LIBERTY’S WRITTEN EVIDENCE TO THE MINISTRY OF JUSTICE (JUDICIAL REVIEW REFORM)

APRIL 2021
ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent research.

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INTRODUCTION

1. Liberty welcomes the opportunity to provide written evidence to the Government’s consultation in response to the recommendations of the Independent Review of Administrative Law (the Review). Liberty has been providing legal advice and supporting landmark cases since 1934. Our legal team provides services to claimants involved in judicial review cases as well as bringing public interest challenges in the areas of human rights and equality law. Our long history in bringing public law challenges means we are well placed to comment on the operation of judicial review as well as the critical role it plays in upholding justice and accountability within the UK’s constitutional settlement.

2. Liberty’s expertise in bringing judicial review challenges is augmented by our policy and campaigns work in Parliament and in the wider community. From this standpoint, it is apparent that the Government’s Response cannot be divorced from political reality. Liberty’s submissions set our response to the role of judicial review in the context of the broader policy considerations at play.

3. In summary, Liberty says:

- The framing of the Government’s Response is concerning. It mischaracterises the findings of the IRAL Report and in doing so claims a false mandate for significant constitutional change;
- The six-week time frame for responses is inadequate, and will have impeded the ability of many individuals and organisations to respond;
- It is not appropriate to adopt the context specific provisions of section 102 of the Scotland Act to make general provision for suspended quashing orders;
- The recommendation to abolish Cart judicial review was based on a seriously flawed analysis. The Government should carry out its own analysis of the statistics and consult further on the basis of better evidence;
- Prospective-only remedies create injustice for individuals, weaken the rule of law and risk creating additional unnecessary complexity in judicial review;
- Statutory instruments are an exercise of executive power like any other and the limited Parliamentary scrutiny they receive means that they must be subject to the possibility of judicial scrutiny;
- The discretion to make suspended quashing orders is already available to the courts.
Suspension should not be presumed or mandated; and

- It will only very rarely be appropriate to remove the High Court’s supervision on lower tribunals and will never be appropriate to remove its jurisdiction over executive decision-making.

4. In response to the Government’s procedural proposals, Liberty says:

- We agree with the proposal to remove the requirement to act ‘promptly’ in judicial review claims. We would also support consideration of an extension to the time limit.

- Any change to allow the parties to agree to extend time in judicial review claims should be very carefully considered.

- We do not think there is any benefit to introducing a track system in judicial review. We do not consider that it would be useful to introduce a requirement to identify intervenors.

- We agree with the proposal to make provision for a Reply and have no objection to the proposal to increase the time limit to file Detailed Grounds of Resistance.

BACKGROUND REMARKS

5. Before addressing the substantive questions in the Government’s Response, several preliminary points bear mentioning.

FRAMING

6. Liberty is extremely concerned by the framing of the Government’s Response to the Review. The Government appears to have mischaracterised the Review’s findings in order to provide cover to its proposed reforms, which if implemented will severely limit the function of judicial review as a check on executive power. The Report recognised the vital role that judicial review plays in ensuring that the law passed by Parliament is respected by the executive, and reflected submissions made by respondents including public bodies1 that judicial review has a positive impact on public decision-making. In contrast, the Government has framed the Review as providing a basis for its far-reaching proposals which would fundamentally alter the role of judicial review as an essential constitutional safeguard.

7. It is notable that the Chair of the Review has publicly corrected the Lord Chancellor’s

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1 *Inter alia, the responses of the Crown Prosecution Service, the Victims Commissioner, North Norfolk District Council and Arun District Council.*
assertion that the Report found that the courts are willing to accept a “worrying expansion” of the remit of judicial review.² Lord Faulks has stated that instead, despite concern “in some quarters” that *Miller I* and *Miller II* are examples of judicial overreach, the Report concluded that those cases did not represent a general trend and should not be used as justification for broader reform.³ That the Government is willing to misrepresent the findings of the independent panel in order to further its own agenda aimed at limiting executive accountability is of serious concern.

8. It appears to Liberty that the Government’s enthusiasm for these reforms, absent any basis arising from the review, are part of a concerted effort to evade both political and judicial scrutiny. When viewed in conjunction with an increasing propensity to legislate by statutory instrument, the proposals to effectively oust the jurisdiction of the court and place limits on the courts’ ability to remedy unlawful executive action reveal an intent to put government decision making beyond the reach of the law.

**TIMESCALE**

9. The consultation was launched on Thursday 18th March with a deadline of 29th April. This six-week period included the Easter school holidays, which will have significantly limited the time that people with childcare responsibilities had to respond to the consultation.

10. Liberty also notes that the consultation and the Government’s proposed reforms raise complex and technical questions about the operation of administrative law. They include proposals which go beyond the scope of the IRAL and which require careful and thorough analysis. As the Institute for Government warned in their recent report on judicial review and policy making, these proposals come with ‘obvious constitutional risks’ and are likely to reduce ‘the ability of citizens to challenge the exercise of coercive state power’.⁴ It is in the interest of all who are affected by judicial review, including the Government, that these proposals receive detailed scrutiny from lawyers, academics, citizens, and expert organisations. A six-week consultation period is simply not adequate to achieve this.

**SECTION ONE – IRAL’S RECOMMENDATIONS**

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to

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² Law in Action, 23 March 2021, accessible here: [https://www.bbc.co.uk/programmes/m000tdtg](https://www.bbc.co.uk/programmes/m000tdtg)
³ Independent Review of Administrative Law (“IRAL”), [2.77] and [2.98]
issue a suspended quashing order?

