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?***

We believe providing for a suspended quashing order would be a sensible reform. This will allow the government time to take any remedial action ordered by the court without the entirety of the measure proposed being quashed. Having studied the consultation document, we believe the government recognises that a combination of precedent from section 102 of the Scotland Act and the suggestion of the Review (IRAL) in providing for discretion for the courts, will be the best way forward. The MDU believes that the courts should retain flexibility to develop, through case law, principles to supplement any broad guidance that may be given through legislation. We feel this is necessary, as without it, the system would be too rigid.

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?***

The MDU has no comment to make on this question.

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

The MDU has no comment to make on this 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?***

We do not agree with this proposal. Judicial Review has a wide remit, and rightly so. When considering what a Judicial Review is, we could be referring to an individual challenging the decision of a regulator – such as a dentist challenging a Fitness to Practise decision of the General Dental Council (GDC). The outcome of that decision affects them and them alone. Equally, we could be referring to a Judicial Review that challenges a piece of government legislation – such as a coalition of charities challenging legislation to amend the law on abortion. The outcome of that decision could affect vast numbers of people.

The central purpose of Judicial Review is that a past error should be revisited. Therefore, we are deeply concerned by any move to allow for prospective-only remedies. If the court finds that something was not done properly, to the detriment of the claimant, a successful Judicial Review should require the defendant to go back and repair the damage caused by their maladministration – and if necessary, begin afresh.

If following this consultation exercise, the government is still minded to proceed with amending section 31 of the Senior Courts Act 1981 – then this amendment must be limited to making this a discretionary power, for the court to exercise only if it saw fit to do so. To

do otherwise would create the risk of serious injustice, both to claimants who have already suffered loss or damage, and those for whom a prospective remedy would offer no remedy at all. We note at paragraph 64 of the consultation that the government is considering legislating the factors which the court must consider, when deciding whether a prospective-only remedy is appropriate. It would be essential for this legislation not to be restrictive. It would also need to have sufficient flexibility to allow for principles to be developed through judge led case law.

In summary, we do not support this proposal. However, for the MDU, the most important point to emphasise is that retrospective remedies must remain an option regardless of any legislative reforms that the government brings forward. Prospective-only remedies, if allowed, should be entirely discretionary for the right type of case, in the right circumstances.

5. ***Do you agree that the proposed approaches in para 68 (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?***

The MDU would require more information before commenting fully on this question. However, we note the breadth of primary and secondary legislation means that defining the circumstances (as at paragraph 68) will be hugely challenging.

Above all, the rights of the individual, pursuing an individual -*retrospective* - remedy in their individual circumstances, must be protected.

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 para 69 (a) or the mandatory approach in para 69 (b) would be more appropriate?***

The MDU has no comment to make on this 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?***

The MDU has no comment to make on this question.

8. ***Would the methods outlined in paras 85-95, or a different method, achieve the aim of giving effect to ouster clauses?***

The MDU would require more information before commenting fully on this question. In making a partial response, we note that a central pillar of this nation's constitutional settlement is that the government of the day must remain answerable to the law, whilst being accountable in law through the courts. As matters stand, courts can and do decide that decisions are beyond the scope of Judicial Review, and instead defer to public bodies. If

the government concludes that should be an extension of the use of ouster clauses, this should only be in exceptional circumstances and should be subject to full and detailed parliamentary scrutiny.

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.

The MDU supports this proposal. The proposal removes the uncertainty of how 'promptly' is defined. A clear three-month time limit, with no additional requirement to act 'promptly', would reduce any uncertainty.

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

The MDU agrees that this should be given consideration. As matters stand, parties cannot agree on an extension of time between themselves – consistent with the principal that it is the court who retains control of proceedings. An amendment to the rules could permit parties to agree an extension of time where appropriate but this should be capped at a maximum period.

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?

The MDU agrees that this should be given consideration; we reiterate our response to question ten of this consultation. As matters stand, parties cannot agree on an extension of time between themselves – consistent with the principal that it is the court who retains control of proceedings. An amendment to the rules could permit parties to agree an extension of time where appropriate but this should be capped at a maximum period.

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?

The MDU agrees that this should be given consideration. In the Civil Justice system, allocation is governed by the financial amount claimed. In Judicial Review, we can surmise that allocation would depend on an assessment of the complexity of a case or the scale of the impact any decision could have – for instance, would it affect one individual or a large section of the public? While making a pre-emptive assessment of such matters will be a challenge for judicial management, we think the practicality of doing so is worthy of careful consideration.

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

The MDU has no comment to make on this 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?

The MDU agrees that the CPRC should be invited to consider this.

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

When read alongside paragraph 106, the contents of this section of the consultation appear contradictory. Therefore, we are limited in the response we can provide to this question. Insofar as it is suggested that the defendant should not file a summary of grounds for contesting the Judicial Review, the MDU would not support this.

The current time limit of three months to commence judicial review proceedings and comply with the pre-action protocol is a challenging time scale. If the intention moving forward is to penalise claimants who do not comply with the pre-action protocol by obviating the need for the defendant to file proper grounds of challenge, this would be a further penalty to a claimant trying to protect their position in the timescale currently provided. Furthermore, it is not instantly apparent how this aids the court in their consideration of the matter.

16. Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

The MDU believes that it would be appropriate to invite the CPRC to consider this.

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

The MDU has no further information to provide at this stage.

Submitted: 29th April 2021

TCJR