

# Judicial review and policy making

The role of legal advice in government

## About this report

This paper examines one of the key checks and balances in the UK constitution – judicial review, the process by which individuals and groups can challenge the lawfulness of a public body’s decision. It looks at who is being taken to court, and how often, and then examines justifications for the criticisms levelled at judicial review and considers its effect on policy making. The paper then sets out what both officials and ministers can do to improve how legal advice is used in policy making, and how they should view the role the courts play in making policy better.

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## Summary

From the high-profile cases that have delayed a third runway at Heathrow airport, to the constant flow of cases against the Home Office and the Ministry of Justice, judicial review – the process by which individuals and groups can challenge the lawfulness of a public body’s decision – is one of the key checks and balances in the UK constitution. As the current government’s 2019 manifesto recognised, judicial review is necessary “to protect the rights of the individuals against an overbearing state”.<sup>1</sup>

Around 4,000 claims for the judicial review of decisions by government departments, councils and various other public bodies are made in the High Court each year.<sup>2</sup> In each of those cases, a challenger asks the court to find that the public body has made an unlawful decision.

The court cannot quash a government decision on the basis that the decision was wrong, or that the judge would have made a different decision if they had stood in the minister’s shoes. Instead, the court can be asked to consider three main questions about the decision:

- First, was the decision ‘irrational’, in the sense that no reasonable person, acting reasonably, could have made it?
- Second, did the government follow a fair process in making the decision – for instance, by giving the people affected by the decision a chance to make representations about it, and by making the decision free from bias or corruption?
- Third, did the government make the decision in accordance with statutes passed by parliament – for instance, by acting only within the scope of the powers that parliament has given it, and by complying with any duties imposed by parliament about what factors the decision maker should take into account?

The current government is undertaking a review of the role of judicial review. Having received the report of its expert panel charged with considering potential areas of reform, it is now embarking on its own consultation on changes that the panel recommended, along with some reforms that the panel rejected, including using statute to specify areas where the courts cannot intervene.<sup>3</sup> It is doing so to follow up on its manifesto commitment to stop judicial review from being “abused to conduct politics by another means or to create needless delays”.<sup>4</sup>

The scrutiny function that judicial review provides, like many aspects of policy making, does create a burden on government departments. From obtaining legal advice to dealing with judicial review challenges when they occur, the demands of compliance with the law can be time-consuming and sometimes frustrating for both officials and ministers. The current government believes this burden is too great and too often hampers policy making and frustrates the will of ministers.

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The government's frustration with the courts seems to have intensified following a few high-profile cases that have gone against ministers, including two Brexit-related challenges brought by the businesswoman Gina Miller. The Supreme Court's ruling that Boris Johnson's five-week prorogation of parliament was unlawful nearly led to a constitutional crisis. Sources in No.10 briefed the press that the Supreme Court had "made a serious mistake in extending its reach to these political matters".<sup>5</sup> Jacob Rees-Mogg, the leader of the House of Commons, described the ruling as a "constitutional coup".<sup>6</sup>

The Supreme Court has decided some more recent high-profile cases in the government's favour – for instance, rejecting Shamima Begum's challenge to the home secretary's decision to deprive her of British citizenship, and throwing out a challenge to the first 'lockdown' regulations. Nevertheless, the government considers that reform is needed.

If ministers believe that judicial review is hampering policy making, they need to look at both sides of the equation. This means examining how policy makers are advised on legal risk and what contribution that advice makes to the policy process. There has been little examination of this issue, inside or outside government. While there are excellent studies of claimants, cases and their consequences,<sup>7</sup> there have been very few attempts to understand how government assesses and mitigates the risk that its actions are found to be unlawful in court, and how that process can be improved.\* This paper attempts to rectify that.

This paper is based on interviews with government lawyers, civil servants, former ministers and special advisers. It begins by looking at who is being taken to court and how often. It then examines justifications for the criticisms levelled at judicial review and considers the effect of judicial review on policy making. The paper then sets out what both officials and ministers can do to improve how legal advice is used in policy making, and how they should view the role the courts play in making policy better.

We found that there are frustrations with how much time and effort the prospect of judicial review adds to policy making. Some departments spend a lot of time and money on legal advice; cases can be a large part of officials' day-to-day work. In some policy areas, such as the environment, infrastructure, immigration and the benefits system, decisions are contentious by their nature and are bound to be challenged. But in others a legal challenge is far from inevitable and is the consequence of bad policy making.

We found that there is scope for the civil service and ministers to improve their handling of legal risk in a way that would address some of these frustrations. Better understanding of how and when to use government lawyers and reduced turnover of staff to maintain experience in highly litigious policy areas could help the government to focus on making legal advice work better.

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\* One exception is Yong B, *Risk Management: Government lawyers and the provision of legal advice within Whitehall*, The Constitution Society, 2013, [www.consoc.org.uk/wp-content/uploads/2013/11/J1336\\_GovernmentLawyers\\_WEB.pdf](http://www.consoc.org.uk/wp-content/uploads/2013/11/J1336_GovernmentLawyers_WEB.pdf)

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The government also needs to consider how it handles the prospect of a court challenge, before a claim is brought. While advice within government about legal risk is generally good, communication about legal risk *appetite* is not. Junior policy staff need clear signals on ministerial appetite for legal challenge in their policy areas. That will allow them to design policies in a way that mitigates legal risk if ministers are wary of challenge, or to advise effectively on the consequences of a court challenge for a minister more comfortable with being taken to court. If ministers themselves had a clearer idea of how much risk they were prepared to swallow, they might be less frustrated when things go wrong.

