a policy or scheme to remove the offending parts and allow the remainder of the lawful scheme to operate (for example in social housing allocations (see for example *R (on the application of Alemi) v Westmisnter City Council* [2015] EWHC 1765 (Admin)) or in the alternative to quashing a policy effectively quashing a decision and making an order requiring the Defendant local authority to amend or withdraw a policy combined with a declaration (see for example *R (on the application of SH by her litigation friend MH) v Norfolk CC and SoS for Health and Social Care* [2020] EWHC 2436 (Admin)).

It is also clear courts may quash unlawful delegated legislation (see *R (C) v Secretary of State for Justice* [2009] QB 657 at [41] and [85]). The restrictions on the availability of quashing orders are well established and described in detail at paragraphs 6-011 to 6-015 of "Judicial Remedies in Public Law" 6th Edition 2020.

In summary, a quashing order only quashes unlawful decisions such that they are not to have any legal effect. The court will not necessarily quash a decision because it exhibits an error of law as a quashing order is a discretionary remedy (see *R v Knightsbridge Crown Court ex p Marcrets Properties Ltd* [1983] 1 WLR 300). The remedy of quashing may be refused where the error of law is not fundamental (*R v Chief Registrar of Friendly Societies ex p New Cross Building Society* [1984] QB 227 at [260]) or has not caused the applicant any prejudice (see see *R v Knightsbridge Crown Court ex p Marcrets Properties Ltd* [1983] 1 WLR 300).

C. Section 102 Scotland Act 1998

The power in section 102 of the Scotland Act 1998 suspends the effect of a decision by holding an enactment to be outwith the competence of the Scotland Act 1998. This power is rarely used if at all. Consideration of this provision should also be read in the context of the Commons Briefing Paper CBP-7670, "*The Supreme Court on Devolution*" and, for example, the use of the 102 power as a remedy in *Salvesen v Riddell and another* [2013] UKSC 22 with the production of remedial order and other devolution disputes.

If the enactment is a nullity, then suspending a judgment articulating that conclusion does not change the fact that the enactment is a nullity. One possible way of accounting for the section 102 suspension power is to characterise Acts of the Scottish Parliament enacted outside competence as void rather than voidable but by using the language of nullity which is presumably intended to connote that legislation enacted outwith competence is void rather than merely voidable. It is clear, however, in our view that the Supreme Court has identified that there is not room for application of section 102 when there is a nullity.

Thus the operation of this section depends on the Act subject to this provision being a nullity. This provision was considered in the case of *The UK Withdrawal From the European Union (Legal) Continuity) (Scotland) Bill – A reference by attorney General and Advocate General for Scotland* [2018] UKSC 64.

Section 29(1) of the Scotland Act 1998 ("the Scotland Act") provides that any Act passed by the Scottish Parliament will not be law so far as any provision of the Act is outside the legislative competence of the Parliament. Section 29(2) says that a provision is outside of the legislative competence of the Scottish Parliament if, amongst other things: it relates to matters which are reserved to the UK Parliament (including international relations); is in breach of the restrictions in Schedule 4 of the Scotland Act (which specifies provisions of enactments passed by the UK Parliament which cannot be modified by the Scottish Parliament); or is incompatible with European Union ("EU") law.

On 13 July 2017, the UK Government introduced the European Union (Withdrawal) Bill ("the UK Bill") in the House of Commons, to repeal the statute which had taken the UK into the EU and to make provisions to achieve legal continuity within each of the UK's constituent jurisdictions. On 26 June 2018, the UK Bill became an Act ("the UK Withdrawal Act"). The UK Withdrawal Act amended Schedule 4 to the Scotland Act to include itself within the prohibition against modification. On 27 February 2018, the Scottish Government introduced the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ("the Scottish Bill"), to make its own provision for legal continuity following the UK's withdrawal from the EU. The Scottish Bill was passed by the Scottish Parliament on 21 March 2018. Section 17 of

the Scottish Bill relates to subordinate legislation made by Ministers in the UK Government after withdrawal from the EU on matters of retained EU law which, if they were contained in a statute, would be within the legislative competence of the Scottish Parliament. The section provides that any such subordinate legislation will be of no effect unless the consent of the Scottish Ministers is obtained. Section 33 of and Schedule 1 to the Scottish Bill provide for the repeal of references to EU law and institutions of the EU in the Scotland Act.

In accordance with section 33(1) of the Scotland Act, the Attorney General and the Advocate General for Scotland made a reference to the UK Supreme Court asking for a decision on whether the Scottish Bill is within the competence of the Scottish Parliament.

