Independent Review of Administrative Law - Call for Evidence

DLA Piper UK LLP Response

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DLA PIPER

Introduction

DLA Piper welcomes the opportunity to respond to the Independent Review of Administrative Law (**IRAL**)'s consultation on administrative law. DLA Piper's public law practice advises a range of clients including claimants and defendants in judicial review and other public law proceedings. In addition to advisory and contentious work for corporate clients, we are regularly instructed by both central and all tiers of local government as well as the devolved administrations on complex high-profile public law matters. DLA Piper is therefore well placed to respond to the IRAL's call for evidence, and we do so concisely below. At the outset, please note that this response does not purport to represent the views of DLA Piper as a firm. Rather, this response has been prepared by some of DLA Piper's public law lawyers.

Our response

Question 1: Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

We are concerned that seeking input from the legal profession at this stage is arguably premature. A sequential approach whereby the responses to the specific questions put by IRAL to government departments on the impact of judicial review on them and any particular concerns this gives rise to was summarised and disseminated first would have assisted greatly in informing and directing our answers to the problems identified by such responses.

Subject to that preliminary caveat, in our view, judicial review is an essential part of a strong and functioning democracy and it is concerning that the questions asked in the questionnaire for government departments imply, contrary to this, that judicial review is an impediment to effective government. The first question asks the respondent to make "full allowance for the importance of maintaining the rule of law". The rule of law is a constitutional principle in the United Kingdom. One of the practical effects of the rule of law is that courts have the ability to strike down government action which is illegal and/or unlawful. Judicial review is the inherent jurisdiction of the High Court and the primary constitutional role of the judicial branch of government. Therefore, absent some other mechanism through which government action can be held to a correct legal and lawful standard, the importance of maintaining the rule of law requires that the courts must be able to carry this constitutional function, and any reform which attempts to hinder or prevent the courts from doing this would be, in our view, unconstitutional.

We support reforms to the judicial review procedure which would make it more effective for both claimants and defendants, and we have sought to provide some suggestions for further inquiry in our response. However we do not support reforms which weaken the ability of the courts in their supervisory jurisdiction to carry out their constitutional role, and we are concerned by the implication in the questionnaire that such a weakening could be justified in the interests of strengthening government decision making.

We make these comments in the context of growing concerns worldwide about the performance of democracies. In the January 2020 **report by the Centre for the Future of Democracy**, the authors

describe how across Western democracies "*growing political polarisation, economic frustration, and the rise of populist parties, have eroded the promise of democratic institutions to offer governance that is not only popularly supported, but also stable and effective*". In our view, the IRAL forms part of this picture of a lack of confidence in democratic institutions. Instead of strengthening the confidence of British citizens in UK democracy, an attempt to shift the balance of power so that it is further in favour of the executive will only risk adding to the perception of democratic malaise currently afflicting our society.

Further, the role of the judiciary in a free and democratic society, and in the context of a parliamentary democracy such as the UK, is to ensure that the executive branch of government is accountable and does not act beyond the powers and discretions afforded it by Parliament. The balance of power between the branches of government is finely balanced, though it has steadily been weighing more in favour of the executive branch through the expansion of the powers afforded by Parliament to the administrative state.

Over the past 20-30 years there has been a clear change in the style of government in the UK with a shift to a more presidential style of government not just at the heart of the national government but also mirrored in the structures for the devolved administrations and the way, at a local level, power has been centralised in the hands of mayors who wield considerable executive power in their regions. This trend has been matched by a clear and growing impatience within the executive at the governance structures and working methods of the civil service leading to policy development and decision making in many cases being channelled through different “informal” processes involving politicians and their “private" political advisers. This trend has also led to growing tensions between the executive and, at a national level, Parliament or, at a more local level, between the regional assemblies and councils whose role it is to scrutinise and hold their executives to account.

Whilst it is entirely possible to have sympathy with politicians who wish to deliver on their mandates and to take demonstrable action within the limited time window available to them before they next face the electorate, this desire cannot, and must not, be allowed to prevail at the cost of sacrificing either the rigour and quality of decision making or adherence to proper governance in the making and execution of decisions. This is a genuine worry as, in our view, a significant part of the current democratic malaise stems from a perception that the quality and effectiveness of policy development and decision making has declined. This is a powerful argument for ensuring that our systems of review remain strong and robust and flexible .