The most urgent priority, though, should be changing how some policy makers view the role of judicial review. We heard that legal advice is not always accepted as fundamental to effective policy making in the same way as economic, statistical or operational advice. In many cases, it also encourages ministers to seek a democratic mandate for their policies, as decisions approved by parliament are harder to challenge in court. That is an important message for policy officials and ministers. Public law can improve public policy, and better policy is more likely to be lawful.

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## Who is being taken to court, and how often?

Both politicians<sup>8</sup> and judges<sup>9</sup> have remarked on the “explosion of judicial review” in recent years. Yet, from a quantitative perspective, judicial review has not exploded – certainly not through the whole of government.

### **The Home Office and the Ministry of Justice face the most judicial reviews by far**

The overwhelming majority of judicial review cases brought against central government relate to decisions made by just two departments: the Home Office and the Ministry of Justice (see Figure 1). From 2007–13, the Home Office and the MoJ accounted for 95–98% of claims for judicial review involving central government departments.<sup>10</sup> The Home Office alone accounted for more than 80% of all judicial review cases over this period.

The majority of these cases related to immigration and asylum decisions. From November 2013 the Upper Tribunal of the Immigration and Asylum Chamber (UTIAC) took over claims for the vast majority of immigration and asylum judicial reviews (see Figure 1). Between 2014/15 (the first full-year figures) and 2019 these averaged around 11,300 claims per year.<sup>11</sup> In 2020 the Home Office faced 842 judicial review applications and the Ministry of Justice faced 750 cases. The impact of Covid-19 is believed to have played a role in the reduction of numbers of claims.<sup>12</sup> This still accounts for 82% of the total cases facing central government departments.

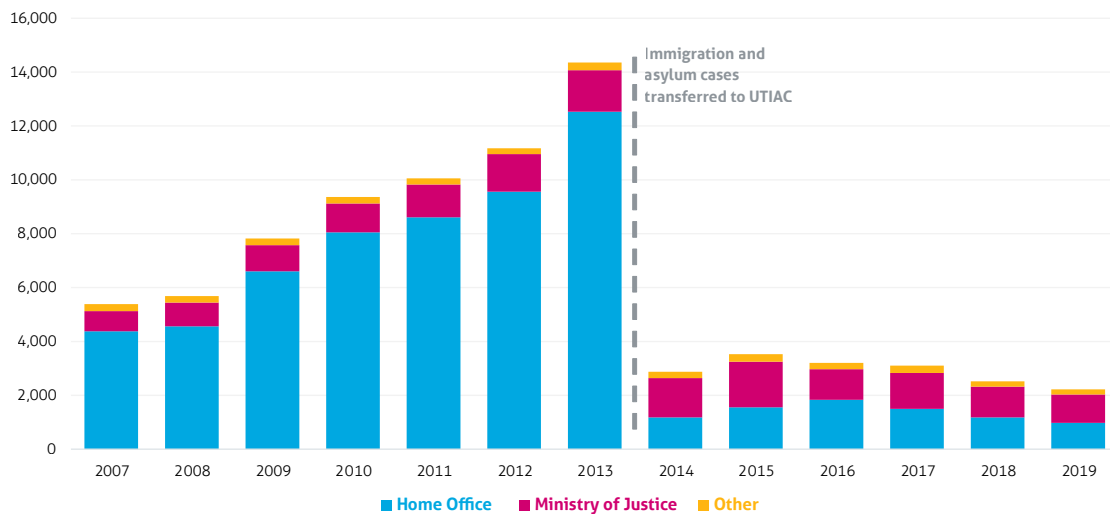
Excluding the Home Office and the MoJ, this leaves an average of 236 judicial review claims brought against central government departments each year between 2014 and 2019 (see Figure 2).<sup>\*</sup> But not all departments have the same experience. The highest number of judicial review applications involve HMRC, followed by the Department for Work and Pensions, the Ministry of Housing, Communities and Local Government, and the Department for Environment, Food and Rural Affairs (Defra) (see Figure 3).

Claims against central government departments directly are not the only judicial review cases they need to consider. The outcome of claims made against other bodies in their remit are also a concern. For the Home Office, for instance, cases brought against the police can have an effect on policy. Between 2007 and 2019, the average number of claims against non-central government departments was 1,187. Between 2007 and 2019, claims against non-central departments accounted for an average of around 20% of overall judicial review claims.

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\* These figures for judicial review do not include appeals to the Court of Appeal where permission for judicial review is refused. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/569604/civil-court-administrative-justice-statistics-guide.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/569604/civil-court-administrative-justice-statistics-guide.pdf), p. 14.

Figure 1 **Number of applications for judicial review involving central government departments (excluding Upper Tribunal)**



Source: Institute for Government analysis of Ministry of Justice, 'Civil justice quarterly statistics', March 2019.