11. In Liberty’s view, the courts already have the power to make a suspended quashing order under section 31 of the Senior Courts Act, but have usually declined to do so on the basis that it will often conflict with fundamental principles of administrative law.⁵ We will deal with the issue of whether suspended quashing orders are an appropriate remedy for public law claims in our response to Question 6.

12. Our response to this question is therefore limited to whether it is appropriate to codify this discretion by using section 102 of the Scotland Act as a precedent. In our view, section 102 of the Scotland Act operates within a very specific context and should not be replicated indiscriminately across the whole spectrum of judicial review. Not only is the section concerned exclusively with issues of competence, it is also a necessary consequence of the carefully balanced and constantly evolving relationship between Scotland and Westminster. For example, the provision that the minister or Parliament should be given time to allow the defect to be corrected reflects the ongoing dialogue in respect of the limits of Scotland’s law-making capabilities as a devolved power.⁶ It is not based on considerations of efficacy and, more importantly, the idea of applying this approach to every unlawful decision of a public authority is clearly incompatible with the rule of law as well as being administratively unworkable. Furthermore, the impact of devolved matters is relatively limited when compared to a reserved matter such as immigration, which will always involve fundamental rights. Any delay to remedies in this context would be unfortunate and therefore reform in this area must be very careful not to mistakenly extrapolate seemingly similar concepts into disparate areas of review.

13. If the Government proceeds to legislate in the context of suspended quashing orders regardless of these concerns, our view is that the discretion should be framed as broadly as possible. It is worth noting that even in the context of devolved competence described above, the only requirement under section 102 is for the court to “have regard to” the extent to which third parties would be adversely affected by the order. There is a risk that an exhaustive list of factors would be unnecessarily limiting. To this extent, we agree with the findings of the Review that it should be left to the courts to develop principles to guide them in determining when to make a suspended quashing order. While we are sceptical of the need to legislate for suspended quashing orders, we would suggest that if the proposal is taken forward, any new provision should be drafted without an accompanying list of

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14. Liberty would also strongly oppose the introduction of any requirement to suspend a quashing order in certain circumstances. This is dealt with in more detail in our response to Question 6.

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

15. It is necessary to first draw the Government’s attention to the flawed evidential basis for the Review’s conclusions on ‘Cart’ Judicial Review (Cart JR). The Review describes that this form of review is an unnecessary drain on judicial resources on the basis that only 0.22% of cases net a “positive” result (i.e. a finding that the Upper Tribunal had wrongly refused permission to appeal from the First Tier Tribunal). But this 0.22% figure is misleading; it has now been pointed out by various practitioners that the Panel only had access to 45 reported cases, of which 12 netted a positive result. This would suggest a success rate of around 26.7%. The Panel arrived at the 0.22% figure by assuming that all 5,502 unreported cases had “negative” results. This presumption has no empirical basis and ignores the reality of the specific procedure for Cart JR.

16. Under the Cart procedure, once permission for judicial review of the decision of the Upper Tribunal is granted, an interested party must request a hearing “no later than 14 days after service of the order granting permission.” If no request for a hearing is made, the court will make a final order “quashing the refusal of permission [by the Upper Tribunal] without a further hearing.” The lack of reporting reflects the fact that hearings are extremely rare. The process is deliberately streamlined to reduce the burden on the Administrative Court; if the Upper Tribunal fails to request a hearing and its decision is quashed, it will reconsider and will usually grant permission. We simply do not know how many unreported Cart Judicial Reviews have positive results and it would be misleading for either the Panel or the Government to suggest otherwise.

17. Given the unreliable evidential basis for the Independent Review’s proposals, Liberty’s view is that the question should be whether, not how, to abolish Cart. In response to that

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9 CPR64.7A
10 Tomlinson and Pickup (see footnote 7)
question Liberty makes the following three points:

- First, the threshold for bringing a Cart JR is deliberately set very high. The Claimant’s case must be (a) arguable and (b) have a reasonable prospect of success and (c) raise an important point of principle or practice (or there must be some other “compelling reason” for permission to be granted). The high threshold will prevent unmeritorious cases from being granted permission. A significant proportion being refused permission on the basis of a high threshold demonstrates a system that is working, rather than one which should be abolished entirely.

- Second, removing the ability of the High Court to review decisions of the Upper Tribunal insulates it from the influence of other jurisdictions and risks developing a local law. The availability of Cart JR is a backstop to ensure that any errors can be corrected.

- Third, immigration and asylum decisions will always contain a complex balancing of issues which may have serious impacts on the fundamental rights of individuals. The fact that these decisions have a special importance was recognised directly by both the Court of Appeal in Sivasubramaniam and the Supreme Court in Cart. A significant proportion of Cart JR involve claims that the applicant would face persecution if removed to their home state. Even if only a small minority of the UT’s decisions to refuse permission are incorrect, the potentially catastrophic consequences for the individual concerned means that every mistake should be taken very seriously. In Cart, Lady Hale pointed to the fallibility of tribunals and the need to “keep such mistakes at a bare minimum” in a way which was “necessary and proportionate” as the primary justification for Cart JR.

18. It is concerning that the Review and the Government have failed to recognise the important safeguard provided by Cart JR. In Liberty’s view, the Government’s willingness to adopt this recommendation without questioning the evidence relied on by the Review forms part of a wider effort to remove legal protections from migrants. We urge the Government to carry out further research and reconsider this proposal.

