Response of Child Poverty Action Group
to the Ministry of Justice Judicial Review Reform Consultation
(Government Response to the Independent Review of Administrative Law)

April 2021

About CPAG

1. Child Poverty Action Group ("**CPAG**") is a medium-sized charity which works to end child poverty through policy and campaign work but also has a specific and highly regarded social security expertise. We have a small legal team engaging in test case litigation on social security issues primarily affecting children and their parents, through both judicial review and statutory appeals and we hold a public law contract with the Legal Aid Agency. Our test cases seek to ensure that ordinary families who are going through difficult periods in their lives where they need to claim welfare benefits (e.g. because of bereavement or because, often despite working, they are unable to provide fully for their family) have their benefit entitlement determined by legislation which complies with basic public law requirements.

General comments on the consultation approach

2. Our reading of the proposals set out in the Government's Response to the Independent Review of Administrative Law (the "**consultation**") against the background of the Independent Review of Administrative Law report ("**IRAL**") is that in many respects the Government's proposals go far beyond the recommendations of IRAL and in places appear to contradict IRAL's findings, without always indicating clearly on the face of them that this is the case.

3. Given the short consultation timeframe of 6 weeks and the nature of the proposals, some of which concern issues that go to the heart of the role and purpose of public law in society and are of a highly technical nature, we have not been able to provide as full a response, or as detailed evidence, as we might otherwise have done within a more adequate timeframe.

4. Crucially, given the timeframe, we have not been able to canvass views from our client base – the individuals who have used judicial review and those for whom judicial review has had a profound effect on their lives. Judicial review does not only exist in a bubble of lawyers, politicians and civil servants and the proposals contained in the consultations have the potential to have a significant negative impact on the ability of individuals, including children and their families, to obtain justice following unlawful actions by the state. In our view, the Government's stated 2019 manifesto commitment to "*ensure that judicial review is available to protect the rights of the individuals against an overbearing state*" would not be upheld if the proposals are pursued.

5. CPAG is also responding to the ongoing Independent Human Rights Act Review and is concerned that the consultation does not acknowledge the overlap between the two areas under review. It is evident that the proposals have potential implications for the operation of the Human Rights Act 1998 (not least access to an effective remedy for a breach of one's human rights). As well as appearing to be a deliberate attack on human rights 'through the back door' instead of transparently in response to the forthcoming report from the independent review panel, the Government's piecemeal approach to reforms in this way risks unintended consequences arising from any changes made as a result.

6. We address in more detail in the 'procedural reform proposals' section below our particular concerns about the data provided by government departments in response to IRAL's call for evidence. However, as a broader point we note that evidence base for the consultation proposals is lacking across the board. In this respect, we agree with the Public Law Project's comment that "*for most of the questions consulted upon, the evidence base is either inadequate or non-existent*" and also with their call for greater use of evidence in legal and constitutional reform.[1]

7. Judicial review is a narrow but necessary component of our system of checks and balances. For the executive to seek to tighten the ability of the court to hold them to account raises profound constitutional questions, in particular when it comes so quickly after the Government commissioned IRAL yet diverges so significantly from IRAL's recommendations in substance. In practical terms, it also risks significantly reducing the ability of individuals experiencing poverty to ensure that they are treated in a lawful manner by the state. This cannot be right. We do not consider that government has made the case for change, must question why these proposals are being made, and call on the Government to drop its plans.

I. Responses to questions on the IRAL Panel'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 issue a suspended quashing order?

8. CPAG does not think it is necessary to introduce a power to allow the courts to make suspended quashing orders given the existing flexibility of remedies that are currently available and the extensive discretion which the courts already have in this area. As such, we do not support the proposal to legislate for suspended quashing orders.

9. *If* legislation for suspended quashing orders were to be pursued, the court must have full discretion as to when the remedy is used. This is reflected by IRAL's recommendation that, in the event that suspended quashing orders are adopted, it

[1] Para. 17, *Consultation response Judicial Review: Proposals for Reform*, Public Law Project, April 2021.

should be left to the courts to develop the factors which should be taken into consideration when deciding whether to suspend a quashing order.[2] This is in line with the existing approach to remedies more generally, which requires the courts to consider what is appropriate in the particular circumstances of a case.