### Overall the number of cases is not increasing

With immigration and asylum dealt with through UTIAC, the remaining number of claims for judicial review in the High Court involving central government departments has varied, from a high of 3,529 in 2015 to a low of 2,223 in 2019. Rather than an explosion in cases, this marks a downward trend since 2015.

It is necessary to go back further to see when the judicial review picture changed. In 1990, there were 2,129 judicial review applications, of which 569 concerned immigration.<sup>13</sup> Between 2007 and 2013, the number of claims more than doubled (from 6,684 in 2007 to 15,593 in 2013), but, as discussed above, much of the increase in claims concerned immigration and asylum cases. Since the introduction of UTIAC the number of claims has fallen every year since 2015/16. Remaining Home Office claims have ranged from a high of 1,832 in 2016 to a low of 976 in 2019.

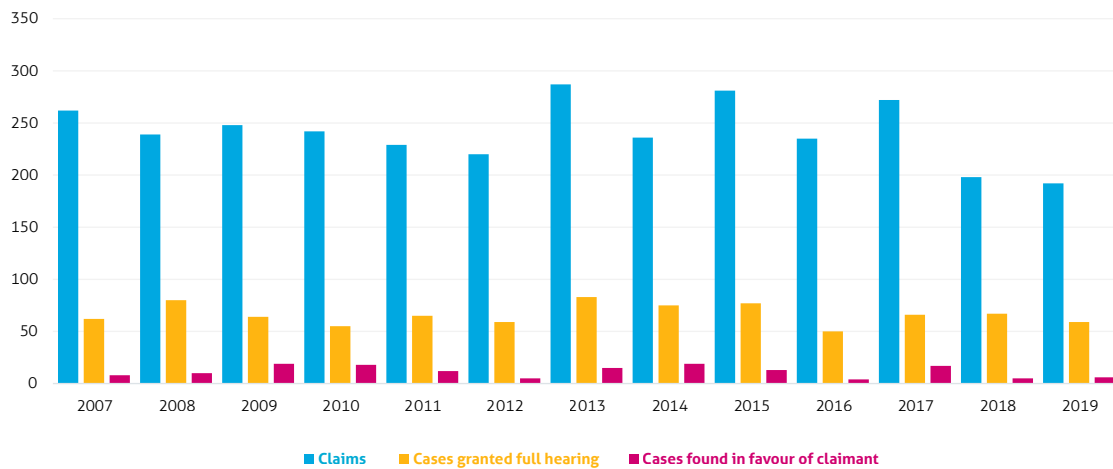
### Many cases do not proceed, but are dismissed or reach a settlement

Some 85% of all claims for judicial review made between 2007 and 2019 did receive permission to progress to a final hearing.<sup>14</sup> In some cases, a judge will have found at an early stage that the case against the government is not arguable, and so dismissed the claim before a full hearing. In others, the claimant will have withdrawn their claim because the public body has agreed to amend its decision, or another form of redress has been provided.

Of claims that go forward, the government wins in court far more than it loses. For central government departments, between 2007 and 2019, claimants won 15% of claims going to full hearing on average. For all JR including non-central government departments, between 2007 and 2019, claimants won an average of 14% of claims going to a final hearing. But the figures also don't show that many strong cases will be settled by the government or public body before going to court.

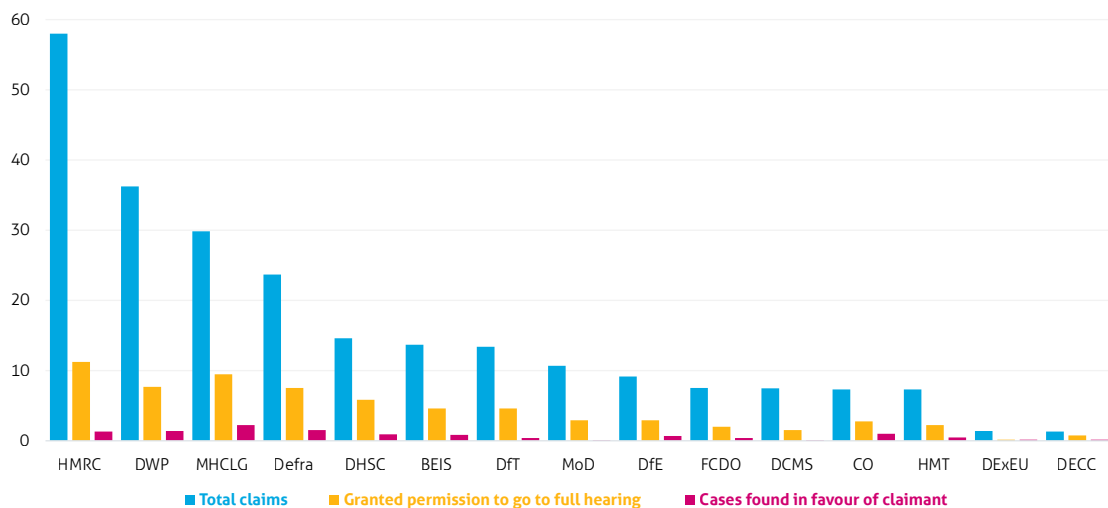


Figure 2 **Number of judicial review applications to central government departments (excluding Home Office and Ministry of Justice)**



Source: Institute for Government analysis of Ministry of Justice, 'Civil justice quarterly statistics', March 2019.