19. We deal with wider issues concerning ouster clauses in our response to Question 8, but Liberty also notes here that in making these proposals the Lord Chancellor told the House of Commons that he intended to “place the decisions of the Upper Tribunal and the High

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12 CPR 54.7A(7)
13 [2003] 1 W.L.R. 475, [52]
14 [2011] UKSC 28, [47]
15 J. Bell (see footnote 11)
16 [2011] UKSC 28, [37]
Court on an equal footing”.17 This is an argument for abolishing Cart based not on (flawed) statistics, but on ousting the jurisdiction of the High Court. We note that in Cart, the Supreme Court found that making the Upper Tribunal a superior court of record was insufficient to oust the jurisdiction of the High Court, and that any argument that it did had been “killed stone dead by Laws LJ [in the Court of Appeal] and has not been resurrected.”18 If the Government intends to proceed with these proposals, it will have to do so with robust Parliamentary scrutiny.

SECTION TWO – ADDITIONAL PROPOSALS

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

20. Yes, any proposals that do proceed should be limited to England and Wales only. We would note that that there has already been detailed analyses of judicial review in both Scotland and Northern Ireland.19 We agree with the Panel that “it would be for the institutions of the devolved government in Scotland and Northern Ireland to decide whether to adopt any procedural changes that might be introduced in England and Wales in implementation of or following our recommendations.”20

21. However, as set out elsewhere in our response, we do not accept that many of the proposals are justified (particularly those in relation to remedies) and therefore would like to clarify that they should not be introduced.

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

22. In Liberty’s view prospective-only remedies have the potential to create opportunities for injustice in individual cases, weaken the rule of law, and introduce unnecessary layers of complexity into an already functioning system. As the Government acknowledges, the Review made no recommendations of this sort, and in its proposals, the Government Response fails to engage with the risks of introducing prospective-only remedies.

18 [2011] UKSC 28, [37]
20 [IRAL, [5.50]
23. It is apparent that this proposal has been made in response to the *UNISON* case. On that basis, it is worth considering the impact that prospective-only remedies would have on the individuals affected by that case. Having found that Parliament could never have intended a clear derogation from the right of access to justice, the Supreme Court quashed the Order which required individuals to pay a fee to use the Employment Tribunal. The remedial consequence of the quashing order was that the Government was required to retrospectively refund the claimants who had been charged fees. A prospective-only remedy in this scenario would have been a serious injustice to the claimants whose fundamental rights to access to justice had been found to have been violated.\(^\text{21}\)

24. Prospective-only remedies also weaken the rule of law because they allow the Government and public authorities to act without fear of legal repercussions. The Government is effectively encouraged to take risks and act unlawfully, and the only consequence is that the decision must be remedied in the event that it is successfully challenged. The Government has made a mistake in asserting that legal certainty trumps other principles and that the need for effective administration outweighs all other concerns. In fact, good decision-making is the foundation of effective administration, and, as was acknowledged by a significant number of the public bodies which made submissions to the Review, the threat of judicial review leads to better decision-making.\(^\text{22}\) Limiting the consequences for public bodies of making unlawful decisions will only lead to poorer decision-making.

25. The Government asserts that there are political mechanisms which can resolve the effect of unlawful decisions\(^\text{23}\) and that it wants to “create a system that encourages solutions to be found through political will rather than legal dispute.”\(^\text{24}\) It is astonishing to suggest that political will alone could act as an effective remedy for unlawful decisions, and even more so to suggest that the appropriate body to provide oversight of the executive is the executive itself. It should not need stating that under our constitution the executive is accountable to both Parliament and to the courts, whose role is to ensure that the executive complies with the law as made by Parliament.

26. We would also highlight that in addition to limiting the accountability of the Government for its decisions, prospective-only remedies create another constitutional difficulty: that in making prospective orders the courts create new law rather than applying it. There is a significant risk that the use of prospective-only rulings could unravel the carefully

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\(^{21}\) And also breach their rights under Article 13 – see paragraph 29 of our submissions

\(^{22}\) *Inter alia* the responses of the Crown Prosecution Service, the Victims Commissioner, North Norfolk District Council and Arun District Council.

\(^{23}\) Government Response, [60]

constructed constitutional balance between the judiciary and Parliament. Lord Nicholls pointed out the fundamental problem in the *Spectrum* case:

> *the essence of the principled argument against prospective overruling is that in this country prospective overruling is outside the constitutional limits of the judicial function.*

27. Looking at the position in other jurisdictions, it is notable that courts are usually only prepared to hand down a prospective ruling in either cases of constitutional importance or cases which would have serious economic repercussions on a large number of good faith relationships. In practice this happens extremely rarely, and these are very limited categories which have been carefully contained on the basis of subtle judicial reasoning and incremental developments. The ECtHR has also held in a very clear judgment that certain remedies which have prospective-only effect cannot be regarded as effective and therefore would be a violation of Article 13.

28. Liberty is also concerned that arguments about whether a prospective-only remedy would be suitable in each case will add complexity to the judicial review process and place an additional burden on both parties. It is unclear exactly how this procedure would operate in practice, but it seems likely that rather than limiting the number of claims, the introduction of this proposal will lead to extensive satellite litigation over enforcement of the prospective remedy.

29. Finally, although we object in principle to the introduction of prospective-only remedies, if the Government is committed to legislating for a prospective-only remedial discretion it should be drafted as broadly as possible. Codifying the specific factors to be taken into account would exacerbate the impact of limiting remedial discretion and add a further barrier to claimants challenging unlawful decision. In our view judges are much better suited to the pragmatic development of the discretion over time, rather than rigid criteria drafted in a vacuum.

