JUDICIAL REVIEW: PROPOSALS FOR REFORM

Consultation Response of Deighton Pierce Glynn Solicitors
29 April 2021

Summary

1. Deighton Pierce Glynn ("DPG") is a leading public law and civil liberties solicitors firm. We represent claimants in a broad range of cases and are well-placed to respond to the consultation. We provide brief details of DPG's work below before addressing the questions in the consultation paper.

2. We have had the opportunity of reading the responses of the Public Law Project and Liberty and adopt their responses as noted below. The 6 week consultation period has not allowed us time to prepare a fuller response, as we are a busy litigation practice. We therefore confine our responses to additional observations that we believe will assist the government in considering the questions it has posed.

3. Our response to the Consultation is ordered as follows:

   (A) Brief details of DPG's work;

   (B) General observations; and

   (C) Responses to the Consultation Questions

4. In summary, we are concerned that the premise for the government's proposals – looked at objectively – is flawed. The quantitative basis for the proposals is either lacking, inadequate or incorrect. And the qualitative premise: that the IRAL report mandated significant reform, is incorrect. Many of the quotations used from the IRAL report remove context. For example, while the IRAL panel said that ouster clauses required sufficient justification, the government has excised their concerns that "highly cogent reasons" capable of justifying the "exceptional course" of excluding judicial review were required. This is much higher than "sufficient justification".

5. Once this is understood the vast majority of the proposals become unnecessary and even inimical to a well-functioning constitutional order. For every one of the high profile decisions with which the government are not happy, and which appear to have prompted these proposals, there are tens if not hundreds of decisions that similarly irk claimant lawyers. But this is not to be deprecated, it is a sign of a functioning and balanced system that pays appropriate deference to government. Through these proposals the government is laying the foundations to skew the rules of the game in

its favour. It matters not that the government says they will only be used sparingly. Once the rules are changed future governments will go further. Vulnerable people affected by unfair government actions will suffer as a result. The rule of law – as defined by Lord Bingham, not in the protean sense – will be severely damaged by these proposals.

(A) About Deighton Pierce Glynn

6. Deighton Pierce Glynn[1] is a firm of solicitors specialising in civil liberties, human rights and public law, with offices in London and Bristol. We employ 40 solicitors and paralegals. We have specialisms in community care and mental capacity; actions against the police; detention and prison claims; equality and discrimination matters; environmental and planning law; healthcare; housing, destitution and migrant rights; international human rights; inquests; and assisting victims of crime.

7. The firm has a particular reputation for its representation of disabled people; persons in detention and vulnerable individuals such as victims of torture, human trafficking and sexual exploitation; unaccompanied child immigrants; and those with serious mental health needs, including people who lack mental capacity (where we are instructed by the Official Solicitor). A significant proportion of our clients have English as a second language or limited literacy skills.

8. To give examples of some of our clients: families whose relatives have died in police custody or prison; survivors of the Hillsborough and Grenfell Tower tragedies; survivors of torture and human rights defenders detained in fast-track immigration detention; trafficking victims who have been overlooked by the public authorities responsible for helping them; members of the Windrush generation denied immigration status in the UK; a victim of unlawful rendition, detained by British forces; people wrongfully refused emergency lifesaving healthcare treatment; families who are destitute and homeless; disabled people in wholly unsuitable accommodation; and others. Please see our website for further details of our work: www.dpglaw.co.uk.

9. Most of DPG's clients are individuals, although we also act for and with charities and non-governmental organisations such as Southall Black Sisters, Amnesty International, Privacy International, Medical Justice, Inclusion London and the Red Cross. The vast majority of our work is funded through legal aid, although we also have significant experience of crowdfunded litigation.

10. Our clients litigate not for commercial reasons, but to obtain access to critical services unlawfully denied to them, to eliminate discrimination, to prevent or to seek redress for interferences in fundamental rights or to bring public bodies to account in relation to issues of wider public importance. We have a long track-record of helping people

[1] http://www.dpglaw.co.uk/litigation-and-public-law-solicitors/reputation/

who are not wealthy secure access to justice.