Figure 3 **Number of judicial review applications by central government department (annual average, 2007–19, excludes Home Office and Ministry of Justice)**



Source: Institute for Government analysis of Ministry of Justice, 'Civil justice quarterly statistics', March 2019.  
 BEIS = Department for Business, Energy and Industrial Strategy; CO = Cabinet Office; DCMS = Department for Digital, Culture, Media and Sport; DECC = Department of Energy and Climate Change; Defra = Department for Environment, Food and Rural Affairs; DExEU = Department for Exiting the European Union; DfE = Department for Education; DfT = Department for Transport; DHSC = Department of Health and Social Care; DWP = Department for Work and Pensions; FCDO = Foreign, Commonwealth and Development Office; HMRC = HM Revenue and Customs; HMT = HM Treasury; MHCLG = Ministry of Housing, Communities and Local Government; MoD = Ministry of Defence.

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## **The impact of judicial review on government is not just about the volume of cases**

The numbers on judicial review tell only part of the story. While it is officials who deal with most cases, ministers in the Home Office, for instance, will still receive long spreadsheets with all the upcoming cases, the risks of challenge and losing the case, and the likely policy impact. Many cases are about individual decisions, not broader policy; it is only those that could affect existing law or policy, or have the potential to become controversial or prominent in the media, that will require their attention. And government does not just deal with cases brought, but also the risk of potential cases. The effect of judicial review can be as much about the wider impact a case might bring, as the number of claims brought.

**A small number of high-profile cases, or the threat of them, can generate anxiety in some departments.** The Department for Transport is one such department. An official described legal concerns as “front and centre” thanks to the “very litigious” approach of the transport sector and environmental groups interested in infrastructure decisions. Likewise, in Defra, animal welfare and environmental cases absorb a lot of time. Even the threat of legal action means that legal risk needs to be considered at every stage of the process. As one official noted: “Everything we do is wrapped in a JR [judicial review] layer.”

**In other departments, facing and fighting judicial review claims is considered a part of advancing policy objectives.** The impact of judicial review on policy making depends not just on the quality and quantity of claims, but also on the mindset of the department. The Home Office, for example, is a law enforcement department. Officials know that tougher enforcement is likely to lead to more claims for judicial review, and more government losses. As one official put it, the mindset is: “If you are not being challenged by someone then you are not doing it right.”

**In other departments, the threat of judicial review does not loom that large in decision making.** Although some departments face a lot of claims and some regularly face a few big ones, several officials with extensive experience of judicial review still argued that it was only one of many things they are thinking about. “I wouldn’t say JR is at the heart of how policy is made or decisions are taken. It is one of many considerations and risks,” said one policy official.

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# What are the main concerns about the impact of judicial review on policy making?

## **Judicial review, or the threat of it, can cause delays to policy making**

The 2019 Conservative manifesto said that judicial review can cause “needless delays”.<sup>15</sup> We found that civil servants shared the government’s concern about delays, although not everyone thought that all of them are needless.

The concerns are of two kinds. The first is about delay arising from the time that officials spend assessing the likelihood of a challenge and considering possible mitigations. One official told us: “There is no question that the whole threat of legal action slows down and complicates government action. It adds a huge amount of time to what we are trying to do”.

The second concern is about the time taken for the court process to play out when a challenge is brought. The decision on a third runway at Heathrow airport was ruled unlawful in February 2020,<sup>16</sup> 20 months after MPs had voted in favour of the project.<sup>17</sup> The Supreme Court subsequently overturned this decision 10 months later.<sup>18</sup> As one official argued, because you “might not get a JR decision for three years after the policy work has been completed... it inevitably feels like a block on action rather than a useful feedback mechanism”.

Paradoxically, however, the way in which the government resists judicial review claims is sometimes one of the reasons they can take so long. The Bingham Centre carried out a study in 2014, when the government last proposed to reform judicial review, and found that one driver of delay was the tendency of public authorities to contend that a challenger’s case is not “arguable”, and so the court should refuse permission for the challenger to bring the claim at all. The report authors encouraged public authorities to consider conceding permission and letting cases go to a full substantive hearing more often, as this “saves time and public money, allows permission to be dealt with more promptly and efficiently, allowing earlier substantive resolution”.<sup>19</sup> According to data published during the government’s previous consultation on reforms to judicial review, in 2011, the permission stage was then adding 11 weeks, on average, to the process when the court made a decision on the papers, and 21 weeks in cases with an oral hearing.<sup>20</sup>

## **Some politicians and officials complain of a ‘lawyer says no’ culture**

Ministers naturally find it frustrating when lawyers tell them that they cannot do what they want to do. “My goodness, civil service lawyers sometimes really would have you do nothing,”<sup>21</sup> said Jo Swinson of her dealings with legal officials during her time as a minister in the coalition government. Dominic Cummings, senior adviser to the prime minister in 2019–20, went further, arguing that “internal legal advice makes discussion of regulatory trade-offs tortuous and wasteful; it is always easier to urge ‘caution’ and ‘we’ll lose a JR’ is an easy way across Whitehall to delay or block change”.<sup>22</sup>

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Government lawyers know that their advice can be perceived this way. One said they had “sympathy” with those who “say we are evil because ‘they are stopping our actions’: we are trained to do an analytical function that says ‘these are the problems with it’”. Others speculated that the frustration arose because of policy colleagues’ own attitude to the role of the law. One official who had worked abroad noted the “striking contrast” between British civil servants and American ones. Whereas in Washington, policy officials pay close attention to the nature and limits of their legal powers, “the approach of the British civil service is, we can do anything unless the law tells us we can’t do it”.