In *The UK Withdrawal From the European Union (Legal Continuity) (Scotland) Bill – A reference by attorney General and Advocate General for Scotland* [2018] UKSC 64 the court considered at paragraph 26 and 27:

> "26. *The starting point in considering these arguments is the proper scope of a reference under section 33 of the Scotland Act. There is a difference between a want of legislative competence and more general grounds for judicial review on public law grounds. The result of a want of legislative competence is that a Scottish enactment is a nullity ("not law"): see section 29(1) of the Scotland Act. A Scottish Page 11 enactment which is held by a court to be unlawful on more general public law grounds is not necessarily a nullity. In AXA General Insurance Ltd v Lord Advocate Lord Hope at para 47 and Lord Reed at paras 149-153, with whom the rest of the court agreed, observed that since the Scottish Parliament is a statutory body owing its powers and duties to an Act of the UK Parliament, section 29 is not exhaustive of the grounds on which its legislation may be reviewed. Other grounds of challenge such as inconsistency with fundamental rights may in principle be available. They were, however, dealing with proceedings by way of judicial review on appeal from the Court of Session. It is clear, in particular from the observations of Lord Hope, that that was the context of these particular statements. A reference to this court under section 33 of the Scotland Act is concerned only with the extent of the Scottish Parliament's "legislative competence": see section 33(1). This is a term of art in the Scotland Act. It refers back to section 29, which provides that a provision is*

outside the legislative competence of the Scottish Parliament in the five cases specified in subsection (2). For the purposes of a reference under section 33, they are exhaustive. It follows that the only relevant issue under Question 1 is whether the Scottish Bill "relates to reserved matters", specifically relations with the EU, within the meaning of section 29(2)(b). Consistency with the rule of law or the constitutional framework underpinning the devolution settlement is relevant only so far as it assists in resolving that issue. They are not independent grounds of challenge available in these proceedings.

27. In order to "relate to" a reserved matter, a provision of a Scottish bill must have "more than a loose or consequential connection" with it: Martin v Most at para 49 (Lord Walker). In Imperial Tobacco Ltd v Lord Advocate at para 26, Lord Hope observed that the question required one first to understand the scope of the matter which is reserved and, secondly, to determine by reference to the purpose of the provisions under challenge (having regard among other things to their effect in all the circumstance) whether those provisions "relate to" the reserved matter. The purpose of an enactment for this purpose may extend beyond its legal effect, but it is not the same thing as its political motivation."

Thus the reference is based on the Scottish enactment being a nullity ("not law") and the decision being void and not voidable.

It is noteworthy that paragraphs 85 and 86 identify the importance of the legal certainty and legality when applied to competence to legislate operating within a legislative framework with the maintenance of the rule of law.

"*85. Similarly, the postponement of the legal effect of the impugned provisions prevents there being any modification of section 2(1) of the 1972 Act, which incorporates EU law into our domestic laws, because the UK withdrawal, which is the precondition of the bringing into legal effect of the provisions, will involve the repeal of section 2(1) of the 1972 Act. Prospective legislative provision for the consequences of the repeal of the 1972 Act, which has no legal effect until such repeal, entails no modification of that Act. The challenge under section 29(2)(c) of the Scotland Act therefore fails.*

86. The residual challenge based on the rule of law is, with respect, misconceived. The principles of legal certainty and legality when applied to the competence of the Scottish Parliament operate within the statutory framework of the Scotland Act. The rule of law in relation to the legislative competence of the Scottish Parliament is maintained through the operation of section 29 of and Schedules 4 and 5 to the Scotland Act and the scrutiny by this court under section 33 of that Act relates to the application of those provisions. That scrutiny involves an assessment whether legislation by the Scottish Parliament complies with the limitations imposed by section 29 of the Scotland Act. As we have stated (para 35 above) there is nothing legally uncertain or contrary to the rule of law about the enactment of legislation by both the UK Parliament and the Scottish Parliament, provided that they do not conflict. The remit of this court under section 33 of the Scotland Act to scrutinise Bills of the Scottish Parliament does not extend to addressing arguments which are either complaints about the quality of the drafting of a Bill or seek to raise uncertainties about the application of a Bill's provisions in future circumstances which may or may not arise and which, should they occur, may require amending legislation. In our view, the Lord Advocate is correct in his submission that the possibility of the need to amend legislation to take account of changed future circumstances does not alter the competence of that legislation now."

It is our view that given the rarity and the narrow circumstances in which the section 102 power may operate in respect of constitutional issues involving the Scottish Parliament it is not an appropriate model.

D. Response to proposals regarding suspending quashing orders

The IRAL recommended the introduction of suspended quashing orders which would enable the courts to take the step that the Supreme Court did not consider to be a remedy to be properly open to it in *Ahmed (No 2) v HM Treasury* [2010] UKSC 5.