(B) General Observations

11. We are concerned that the answers in the consultation cannot be answered without substantial empirical and statistical evidence gathering, over a substantial period of time, in order to monitor the judicial review caseload nationally and to discern how it operates in practice. We are able to provide anecdotal evidence, but clear statistical information can only be gathered from the courts service and from persons commissioned to study the same. This is a necessary precondition to any reform.

12. There is a premise underlying the consultation that the balance between the rights of claimants and well functioning government has become misaligned. A rigorous analysis of the evidence may well show – we submit it does show – that this premise is false. Judicial reviews remain very hard to win; the courts take an appropriately deferential approach to executive decision making. The appeal process exists to ensure that the balance is struck in an individual case.

13. Because of this premise, almost all of the reforms canvassed in the consultation face the same way: they are concerned with constraining judicial review only, without regard to broader considerations of the rule of law and access to justice. For example, asking "*should certain decisions not be subject to judicial review?*" without asking whether other decisions could be usefully brought within the scope of judicial review.

14. Another consequence of the assumed premise is that the consultation fails to consider the 'upstream' causes that lead to judicial reviews being brought. The government needs to examine these issues and take them into consideration, lest it reach conclusions that unfairly visit upon claimants problems which really lie at the feet of defendants or elsewhere (and thus fail to achieve the government's aims). It is essential that the government considers and accords due weight to these wider causes. For example:

    - the efficiency of government departments in responding to judicial reviews;

    - the delays in central government departments in providing instructions to the Government Legal Department;

    - policy decisions taken by government departments to oppose claims they are likely to lose;

    - the complexity, rate of change and comparatively very high volume of domestic parliamentary law making[2];

[2] See the study of First Parliamentary Counsel and Permanent Secretary of the Cabinet Office in 2013, identifying a marked increase in volume of primary legislation over the preceding 40 years. This growth rate is even greater once secondary legislation is added-in: https://www.gov.uk/government/publications/when-laws-become-too-complex/when-

- the growth in law making by statutory instrument[3]; and

- the deterioration in the quality and oversight of government decision-making, particularly in response to Brexit and the COVID-19 pandemic and the knock-on effect that this domination of civil service 'bandwidth' has on decision-making in other areas.

15. A flawed premise and a closed mind to proper context significantly undermines the government's proposals. Before pursuing these reforms further, the government should give significant weight to the concentrating influence on government decision-making that an effective judicial review system has, as acknowledged by government and reflected in its 'Judge Over Your Shoulder' guidance[4].

16. In our experience much of the discussion in this area is conducted using the language of parliamentary supremacy but disingenuously. The complaints of 'judicial policy making' are often on closer examination a complaint about a lack of executive supremacy. This can be seen in para 25 of the consultation document, where a Supreme Court decision about refraining from reviewing unreasonability in relation to the Scottish Parliament is used as a springboard for making the same inroads in relation to decisions of the UK government. Executive supremacy is not a principle of our constitution nor should it be. We agree with PLP's submission to IRAL that:

"*In the UK constitutional framework, it is the function of the judiciary to scrutinise the lawfulness of government action, whether through secondary legislation or the implementation of policy. The courts' function includes being the final arbiter of the interpretation and application of legislation, both primary and secondary. This necessarily involves consideration at times of questions of policy; but the courts' role is not to decide whether the policy choice made by the democratically elected branch is the right one: its role is to scrutinise its lawfulness. So too with the HRA: the courts' rule is to scrutinise the compatibility of policy choices with the rights protected by the HRA, not to decide whether the policy is desirable or the 'right' one. This function of the courts in ensuring that government acts within the law is an essential element of the rule of law in a functioning democracy*."

(C) Response to Questions

Question 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?

laws-become-too-complex. See also the Report of the House of Commons Political and Constitutional Reform Committee, 'Ensuring standards in the quality of legislation', 9 May 2013 (https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf). This work needs to be updated and expanded.

[3] Erskine May, Overview of delegated legislation (https://erskinemay.parliament.uk/section/5613/overview-of-delegated-legislation/)

[4] https://www.gov.uk/government/publications/judge-over-your-shoulder

17. The courts are already able to make orders short of a full quashing order and often do confine their decisions to declaratory relief where they accept public policy considerations do not require a quashing order to take effect. S102 of the Scotland Act, concerning issues of competence, is a very specific instrument and it should not be expanded to all judicial review.