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

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26 [2005] UKHL 41, [28]
27 ECJ - Case C-209/03, [69]
28 Ramirez Sanchez v. France [GC], 2006 [165-166]
30. Liberty strongly objects to the proposal to presume or mandate prospective-only remedies in respect of challenges to secondary legislation. As set out in our response to Question 4, Liberty’s view is that giving the courts the power to make prospective-only remedies undermines basic principles of constitutional law. We also note that the Review did not recommend any change to the approach to remedies for unlawful secondary legislation.

31. The Government’s proposal relies on the submission of Sir Stephen Laws that it is not necessary to distinguish between primary and secondary legislation and that acts of this nature are “inherently different from other exercises of power”.29 Liberty disagrees. The Hansard Society has found that the standard ratio is that 80% of secondary legislation is passed using the negative resolution procedure and 20% are passed with the affirmative resolution procedure.30 The result is that the vast majority of secondary legislation is subject to virtually no scrutiny. It is therefore essential that unlike primary legislation, secondary legislation is subject to judicial scrutiny.

32. The Government Response states that retrospectively quashing legislation that has been relied on by individuals is contrary to the rule of law.31 This entirely fails to acknowledge that the Government must act in accordance with the law. If the courts can only prospectively quash secondary legislation, there are serious implications for individuals who would remain subject to the effects of legislation that the courts find to be unlawful.

33. The proposal is also an attempt to address a perceived problem that does not in reality exist. In fact, the courts very rarely retrospectively quash statutory instruments and where they do find secondary legislation unlawful, it does not mean that it is inevitably struck down. Liberty understands that the last six years there have been 23 successful challenges to statutory instruments in the High Court, eight in the Court of Appeal and six in the Supreme Court. In only 10 of those 37 decisions did the courts quash or disapply a statutory instrument as a remedy. Four of these decisions related to the same two statutory instruments and one of the decisions quashed the statutory instrument only prospectively. This means that only seven statutory instruments have been retrospectively quashed over a period of six years, compared with approximately 1500-2500 statutory instruments which are passed every year. In the overwhelming majority of the 42 cases the court gave only a declaration of unlawfulness as a remedy.32

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29 Government Response, [67]
30 Hansard Society, ‘Westminster Lens: Parliament and delegated legislation in the 2015–16 session’ (2017) 4 which showed 19% of SIs were affirmatives in the 2015-2016 parliamentary session.
31 Government Response, [67]
32 Data provided by the Public Law Project
34. The Government Response states that the courts are carrying out “wide and retrospective quashing”\(^3\) of secondary legislation, but this is simply not borne out by any evidence. The courts take a cautious approach to quashing secondary legislation even in cases which concern breaches of human rights. Thousands of statutory instruments are laid each year and yet in the two decades since the HRA came into force there have barely been more than a dozen cases in which the courts have found subordinate legislation to be unlawful because of the HRA, and even in those cases, it is extremely rare for the court to quash offending provisions.\(^4\) In *Tigere*, Lady Hale found that the claimant in the case was “clearly entitled to a declaration that the application of the settlement criterion to her is a breach of her rights” but declined to quash the instrument, which “[left] it open to the Secretary of State to devise a more carefully tailored criterion which will avoid breaching the Convention rights of other applicants, now and in the future.”\(^5\)

35. Liberty is strongly opposed to both of the proposed approaches. However, if the Government proceeds with this proposal it should choose a presumptive approach to prospective-only quashing of secondary legislation. As we have noted, in practice, the courts are already extremely hesitant to retrospectively quash secondary legislation. We would be extremely concerned by the removal of any discretion to quash unlawful statutory instruments. To deny the victims of human rights violations and individuals affected by unlawful decision-making effective redress by undermining the ability of the courts to deal appropriately with subordinate legislation would be deeply unjust.

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

36. As set out in our response to Question 1, in Liberty’s view the courts already have the discretion to suspend quashing orders. The courts can and do exercise their discretion to withhold relief permanently,\(^6\) and the power to suspend an order is available on the same basis. Exercising either discretion will usually conflict with the basic principle of public law that an unlawful administrative act is invalid, but the courts have shown a pragmatic approach that recognises that in some cases it is appropriate to withhold relief.

37. Question 7 deals in more detail with the question of whether it is conceptually necessary

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\(^3\) Government Response, [68]


\(^5\) *R (Tigere) v Secretary of State for Business, Innovation and Skills*[2015] UKSC 57

or even possible to distinguish between errors which are invalid and those are which are ‘voidable’, which the Review takes as its starting point for its recommendations on suspended quashing orders. However, it is necessary to point out here that Liberty does not agree that the Supreme Court’s decision in Ahmed precludes the use of suspended quashing orders in any judicial review. In that case, the court readily concluded that it has the discretion to “suspend the effect of any order that it makes.”37 The difficulty was that the court had already made a concrete decision which held that the provisions were void and did not want to undermine this decision.

