MINISTRY OF JUSTICE CONSULTATION
JUDICIAL REVIEW REFORM

Doughty Street Chambers

Administrative and Public Law Team Response

29 April 2021

Background

1. The Ministry of Justice published its response to the Independent Review of Administrative Law in March 2021. This response took the form of a Consultation Paper issuing proposals for judicial review reform. The Consultation opened on 18 March 2021 and closes on 29 April 2021.

2. This Consultation Response has been prepared by members of the Administrative & Public Law Team at Doughty Street Chambers. The Team is led by Martin Westgate QC and comprises members practising in a diverse range of administrative and public law matters, from housing and community care to mental health, immigration and actions against the police, terrorism and prison law.

3. Doughty Street Chambers is a set of internationally renowned barristers with a reputation for excellence. All members of Doughty Street Chambers have a commitment to human rights and civil liberties which they bring to their cases. Doughty Street Chambers is at the forefront of human rights related public law cases. Administrative and public law is at the heart of Doughty Street Chambers**.** Although the primary focus of Doughty Street Chambers is acting for Claimants; members also work for local authorities, central government and regulatory bodies. It has long been recognised as a leading set in administrative and public law by both Chambers & Partners and Legal 500.

4. For further information, please contact civilclerks@doughtystreet.co.uk.

Introduction

1. This is the third major consultation on judicial review or human rights since October last year. Practitioners and others have little resource to respond to what are potentially very wide-ranging changes with significant legal and constitutional implications. The consultation proposals are backed by explanations and descriptions of judicial review and its place in the constitution that are simply unrecognizable to many lawyers active in this field. In the circumstances, this reply focuses on the specific questions raised by the consultation.

2. However, we must start with some observations about the scope of the government response to the Independent Review of Administrative Law (IRAL) and further consultation. The IRAL Panel deliberated for several months and produced a careful report impressively referenced from a range of sources. Even with this extensive work, the Panel recognized that it was not in a position to conduct a comprehensive assessment of judicial review [para 11]. A key message that emerges from the IRAL report is that there is a need for coherence in constitutional change; ill-considered constitutional change may have unforeseen side effects [para 14]. Linked to this, the IRAL report concluded that wholesale legislative reform is to be discouraged: *"the temptation to legislate should be resisted*" [para 4.166].

3. In taking this approach, the Panel came to the same conclusion as the Law Commission did in 1994[1]. Its conclusions were also reflective of the fact that the material before it did not indicate a need for widespread change. The IRAL noted that "*those government departments that gave an estimate of their cost in financial and human resources gave little indication that the cost was overwhelming or in any way disproportionate to the value of maintaining "the lawfulness of executive action*"" [para 35].

4. In keeping with this, the IRAL Panel did not generally make recommendations for legislative changes to judicial review. The Panel recognized that change, if needed, should come from the judiciary and that any intervention by government should be on a limited basis. It did not recommend codification, or legislating for justiciability, or for tailoring grounds of review or legislative changes for standing, intervenors or the duty of candour.

[1] Law Com No 226 (1994) cited at para 6 and fn 6.

5. The current consultation paper [CP] is in sharp contrast to this. Whilst the CP claims that a radical re-structuring of judicial review is not proposed – and Chapter 3 is expressly headed "*targeted incremental review*" – the proposals it makes are fundamental and have significant implications for the rule of law and the constitution. It is troubling that the CP is either being disingenuous or it fails to recognize the scale of what is being proposed, and that it does so in the teeth of the IRAL conclusion that there is no need for wholesale or legislative change. To embark on many of the proposed recommendations would be reckless, and the paper makes out no case for them. Changes of the kind proposed, in the context of the fundamental constitutional role played by judicial review, should only be contemplated after the most careful consideration and with a proper evidential basis that change is needed.

6. While the CP makes proposals across the entire field of judicial review, it purports to do so in response to perceived concerns about particular kinds of case only. An underlying theme, not expressly stated, is that the majority of judicial review claims challenge the merits of governmental decisions which are properly the subject of the political democratic process [see for example para 31]. This is a fundamental misunderstanding. Judicial review is not a challenge to the merits of a decision, but to the legal basis for the decision and the procedure by which it is made. Very few judicial review claims challenge decisions made in the areas of foreign affairs or defence; the vast majority of claims involve individual complaints of unlawful action or decisions by a central or local government body. Contrary to the claim that the "*court is not designed or equipped to deal with such issues*" [at the end of para 31], the exact opposite is true. These cases raise "*a specific question*" for the reviewing court to answer.