10. Based on our experience in relation to challenges in the field of social security, we think that in the majority of cases where declaratory relief has, absent the option of a suspended quashing order, been considered an appropriate remedy by the court[3], courts would be reluctant to prescribe and the defendant would be reluctant to accept "*certain conditions*" to be completed within "*certain time periods*" (as would be necessary for the court to set as part of the terms of the suspension of the quashing order). The need for terms of any such order to be drawn up by the court for it to be meaningful risks drawing the courts into matters which are more appropriate for the executive and parliament to determine; for example, the manner in which the judgment is implemented, the feasibility of potential solutions to the identified defect, the availability of resources and the prioritisation of parliamentary time for the laying of remedial legislation.

11. Should this proposal be pursued, there does not seem to be good reason to use section 102 of the Scotland Act as a template for legislation and its relevance as a 'precedent' is limited. Section 102(2) is specific to issues of constitutional competence to enact legislation under devolved powers, which are narrower than the powers which can be the subject of judicial review in England & Wales. For it to be used as a template for a broad, general power to suspend quashing orders across the board would not be appropriate. We understand that the power has rarely been considered by the Outer House of the Court of Session in civil judicial reviews. Further, no examples have been provided of section 102 being used by the Scottish courts to direct the Scottish government to take specified legislative action within a given timeframe (nor are we aware of any), rendering it unhelpful as a precedent.

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?

12. Our views on suspended quashing orders are set out in response to questions 1 and 6. We do not believe they are necessary or appropriate and strongly oppose any presumptive or mandatory approach.

13. CPAG strongly opposes the proposal to remove *Cart* judicial reviews based on our experience of *Cart* judicial reviews arising from appeals to the Upper Tribunal

[2] Para. 3.69, IRAL report.

[3] These cases would be in the same vein as the example of *Hurley and Moore* given by IRAL, though in that case the court found there had been "substantial compliance" with public sector equality duties. The reasons for the courts giving declaratory relief rather than quashing secondary legislation are varied and turn on the particular circumstances of a case.

(Administrative Appeals Chamber) from the First-tier Tribunal (Social Security and Child Support).

14. The consultation document states that the Government "*considers the concept of diverting large amount of public resources towards Cart cases to be disproportionate*"[4] and relies on IRAL's findings of a "success rate" of *Cart* judicial reviews of only 0.22%. We have serious concerns about the validity of the evidence base for IRAL's recommendation to remove this route. The Public Law Project are the foremost experts in this field: we agree with their analysis of IRAL's fundamental error as to the number of successful *Cart* judicial reviews as set out in their response to this consultation.

15. Putting aside our view that IRAL have not captured all of the 'positive' *Cart* judicial reviews by their own definition, we are able to think of examples of *Cart* judicial reviews which would not have met IRAL's own definition of a 'positive' result, but which nonetheless demonstrate that the *Cart* procedure was essential to ensuring a fair hearing for the appellant and that the Upper Tribunal was given the opportunity to clarify an important point of law, which had the potential to impact many families (for example, see case study below).

Cart case study: *AR v SSWP* [2020] UKUT 165 (AAC); *AR v Upper Tribunal Administrative Appeal Chamber and Secretary of State for Work and Pensions* (Interested Party)

The appeal which led to *Cart* judicial review proceedings in this case concerned entitlement to widowed parent's allowance (WPA) where the appellant and her partner had undergone a religious ceremony some years prior to his death and considered themselves to be, and held themselves out as being, legally married but were not in fact married under English law.

In this case:

- the court granted permission on the papers to make an application for a *Cart* judicial review

- on account of the Supreme Court's decision in *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48 (which was decided after the initial refusal for permission to appeal by the UT in this case), the court recognised in its order granting permission that it was arguable that the UT had been wrong to refuse permission to appeal and that the appeal raised an important point of principle which was likely to affect a number of households and clarify the legal position in a significant way[5]

[4] Para. 52, consultation document.
[5] Order by the Honourable Mrs Justice Cockerill dated 11 January 2019.