38. Liberty does not object in principle to an amendment to section 31 of the Senior Courts Act to clarify that the courts have the power to make suspended quashing orders. However, we would strongly resist any presumption or requirement that any quashing order be suspended. There is a danger that requiring the court to engage with considerations including whether a defect can be remedied, or the cost of remedial action, would stray too far into the substance of an issue. The status quo allows the court to quash a decision it has found to be unlawful but also provide the public authority with considerable discretion in terms of how it remedies the illegality. The suggestion that the court must suggest conditions which (in its view) would remedy the defect creates a more intrusive form of review and ignores its limited institutional competence. For example, the court may not be best suited to suggest conditions that relate to subtle issues of economic policy.38 It is however well suited to answering questions of competence,39 which is why section 102 of the Scotland Act confidently supplies the court with the power to provide conditions. Any requirement to suspend quashing orders indiscriminately across the whole spectrum of judicial review should therefore be strongly resisted on constitutional grounds.

39. Suspended quashing orders can be appropriate in circumstances where the court is well suited to suggesting conditions, the best examples being procedural fairness, competence, and violations of fundamental rights. However, we would suggest that any “presumption” or “mandate” even in these limited contexts would introduce inflexibility and ignore the nuanced constitutional issues. A test like exceptional public interest is simply too high a bar and too blunt a sledgehammer;40 if the courts are recognised as being the best bodies to balance these issues, then they should have full remedial discretion and be allowed to develop this discretion over time. We note that this was the approach suggested by the

38 [2016] UKSC 6 [22]-[23]
Review, which found that “it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded”.41 However, we do not agree with the Panel that there is merit in requiring suspended quashing orders to be used in relation to powers more generally.

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

40. The Government’s concerns about the clarity of the principle of nullity appear to arise from the Review’s discussion of the relationship between nullity and suspended quashing orders. The Review concluded that the unlawful exercise of power does not always lead to the conclusion that the exercise of that power was null and void,42 paving the way for its recommendations in relation to suspended quashing orders. Importantly, the Review found that it would be “an impossible task” for the courts to distinguish between its categories of “cases where a public power has been exercised validly but unlawfully” and “cases where it has not been exercised validly and...was therefore null and void”.43 Instead, the Review recommended giving the courts the freedom to decide whether or not to treat the exercise of a power as null and void in order to enable the use of suspended quashing orders where appropriate. As set out above, the courts already exercise this discretion.

41. The Government Response in turn states that “the application of the principle of nullity...is of concern to the Government” and that if the orthodox conception of nullity is retained it would be “extremely inconvenient.”44 Correcting unlawful decision-making may well result in some inconvenience for the government, but in any event, in our view the Response (and to some extent the Review) exaggerate the difficulties posed by the principle of nullity. The concept of nullity does not appear to present any real problems in practice and serves at least three very important purposes.

42. First, nullity is itself a means of controlling abuse of power.45 The principle of nullity forces public authorities to engage very carefully in any decision-making process. If the risk that an unlawful decision might be void is removed there is a danger that public authorities will engage in unpredictable and substandard decision-making without the necessary repercussions.46 Nullity enhances decision-making because it forces the authority to engage

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41 IRL, [3.69]  
42 IRL, [3.60]  
43 IRL, [3.63]  
44 Government Response, [71] and [72]  
45 [1975] AC 295, per Lord Diplock on p.365—“a means of controlling abuse of power by the executive arm of the Government”  
with the relevant issues.⁴⁷

43. Second, an individual should be entitled to an expectation that unlawful action taken against them will be void. The unlawful exercise of public power is not analogous to the breach of a contract; it is a fundamental breach of the right of an individual to be governed lawfully. The academic debate about ultra vires is a distraction, particularly when attempts are made to draw “close analogies” between private law and public law powers.⁴⁸ The contexts are simply very different. The much more pressing issue is how we view unlawful actions by public authorities within our constitutional framework. Liberty’s view is that the general rule should remain that unlawful acts are null and void.

44. Third, contrary to the suggestions of the Government,⁴⁹ nullity strengthens the rule of law because the result is legally certain.

45. In any event, the courts are already applying the concept of nullity flexibly. Regardless of the “metaphysics”⁵⁰ the practical reality is that nullity arises only as a consequence of a court order.⁵¹ There will of course be instances in which it will be pragmatic for the court not to void the decision. For example, the court has refused to find a planning decision void when compliance with the relevant EU Regulations would have made no difference to the outcome.⁵² There are also cases which suggest that, for example, the fair decision of a Tribunal which was made under an ultra vires provision will be legally valid.⁵³ The Review also points to case law on the Continuity Bill,⁵⁴ but Liberty would reiterate that rather than an unravelling of constitutional principle, this is simply another good example of the dialogic approach in the devolution context.⁵⁵ These three cases represent the very careful application of concepts such as deference and institutional competence to discrete areas of case law and we suggest that the Government’s focus should shift from metaphysics to practical reality.

46. We also note that legislation currently deals with the potentially negative impacts nullity may


⁴⁷ For a first-hand account – see para 7 of the CPS submissions to the IRAL (EIN 233)
⁴⁸ T. Adams, “The Standard Theory of Administrative Unlawfulness” Cambridge Law Journal 76(02) [2017], 1-22, p.2 [Lord Diplock warns against the conflation of public/private law principles in La Roche, p.366 – “these are concepts of private law which are ill-adapted to the field of public law”]
⁴⁹ Government Response, [84]
⁵⁰ Government Response, [40]
⁵¹ [1975] AC 295, per Lord Diplock on p.365—“unless there is such a challenge and, if there is, until it has been upheld by a judgement of the court, the validity of the statutory instrument and the legality of the acts done pursuant to the law declared by it are presumed”
⁵² [2016] UKSC 52 [54]
⁵³ [2017] EWHC 59 (Admin) [96]
⁵⁴ IRAL, [3.60]
⁵⁵ [2018] UKSC 64 [26]
have on third parties in discrete situations. For example, under s.2(1) of the Local Government (Contracts) Act 1997: “where a local authority has entered into a contract, the contract shall, if it is a certified contract, have effect (and be deemed always to have had effect) as if the local authority had had power to enter into it (and had exercised that power properly in entering into it).” This showcases a flexible way in which nullity can be approached without the need to uproot fundamental principles of our administrative law.