Despite the frustration of some, we found that, in general, policy officials did not think that government lawyers took an ‘obstructive’ approach to legal advice. Many lawyers we spoke to emphasised that their role was to advise on risk; it was then for the ‘policy client’ to decide what risk to take.

Officials and former special advisers consistently told us that government lawyers have got much better at this in recent years. One senior official said: “Ten years ago, [lawyers] were much more likely simply to say ‘you can’t do that, you can do this.’” Now, they give their advice according to a strict risk matrix. Legal risk is divided into three variables. Two of them – the likelihood of a legal challenge being brought, and the impact of the challenge if it is successful – are considered by a policy lead, with legal input. The third, the likelihood of a challenge being successful if it is brought, is owned by a legal lead with policy input. ‘High’ risk is more than 70%, ‘medium high’ is 50–70%, ‘medium low’ is 30–50% and ‘low’ is less than 30%. Additionally, if there is ‘no respectable legal argument’ that the government could put before the court, a lawyer will advise that the proposed action is ‘unlawful’, but should refer the matter to their line manager and legal director before giving that advice.\*

This framework has been well received and has made it easier to understand risk. The matrix is more nuanced and makes it easier for ministers to understand than words such as ‘serious’, ‘considerable’ or ‘unacceptable’ risk. It can also encourage officials and ministers to consider changes that could move the policy to a different risk bracket. Policy officials noted that the risk matrix is particularly useful in situations when the government is consciously seeking to push policy as far as is permissible within the constraints of the law. For example, when devising new rules on prisoner voting, the government wished to cede no more than the bare minimum to comply with a 2005 ruling of the European Court of Human Rights that a blanket ban on prisoner voting was indiscriminate and disproportionate.\*\*

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\* For government guidance on legal risk, released in response to a Freedom of Information request in 2015, see: Government Legal Department, ‘Guidance note on legal risk’, 2015, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/736503/Legal\\_Risk\\_Guidance\\_-\\_Amended\\_July\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736503/Legal_Risk_Guidance_-_Amended_July_2015.pdf)

\*\* In 2005, the European Court of Human Rights ruled that a blanket ban on prisoner voting was a breach of the European Convention on Human Rights. In December 2017, the UK government put forward proposals to allow prisoners on temporary licence to vote. The Council of Europe subsequently deemed that these changes were enough to signify compliance with the ruling. See Johnston N, *Prisoners’ Voting Rights: Developments since May 2015*, House of Commons Library, 2020, retrieved 25 March 2021, <https://commonslibrary.parliament.uk/research-briefings/cbp-7461>

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## Different ministers and departments can have conflicting views of legal risk

Not everyone in the government has the same legal risk appetite. There are differences between officials, departments and ministers. We were told that departments' failure to communicate with one another about legal risk appetite can be a source of frustration.

Ministers' background and experience have a strong influence on their risk appetite. Some junior ministers, having less experience than secretaries of state, have "no palpable sense of what high legal risk means" in policy and political terms. For some, this means that they "get scared" and show low risk appetite. One former official described the range of responses: some ministers "would take what lawyers say as gospel", others would be engaged and prepared to ask questions and test the advice, but the most difficult were those who "totally refused to accept the fundamentals on which officials and lawyers were giving advice", leading to the problem of finding the right language to explain to them why they could not break the law.

While legal background might affect how comfortable ministers feel with the law, or how much they think they know, our interviews suggest that the experience that exerts the greatest influence on ministers' attitude to legal challenges is losing them. Defeat in a major judicial review case can affect a minister's standing and career. In the view of one former minister, it "becomes the subject of jitteriness".

Departmental outlook can be as important as personal background. In particular, we were told that No.10 and the centre of government tend to have a higher tolerance for legal risk than departments. The policy leads in departments are attuned to the cost of a successful court challenge – which could overturn years of policy preparation – and will have to manage the fallout of a legal defeat, whereas No.10 is more focused on driving forward the government's political agenda. Where conceding a challenge would be expensive, we were told that the Treasury is also minded to allow departments to "test" the policy in court rather than concede.

In Defra, which has had 40 years of operating with a bedrock of EU legislation, "no one moves without talking to their lawyers"; the law is seen as "totemic" and that can influence how "risky" any course of action is perceived to be. However, in the Home Office, risk appetite is higher, at least where the minister's political objective is a 'crackdown' approach to enforcement. As an official said: "If the government takes an aggressive position on deporting people (for example) it is going to encounter these problems. It is for the government to choose if they want to magnify these problems." In fact, judicial review is sometimes considered a political tool in itself. More than one interviewee told us that with certain Home Office decisions, politicians would find it more politically palatable to be forced to abandon a policy or action by a court than to abandon it themselves.