In *Ahmed (No 2)* the Supreme Court took the view that unlawful administrative acts including unlawful secondary legislation are invalid "and of no effect in law" such that they are void ab

initio and therefore it would not be right to suspend a quashing order. The court went on to state that the Court "*should not lend itself to a procedure which is designed to obfuscate the effect of its judgment*". This was the position of the majority in the Supreme Court even though the Court does have the discretionary power to deny or withhold relief in narrow and specific circumstances. It is our view that this in reality sits with the idea that a quashing order is used to enforce the rule of law in respect of unlawful decisions which are a "*nullity*" and void so to prevent them from having effect and it draws a clear line and provides certainty as to the law.

The IRAL appeared to share the Supreme Court's view that if unlawful acts are void and thus suspending the operation of the quashing order is problematic as Professor Mark Elliot pointed out in his blog of the 6 April 2021 ("Public Law for Everyone") the IRAL attempted to attack the concept of a nullity and attempted to adopt a proposition that 'a decision-maker who decides unlawfully, does an act which he has no power in law to do', thereby rendering the act void — is flawed because, according to the IRAL, it 'overlooks the elementary distinction between a power and a duty'. The IRAL states that:

> "*Suppose a public body is vested with a power, and a duty as to how it exercises that power. If the public body exercises the power in breach of that duty, it acts unlawfully – but it does not follow that its exercise of that power was necessarily null and void. In fact, the power is exercised unlawfully because it was validly exercised – if it were not exercised at all, then there would be no basis for saying that it had been exercised unlawfully.*"

This, as Professor Elliot points out, is an "*enigmatic*" attack on the notion of nullity to pave the way to introduce suspended quashing orders.

The Government, in its response, goes much further and is consulting on the following:

- Giving judges a discretion to make remedies, including quashing orders, prospective-only
- Introducing a presumption that quashing orders will be prospective-only in respect of secondary legislation

- Requiring quashing orders to be prospective-only in respect of secondary legislation 'unless there is an exceptional public interest requiring a different approach'
- Introducing a presumption that quashing orders should be suspended
- Requiring quashing orders to be suspended 'unless there is an exceptional public interest requiring a different approach

This is also combined with an assault on the concept of nullity, such that only a lack of jurisdiction in the narrow, *pre-Anisminic* sense would render an administrative act or decision void. A '*presumption against the use of nullity*' is also suggested such that these proposals may be supported by legislation that would '*further clarify the distinction between the Government acting without any power, and the wrongful use of a power that Parliament has granted it*', with only the former operating to make administrative acts and decisions null and void.

As identified by Professor Elliot, it is also our view the Government's agenda is apparent from the following passages from its response, which favour prospective-only remedies, which would permit unlawful administrative acts and decisions including secondary legislation to continue to have effect up to the point at which the prospective-only quashing order was issued:

> "*In effect, this would mean that a decision or secondary legislative provision could not be used in the future (as it would be quashed), but its past use would be deemed valid. This would provide certainty in relation to government action; if a policy has cost a considerable amount of taxpayers' money, for instance, it would mitigate the impact of immediately having to set up a compensatory scheme. In turn, this would mitigate effects on government budgeting, which would enable the Government to continue to spend on improving the lives of its citizens. Instead, a prospective-only remedy could use conciliatory political mechanisms to the fullest extent, to set up a compensation scheme that is appropriate and robust, rather than created in a reactive manner*."

And to say that:

> '*[i]t is recognised that this could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy*',

then offers a rather unconvincing and toothless addition: '*would be remedied in the long-term*' — presumably by means of the '*conciliatory political mechanisms*' and '*compensation scheme[s]*' to which the Government would be under absolutely no legal duty whatever to have recourse. In our view, this is woefully inadequate.

The Government then proceeds to argue that all of this is to be done in the service of the rule of law:

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

This position in our view conveniently overlooks the fact that another critical component of the rule of law is the requirement of government under law.

It is our view that these proposals undermine this fundamental principle by preventing or improperly limiting retrospective invalidation of unlawful administrative acts through suspension of quashing orders. It is our view that the section 102 procedure is specifically limited to the particular constitutional issues of the Scottish Legislature and is rarely used if at all and should not be applied to Administrative Law in England and Wales.

It is our opinion, as shared with Professor Elliot that, in effect, this would enable the Government to legislate at will, confident in the knowledge that anything done under secondary legislation however clearly unlawful it might be would be functionally lawful up to the point of the issuing of any relief, as a result of the courts' inability retrospectively to

invalidate it. This would in our view also enable public authorities to use this mechanism to act unlawfully and contrary to the rule of law.