Question 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?

18. We defer to the response of Public Law Project in relation to Cart Judicial Reviews. We agree that the factual and statistical premise of the question is wrong. As regards suspended quashing orders, see above. This should not be pursued. Were it to be, then a purposely high threshold should be required in order for such an order to be available.

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

19. In the absence of proposals from the other jurisdictions then, yes, they should be limited to England and Wales only, such as they are.

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?

20. The wide use of prospective-only remedies, while benefitting legal certainty for government in one sense, would undermine legal certainty in another sense and overall would disproportionately undermine the rule of law. It would make lawfulness of a policy or piece of secondary legislation contingent on the speed with which a judicial review was heard. The government's suggestion that where prospective orders were used then appropriate compensatory mechanisms might be put in place for those affected prior to the suspended quashing order taking effect lack any kind of legal force and cannot be relied upon. This proposal is pointedly seeking to deprive affected individuals of a remedy and that must be used sparingly if at all.

21. We agree with Liberty that prospective-only remedies carry too grave a risk that the rule of law is weakened as they "allow the Government and public authorities to act without fear of legal repercussions".

Question 5: 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?

22. The premise to this proposal is flawed as the vast majority of secondary legislation receives little or no parliamentary debate and any notion of scrutiny is largely illusory. Nevertheless, the courts take an appropriately cautious approach to the quashing of any legislation and will first seek to read-down legislation consistent with its authorising statute.

23. We invite you to consider the statistics as to the minimal use of quashing of secondary legislation provided by PLP.

Question 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 (a) or the mandatory approach in (b) would be more appropriate?

24. The Government itself notes in the consultation that "*there are plenty of examples of cases where a finding that public power was exercised unlawfully does not lead to an ineluctable conclusion that the exercise of that power was always null and void*". i.e. the courts already exercise discretion. We agree with IRAL that the Courts are best placed to develop remedies that work in practice. There is no merit in formalising and directing and their use in broader constitutional contexts, particularly in the absence of sound quantitative and qualitative evidence.

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?

25. No, please see above.

Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

26. We do not accept that ouster clauses are appropriate. As noted above, the government argues that 'ouster clauses should be effective where there is sufficient justification' but ignores the IRAL Report's emphasis on 'highly cogent reasons' and exceptionality. These are not made out in the consultation document. We adopt the submissions of PLP in this regard.

Question 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.

27. Yes, we agree with this. Its use was already removed in certain EU law contexts. It is rarely relied upon, and the 3 month period is already very short. It is causative of uncertainty for litigants in person.

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

28. Yes, in appropriate cases. Pre-action negotiation is often cut short by the need to issue proceedings, and the parties are unable to agree to toll limitation unlike in other contexts. We believe litigation costs would be minimised by greater flexibility.

Question 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?

29. Yes, for the reasons stated above in relation to question 10.

Question 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?

30. We do not see this as necessary, as the Administrative Court Listing Office is already skilled in prioritising particular judicial reviews. The reasons are various and do not always relate to perceived "importance" of a decision; financial value or other easily identifiable measures.

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

31. This question is unclear as IRAL were concerned with interveners and they are being confused with other groups or companies who might assist litigation. Interveners assist the court. We adopt the submissions of Liberty and PLP.

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?

32. Yes, there is some provision for this in the Administrative Court Guide. This should be formalised as the cases where Summary Grounds of Resistance raise new matters requiring a reply are too frequent, and court time and the parties' time is taken up negotiating the submission of a reply document, with consequent procedural uncertainty.

Question 15: Do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

33. In certain limited circumstances this may be appropriate. Summary Grounds may sometimes suffice as Detailed Grounds. But this should not be at the expense of compliance with the duty of candour. Besides this, we adopt the submissions of PLP

as to the general position: that there is instead a case for a more proportionate approach to pre-permission Summary Grounds, which have become far less "summary" in form.

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

34. No. There is no evidence for this, and this would have the effect of making the JR procedure more protracted. We adopt the submissions of PLP.

Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?
Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?
Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

35. We are not able to provide a proper response to this in the short time available and without having had the opportunity to see a draft equalities impact assessment. Affected victims should be consulted in response to the impact of any proposals carried forward.

Deighton Pierce Glynn
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