- following the grant of permission in the *Cart* judicial review proceedings, the Secretary of State withdrew a previously made request for a substantive hearing in those proceedings. The UT had previously confirmed that it would not participate in the judicial review

- the claimant and the Secretary of State agreed by consent that the court should allow the application for judicial review. It was ordered by consent that the decision of the UT to refuse permission to appeal should be quashed and that the claimant's application for permission to appeal required fresh determination by the UT[6]

- the *Cart* proceedings therefore involved no hearing, either at permission or substantive stage, and there was no judgment or reported decision. Judicial resources deployed in the *Cart* proceedings were therefore limited

- following the return of the matter to the UT, and grant of permission to appeal by the UT, the UT ruled that the appeal involved "*a point of law of special difficulty, and also an important point of principle, which warrants its assignment to a three-judge panel*"[7]

Treatment of the case by the IRAL analysis:

- The *Cart* judicial review proceedings in this case concluded in 2019, but this case does not appear amongst the 4 identified reports or transcript of cases for that year in IRAL's table at paragraph 3.45 of the report. It is not known whether the IRAL methodology would have picked up this case had they reviewed UT decisions for the first part of 2020 (on account of the reference to *Cart* proceedings in that judgment), but we emphasise that not all UT decisions are reported and even when they are, may not necessarily set out the procedural history in detail so as to refer to the *Cart* proceedings.

- Even if this case had appeared in IRAL's analysis, based on IRAL's definition of 'positive' results of *Cart* proceedings this *Cart* judicial review would not have been deemed 'successful' by IRAL. That is because, even though in the UT appeal following the *Cart* proceedings the Secretary of State accepted that the appellant had been unlawfully discriminated against, contrary to her rights under Article 14 read with Article 8 of the ECHR, the three-judge panel of the UT found that it was unable to interpret the meaning of 'spouse' in the legislation so as to include those in the appellant's position, within the proper limits of its interpretive powers under section 3 of the Human Rights Act 1998. As such the UT upheld the FTT's decision and so this case would not meet IRAL's requirement for the UT to have '*found in favour of the claimant on the basis that the FTT had indeed misapplied the law in the*

[6] Order by the Honourable Mr Justice Supperstone dated 29 April 2019.
[7] Order by the Honourable Mrs Justice Farbey dated 10 October 2019.

claimant's case' in the substantive appeal which followed the successful use of the *Cart* procedure.

- In our view, the quashing of the UT's decision to refuse permission to appeal, with minimal use of judicial resources, and the subsequent recognition by the UT that this case was important enough to warrant hearing by a three-judge panel is an example of the *Cart* procedure working well and illustrates why the definition of 'positive' outcomes used by the IRAL panel is misguided. In fact, a 'positive' outcome in terms of the appropriate administration of justice and due process will not always lead to a finding in favour of the claimant in the appeal that follows.

II. Responses to questions on the Government's additional proposals for consultation

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

16. For access to justice to be meaningful individuals must have the ability to hold government to account and obtain proper redress. This should not be subject to government's whims nor factors such as where in the UK a person happens to live. The best and easiest way to avoid divergence in the ability of individuals across the UK to access justice is for these proposals not to be implemented in any of the nations.

17. Although CPAG operates a welfare rights service, provides training and conducts policy work in Scotland, we do not currently have a legal team operating in Scotland and all of our judicial review work is in England and Wales. We do not feel well placed to comment on this question in respect of Scotland, other than to say that we recognise, as the IRAL did, that judicial review of administrative action is a devolved matter in Scotland and is therefore a matter for the institutions of devolved government in Scotland.

18. CPAG does not operate in Northern Ireland although we have intervened at Supreme Court level in an appeal of a Northern Irish judicial review case (*In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48. CPAG's expertise was relevant in that case because despite social security being fully devolved in Northern Ireland, in practice, parity with the UK Government's approach has generally been adopted and so the legislative schemes in that case were identical. As above, we do not feel well placed to comment on this question in respect of Northern Ireland other than to observe IRAL's recognition that the adoption of any procedural changes would be a matter for the institutions of devolved government in Northern Ireland.

19. In respect of Wales, social security is predominantly reserved to the UK Government, and so as things stand our judicial review cases relate to both England and Wales. Were social security to become more devolved in Wales, as has been the case in Scotland over recent years, we would be concerned about how the proposals would operate in relation to challenges to the exercise of devolved powers in Wales. Whilst this remains a hypothetical concern at the moment in the field of social security, we do not think divergence of how judicial review operates in Wales in relation to devolved and UK-wide powers respectively is desirable.

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?

20. CPAG strongly opposes the proposal to legislate for prospective-only remedies. We note this proposal did not form any part of IRAL's recommendations after careful consideration of extensive evidence.