It is our clear view that given the problems identified in the case of *Ahmed (No 2)* [2010] UKSC with suspension of quashing orders and the IRAL's concession adopting the concern but then without reference to clear principle as to an attack on the concept of a nullity that the Government's proposals on reform undermine the rule of law and undermine the principle that the Government itself is subject to the law and the rule of law.

It is our view as shared with Professor Elliot that these proposals will create legal uncertainty and fail to address the fact that the courts use prerogative remedies accordingly, in combination and the remedies are tailored to the judgment in the case and to give certainty to the parties.

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

Cart judicial reviews

We have serious concerns about the evidence basis used to justify this proposal which in our view and experience is likely to lead to very significant injustice in a large number of cases. Our concerns are these:

First, the numbers used by the IRAL are with respect plainly wrong. While it is not practicable for Garden Court Chambers to carry out our own assessment of the number of *Cart* judicial reviews that have been successful, as the leading immigration Chambers in the United Kingdom we are in a position to say categorically that the numbers found by the IRAL are completely inaccurate: from speaking to colleagues it is clear that there are far more successful

cases on Bailii alone than referred to by the IRAL (at a very conservative estimate at least twice as many).[1]

Moreover, we as practitioners are aware of many more that are *not* on Bailii or where Bailii does not indicate the fact that the successful hearing was pursuant to a *Cart* judicial review (examples include reported cases e.g. *Gauswami (retained right of residence: jobseekers) India* [2018] UKUT 275 (IAC)). Where permission is granted by the Administrative Court or Court of Appeal there may be no record of that fact at all (e.g. *HG (Jamaica) v Secretary of State for the Home Department* C5/2019/2641) and an Upper Tribunal Judge is not required to refer to the means by which permission was granted (nor is it likely to be generally relevant). The reality is that the means by which the IRAL sought to assess the number of successful cases is in statistical terms useless, or indeed so misleading as to be worse than useless.

We note moreover the narrow definition of success employed by the IRAL in the review. In our view a person with an arguable error of law in a matter so serious as to engage the very high *Cart* threshold having that matter ventilated at a proper hearing is in itself a very significant benefit and a key bulwark in support of the rule of law, particularly important in immigration and asylum cases where the stakes are often so very high.

Second, and vitally, the proposed changes neglect the fact that where a *Cart* judicial review succeeds that is almost by definition an instance of very serious injustice averted. The fact that this happens relatively rarely is of little comfort to those likely to be affected by such injustice. The threshold for a grant of permission in a *Cart* judicial review is extremely high – the claim must be one that, in the words of Lord Dyson, either raises an important point of principle or

[1] PA/04084/2015; HU/04919/2019 (these two determinations do not state on their face that they are *Cart* judicial reviews, but we have confirmed with counsel on the case that they are); HU/08391/2018; PA/12860/2016; HU/06526/2017; PA/13154/2016; PA/02578/2017; *PA (Iran) v Upper Tribunal (Immigration and Asylum Chamber)* [2018] EWCA Civ 2495; IA/43845/2014; IA/02110/2015; PA/08061/2016; IA/12862/2015; PA/11961/2017; PA/09356/2017; HU/13573/2015; HU/00473/2015; PA/06610/2017; IA/14235/2014; PA/13132/2018; PA/01982/2015; AA/06293/2014*; MA (Cart JR: effect on UT processes) Pakistan* [2019] UKUT 353 (IAC)*; G and H* [2016] EWHC 239 (Admin)*; Rana (s. 85A; Educational Loans Scheme) Bangladesh* [2019] UKUT 396 (IAC) (see [2]); *Hamat (Article 9 - freedom of religion : Afghanistan)* [2016] UKUT 286 (IAC) (see [5]-[6])*; Restivo (EEA - prisoner transfer) Italy* [2016] UKUT 449 (IAC); *Essa v Secretary of State for the Home Department (EEA: rehabilitation/integration) Netherlands* [2013] UKUT 316 (IAC)*; SMO, KSP & IM (Article 15(c); identity documents) CG Iraq* [2019] UKUT 400 (IAC) (see [4]-[5]).

practice or "*cries out for consideration by the court*" (*Cart v Upper Tribunal* [2012] 1 AC 663 at §131). The result is that these are cases that are either important for the courts to decide because of the issues they raise or because serious injustice would otherwise occur.

The seriousness of the matters raised in these cases demonstrates the importance of this safety valve. For example, in *PA (Iran)*, the First-tier Tribunal had "*misread, misunderstood or mischaracterised*" (§27) the medical evidence in respect of a very vulnerable young man leading it to erroneously dismiss his asylum appeal in a determination with "*fundamental flaws*" (§35). These are cases frequently raising life and death issues, involving clear and very serious errors of law and the fact that there are so many *Cart* judicial reviews that succeed should actually serve as a warning of the importance of this protection.