7. A key problem with the CP is that it proposes changes to the whole system of judicial review, affecting thousands of ordinary litigants, in order to address problems that are claimed to have arisen in respect of a few isolated cases where the Government has been a losing party. Each of the changes proposed is patently intended to make it more difficult to bring judicial review claims and to restrict the remedies that are granted when claims succeed. It is a matter of grave concern that the Government is willing to implement wholesale change to judicial review, a fundamental part of our constitution, in furtherance of its own political interests and without a proper evidential basis for the proposed changes.

8. Compared to the number of public law decisions each day, the volume of judicial review claims is tiny. The real question is not why there are so many claims for judicial review but why there are so few. Part of the reason may be that there are many barriers to access for ordinary litigants, including lack of knowledge and awareness and costs risk, which are insurmountable for most individuals. In addition, sweeping changes to legal aid and reductions in legal aid coverage have made it more difficult for individuals, including some of the most vulnerable in our society, to achieve redress against unlawful decision-making by public authorities. The government says that it hopes to stimulate productive debate about the proposals and recent trends in judicial review [para 116], but a real "*debate*" about judicial review would recognize these issues and would focus on addressing them. It would extend to asking how else individuals can achieve administrative redress and would evaluate how effective initiatives like the pre-action protocol have proved to be, or what scope there is for alternative dispute resolution (ADR) in public law disputes. These are the kinds of initiatives that only government can engage in and they have the potential to make a real difference. The CP has nothing to offer here; instead it focuses on the pre-occupations of an occasional but apparently sore loser. In the context of such potentially significant constitutional changes; this is a dangerous and unprincipled approach.

9. Even if one focuses on the narrow group of cases that the CP seems most concerned about, there is no evidence that judicial review "*unnecessarily imped[es] the conduct of public affairs*" [para 35]. There is no real evidence of judicial overreach and - as the IRAL noted - the examples of judicial restraint are equally, if not more, important. A recent example is the decision of the Supreme Court in *Shamima Begum*. Many commentators think that this decision struck the wrong balance and denied fair process to a young and vulnerable woman when the security risks of an appeal could be managed. However, it would obviously be wrong to apply the logic in the CP in reverse - to suggest changing the whole legal architecture of judicial review or immigration appeals - in order to change the outcome of this one case. The price of having independent courts is that sometimes they make decisions you do not like.

10. Chapter 2 of the CP is headed "*The Constitution and Judicial Review*". The vision presented in the chapter is highly contentious, both as to general principles and as to the specific diagnoses about what is said to be wrong with the present functioning of judicial review.

11. The CP rightly recognises that the rule of law is a fundamental principle at the heart of our constitutional arrangements. It also rightly recognises that judicial review is a fundamental part of the rule of law, precisely because it ensures that public bodies are held accountable. However, the CP is wrong to say that there are "*many differing viewpoints*" about "*the current meaning, rightful application of, and history of the Rule of Law*" [para 19], or to suggest that any such debate was reflected in the IRAL report. On the contrary, as the IRAL report noted, its review took place "*within a well understood constitutional framework, which was not challenged by any of those who gave evidence to us*". Nor, contrary to the suggestion of the CP, was there any debate about the meaning of the rule of law. The IRAL report noted that "*its general meaning is well understood in its simple sense that everyone is subject to and must obey the law*" and further noted that openness, transparency, honesty and integrity, as principles of public law, were embedded values integral to public life and administration (not least through the Nolan principles). Judicial review is understood and agreed to be a fundamental element of ensuring the rule of law within the constitution. The CP's suggestion that its proposals for changes to judicial review should be seen as part of a general ongoing "*debate*" about the meaning and role of the rule of law within the constitution is therefore seriously misleading.

12. Similarly, the CP's characterisation of judicial review as "*as much a creation of statute as it is the development of law by the courts*" is also misconceived. As the CP itself recognises, the principles underlying judicial review (that executive power was delimited by the law and that the exercise of power by the Crown and its servants could be challenged in court) were established not by statute but by the courts. Those principles have since been developed by the courts, and not by Parliament: developing and refining the grounds on which a claim for judicial review may be brought, constraining executive exercise of power, defining rules of standing, and clarifying the boundaries of justiciability. As Lord Carnwath made clear in tracing the history of judicial review in the *Privacy International* case[2], the role of statute (the Acts of Judicature and the Senior Courts Act 1981) has been to preserve the common law supervisory powers of the High Court / Court of Session and the remedies available through judicial review, not to create or delimit them. The Human Rights Act 1998 was not a 'statutory intervention' in judicial

[2] *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] 2 WLR 1219

review, but rather a measure which enabled Convention rights to be relied on in all domestic proceedings (not only judicial review).