21. Courts already have the powers to grant prospective-only remedies in exceptional circumstances. Putting that discretion on a statutory footing or introducing any expansion of the circumstances in which that power is used will result in the denial of justice for individuals. By lessening the effectiveness of remedies, it would also create a perverse incentive for decision-makers and government departments to have less regard for the lawfulness of their actions. This is double-edged in the sense that not only will be defendants know that the implications for unlawful actions are lessened (and so it becomes less important that unlawful actions are avoided) but also a claimant is less likely to pursue a challenge of an unlawful decision if they are unlikely to obtain an effective remedy at the end of that challenge.

22. We note that this proposal is underpinned by a focus on the principle of 'legal certainty' which runs throughout the consultation document. The Government's tunnel vision on this principle alone, which is just one aspect of the rule of law, comes at the expense of the principles of justice and government under law. From the perspective of the families and children we represent who have been subject to unlawful action by the state, and those in similar positions to them who stand to benefit from the cases we bring, it is of no comfort to them that they can be 'certain' from the outset of the introduction of an unlawful policy that they will continue to suffer under it until the date they are successful in their judicial review. Unless there is also an assurance that there will be the opportunity to obtain meaningful relief once that unlawfulness is recognised by a court, an imbalance towards 'legal certainty' risks causing a loss of faith in our legal system and leaving the rule of law rendered meaningless.

23. In some circumstances, denying individuals access to retrospective remedies will engage their Article 6 rights under the European Convention on Human Rights (ECHR),

as incorporated by the Human Rights Act. In cases where a breach of the claimant's human rights has been established by the court, the denial of a retrospective remedy may further violate the individual's right to an effective remedy under Article 13 ECHR, forcing recourse to the Strasbourg court. It is concerning the consultation does not acknowledge these implications and before pursuing any proposals a proper analysis of the human rights implications should be undertaken, alongside findings of the Independent Human Rights Act review.

24. From a practical perspective, in our view it is likely that any changes in this area would give rise to an increase in post-judgment hearings and appeals in relation to remedies only, both of which would increase costs of litigation and require both defendants and the courts to dedicate additional resources to judicial review.

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?

25. We strongly object to the proposal to introduce either a presumptive or mandatory approach for prospective-only remedies in relation to statutory instruments and, again, note this did not form part of any recommendation from IRAL.

26. In relation to statutory appeals within the field of social security, there is already a bespoke statutory scheme which effectively restricts findings of error of law by an appellate court/tribunal in *one* case, from having retrospective effect on *other* cases.[8] This scheme has been deliberately constructed by parliament so as to not apply to judicial review and so as to function in a way which aims to preserve effective remedies for individuals. This scheme and its predecessors have been the subject of strong criticism from a rule of law and constitutional perspective[9] but the limiting of the scheme to statutory appeals is arguably one of its key 'safety valves'. The proposals in the consultation go far beyond this scheme. In circumstances where there are already context-specific mechanisms which limit retrospective ramifications of unlawful decision-making, introducing such a blunt and broad mechanism as those contained in these proposals would be wholly disproportionate and unjust.

27. Neither of the proposed approaches in a) or b) would create a "*fair system*" which the Government states is part of its aims[10] but instead would result in a great cost to the ability for individuals to obtain justice.

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[8] This is termed the 'anti test case rule' and is set out in Section 27 Social Security Act 1998 with related provisions in sections 25 and 26. It existed in earlier forms prior to 1998, on which see *Chief Adjudication Officer v Bate* [1996] WLR 814 (HL).

[9] For example, S Sedley, '*Law and Public Life*', in M Nolan and S Sedley, The Making and Remaking of the British Constitution (Blackstone Press, 1997), 63.

[10] Para 35, consultation document.

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?

28. We strongly oppose both the presumptive approach and the mandatory approach in relation to suspended quashing orders, neither of which were recommended by IRAL. As set out in response to question 1 above, we do not think that suspended quashing orders should be introduced but, if they are, it is essential that they are discretionary and it should be left to the courts to develop the guiding principles as to when they are appropriate.

29. The proposed exception to the mandatory approach for cases of 'exceptional public interest' would be wholly insufficient in mitigating the effect of the proposal on the ability of individuals to obtain justice.

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?

30. No. In our experience the concept of nullity is of limited relevance to the outcomes of judicial review cases in practice. Whilst there is complex and interesting academic debate on the topic, this debate has not, in our experience, affected the operation of the court's discretion when considering remedies and the courts continue to be able to decline to grant a remedy (or grant a partial remedy only). Interference in this area by the Government would likely have the opposite effect from the stated aim of providing clarity and would instead cause confusion and introduce complexity.