Third, in our view the current system by which (i) there is a limited time for applying for a *Cart* judicial review, and no right of oral renewal (54.7A); and (ii) there is a similarly truncated right of appeal to the Court of Appeal (CPR 52.9), appropriately strikes the balance between ensuring that this essential safeguard for preventing serious and important errors remains and curtailing the opportunity for unnecessary or frivolous applications.

It is our view that the proposed removal of the *Cart* safety valve is dangerous, inappropriate and has been proposed in reliance on a quantitative assessment that fails to grasp the seriousness of the cases involved and, more importantly, is so misleadingly inaccurate as to be without value.

Suspended quashing orders

This is comprehensively covered above. In our view it would be a grave mistake to introduce such an innovation.

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

Garden Court Chambers' barristers practise across England and Wales. As few of our members practise in Northern Ireland and Scotland, we are not qualified to comment upon the impact of these proposals there.

We are concerned, however, that the proposals demonstrate a poor understanding of the devolution arrangements in Wales. The IRAL responses from Wales-based practitioners and academics raised a number of concerns that we share. In particular, Public Law Wales[2] noted (at paragraph 15) that:

> *"Although judicial review is a procedure which applies, in principle, throughout the UK, the Call for Evidence rather naively suggests that the consequential effect of such reform on devolved governance can be limited to "minor and technical changes to court procedure" which will be capable of being disposed of by "careful consideration of any relevant devolved law and devolution matters arising" and an unspecified "engagement with the Devolved Governments and courts"."*

Given the complexities of the devolution arrangements, we invite the Government to give particular regard to responses from practitioners and academics working in the devolved jurisdictions.

4) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, which factors do you consider would be relevant in determining whether this remedy would be appropriate?

In our view it would not be appropriate for a discretionary power of a prospective-only remedy to be provided for in legislation.

We note that the IRAL Panel in their report did not recommend prospective-only remedies as a proposed change to judicial review. They were correct not to do so; it is a potentially very damaging proposal that would not only undermine very significantly judicial review as a means of obtaining justice for state wrong-doing, but would also significantly undermine the

[2] Available here Collection of responses to the Independent Review of Administrative Law (IRAL) | UKAJI

principle of parliamentary sovereignty which is unlikely to have been the government's intention.

We note further that it is difficult to conceive of any scenario in which a prospective-only remedy would uphold the rule of law, and provide for the accountability of decision-makers for unlawful action. It is understood that none have been offered by the government. The fact that no such scenarios have been suggested is in our view significant.

Introducing a concept of prospective-only relief would in our view significantly undermine the principle of legality and the ability of judicial review to ensure considered, fair and lawful decision-making.[3]

Firstly, prospective-only remedies would discourage individual claimants (with meritorious claims likely to benefit themselves and others) from seeking to hold decision-makers to account via judicial review proceedings. That would not only be for practical reasons, in terms of the available remedies, but also because the availability of such a remedy may affect their ability to obtain legal aid funding or to recover their legal costs if successful. It is difficult to escape the idea that this deterrent effect is partially what is intended. The government does not appear to have given thought to the possibility that the result may be more NGOs, charities, and other public interest organisations being forced to act as claimants in judicial review proceedings.

Second, if the government is genuinely concerned about upholding the principle of parliamentary sovereignty, the idea of prospective-only remedies is logically and fundamentally extremely problematic. A prospective-only remedy in judicial review proceedings relating to, for example, statutory instruments, would quite literally involve judges ordering Parliament how to draft future legislation, as opposed to scrutinising legislation that has already been drafted.

[3] See, e.g., https://publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/

Third, the current system of declaratory relief being available, with the courts then leaving it to Parliament to re-draft any offending legislation, works reasonably well in terms of providing accountability for past wrongs (i.e. unlawful decisions), vindication for affected individuals, and flexibility for legislators in how to address the courts' concerns.[4] In other words, 'Parliament-focused solutions' are already available.

Fourth, we also note that the proposal makes no reference to how prospective-only remedies would interact with the Human Rights Act 1998 (particularly section 6), or the right of access to an effective remedy, as per Article 13 of the ECHR. In our view there would be no access to an effective remedy either by reference to the Convention or to the common law in circumstances where past unlawful action by the state was allowed to stand.