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The volume of cases that the Home Office faces also has an inuring effect. In a department “where you expect everything to be challenged”, the department becomes more comfortable with legal risk. One official told us that: “HO [the Home Office] has a more adversarial approach to legal challenge because you are dealing with people who do not want to follow the law, a very small number of people. Whereas other departments are designing law for people who want to comply with the law.”

### **Some policy officials feel hamstrung by disclosure rules**

As soon as a government department becomes aware that someone is likely to challenge one of its decisions, the government comes under a ‘duty of candour’. This is a duty on the decision maker to “set out what they did and why, so far as is necessary, fully and fairly to meet the challenge”. That includes information that will be harmful to the government’s case, and material that will prompt a claimant to introduce new grounds of challenge. This can mean that departments must hand over consultations, impact assessments and even an email trail showing how a decision came about.

Some officials in litigious areas therefore feel they lack a ‘safe space’ in which to develop and debate policies. One official noted that colleagues had questioned whether they were permitted to contact certain stakeholders at all, concerned that it could create legal issues in future. We were also told of concerns that it made it harder to experiment: “I worry that the law pushes us into an old-fashioned policy approach, away from an iterative, agile approach.”

However, more senior officials and lawyers were more relaxed about disclosure and felt officials could be overly risk-averse on this front. One even thought that some of the worries were “naïve” and that it should not be a freeze on policy making, but a question of good practice. One official talked about the inertia that can arise if you start to think of consultations only through the lens of how they might affect a later judicial review. They worried that the mentality could too easily become: “We can’t consult unless we have thought of every single issue and put it out there, or we’ll be judicial reviewed on it if we put an issue in later that we didn’t include in the consultation.”

Government lawyers we spoke to emphasised that, albeit ensuring good practice, they did not think officials should be thinking through the legal consequence of every communication. One lawyer told us that policy officials should be reassured that “they can do things without every step being checked by a lawyer”. This message needs to come from the top. As one official put it: “Senior people have to give reassurance and say ‘we have faith in our processes’.”

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# How to improve the use of legal advice in policy making

It is inevitable that legal challenge, like any kind of challenge, causes frustration among policy makers. It would not be possible, or desirable, to reform either the government's own processes, or administrative law in general, to eliminate that frustration. Ministers are never likely to be pleased to lose in court.

Nevertheless, there are ways in which Whitehall could change processes and attitudes to ensure that advice about legal risk is a positive part of the policy making process, which helps ministers to govern more effectively.

## **Policy makers should recognise that good policy making is less likely to be found unlawful**

There is significant overlap between the principles of good policy making and the principles of public law. Compliance with public law will often lead to a more robust policy process that produces better policy, while decisions made through a robust policy process will be less likely to be struck down in court.

For example, when it comes to consultation, the courts apply a set of rules known as the 'Gunning principles' to decide whether a consultation is lawful:

- the consultation process should be at a formative stage of policy making
- the consultation document should give sufficient reasons for the proposal that respondents can consider it and respond intelligently
- there should be adequate time for consideration and response
- responses should be "conscientiously" taken into account in finalising any of the proposals.<sup>23</sup>

These are closely in line with the recommendations in the Institute for Government's own 'evidence transparency framework';<sup>24</sup> they are all maxims for good, as well as lawful, consultation.

Another example is the public law principle of rationality. Although the One senior policy official told us courts have consistently said that "the wisdom of governmental policy is not a matter for the courts",<sup>25</sup> they can strike a decision down on the grounds that it has no "rational basis" at all.<sup>26</sup> Likewise, where the government seeks to argue that a measure that discriminates against protected groups, or interferes with individuals' human rights, is justified by reference to a legitimate policy objective, the courts will require some evidence that the measure "can reasonably be expected to contribute towards the achievement of that objective".<sup>27</sup> It is, similarly, good practice for policy makers to ensure there is evidence that a measure will actually do what it is supposed to do.



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At official level, there is some recognition of this. We were told that the government's experience of judicial review is worst when there are problems with its own policy thinking. As one former policy maker noted: "in the cases where the government has lost (and largely it doesn't, and when it does they tend to be spectacular) it tends to be because they have done something wrong or badly."

For example, in 2017, the High Court considered changes to the rules on personal independence payments (PIPs) – a benefit designed to support those with long-term health problems or disability – which sought to prevent some individuals claiming the benefit if their inability to undertake certain tasks was solely due to psychological distress. The court found the changes unlawful, because they discriminated against people with mental health problems but there was no "factual or evidential basis" that they achieved the government's stated objective of targeting support at those with the greatest need. The ruling was hugely costly, leading to millions of claims being reviewed.<sup>28</sup> Flaws in the design of the scheme made it much harder to fight, and deal with the result of, the case. As one person who worked on the problem noted, the problems the judge identified were already obvious by the time the government got to court: "It was fairly clear that the benefit didn't do what it was meant to." But securing parliamentary time to push through legislation, particularly in a sensitive area such as welfare reform, proved impossible after the government's loss of its majority at the 2017 general election.