In this context, a critical part of the checks and balances that form the UK constitution is that it is for an independent freely functioning judiciary to act as arbiter in the process of holding the executive to account. A key limb of that process is that the process of judicial review and the checks and balances built into that procedure have been predominantly of judicial origin and they have evolved over time through case law. Possible reform of that process has been the subject of review and reports by the Law Commission overseen by the judiciary. It is unclear why the current Government considers that this system should in some way be overridden.

However, if the Government is to intervene (especially if that is in anyway a response to the wholly exceptional circumstances that existed immediately before the last election) then it is not appropriate to review judicial review or the role of the courts in that context in isolation. Instead, a wider review that

considers the functioning of government, its relationship with Parliament and, in that context, the role and functioning of judicial review and other forms of oversight must be appropriate.

In any event, the IRAL's review is predicated on an implicitly false assumption: that judicial review is an impediment to good governance. In our experience as professional legal advisers (acting for both a diverse range of claimants and defendant public bodies, including central government bodies), judicial review encourages good governance. It polices executive decision-making processes and, as a result, invariably results in better policy outcomes. For example, the common law development of the duty of consultation through judicial review has meant that affected citizens and other persons are more involved and able to input into the policy making process. It is our experience as solicitors that the resulting policies are more effective as a result of consultation.

While judicial review is sometimes inconvenient for the government, seeking to restrict the judicial branch's constitutional function of supervising the legality and lawfulness of executive branch action with the aim of protecting flawed policy from the inconvenience of such scrutiny is not a solution that respects the rule of law or the separation of powers. If there is a risk that policy will be judicially reviewed, the government always has the option of legitimising the lawfulness of its policy by seeking to introduce legislation in Parliament which has the effect of codifying any policy that would otherwise be held to be illegal and/or unlawful under a judicial lens. The government can seek to legislate retrospectively to legitimise policy that has already been struck down through judicial review by seeking to introduce validating legislation. Whether there are limits to Parliament's law-making power has not been authoritatively determined, and accepted case law at this time does not support judicial review of the substance of legislation, and so it is currently anticipated that the Courts will not readily strike down primary legislation in any context.

As a final and speculative thought on this point, we note and agree with most of the conclusions drawn by Lady Hale in her 2018 Michael Ryle Lecture "*Should the Law Lords have left the House of Lords?*". There is no obvious benefit to the judiciary in the performance of their functions in maintaining such a link. However, we do question whether, the reverse is so true. Rather than being an anomaly or inconsistency, restoring the hybrid nature of the role of Lord Chancellor as a senior lawyer from the House of Lords free from the tyranny of the electoral cycle might have benefits in terms both of the quality / impartiality of the advice imparted to the executive and in ensuring effective relations between executive and the judiciary at time of possible tension.

Question 2: In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Question 3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

Question 4: Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

Question 5: Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

Question 6: Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

Question 7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

Question 8: Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

Question 9: Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

Question 10: What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

Question 11: Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

Question 12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

Question 13: Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

We answer the above questions collectively below.

In our view, it is impossible to consider reform of judicial review in a vacuum and without basic statistical analysis of the incidence of judicial review and how this has changed over the years. We believe that the panel should consider the following covering the period of the last 20-30 years:

a. The annual number of judicial review cases;
b. The number of cases granted permission (both in total numbers and as a percentage of the number of applications for leave being made);
c. The number of cases that were ultimately successful in whole or in part broken down both by reference to central government / local government and by subject matter category (e.g. immigration, environmental/planning, education, health);
d. The average duration of cases from issue to final judgment, and
e. The number of judges sitting in the Administrative Court or with a ticket to hear administrative cases in other courts.

This kind of statistical data is not readily available and we suggest that until it is, the IRAL cannot properly and sensibly address whether procedural reforms to judicial review are needed to "streamline the process", as they are asked to do by the Terms of Reference.