Fifth, in our view, with respect to challenges relating to the lawfulness of statutory instruments, prospective-only remedies would not provide legal certainty or uphold the rule of law. Nor is it correct that statutory instruments are subject to any greater level of scrutiny than other aspects of public law decision-making. Among others, the Hansard Society has highlighted how little Parliamentary time is given to scrutinising statutory instruments, with an increasing trend in 'skeleton' primary legislation being supplemented by regulations.[5]

The vast majority of statutory instruments are passed using the 'negative resolution' procedure – which means that the vast majority are never debated and subjected to no scrutiny.[6] No statutory instrument has been rejected in the House of Commons since 1979.[7]

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[4] Among the clearest examples of this working in practice is the challenge to the 'bedroom tax' regulations in *Carmichael v SSWP* [2016] UKSC 58. Following the Supreme Court's judgment in November 2016, by March 2017 Parliament laid amended regulations. The Supreme Court held further in *RR v SSWP* [2019] UKSC 52 that decision-makers, including courts and tribunals, are constitutionally bound to disapply unlawful secondary legislation that would otherwise result in acting incompatibly with rights under the ECHR – thereby assisting with individuals who may be affected in the period between a declaration being granted and amending legislation coming into force.

[5] See, e.g., https://www.hansardsociety.org.uk/blog/end-of-session-si-debate-spree-highlights-shortcomings-of-scrutiny-process , published 27th April 2021.

[6] Public Law Project, *Plus ça change? Brexit and the flaws of the delegated legislation system*, 13th October 2020. https://publiclawproject.org.uk/resources/plus-ca-change-brexit-and-the-flaws-of-the-delegated-legislation-system/

[7] *Ibid*.

All of which means in practice, increasingly often it is only when a statutory instrument is scrutinised by a judge that proper attention is given to its lawfulness and efficacy.

Further, research conducted by the Public Law Project has shown that few cases brought challenging the lawfulness of a statutory instrument result in a quashing order – demonstrating clearly that the courts are already conscious of their constitutional boundaries and that the executive is already given significant leeway.[8] This is a solution in search of a problem.

Finally, it is difficult to avoid the conclusion that the government wants to avoid finding itself in situations akin to the aftermath of cases such as *UNISON v Lord Chancellor* [2017] UKSC 51 and *R (RF) v SSWP* [2017] EWHC 3375 (Admin), both of which involved reviewing several thousands of cases that had been determined under unlawful statutory instruments, and in some cases paying out compensation to affected individuals.

While it may be inconvenient for the state to have to pay compensation to individuals subject to unlawful action that does not justify the introduction of a remedy that would in effect disregard that unlawful action. Where a person has been treated in a manner that is unlawful by a public body they are entitled to have that recognised by the courts and to have a remedy for it – that is the essence of the rule of law the public is likely to be alarmed by any proposal to erode it, particularly in order to prevent ministers from suffering the consequences of unlawful action taken with the powers of Parliament but little or none of its scrutiny.

5) Do you agree that the proposed approaches in para 68 (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

[8] https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/

We strongly disagree with this proposal. We are unaware of any evidence that supports the need to reform the provision of remedies for unlawful Statutory Instruments ('SIs'). Indeed, the IRAL did not recommend any changes.

Despite the suggestion in the consultation paper, it is plainly not contrary to the rule of law for the Courts to retrospectively quash SIs. Governments must act in accordance with the law. Retrospective quashing allows the effects of unlawful decision-making to be mitigated when appropriate to do so. An example of the importance of retrospective quashing is *RF v Secretary of State for Work and Pension*s [2017] EWHC 3375 (Admin), a judicial review of an SI relating to the Personal Independent Payment (PIP) scheme. RF successfully challenged the disparity of treatment of individuals with physical and mental health impairments. The High Court quashed the relevant parts of the regulations on the basis that they were "blatantly discriminatory". If there had not been a retrospective quashing order, tens of thousands of highly vulnerable individuals might not have received the benefits payments that they were entitled to.

In our experience, Courts are very aware of the impact of quashing SIs and are reluctant to do so. Quashing orders are narrowly tailored (see, for example, *R (Carmichael & Others) v Secretary of State for Work and Pensions* [2016] UKSC 58) in order to remedy the unlawfulness and to avoid wider disruption. In our opinion, if anything, Courts are too hesitant in granting retrospective quashing orders out of deference to concerns about prejudicing good administration.

Option 68(b) of the proposals is particularly problematic. It would entirely remove the Court's discretion to quash SIs, even those that have received no Parliamentary scrutiny, unless the "exceptional public interest" test is met.

6) Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in para 69 (a) or the mandatory approach in para 69 (b) would be more appropriate?

We do not consider that there is a presumption that a quashing order should be suspended, still less that a quashing order should be suspended unless there is an 'exceptional public interest not to do so.'

We adopt, in respect of these questions, the submissions that we have made in response to Question 1 (the use of precedent from section 102 of the Scotland Act) and simply make the following additional observations in respect of the existing remedies, short of quashing orders, that are open to Judges in appropriate circumstances.