Immigration is another area in which defective policy making has increased legal risk. As an Institute for Government report found in 2019, most changes to the immigration system are made through secondary legislation and, rather than reviewing or adapting existing legislation, the Home Office has tended to add more clauses to existing rules.<sup>29</sup> This means that the rulebook has quadrupled in size since 2008, with the result that the immigration rules "contain duplication, cross-references to sections that have subsequently been removed and inconsistent drafting, and in certain parts they have become largely incomprehensible".<sup>30</sup> It is little wonder, in that context, that the Home Office faces a high volume of legal challenges and is more likely to lose immigration and asylum cases than cases in other areas. The rules can be difficult for individuals, and indeed the government itself, to understand.

Ministers and policy officials will not be able to head off every judicial review by effective policy making. But those who view legal advice as an obstruction to pursuing the government's policy objectives ought to recognise that, in many cases, it has the opposite effect. As with many forms of internal challenge and scrutiny, when a lawyer says that the evidence for a measure is so weak that a court may consider it irrational, or that stakeholder engagement is such a mess that a court may find that the government has unlawfully frustrated someone's legitimate expectations, or that a consultation process is so perfunctory that a court may strike down the policy that comes out of it, the result is not always "needless delays". It can be better policy and more effective government. As one government lawyer put it: "The idea that you don't consult, that you don't take a range of views, [that you make] unevidenced policy... We think that's wrong from a basic good policy making point of view. And the law just backs that up."



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## **Policy makers should recognise that the courts are their allies in giving effect to policy**

It is important for policy makers to understand the broader constitutional context in which the courts exercise their judicial review jurisdiction. Judicial reviews against central government are often not about enforcing judge-made law on standards of decision making, or fundamental rights, at all. They are instead about whether parliament has given the government the power to do what the government has tried to do, and whether the government has complied with duties that parliament has imposed.

In fact, some of the areas of public law that cause greatest frustration in Whitehall come under that category. For example, the public sector equality duty (PSED), which provides that a public authority must have regard to various equality-related considerations in the exercise of its functions, can increase the time and paperwork involved in making a decision. It can, for example, mean that officials working on a policy produce an equality impact assessment before the minister makes a decision. This duty is not judge-made, however, but politician-made. It is given effect by section 149 of the Equality Act 2010.

In enforcing that duty, as with the enforcement of statute in general, the mission of the courts and the lawyers is not to get in the way of the politicians, but rather to give effect to their intentions as recorded in legislation. It follows that, if legislation is getting in the way of a minister's policy objectives, the best thing they can do is persuade parliament to change it. Their freedom to do so is also wider now than ever, as laws that originated in the EU institutions are now on the UK statute book as a result of parliament's own decisions during the Brexit process, and can be modified or repealed by acts of parliament. The court will not overturn a decision that is given effect in primary legislation, and is likely in general to exercise a lighter-touch review of decisions that have some democratic underpinning – for instance, because they have been subject to extensive debate in parliament. Again, that aligns with the demands of good policy making: when major changes in policy take place, parliament enacts them and they are given proper scrutiny.

## **Policy officials should engage lawyers as soon as they have set their objectives and identified the options**

We were told that many of the problems identified in the previous section of this paper – delay, obstruction and ministerial frustration – can be headed off by consulting lawyers early enough that it is still possible to course-correct. As one former minister noted, it is also easier to address problems if they are identified early on before politicians and advisers become ideologically and professionally invested in a particular policy approach. If a government lawyer is consulted too late in the process, they have to give a view on the legal risk and they are less able to propose alternatives. In the worst-case scenario, they “have to walk the policy backwards”.

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However, there is a balance to be struck. If legal advisers are brought in too early, when the overall policy goals have not yet been formulated, they might not be asked the right questions. One senior lawyer expressed concerns that the government had not always got the best out of its lawyers on Brexit issues. Because so much work was needed to design new legal frameworks to replace those that had previously been part of EU law, at times policy officials would effectively turn to the lawyers first, rather than consider the objectives they were trying to achieve:

“On EU exit, the policy design is so legal that it has fallen on lawyers to do the policy design. So when no one has a clue, and it ends up being the lawyers who do the policy design, I say ‘I can’t give legal advice on a one-sentence policy’. I say ‘go away and do some policy design.’”

One government lawyer told us that within the ‘policy wheel’ – the different stages of developing objectives, analysing the problem, thinking about existing tools, engaging stakeholders, deciding policy options, agreeing them and implementing them – lawyers should be brought in after the objectives have been set out and the analysis has been done. Getting that timing right would help to ensure that lawyers make a positive contribution.

### **Policy makers and lawyers should avoid eliding policy advice with legal advice**

When the line between legal advice and policy advice is blurred, that can give ministers and special advisers the impression, as Dominic Cummings put it, that policy officials are using the risk of losing a judicial review to delay or block policies.<sup>31</sup> Officials admitted that legal advice can reinforce scepticism among their colleagues about policies they already feel are flawed. But if that happens without policy officials thinking through how to surmount the obstacles, ministers are understandably frustrated.