13. Similarly, the grounds on which a claim for judicial review may be brought are not, and have never been, defined by Parliament through statute, but rather are defined by the common law as it has developed over centuries. The assertion in the CP [para 25] that somehow there is a selection of "*default*" grounds for judicial review, which Parliament can expand or restrict at will, betrays a grave lack of understanding of both the development of judicial review and its constitutional role. This is of particular concern given the wide-ranging impact of the changes proposed in the CP. The suggestion that the courts, exercising the supervisory jurisdiction of judicial review, are merely "*the servant of Parliament*" (the quote itself taken out of context from Baroness Hale's IRAL submission) and hence subject to any statutory intervention limiting the scope or grounds of judicial review, is wrong. Judicial review ensures that public bodies act in accordance with law enacted by Parliament, as a fundamental element of the rule of law. To characterise judicial review as subject to direction and constraint by the executive, as the CP seeks to do, is not only a misconception of judicial review but has the potential to undermine the rule of law itself.

14. Contrary to the assertion in the CP, it is highly doubtful that Parliament has the power to create a public body whose acts or decisions are wholly unjusticiable. This is so even in the case of the Scottish Parliament (the example given in the CP), which has broad plenary powers under s29(2) Scotland Act 1998 within its sphere of jurisdiction. The Supreme Court has found that Acts of the Scottish Parliament are still amenable to judicial review and its freedom to act is subject to implicit constraints to protect fundamental rights and the rule of law[3].

15. We are not aware of any case concerning statutory powers or duties where the courts have applied "*as a matter of course another source of authority*" still less where they have found such a source in their "*own concept of fundamental rights*" [para 26]. No example has been given in the CP and the IRAL report did not identify this as an issue. The House of Lords in *Pierson* (referred to in the CP) is in fact evidence of the opposite approach. The court in that case was addressing the legality of the Secretary of State's power retrospectively to increase a criminal sentence; Lord Browne-Wilkinson's point

[3] *Axa General Insurance Ltd v Lord Advocate* [2011] 3 WLR 871 at 47, 143.

was precisely that the court in judicial review was concerned only with whether the Secretary of State had acted within the remit of the power conferred on him by Parliament, not with the court's own judgment as to what was a substantively fair outcome for the individual prisoner.

16. The description of the principle of legality in the body of the CP is a caricature [para 27]. The principle of legality does not enable the courts to impose "*their own standards of fairness*[4] *onto statute and essentially [interpret] it according to what, in their eyes, Parliament's intentions should have been*", as suggested by the CP. Parliament's intention is always expressed in the words used in the legislation, but as Lord Steyn explained in *Pierson*, Parliament does not legislate in a vacuum and so the courts approach legislation on the basis that Parliament is presumed not to legislate contrary to the principles and tradition of the common law. This line of reasoning is not some modern invention but can be traced back over 150 years to cases like *Minet v Lehman (1855) 20 Beave 269* and *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180. Principles of due process and equality before the law date back even further, to Magna Carta. It is a tradition of which Britain is rightly proud.

17. The precise boundaries of the legality principle are open to debate, but the CP appears (without evidence) to assume that the principle of legality is itself illegitimate and that judicial overreach is inherent in the process of judicial review. Strikingly, the paper contains no recognition that the principle of legality is only a presumptive rule of interpretation and can be overridden by Parliament by clear words to the contrary in legislation. That point was made by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at p. 131 E-G:

> *"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*

4 What appears to be meant here is substantive fairness and that is what Lord Browne-Wilkinson addressed in *Pierson*. The author of the paper does not seemingly mean procedural fairness which will always be implied unless the statute clearly states otherwise.

18. So understood, the principle of legality is explicitly supportive of Parliamentary democracy and the importance of political avenues of accountability. All that it asks is that Parliament be honest with itself and with the electorate by making it plain when legislation is intended to be contrary to fundamental principles of law, fairness or human rights. This importance of this principle has been highlighted recently in the legislation introduced to address Brexit, where a framework of broad 'Henry VIII' enabling powers and an avalanche of secondary legislation have reduced the scrutiny which Parliament is able to give to individual legislative changes. Similarly, the importance of the legality principle has been highlighted in the Covid-19 pandemic. Measures which curtail individual freedom have been introduced via secondary legislation under emergency powers and often brought into force without scrutiny and before being laid before Parliament. In these circumstances, judicial review is a vital mechanism to ensure that measures introduced by the executive do not, without express wording and Parliamentary approval, encroach on fundamental principles of the common law.