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

31. IRAL did not make any recommendations for action in this area and the consultation document does not establish that there is a need for action. CPAG does not work in an area where there is a history of the use of ouster clauses and so we are not commenting on the effectiveness (or otherwise) of any methods of achieving the Government's stated aim.

III. Procedural reform proposals

General comments on procedural issues addressed by IRAL

32. Before addressing the consultation questions, as a general comment on the matters covered in '*Chapter 4: Procedure'* of the IRAL Report, we wish to note that CPAG shares

the concerns of the Public Law Project and JUSTICE cited in paragraphs 4.9 and 4.12 of the Report on the impact of changes to legal aid on the claimant public law supplier base and lack of legal aid in certain circumstances. We agree with the Panel's conclusion that there is need for "*further careful study by a body equipped to carry out the kind of research and evaluation"* on "*the potentially serious impact of the current costs regime in judicial review cases on access to justice"* which the Panel recognised they were unable to carry out (para 4.14).

33. Whilst CPAG does not disagree with the Panel's conclusion in its chapter on procedure that "*more should be done to make the procedures for bringing claims for judicial review accessible to ordinary individuals*" (para 4.173) we wish to emphasise that, in our view, unless the system were to be dramatically overhauled, no amount of improvements to accessibility to the procedural aspects of judicial review will serve as a substitute for access to legal representation. The benefits to the efficient progress and administration of cases in the courts arising from adequate legal aid provision should not be underestimated.

34. We note the comments of the Panel that the data submitted by government departments "*did not all relate to the same period and were not comprehensive*" (para 4.55). CPAG would welcome the introduction of guidance for government departments on the collection of data on judicial review so that more consistent monitoring and data collection practices can be developed. In terms of the accuracy of the data that was provided, it is impossible to draw conclusions in circumstances where the submissions of the government departments have not been published. CPAG wrote to the Department for Work and Pensions on 14 April 2021 requesting clarification on aspects of the DWP statistics quoted in the Summary of Government Submissions to the Independent Review of Administrative Law (published 7 April 2021) and referred to in the Panel's report, but did not receive a substantive response.

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.

35. We agree that the requirement to bring a claim 'promptly' under CPR 54(1)(a) in addition to 'within 3 months' creates some uncertainty for claimants and could be removed, though this is unlikely to make a difference to the conduct of claimants in the vast majority of cases. On account of s31(6) Senior Courts Act 1981, which we understand is not proposed to be amended, claimants would, absent the 'promptness' requirement in CPR54(1)(a), nonetheless strive to bring claims without 'undue delay' on account of the potential implications on relief.

36. Question 9 states '*the result* [of the proposed changes] *will be that claims must be brought within three months*'. The consultation document does not propose that the current general power for the court to extend time under CPR Part 3.1(2)(a) would be

affected by the removal of the promptness requirement, however, for the avoidance of doubt we would object to any lessening of the court's powers to grant extensions to the 3 month time limit in circumstances where there is good reason to. Any restriction of this existing discretion would be contrary to the IRAL Panel's recommendations which noted that they opposed any "*tightening of the current time limits for bringing claims for judicial review*" (para 4.172) and risks having an adverse impact on some of the most vulnerable in society, including disabled people, children and those with limited financial resources.

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

37. Yes, in CPAG's experience the 3 month time limit is extremely short. The clients that we work with often have no awareness of judicial review; will often 'put up' with an unlawful situation for lack of understanding of the highly complex and constantly amended field of social security law; and are vulnerable in the sense that they often reluctant to challenge those who ultimately control how much income they receive, as well as struggle to find the time and space to engage in an alien litigation process. As a result, they often come to us or, having seen a welfare rights adviser, are referred to us already several weeks, if not longer, since the relevant decision was made. On some occasions, this can truncate the time available to engage in pre-action correspondence. For example, it may become necessary to reduce the requested deadline for a response from the proposed defendant to 7 days rather than the usual 14 or it may mean that we are unable to await a response to follow up correspondence requesting clarification on matters raised by the defendant in their initial response, prior to filing the claim, which might otherwise have helped narrow the issues.

