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By email: judicialreview@justice.gov.uk

Judicial Review Reform
Ministry of Justice
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Our ref GLOBALREG/CRNB/10099960

Dear Sir / Madam

THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW – THE GOVERNMENT RESPONSE

We write in response to the Government Response to the Independent Review of Administrative Law (the "**Response**") and its call for views on its specific proposals for judicial review reform.

Hogan Lovells is a global law firm that provides a full range of legal services to businesses operating and investing in countries around the world, including the UK, as well as to sovereign states, government departments and regulators. We are recognised as a leading law firm in dispute resolution and administrative and public law. We have substantial experience, built up over many years, of acting for claimants, defendants and interested parties involved in high-profile and complex commercial judicial review cases, and of advising on administrative public law issues on both sides. We are therefore well-placed to provide insight into the importance of judicial review in a business and regulatory context and, in particular, the ways in which it enhances the UK's reputation as an attractive place to do business.

We have sought to limit our answers to the areas on which we feel we can most meaningfully contribute. For ease of reference, we address the questions in the order in which they appear in the Response.

Many of the proposals in the Response seek to enhance certainty in the process and outcomes of judicial review. We very much agree with the importance of predictability, certainty and transparency in judicial review (and, in fact, any dispute resolution mechanism), as this benefits claimants, defendants and impacted third parties alike. However, this must be balanced with the need to maintain judicial discretion, which allows the courts to make decisions about each case on its specific (and often complex) facts and in accordance with the requirements of fairness. Our answers seek to identify the ways in which this balance can be attained with respect to the Response's proposals.

1. **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? (Question 2)**

Please note that this answer only addresses suspended quashing orders and not Cart Judicial Reviews.

1.1 We support the introduction of a *discretionary* power to grant a suspended quashing order as a means of bolstering the range of discretionary remedies available in judicial review proceedings.

1.2 If such a power is introduced, we consider that there may also be some value in introducing guidance as to the use of the court's discretion in granting a suspended quashing order. This would provide greater predictability for claimants, defendants and impacted third parties.

1.3 However, we would favour guidelines developed by the judiciary itself, by way of a judicial practice direction, rather than legislation (as proposed by the Response). That is because remedies in judicial review are inherently discretionary and it is imperative that judicial discretion is preserved to allow courts to deal with each case on its particular facts, which in many instances, are extremely complex. Any attempt to prescribe in legislation specific factors that courts must consider when determining whether to grant a suspended quashing order (or any form of remedy) would potentially limit that discretion in a way that could work against the interests of claimants and defendants alike. In our view, allowing the judiciary to develop its own guidelines (if guidelines are deemed by the judiciary to be necessary at all) would strike an appropriate balance between predictability and certainty on the one hand, and the protection of judicial discretion and, ultimately, the separation of powers, on the other.

1.4 If, however, the Government does conclude that factors to be considered by the courts should be set out in legislation, we would strongly support that these factors be developed in consultation with the judiciary. It would be critical that the courts are expressly allowed to decide what weight should be attributed to each factor on a case-by-case basis.

2. **(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? (Question 4)**

2.1 With regards to (a), cases such as *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills* show that the courts are already able to avoid granting retrospective remedies where they consider these to be inappropriate. Nevertheless, we consider that there may be merit in giving courts a statutory power to grant a prospective-only remedy as these may be appropriate in some cases.

2.2 If the power to grant prospective-only remedies is to be enshrined in statute, then there is evidence that the courts are already well aware of the factors that are relevant to the retrospective/prospective debate (see, again, *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills*). Nevertheless, there may be some value in introducing guidance as to the use of the court's discretion to provide greater predictability for claimants, defendants and impacted third parties. However, as above, and in order to preserve judicial discretion, we would favour guidelines developed by the judiciary itself, by way of a judicial practice direction, rather than formalising these in legislation.