Firstly, in respect of whether or not an impugned decision falls to be considered a nullity, the authorities draw a distinction between a decision that fails to follow the mandatory requirements of an underlying statutory power and 'directory' requirements and make it clear that in certain circumstances an error of law that falls into the latter category may not render the decision a nullity (e.g. *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, *Wang v Commissioners of the Inland Revenue* [1994] 1 WLR 1286).

Secondly, even if a flawed decision is considered to be a nullity, that does not automatically result in the making of a quashing order. The ultimate question before the Court remains; '*…whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take*.' (per Lord Donaldson MR in *R v Panel on Mergers ex parte Guinness plc* [1990] 1 QB 146 [§159-160]).

As HRW Wade wrote:[9]

"Although action which is adjudged to be ultra vires is properly described as void or a nullity, this voidness necessarily depends upon the right remedy being sought successfully by the right person. ... For as against third parties, whose rights are not infringed, a "void" act may well be valid if they have

[9] H. W. R. Wade, *Administrative Law* 3rd edn (Oxford 1971), 105-106

no legal title to challenge it. Even the injured party may be refused relief, e.g. by an exercise of discretion or because of some waiver. The meaning of "void" is thus relative rather than absolute; and the court may in effect turn void acts into valid ones by refusing to grant remedies.
There is no absurdity in this. The absurdity lies rather in supposing that "void" has an absolute meaning independently of the court's willingness to intervene."

Professor Paul Craig also highlights the fact that a Court may in its discretion refuse a remedy for an unlawful act that is void (or a nullity).[10] As Professor David Feldman puts it, on this view, a finding of nullity or 'voidness' is 'merely a threshold condition' for the grant of a remedy.[11] Professor Christopher Forsyth puts forward a 'second actor' theory wherein a decision that is otherwise a nullity had legal effect if a second actor has independent power to act notwithstanding the illegality of the earlier act.[12]

These examples (by no means exhaustive) illustrate the flexible nature of judicial review and the remedies available to Judges. As we stated in our response to Question 1; the court will not necessarily quash a decision because it exhibits an error of law as a quashing order is a discretionary remedy (see *R v Knightsbridge Crown Court ex p Marcrets Properties Ltd* [1983] 1 WLR 300). The remedy of quashing may be refused where the error of law is not fundamental (*R v Chief Registrar of Friendly Societies ex p New Cross Building Society* [1984] QB 227 at [260] or has not caused the applicant any prejudice (see see *R v Knightsbridge Crown Court ex p Marcrets Properties Ltd* [1983] 1 WLR 300).

We consider that the use of suspended quashing orders is neither necessary nor desirable and would undermine the rule of law, the principle of legality and the crucial principle that the government itself is subject to the law and to the rule of law.

[10] Paul Craig, Administrative Law 7th edition (London 2021) p743
[11] David Feldman 'Error of Law and Flawed Administrative Acts', Cambridge Law Journal, Vol 73, Issue 2, July 2014, pp275-314
[12] Christopher Forsyth, 'The metaphysic of nullity' – invalidity, conceptual reasoning and the rule of law' in Christopher Forsyth and Ivan Hare (eds) The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade (Oxford 1998) 141-160.

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

For the reasons already given, we do not agree with this that these proposals are helpful, nor would they be clarifying.

We are concerned that the consultation questions are clearly framed towards inviting respondents to reach a certain conclusion.

9) Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

We agree with the proposal. We understand the proposal to be the removal of the promptitude requirement but not the removal of the possibility of an extension of time under CPR 3.1(2).

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

Whilst it is important that there is certainty in relation to decisions by public bodies, the time-limit for bringing a claim for judicial review is short.

From our work in housing law, community care and other social welfare areas of law we are aware of the difficulties in navigating the system faced by people who are vulnerable due to ill-health or youth, or who are parents of children with disabilities, and who are dependent on legal aid in order to get advice about their situation and to bring their case. They will need to find a legal aid solicitor who has time to take on their case, apply for and get legal aid in place. We are also aware of the pressures some of our legal aid solicitor colleagues, who have heavy caseloads, work under to get cases up and running for legally aided clients. There is a

particularly pressing problem in the current state of the law in that if legal aid is not in place in time, the lack of legal aid is unlikely of itself to justify a failure to issue a claim for judicial review in time.

We support a reversal of the current law in this respect, to return to the previous position that delay arising out of the need to obtain legal aid was regarded as a sufficient justification for delay.[13] Even just a modest increase in the time-limit for issuing judicial review would reduce the pressures on the legal aid reliant group of claimants generally. This would reduce the risk that in those cases the parties miss out of the chance of a possible pre-action resolution. Therefore, we support consideration of a modest increase in the time-limit (whilst always retaining a discretion in the court to be able to consider extending time beyond the set time-limit in an individual case.)

11) Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

For similar reasons to those given in answer to the previous question, we agree with the proposal in this question, alongside the modest extension in the time-limit referred to in answer to the previous question, or in any event, if there is to be no change in the time-limit. In some cases, the possibility of agreeing a short further period to continue discussions (even 14 days) will avoid the need for issue of proceedings. There should be no requirement to agree an extension or to defer issuing, and satellite litigation on that issue would be undesirable of course. This is with the exception that we think that allowing the parties to agree a short extension to the time limit could usefully be accompanied by a guideline (relevant to decisions on costs) that an extension should usually be agreed where requested by a proposed claimant on grounds that they are waiting for legal aid to be put in place.

[13] The current authority is *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286; [2016] 1 WLR 723, CA; the previous position was stated in *R v Stratford-upon-Avon DC, Ex p Jackson* [1985] 1 WLR 1319. The previous and current principles are set out in Civil Procedure, Vol 1, Sweet and Maxwell (the White Book), paragraph 54.5.1.

12) Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

While we do not have an objection in principle to the introduction of a 'track' system, we do not consider that such a system is likely to improve the operation of the Administrative Court or higher courts. Simply, there is no demonstrated need for such a system.

The procedure which applies in judicial review claims is clear and simple. These Courts already have in place effective mechanisms for identifying claims that are urgent and / or of wider public importance. Case management directions can be sought on the claim form and Claimants can request expedition using an N463 form. The Court regularly gives detailed directions which reflect the urgency of the individual case. We consider that this obviates the need for a 'fast track' system and ensures that cases are heard within an appropriate time. Similarly, appropriate (often standard) case management directions are given at the point at which the Court grants permission and the Court has the ability to make *ad hoc* directions where needed.

Judicial review claims are not liable to consume as much court time as civil hearings as substantive hearings in judicial review rarely extend over more than a few days. Therefore there is no clear need to designate cases by their complexity to facilitate listing. Similarly, the value of cases (where this can be identified) is unlikely to be a helpful guide to the claim's wider importance or legal complexity.

We do not support the introduction of a 'track' system in judicial review claims. We consider that this would merely be an unnecessary procedural and administrative change which would in all likelihood be burdensome and unproductive.

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

We do not see any merit in this proposal, which we consider may be unworkable in practice. There are already adequate procedural rules (and jurisprudence) governing applications to intervene in proceedings. Permission must be granted for third parties to intervene in proceedings. There is no duty on third parties to intervene in litigation and there are various implications of doing so, primarily as regards resourcing and costs.

In our view, the current system works well and retains flexibility without placing additional burdensome obligations on the parties. It is unlikely to assist the Court to be presented with a general list of NGOs and other groups that might be well-placed to assist in litigation, without any information on their willingness or ability to intervene. Legal representatives preparing judicial review claims, especially those funded by legal aid, are already hard-pressed and adding further obligations on them is unnecessary and unhelpful.

We further consider that this duty is likely to be unworkable in practice. In most cases third parties are unlikely to be of assistance. In those cases where interventions may be appropriate, as the Court has no power to compel the involvement of third parties, this would not usefully assist the court.

14) Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply?

We strongly support introducing such a provision. In our experience as judicial review practitioners representing claimants, Replies are both useful and often necessary. They assist the permission judge in dealing with new arguments or evidence taken by the defendant in an Acknowledgement of Service, and may be essential to clarify confusion or alert the Court to the most up to date factual position.

We agree with the IRAL's view (at paragraph 4.152) that it is not satisfactory that the admission of Replies is left to judicial discretion. It leads to uncertainty and inconsistency. It is unhelpful that claimants are not given any clear timeframe for responding to the Acknowledgment of Service, which means that replies may not reach the permission judge before a decision is made.

We consider that appropriate procedural provision could be made to ensure that Replies are brief, relevant and do not repeat material already included in the Statement of Facts and Grounds.

18) Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

We rely upon our response to question 2, which refers to a wide range of Cart judicial review decisions.

We are aware from our work as the UK's leading immigration chambers that individuals with protected characteristics are likely to be overrepresented amongst Cart judicial review claimants.

Such claimants are highly likely to be from ethnic minority backgrounds and, by necessity, they will all be non-British nationals. Asylum-seekers and individuals who make human rights claims to remain in the UK include a disproportionate number of individuals who are disabled. Many of our clients within this group are LGBTQ+, pregnant and / or young parents, religious minorities and often have other protected characteristics.

We urge the government not to remove Cart judicial reviews and not to make any changes to such judicial reviews without a thorough, evidence-led examination of the equalities impact of such a proposal, which is likely to have a direct impact on a group that disproportionately falls within the categories protected by the Equality Act 2010.

Questions 8, 15 to 17 and 19.

We do not seek to respond to these questions