38. If any extension to the current time limit is introduced, we strongly consider that it should not in any way lessen the discretion available to the court to extend time where reasonable, which is exercised in already limited circumstances. We can see that in this context a non-exhaustive list of factors to be taken into account when the courts are exercising their discretion to extend the time limit could be useful to encourage the Administrative Court to expand the circumstances in which this discretion is exercised: if this route is pursued, one such factor should be if a claimant has an application for legal aid, or an appeal / request for review of a decision on the same, pending. Another should be in circumstances where the Legal Aid Agency has itself delayed in granting legal aid until shortly before the deadline for a claim. Despite the availability of emergency procedures in legal aid application processes, in practice the process of securing legal aid can take several weeks, which can impact on the preparation of the claim.

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?

39. No, on balance we think this would increase uncertainty for all parties involved in litigation and additionally for third parties whose interests may be impacted.

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?

40. No, we consider a 'track' system is unnecessary as claims are already dealt with by the court issuing directions which are appropriate to the complexity of a case. We do not think there is any problem with the current arrangements which a 'track' system would solve. Further, it would be very difficult to devise useful or simple allocation criteria (e.g. judicial review claims do not generally have a monetary value in terms of damages sought) and such a system would likely result in more work for the Administrative Court Office with little to no benefit for the fair and efficient disposal of claims.

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

41. No, we do not consider this would be useful and it risks creating an additional burden on the court with no obvious benefit. It is entirely unclear what the proposed list of organisations is intended to achieve.

42. *If* the intention for the list is to only contain organisations which have been approached by the claimant and have indicated they might wish to intervene, the proposal risks delaying the issuing of claims and puts a considerable burden (particularly on litigants in person) to approach organisations from the outset, at a stage when it is not known if the judicial review will proceed. There is already a requirement for the claimant to identify any person he considers to be an interested party in the claim form, defined as 'any person (other than the claimant and defendant) who is directly affected by the claim' (CPR 54.6) and to serve the claim form on any identified interested party (CPR 54.7).

43. The CPRC are already considering changes to procedural aspects of interventions including a requirement to provide evidence upfront – we have concerns about the CPRC's proposal as it is likely to delay applications to intervene. This would potentially cause inconvenience to the parties and the court and also place a disproportionate burden upon the proposed intervener, to use limited time and resources to prepare evidence before knowing whether they will have permission to intervene. It is not clear how the proposed list would interact with those proposed changes.

44. *If*, on the other hand, the intention is for the list to broader than this and to contain all organisations who might conceivably have knowledge or expertise in the area to which the claim relates, this would result in a potentially very lengthy list which bears little to no relevance to the proceedings.

45. We note that the consultation document states "*Giving the court and Defendants notice of the potential for interveners could also be useful in estimating cost and length of litigation.*" [103]. There is already a requirement for applications from interveners to be made promptly (CPR 54.17) and the court receives notice of potential interveners at the stage those application(s) are made and can refuse permission if they have not been made promptly. In our experience, it is also usual practice for potential interveners to seek the consent of the parties prior to their application and place any objection before the court as part of their application. We do not think that inclusion of potentially lengthy lists of organisations or wider groups from the outset of the claim would assist in any way with estimating the cost or length of litigation: at that stage, it is not even known if the claim will be granted permission to proceed, nor would it be known, should permission be granted, which of the listed organisations might wish to apply to intervene or whether they will have capacity or the resources to intervene. Even if the proposed list were to be drawn up once permission for the application for judicial review is granted, the list would give minimal assistance with estimating costs or the length of litigation: it would not be known whether the court will give permission for the interventions; there are varied bases on which interventions can take place (for example, by written submissions only); and interventions can also be subject to conditions set by the court. In our experience, more often than not, permission for interveners is granted after a hearing date has been set and interveners are expected to fit into the existing timetable in any event. Interveners are already subject to a costs regime set out in s.87 Criminal Justice and Courts Act 2015, including a requirement (absent exceptional circumstances) for the court to order the intervener to pay costs if certain conditions are present and an application is made by a party to the proceedings (s.87(5)-(8) CJCA 2015). It is not clear that the current proposal would add anything to this.

46. It is not clear whether or not the proposed list of organisations would have any effect on the potential for other organisations who were omitted from the list to apply to the court for permission to intervene. However, we would strongly object to any proposal that potential interveners were restricted to organisations included in the list. This would risk significant inconsistency in approach as it would be dependent on the knowledge of the claimant of relevant organisations (indeed claims where claimants are least likely to identify relevant organisations might well be those where interveners may be able to provide the most assistance to the court) and also would risk the court being deprived of helpful material which would assist it in its fair determination of proceedings. It is also conceivable that there are potential interveners who are not aligned with the claimant but could nonetheless assist the court. Making any proposed list exhaustive would risk those interventions being excluded.