The limited evidence that is available in this area suggests that the numbers of judicial review applications are falling, not rising. For example, Tables 2.1 and 2.2 of the Civil Justice Statistics Quarterly: April to June 2020 show that in 2017, the number of applications lodged with the

Administrative Court dropped below 4,200 for the first time since 2000. This number further declined in 2018 (3,595 applications), 2019 (3,383 applications) and the first half of 2020 (1,448 applications). According to the Ministry of Justice Tribunal Statistics Quarterly: January to March 2020, 5,679 applications for judicial review were lodged in the Upper Tribunal in 2019/20, the lowest figure since the Tribunal began its work in 2013.

Nevertheless, one clearly significant factor that would conceivably result in greater numbers of claims for judicial review being brought in the past two or three decades would be the substantial growth in the role of the executive branch of government in making administrative decisions. If there has been a higher volume of decision making, then our hypothesis would be that the logical consequence will be a higher volume of dissatisfaction with decision making, and therefore a higher volume of legal challenges being issued in court.
Another potential variable effecting the number of judicial review applications may be related to shifts in the general quality of public law decision making in the administrative state over the past three decades, and the potential impacts of austerity on quality decision making.

Subject to these comments, we suggest possible areas of reform as follows:

Track system

The IRAL may wish to consider recommending the adaptation of some form of track system for judicial review cases. All cases would still be referred to a High Court judge at the leave stage but as well as considering leave the judge would have to certify whether the case was appropriate to be dealt with by the Administrative Court or whether given the complexity of the issues, their public importance or potential administrative impact the issues could be referred to the County Court, Crown Court or other appropriate tribunals in the first instance. If such an approach would free up capacity in the Administrative Courts as well as allowing a significant number of other “simpler” cases to be disposed of more quickly on a “fast track” basis that might help alleviate both the cost and the administrative burden on Government of addressing judicial review as well as managing the cost and resource risk for claimants.

Whilst this may condescend to a level of detail that is outside the scope of IRAL’s review we annex a paper we prepared on possible proposals for reform of the procedural law relating to procurement challenges as well as a subsequent note summarising a roundtable discussion of the issues raised. For IRAL’s purposes we highlight the fact that we cannot see any good reason to perpetuate the bizarre situation that currently exists whereby some cases are subject to the procedural regime under the Procurement Regulations but others are subject to judicial review . We also believe that this is a good example of an area of the law where the cost and burden on the government of legal challenge could be significantly ameliorated in many cases by referring cases below a certain value threshold to a specialist tribunal for determination.

Funding

If the Government is not prepared to provide legal aid for judicial review cases (except in limited circumstances) then it is inevitable that litigants will (particularly in high profile cases) turn to crowd funding to raise funds to facilitate litigation. Crowd funding is currently largely unregulated. This can result in spurious, politically motivated claims. In our view, the Government would be well advised to increase the availability of legal aid funding and in tandem introduce a regulatory regime for crowd

funding platform. This should reduce the number of quasi political changes to administrative action. Crowd funding , however, raises a series of potentially troubling issues around the advice on costs risk, merits and other factors that should be given to prospective funders before they are asked to donate as well as the appropriateness of initiating a speculative challenge when there is insufficient funding in place, for example, for the challenge to be advanced beyond the letter of claim stage. In many cases such claims are arguably vexatious and it is a waste of tax payer's money responding to them. There is a good case that law firms that wish to promote such claims should provide preliminary merits and related advice on an "at risk" basis and only if there is a substantive case with reasonable merit should crowd funding be permitted to proceed with potential funders having access to the advice before they commit .

Standing

We think that the common law principles on standing have become confused over time and often appear to be given little weight. Clarification of some kind – e.g. through amendments to the CPR – to provide clarity on standing would assist both claimants and defendant public bodies. Standing should continue to be interpreted broadly as a matter of judicial discretion but there should be a greater onus on applicants either to show why they are directly impacted by a decision and thus should have standing or why a particular decision is of sufficient importance that the standing of the prospective challenger should not be a material factor in permitting a review to proceed.

In particular, we think the courts could arguably be more sceptical in their approach to the selection of challengers by prospective claimants as clearly this is done in many cases with the intent of choosing someone who is sufficiently impecunious to restrict future costs risk. We think a duty on lawyers to identify to the court not just the named challenger but any organisation or wider group that that individual represents or is affiliated to might assist.

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