47. Having identified a problem which does not in reality exist, the Government proposes to remedy it by legislating to codify the types of public law error which result in a nullity. It proposes that only lack of competence would lead to a nullity, and that all other public law errors are merely voidable. However, it proposes that even a jurisdictional error could be remedied by a suspended quashing order, which appears to undermine any argument for making a distinction between the two types of error.

48. In our view, the Government’s new formulation of the distinction between jurisdictional and non-jurisdictional errors as “acting without any power” and “the wrongful use of a power” is arbitrary and unnecessary. There are very good reasons for why we should view violations of fundamental constitutional rights and principles (such as access to justice and Parliamentary accountability) as nullities, even though they would be conceptualised by the Government as the wrongful use of power. Attempting to isolate nullity to questions of competency is an attempt to undermine the protection of fundamental rights. The distinction also fails to recognise that these are complex questions which the courts have been grappling with for decades.

49. We are also concerned about the wider consequences of codifying a distinction between jurisdictional and non-jurisdictional errors. Categorising the majority of public law errors as the wrongful use of power would potentially leave these errors entirely immune from review, subject to an effective ouster clause. It is unclear if that is a deliberate or unintended consequence of the Government’s proposals, but it would be extremely concerning if this was the outcome of these reforms.

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

50. The Review was not asked by the Government to consider ouster clauses and made no

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56 https://www.legislation.gov.uk/ukpga/1997/65/section/2
57 Government Response, [81]
58 [2017] UKSC 51
59 [2017] UKSC 5
60 [2011] UKSC 28 [40]
proposals in relation to them. So far as the Review referred to ouster clauses, it did so by noting the risk of broad statutory ouster as one serious disadvantage to codification of the boundaries of judicial review. It also found that in relation to the question of justiciability, while Parliament could legislate to exclude the exercise of a particular power from judicial review, it would be an "exceptional course" that should only be taken for "highly cogent reasons".\textsuperscript{61} Liberty does not agree with the Government that the Review’s finding that Parliament has the theoretical power to limit judicial review "begs the question" of how to do it,\textsuperscript{62} and is therefore concerned by this question, which is premised on the desirability of effective ouster clauses.

51. Rather than considering the efficacy of the Government’s proposals in relation to ouster clauses, Liberty considers it necessary to ask why the Government is seeking to oust the jurisdiction of the courts over its decision-making. It is unclear from the Response whether the Government is looking to give effect to ouster clauses which remove the jurisdiction of the High Court over certain specialist tribunals, or whether it is more broadly concerned with limiting judicial oversight of the exercise of certain types of power.

52. In Liberty’s view, it is not generally desirable to entirely oust the jurisdiction of the High Court over other courts and tribunals. In \textit{Privacy International}\textsuperscript{63} Liberty provided evidence to the court which demonstrated that as a result of the very broad jurisdiction of the Investigatory Powers Tribunal, which has the power to make determinations in relation to many issues which also arise in other courts, the possibility of oversight by the High Court was necessary in order to achieve consistency in the law. The existence of judicial oversight should not preclude the possibility of further review, and in our view, it will very rarely be appropriate for any court or tribunal to be entirely immune from challenge. As submitted in Question 2 above, this includes review of permission decisions of the Upper Tribunal.

53. The Government rightly states that the creation of local law is undesirable, but this is an inevitable consequence of the removal of judicial oversight. In certain very limited jurisdictions, the creation of local law might be acceptable, such as in the example given by the Government of employment practices within a university.\textsuperscript{64} However, in any context in which fundamental rights are at stake or where there is any overlap with other jurisdictions, it will be wholly inappropriate to allow for the creation of a legal fiefdom un-correctable by judicial process.

\textsuperscript{61}\textsuperscript{61} RLAL, [2.89]
\textsuperscript{62}\textsuperscript{62} Government Response, [89]
\textsuperscript{63}\textsuperscript{63} \textit{R (Privacy International) v Investigatory Powers Tribunal and others}[2019] UKSC 22
\textsuperscript{64}\textsuperscript{64} \textit{R v Lord President of the Privy Council ex parte Page}[1993] AC 682
54. Should the Government be considering these reforms in order to oust the jurisdiction of the courts in other circumstances, for example, over any form of executive decision-making currently subject to judicial review, Liberty would oppose this in the strongest terms. The Government response states that ouster clauses are “not a way of avoiding scrutiny” and argues that in some instances political rather than legal accountability is appropriate.\(^{65}\) It is unclear if this is a reference to Miller I and Miller II, or if it is a broader reference to legal challenges which have resulted in the quashing of secondary legislation. In respect of secondary legislation, as described above, the vast majority of statutory instruments are passed by the negative resolution procedure. This involves virtually no parliamentary scrutiny, and it would be fundamentally suspect to assert that secondary legislation should ever be immune from challenge on the basis that it is subject to any kind of ‘political accountability’. Any steps to oust judicial review of this kind of executive decision-making would be entirely contrary to the rule of law.