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?

47. Yes. However, we suggest any formal provision to provide the claimant with an opportunity to file a 'reply' allows a minimum of 14 days from service of the Acknowledgement of Service. Such a provision should be optional as to whether or not the claimant chooses to do so. In our experience, claimants already endeavour to limit any such reply to short submissions and to file it promptly. However, in some circumstances 7 days would not provide enough time to obtain instructions and prepare an adequate reply, particularly given that the Acknowledgement of Service may raise new arguments which were not addressed by the defendant in pre-action correspondence, notwithstanding that they have had an opportunity to raise these during the pre-action stage.

48. A timeframe of 14 days would not cause any prejudice to the efficient progress of claims as it would be open to the claimant to file their reply sooner (as it is to the defendant to file their Acknowledgement of Service sooner than 21 days after service of the claim form) and in our experience in cases which are not subject to expedition a decision on permission is often not received for between 3 to 9 months in any event. It would also be more feasible over periods such as Easter or Christmas where the 7 days may fall over several bank holidays in addition to weekends.

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?

49. The proposal in question 15 is not sufficiently clear to enable us to provide our views. Paragraph 105(a) of the consultation document appears to refer to a proposal for there to be no requirement for a defendant to file Summary Grounds of Resistance, in certain circumstances. However, this question refers to obligations surrounding Detailed Grounds of Resistance. Similarly, paragraph 106 refers to the 'lengthy task of writing Detailed Grounds of Resistance' and Defendants being 'compelled to draft detailed grounds before permission is granted'. This is simply not the case under the current procedure. Prior to permission being granted the defendant can, should they wish to partake in the permission stage, file an Acknowledgement of Service containing a 'summary of his grounds' for contesting the claim. These, as the description suggests, should be brief. Choosing not to file an Acknowledgement of Service does not prevent a defendant from participating in the substantive hearing under CPR 54.9.

50. We note that if the intention of this proposal was instead to amend the CPR so that the Defendant is only invited to submit *Summary* Grounds of Resistance where the pre-action protocol was not followed, there is risk this would give rise to disputes at an early stage on 'grey areas' as to whether or not it had been followed in the particular circumstances of the case.

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 CPR 54.14 to 56 days?

51. We do not consider an extension of the time limit from 7 weeks to 10 weeks for the filing of detailed grounds and written evidence to be necessary. In our view, 7 weeks already constitutes ample time given that the defendant is already familiar with the legal arguments prior to this window commencing and defendants will have also had the opportunity to consider in advance what evidence will be required from both the pre-action stage and pre-permission stage of the proceedings.

52. As things stands the defendant can apply for the deadline to be extended and, in our experience, this can often be agreed between the parties. Under this route the extension can be granted by consent order approved by a lawyer in the Administrative Court Office using delegated powers, rather than taking up judicial time.

53. If the time limit is extended to 10 weeks we expect that there would still be requests from defendants to claimants to agree to extensions, and associated applications made to the ACO. This is because defendants are aware that a claimant will not unreasonably refuse consent to an extension of time, on account of the potential costs sanctions the claimant could face should they be found to not be assisting the court in furthering the overriding objective.

IV. Economic impacts

Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

54. The proposals are not yet sufficiently formulated for us to provide any specific evidence on this.

V. Equalities impacts

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.

55. CPAG's test cases aim to help children and families living in poverty. Children from black and minority ethnic groups are more likely to be in poverty: 46% are now in poverty, compared with 26% of children in white British families. 37% of children living in

families where someone is disabled are in poverty (compared to 28% of children living in families where no-one is disabled). This package of proposals take as a whole will have a detrimental impact on the ability of these groups to hold the government to account and to challenge unlawful policies and practices which affect them.

56. In addition to assessing the equalities impact of these proposals, the Government should conduct a Child Rights Impact Assessment, with regard to its obligations under the UN Convention on the Rights of the Child.

57. We have set out above our concerns about the inconsistency of approaches to data collection by government departments on judicial review and repeat our suggestion of the introduction of guidance for departments on the collection of data, which could additionally be used for the purposes of assessing equalities impacts of any future reforms.

58. In our view, the Ministry of Justice and HMCTS are also well placed to collect data on the protected characteristics of those bringing judicial review claims, including of specific categories of judicial review such as Cart claims and should take steps to do so.

Child Poverty Action Group

29 April 2021