That frustration can be avoided in three key ways. First, officials need to ensure that a clear line is drawn between policy advice and legal advice, even when the content of the advice overlaps. Second, as described above, policy officials need to make sure that they have done their initial thinking on a policy before bringing in the lawyers. Third, the government needs to drive forward the wider agenda of reducing churn among officials and preserving institutional memory when they move on. Whereas policy officials typically stay in post for around two years, lawyers typically stay in post for longer, often four years. This can mean they are often a greater expert on a policy area than their policy counterparts. That means, in turn, that senior policy colleagues and ministers look to lawyers to provide what is essentially policy advice. This is not to say that legal specialists are a bad thing. We were told that, particularly where there is a generalist policy lead and a generalist legal lead, “you miss things”; specialist lawyers are also more likely to know what ideas or arguments have been tried before, and how the wider sector might react to policy. But where an imbalance of specialist knowledge between lawyer and policy official means that the lawyer is effectively providing policy advice, that can lead to confusion and frustration.

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## **Policy makers and lawyers should be taught how to speak each other's language**

Ensuring that the two groups understand each other better could also address some of policy makers' frustrations with advice from lawyers. More than one official told us that when policy officials did not know how to ask the right questions of lawyers or explain what they are trying to do, lawyers can end up envisaging a policy too narrowly, leading to poor advice. One senior policy official told us that lawyers could be "too literal in their reading of what you are asking", which is a "risk with all functional advice". Policy officials therefore need to ensure that lawyers understand the policy on which they are advising, giving the lawyers "client instructions" to advise on it and be careful of loose language that can cause misinterpretations. They also need to know how to challenge the legal advice, and make sure they have really understood it.

The Government Legal Department, a non-ministerial department from which government lawyers operate, has made efforts to improve how lawyers both communicate their role and work with policy officials to make the best use of them. But more can be done. The department gives policy officials general training on the law, but many we spoke to felt that this could too often be passively received: "Everyone goes to one. But few... probe it. Most just listen and accept." Many policy officials told us that their understanding of judicial review and how to use the legal service came from 'learning on the job'. Officials transferring to highly litigious policy areas from less litigious ones felt they were on a steep learning curve. The induction that policy officials receive at the start of their role should cover how to work constructively with government lawyers.

Better induction and training would also help to address the cultural problem that civil servants and ministers are inclined to view the law as an obstacle to policy making rather than a toolkit with which to make good policy. As one government lawyer argued, for policy officials, understanding the law should be "as important as understanding economics or stats. So often the lawyers are not embedded, whereas economists are embedded". The message that needs to go out is: "Don't be afraid of the law."

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## **Government should improve its communication of legal risk appetite, particularly between departments and the centre of government**

While officials and lawyers can do more to reduce frustrations with how legal advice is delivered and used, it is ultimately ministers who are responsible for a government's attitude to legal risk. Yet different ministers and departments, with their different personalities and incentives, are bound to have different risk appetites. Those differences need to be communicated effectively if departments are to avoid last-minute blow-ups in policy.

In the first instance, ministers need to communicate their own legal risk appetite to their officials. That will help to ensure that they receive advice that they perceive as useful and positive, rather than obstructive. Ministers from different departments should also think about legal risk appetite as something on which they need to 'align' when departments are working together.

If No.10 wants a cross-governmental change to legal risk appetite, it needs to say so. There does not necessarily need to be a unified government policy on risk appetite, but the current administration makes no secret of the fact that it regrets what it sees as the constraints the demands of public law place on policy making. The government could deal with that by telling departments to *reduce* their risk appetite, to decrease the chances that policies that are important to the government's political agenda get held up in court. Alternatively, it could deal with this concern by telling departments to *increase* their risk appetite as, although this would mean more decisions being quashed, it would also mean that those decisions that are not quashed go further to achieve the government's objectives.

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## Conclusion

The government has said that the work of the Independent Review of Administrative Law<sup>32</sup> was the “first step” towards implementing the Conservatives’ 2019 manifesto commitment, that a Conservative government would “ensure that judicial review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays”.<sup>33</sup> The review panel recommended only minor reforms to the current system, having found that the courts’ “underlying ethos... is one of judicial self-restraint”.<sup>34</sup> However, the government is now consulting on reforms that go beyond what the panel has recommended, including on how the courts’ jurisdiction to review particular government decisions can be removed (or ‘ousted’) altogether.

If the government can muster a majority for change in parliament, then it is entitled to legislate for reform. Yet doing so comes with obvious constitutional risks, reducing the ability of citizens to challenge the exercise of coercive state power. The government should therefore look inwards as well.

We have found that policy makers, at both political and official levels, could develop a more constructive relationship with lawyers and the law. Some improvements could be made to internal processes: by ensuring that lawyers are brought in at the right time, that policy officials use their advice in the right way, and that the policy profession is properly trained in how to commission, interrogate and understand legal advice.

Some other improvements we have recommended in this paper are cultural. Policy makers should recognise that lawful decisions are likely to be better ones. They should also recognise that the best way to protect a decision from judicial review is to get a proper democratic mandate for it in parliament or, failing that, to follow a fair and robust policy process.

Like managing efficiency and cost, parliamentary and media attention, and evidence about the impact of policy, dealing with legal risk is part of being in government. Like other forms of scrutiny and challenge, it can be time-consuming and onerous, but it can also help ministers to govern more effectively.

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