

## **Independent Review of Administrative Law**

### **Response to the call for evidence from the Baring Foundation**

1. This is a response to the call for evidence issued by the Independent Review on Administrative Law (the Review) for and on behalf of the Baring Foundation, a company limited by guarantee registered in England (number 950696) and registered as a charity in England and Wales (number 258583) (referred to here as “we”, “us” and “the Foundation”).
2. We are an independent foundation which protects and advances human rights and promotes inclusion. We believe in the role of a strong, independent civil society nationally and internationally. We use our resources to enable civil society to work with people experiencing discrimination and disadvantage and to act strategically to tackle the root causes of injustice and inequality
3. This response focuses on questions 7, 8 and 13 of the call for evidence and refers to paragraph 4 sections (c)&(g) of the terms of reference for the Review. Namely whether procedural reforms to judicial review are necessary, in general to “streamline the process”, and, in particular, on possible amendments to the law of standing and on costs and interveners.
4. We engage with these questions as an independent grantmaking foundation that works with civil society organisations in all four nations of the United Kingdom, supporting their work to tackle discrimination and disadvantage. The views expressed here are drawn from this diversity of experience, but focus specifically on the ways our grantholders and others have used judicial review to protect women and girls from violence.

#### **General comment**

5. We see judicial review as a fundamental and legitimate tool for civil society in the United Kingdom to use in protecting the rights of individuals against an overbearing state. Civil society is often the first to see instances or patterns of decision making that are unlawful and is frequently best-placed to provide quantitative and qualitative evidence to assist the court.
6. Civil society frequently supports vulnerable claimants through the judicial review process and amplifies the voices of communities in challenging unlawful public decision making. Our experience suggests that substantive or procedural changes that narrow access to

judicial review have a disproportionate impact on those facing the most acute forms of discrimination and disadvantage.

7. As examples, our grantholders have recently contributed to judicial reviews that:
  - a. overturned student finance regulations that discriminated against survivors of domestic abuse (*OA v Secretary of State for Education* [2020] EWHC 276 (Admin));
  - b. led to new forms and guidance from the National Police Chiefs' Council which set out the circumstances in which the police may lawfully ask a victim or witness to provide material from their digital devices in the course of a criminal investigation (unreported);
  - c. challenged the Parole Board's decision to release black cab rapist John Warboys, not only overturning that decision but leading to an overhaul of Parole Board processes and the introduction of a new system for victims to appeal against the release of the most serious offenders (*DSD & NBV v Parole Board & ors* [2018] EWHC 694 (Admin)); and
  - d. ensured a separate emergency fund was established for local authorities to ensure they are able to adequately house survivors of domestic abuse in hotels or other safe and suitable accommodation during the Covid-19 pandemic (unreported).
8. As claimants, intervenors and lawyers our grantholders and civil society more broadly hold the state to account for its actions through judicial review, highlighting failures in its duties and contributing their expertise and data to protect some of the most vulnerable in society.

## **Standing**

9. Where civil society organisations can demonstrate sufficient interest, they frequently bring claims in their own name. In protecting women and girls against violence, this can be crucial to raise an issue of general public concern or to protect survivors of violence from the long and often difficult process of bringing a claim in their own name.
10. Rights of Women brought a claim in its own name to successfully challenge regulations that stipulated the type of evidence women must produce to prove abuse in order to qualify for legal aid on family law proceedings. Rights of Women is a charity providing free legal advice on family law. It also campaigns and provides education and training on women's rights, with a particular specialism in gender-based violence. It was uniquely placed to recognise the impact these regulations had on victims of abuse and the barrier it presented to access to justice, bringing a claim on that basis.

11. We view the operation of current rules on standing – which permit charities and civil society organisations to bring judicial review claims where they can demonstrate sufficient interest – as already narrowly drawn.
12. **We recommend that the Review highlights the important role civil society plays in bringing judicial review claims in its conclusions and in any recommendations protects and expands current rules on standing to ensure civil society can continue to play its important role in challenging unlawful public decision making through judicial review.**

## **Costs**

13. Civil society and, in particular, registered charities operate a long established not-for-profit model, that is recognised by statute and regulated by the Charity Commission for England and Wales (or equivalent in the devolved nations). Charities have clear and regulated duties in relation to their operational budgets, the use of their assets and the holding of reserves.
14. The vast majority of our grantholders operate on budgets of under £1 million per year and hold minimal unrestricted assets (i.e. assets that can be spent on activity outside the purpose for which they were donated). Most unrestricted assets are held as reserves that are required by the Charity Commission for England and Wales (or equivalent) and encouraged as part of good governance. This means any costs incurred as part of a judicial review can be prohibitive or an absolute barrier to bringing a claim (either in a charity's own name or in supporting a beneficiary of its work).
15. In some circumstances, civil society is able to fundraise explicitly to bring a claim and meet costs through donations from individuals or trusts and foundations. However, this form of fundraising is both difficult and unreliable – to meet current time limits for judicial review, funds must be raised quickly and favour causes already in the public eye.
16. It may also be possible to secure pro bono legal services when bringing a claim in judicial review. However, this does not provide absolute protection against costs, particularly if an adverse costs order is awarded against the claimant. It is also important to note that sufficient pro bono support for complex claims is rare.
17. Many charities will also apply for a Costs Capping Order (CCO) as they bring claims in the public interest. A CCO – where it is awarded and recognises the particular financial position and charitable duties of civil society – can provide some level of protection. However, it does not protect against costs prior to its award nor does it mitigate the steep costs of court fees and legal representation.

18. The Covid-19 pandemic has also created an acute funding crisis for many civil society organisations that is likely to impact their finances for many years. This is likely to further constrain unrestricted funding available to meet any costs related to a judicial review.
19. **We recommend that the Review recognises the barrier that costs of any kind can create for civil society in bringing a judicial review in its conclusions and that it recommends a costs regime that substantially limits costs for civil society in bringing a claim and reflects the particular financial context and charitable obligations for charities when bringing litigation.**

### **Interventions**

20. By virtue of their charitable objects and purpose, many civil society organisations are closely connected to communities throughout the United Kingdom. Through their location, their history and the services they provide, they engage with, support and hold research and data on a wide variety of individuals and diverse communities. Where a case may have implications for public policy, it is civil society that can often inform the court on factual and legal questions of public interest.
21. Third party interventions are a crucial opportunity for civil society to assist the court. Courts frequently cite their usefulness in judgments, as well as directly inviting interventions in certain circumstances.
22. The Supreme Court explicitly recognised the value of such interventions in a further case related to the investigation and prosecution of John Warboys (*Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11). In this case five civil society organisations intervened, contributing their substantial and varied expertise in relation to violence against women, the investigation and prosecution of rape and the duties of the police.
23. **We recommend that the Review notes the positive role of civil society in assisting the court through third party interventions in its conclusions and that it recommends rules on third party interventions that allow civil society to easily apply to intervene as a third party and that substantially limit any costs related to such interventions.**

**The Baring Foundation**  
**23 October 2020**

We would be happy to provide further information on any of the details and recommendations contained in this submission and can be contacted at [baring.foundation@ing.com](mailto:baring.foundation@ing.com).