55. In respect of the two Miller cases, Liberty’s view is that judicial intervention is appropriate where the executive stretches its power beyond accepted limits, and agrees with the Review that a tiny number of contentious cases do not necessitate far-reaching legislation in respect of the justiciability of the exercise of executive power.\(^{66}\)

**SECTION THREE — PROCEDURAL REFORM**

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

56. Liberty was pleased to see the Report adopt our submission that the promptitude requirement should be abolished.\(^{67}\) In our view, the requirement to act promptly in addition to issuing a claim within three months creates uncertainty for all parties. We agree that the CPRC should be invited to remove this requirement.

57. We would also like to emphasise that removing the requirement to act promptly should have no impact on the court’s discretion to extend time where there are good reasons for doing so. These could include situations where a claimant could not reasonably be expected to file a claim, for example where an application for legal aid has been made in good time but not yet granted, and as a result the claimant has no costs protection.

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\(^{65}\) Government Response, [86]  
\(^{66}\) IRAL, [2.95] and [2.96]  
\(^{67}\) IRAL, [4.145]
Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

58. Liberty agrees that at the same time as considering whether to remove the requirement to act promptly, the CPRC should consider extending the time limit. Three months is a much shorter time limit than most other areas of law, reflecting the need for certainty in public decision-making. However, the process of judicial review is heavily front-loaded for claimants, and as a result, many poor decisions go unchallenged due to the strict time limit.

59. In order to commence proceedings for judicial review, a claimant must undertake a significant amount of work in a very short timeframe. It will be necessary for a claimant to provide detailed instructions, a process which will inevitably be more time consuming than the equivalent task completed by an experienced officer of a defendant body. There will be research to undertake and witnesses from whom to take statements. This exercise will take even longer in cases where claimants are distressed, illiterate, do not speak English, are communication impaired, or have other characteristics frequently seen by lawyers acting for more vulnerable groups.

60. The pre-action protocol requires the claimant to send a detailed letter before claim setting out their case and the proposed grounds of challenge. In order to issue a claim, the claimant must provide a detailed statement of facts and grounds, provide copies of all documents on which they intend to rely, and provide all the relevant statutory materials. There is no provision for claimants to supplement their grounds before permission is considered, so there is a heavy onus to ensure that the facts and grounds are detailed and comprehensive at the outset.

61. In addition to the procedural burden, claimants must also act extremely quickly to obtain specialist advice, funding and costs protection within the three-month time limit. Allowing more time for these steps would improve access to justice as well as the quality of public body decision-making without impeding good administration.

62. On this basis, Liberty would support consideration of an extension to the time limit.

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

63. Liberty agrees with the finding of the Report, that it would be very difficult to implement provision for an extension of time to be agreed between the parties without creating
undesirable side effects. Those side effects include the impact on third parties with the potential to be affected by any litigations, as identified by the Bingham Centre for the Rule of Law.

64. In Liberty’s view, there are additional potential consequences which should be carefully considered. The Pre-Action Protocol currently operates extremely well as a mechanism which enables parties to resolve issues before resorting to litigation. Where both parties engage effectively with the pre-action protocol, it avoids the need for unnecessary litigation and resolves issues in a timely way. There is a risk that the ability to extend time by agreement could reduce the incentive on the parties to comply properly with the pre-action protocol and has the potential to cause unnecessary delays in resolving disputes. Any change should be very carefully considered and should be based on a fixed limit for any extension (e.g. up to two months) and limited to cases where pre-action resolution is actively being pursued.

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

65. In Liberty’s view, the introduction of a ‘track’ system is unnecessary in judicial review claims. This proposal was not considered by the Review, and it is not apparent that there is any problem with the administration of judicial review in the Administrative Court. In fact, there is a risk that decisions around allocation could add an additional administrative burden with no obvious benefit.

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

66. We note the Panel’s recommendation that criteria for permitting intervention should be developed and published, and further note that the Government has confirmed that it believes this proposal has merit but will be considered separately.

67. In respect of the specific question of imposing a duty “to identify organisations or wider groups that might assist in litigation”, it is unclear whether this would be a duty on both parties, or just on the claimant, as suggested by the Response’s reference to “giving the

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68 IRL, [4.144]
69 Streamlining Judicial Review in a Manner Consistent with the Rule of Law (Bingham Centre Report 2014/01), Bingham Centre for the Rule of Law, BCL, London, February 2014.
70 IRL, [4.108]
71 Government Response, [102]
72 Government Response, [103]
court and Defendant’s [sic] notice”.73

68. In any event, we do not consider that this would be useful, particularly in the light of concerns raised as to multiple interveners and interventions that do not assist the court.

69. This proposal would place a considerable burden on claimants (and defendants if they were included) to identify, presumably, all organisations or wider groups that “might” assist. It would significantly increase the risk of multiple intervention applications. It is also unclear how this would assist in estimating the cost and length of litigation, (particularly if this step was taken at the outset and pre-permission). The majority of interventions are by written submissions only with a strict page limit. Even oral submissions (usually time-limited to an hour or less) rarely affect the overall timetable of the case or the time estimate of the final hearing. Providing a list of all possible interveners – with no indication as to whether they would in fact apply to intervene – would not assist.

70. By way of an example, Liberty is contacted on a frequent basis by parties who wish to draw cases to our attention in case we wish to apply to intervene in them but Liberty actually applies to intervene in a very small proportion of such cases, and this decision is usually taken after the grant of permission when the issues have narrowed and the legal arguments in play have crystallized. Without any actual confirmation that an intervention application will be forthcoming, the identification of an organisation or wider group as having the potential to assist in litigation tells the court nothing that could assist with case management.