3. **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? (Question 5)

3.1 We oppose both a presumption in favour of prospective-only remedies and mandatory prospective-only remedies with regards to Statutory Instruments ("**SIs**") and any other acts or decisions taken by government and public bodies.

3.2 In our view, a prospective-only remedy should (as with a suspended quashing order) simply be an additional option from which the courts can choose in the exercise of their discretion. As set out in our answers above, it is imperative that the courts' discretion to determine the appropriate remedy in any case is preserved.

3.3 Moreover, in many cases, preventing or limiting the retrospective effect of remedies would directly undermine the purpose of judicial review of providing accountability and remedies for unlawful conduct by public bodies. Such a move has the potential to render judicial review, to some extent, toothless and to interfere with the fundamental principle that unlawfulness does not arise as at the point of judgment, but *ab initio.*

3.4 With regards to SIs specifically, limiting the availability of a retrospective remedy in this way would be to remove a vital tool in correcting mistakes made (including *vires* mistakes, where the SI in question has not achieved the objectives that Parliament intended when granting the power to make the SI). Given the increased use of SIs, including those laid under the negative procedure, limiting the available remedies in this context and thereby reducing the protection for those adversely affected by unlawfulness in SIs, risks making the UK a much less attractive place for business to invest.

4. **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? (Question 6)**

4.1 For the reasons set out in our answer to question 5, we oppose the introduction of any form of presumption or mandating of the use of a particular remedy, including suspended quashing orders.

4.2 We understand the importance of certainty for Government and (as outlined above) agree that in some cases a suspended quashing order will be an appropriate remedy. However, we do not think that introducing a presumption in favour of, or mandating, the use of a suspended quashing order would strike the right balance between certainty and fairness. The fact that there is currently a "*wide array*" of possible outcomes when legal acts have been found to be unlawful is, in our view, an advantage to both claimants and defendants, as it means that the courts can determine the most suitable remedy in every case.

4.3 We share the Government's concern as to the possible lack of understanding as to how and when such a discretionary power will be applied by the courts (as noted in paragraph 69 of the Response). However, this would be remedied by the introduction of a judicial practice direction regarding the factors to be considered before granting a suspended quashing order (as set out in response to question 2).

5. **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? (Question 11)**

5.1 In our response to the call for evidence we proposed that the time limits for judicial review could be adjusted so that time "stops" once parties engage in pre-action correspondence to encourage meaningful engagement. The suggestion considered in the Response focuses not on time "stopping" before the time limits are met, but on the possibility of those

limits being extended by agreement of the parties. In our view, this suggestion raises a number of concerns:

(a) it introduces uncertainty into the process as there is no guarantee that both parties will agree to an extension (whereas under our initial proposal, there would be certainty that time would be "stopped" once the parties engage in meaningful correspondence);

(b) this uncertainty is likely to have a negative impact on third parties and it is not clear how the interests of such parties would be represented in an agreement between the claimant and defendant to extend time;

(c) parties will have to spend time and resource on negotiating an agreement as to an extension rather than focusing on meaningful engagement with a view to early resolution (time and resource which could be wasted if an agreement is not reached); and

(d) it shifts the power away from the courts and towards the parties.

5.2 At present, if an extension of time is required, the claimant(s) must make an application when they file their claim form. While CPR 54.5(2) provides that the time limits for filing a claim form cannot be extended by agreement between the parties, the courts will, when considering such an application, consider any consensus between the parties as to an extension. In our view, changes could be made to the current procedure which would not go as far as "stopping" time, but would better balance the need for certainty, the importance of encouraging early resolution, and the consideration of impacts on third parties. In particular:

(a) applications for extensions of time could be permitted to be made in advance of filing the claim form (this could be introduced by an amendment to the CPRs); and

(b) guidance could be issued to the courts that applications to extend time should normally be granted when the parties are in agreement. The presumption in favour of granting an extension could be rebutted if it would have serious adverse consequences on any third parties.

Yours faithfully

Hogan Lovells International LLP