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

71. Yes, we do agree that the CPRC should be invited to include a formal provision for a Reply, although we do not think that seven days is sufficient. We would suggest 14 days, unless the claimant has sought expedition, in which case they would ordinarily be expected to propose a truncated timetable appropriate to the circumstances of the claim.

72. In many cases, the defendant has not replied to the pre-action protocol letter, and the AoS is therefore the first time that the claimant has been provided with any information as to the defendant’s response to the claim. Even when the pre-action protocol has been complied with by the defendant, the AoS often includes additional arguments, factual information or evidence not previously provided to the claimant. This is why formal provision for a Reply would assist, and why seven days is insufficient to deal with such

73 Government Response, [103]
matters. A Reply will provide the court with additional information (including concessions by the claimant where appropriate) before making a decision on permission.

73. We would also suggest that at the same time the CPRC should be invited to consider a related amendment to CPR 54.8(2)(b) which currently requires service of the AoS “as soon as practicable [after filing] and, in any event, not later than 7 days after it is filed”. Many defendants now file and serve simultaneously but not all. This often creates a delay of up to seven days between the filing of the AoS and service on the claimant.

74. We would therefore suggest that CPR 54.8(2)(b) is amended to require the AoS to be filed and served at the same time. This would avoid unnecessary delay and also provide a clear timeframe for the deadline for any Reply. The court would therefore be aware of when that deadline had passed and the papers could be passed to a judge for a decision on permission.

Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

75. We are unclear as to the proposal and question here. Paragraph 105(a) of the Response suggests changing the obligations surrounding the Summary Grounds of Resistance, not the Detailed Grounds of Resistance. Paragraph 106 also appears to confuse Summary Grounds of Resistance with Detailed Grounds, as it mistakenly suggests that Defendants are somehow “compelled to draft detailed grounds before permission is granted”. This is not the case; detailed grounds are only required after the grant of permission.

76. We are therefore unable to answer this question as it does not make sense given the context set out in paragraphs 105 to 107.

Question 16: As set out in para 105(b) above, is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

77. We have no objection to this proposal. Defendants routinely take more than the current time limit of 35 days without it having a negative impact on the claimant or management of the case overall. Any further extension should of course require an application to be made on notice.

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74 Government Response, [105(a)]
75 Government Response, [106]
76 Government Response, [105-7]
SECTION FOUR – IMPACT ASSESSMENTS

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals? We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about Cart Judicial Review Claimants, and their protected characteristics.

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

*Equality Impact Assessment*

78. In our view, on the basis that the Ministry of Justice does not collect detailed information about court-users, it cannot have a full understanding of how the proposals set out in this document will affect people with protected characteristics. There is established evidence that groups including disabled people, women, and people of colour are disproportionately likely to need to access the justice system and to experience barriers to doing so. People in these groups stand to be most adversely affected by measures which will restrict the remedies available to them through the system of judicial review.

79. While we acknowledge the Government intends to use this consultation process to seek further evidence about the potential impact of these reforms, we believe six weeks is too short a time period to gather this evidence, especially given the lack of official data on the experience of people who use the courts. Earlier in this submission we set out our position on the substantive proposals. However should the Ministry of Justice continue to develop these proposals we believe the onus should be on the department to commission the empirical research needed to develop a full equality analysis.

80. For the full impact of these proposed reforms to be properly assessed, it will also be necessary for the Government to carry out a cumulative impact assessment on all the related proposals concerning judicial review, including the proposals in the New Plan for Immigration and any proposals arising from the Independent Human Rights Act Review.

*Cart Judicial Review*

81. It is right that the consultation document acknowledges that removing Cart Judicial Review would disproportionately affect people with protected legal characteristics. This includes

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individuals with the protected characteristics of race, religion and sexual orientation who are more likely to need to make use of Cart JRIs in relation to immigration and asylum claims. It is important to recognise that legislating to reverse Cart would also have an impact on other types of decisions under the Upper Tribunal’s remit. For example in the Administrative Appeals Chamber, social security appeals make up the biggest volume of cases, with a large proportion concerning disability benefits and incapacity benefits. Removing Cart JR would have a differential impact on disabled people who are more likely to need to draw on support from these benefits.

82. We do not accept the reasoning in the consultation document that these impacts would be justified on the basis that a low proportion of Cart JRIs result in a finding of an error in law. As we discuss earlier in our submission, this conclusion is based on an empirical mistake and does not reflect the true impact of Cart JR. We also do not believe that this disproportionate impact is mitigated by the fact these proposals apply to the whole Upper Tribunal. It is entirely possible for a policy to amount to indirect discrimination on the basis of its differential impact even if it is drawn widely.

**CONCLUSION**

83. The Government’s proposals for reform of judicial review are rushed, lack evidential basis, and go far beyond the terms of reference of the Independent Review. Further, a six-week consultation period is entirely inadequate given the far-reaching constitutional implications of the proposals. Judicial review is a vital safeguard against poor decision-making and the unlawful exercise of executive power. The majority of the proposed reforms would weaken the ability of individuals to hold the Government to account and stifle the courts’ ability to provide meaningful redress. Robust legal accountability for the executive is not an inconvenience, it is an essential part of the rule of law and our constitutional arrangements. The Government must reconsider their intention to proceed with these proposals.

**KATY WATTS**
Lawyer

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78 Senior President of Tribunals, *Senior President of Tribunals’ Annual Report 2020* (2020)