SPECIFIC CONSULTATION ISSUES

Reversing *Cart*

19. The statistics in this section do not bear up to scrutiny. It is lamentable that the authors of the CP have not identified this. There are several problems:

    a. Firstly, the IRAL compared the total number of cases issued with the total number of reports/transcripts (i.e. those on BAILII or Westlaw) that had identified an error of law. This caused it to conclude that out of 5502 cases issued only 12, or 0.22% had achieved "*positive results*". This is patently not comparing like with like. The IRAL only looked for positive outcomes in cases that generated a transcript of a judgment, but the nature of Cart judicial reviews is that this is most unlikely to happen because, once permission for judicial review is granted, the decision of the Upper Tribunal is quashed automatically unless that outcome is actively opposed. If the Panel wanted to compare like with like then it should have compared the outcome of transcripted cases with the number of transcripted cases. There were 45 transcripted cases with 12 "*positive*" results, or 27%. On this measure claimants are over 100 times more likely to succeed than the IRAL review

stated. Even this is likely to understate the success rate for claimants, because the cases that generate a transcript (those where quashing of the Upper Tribunal decision is opposed) are more likely to reflect a more 'bullish' approach by the Home Secretary in defending the claim.

b. In addition, the description of a "*positive result*" in the IRAL report is unduly limiting because it looks to whether, in granting permission, the court identified an error of law in the First Tier Tribunal decision, whereas it ought to be sufficient to identify an error of law in the Upper Tribunal which is the target for judicial review.

c. The exercise also failed to take account of whether claims or appeals were compromised to the benefit of the appellant.

20. Given these fundamental statistical errors, the IRAL evidence cannot justify reversing *Cart*. Even if the figures were correct, we doubt whether it would be justified to remove this jurisdiction altogether given the importance of what is at stake.

21. The CP has a second rationale for this proposal being that the Upper Tribunal was a superior court of record and that the Supreme Court 'downgraded' its status. This cannot be a sufficient reason in itself to abolish Cart JRs, since it is not possible simultaneously to hold that the UT should be immune from review for this reason and also to commend the aim of the Supreme Court's rationale spelled out at para 52. If the apparently wrongly-downgraded status of the Upper Tribunal was a compelling argument in itself, then Parliament would surely have taken action to reverse the Supreme Court's decision in the decade since *Cart* was decided. Arguments by the government in *Cart* based on the status of the Upper Tribunal as a superior court of record were (as the Supreme Court put it) "*comprehensively demolished*" at first instance by the judgment of the late Laws LJ, upheld by the Court of Appeal [para 17]. Counsel for the government did not renew the point in the Supreme Court.

Suspended Quashing Orders

22. The CP fails to make any case that suspended quashing orders are necessary at all. There is certainly no case for creating a presumption in favour of them or for extending them beyond delegated legislation.

23. *Ahmed v HM Treasury* suggests that the court does have power to suspend the effect of its order. However, it is a power that should very rarely be exercised. This strikes the correct balance.

24. Suspended orders are objectionable in principle because they tend to create uncertainty as to the effect of the court's decision, and so contradict the principle of legal certainty (on which the CP places such emphasis at other points). It is inconsistent to find that action is unlawful but then to suspend that decision. This, ultimately, was the reason for the Supreme Court's decision in *Ahmed*. This can be of great importance to private individuals affected by an unlawful decision, as the "*suspended*" decision may impact matters like benefit entitlements, detention, or removal or liability to criminal prosecution. Further delay can also exacerbate the impact of an unlawful decision and would be particularly acute in such cases. Even if prosecutions, for example, are unlikely during the period of suspension, there remains a question of the effect on the actions taken in reliance on the decision on it, such as contracts.

25. Suspended orders also do nothing to encourage lawful conduct at the point that decisions are made, because they allow the decision maker an opportunity to later escape the consequences of their unlawful conduct. The rule of law requires that the executive acts according to the law, not that the executive be able to validate its unlawful action after the event, in light of an inconvenient or embarrassing judgment.

26. Suspended quashing orders are likely to increase the costs of litigation by adding another level of complex argument at the remedial stage. They will necessarily drag the courts into the merits of the decision-making process, since what seems to be envisaged is that the courts will indicate in general terms what action needs to be taken. In no other field does the court get involved in what is, in effect, giving advice to the losing party. It is hard to see why that is appropriate here. It is also contrary to the emphasis elsewhere in the CP that courts should avoid interference with executive decision-making.

27. The suggestion addressed in para 54 of the CP is also revealing. It is to the effect that the Government should be permitted time to promote legislation to ratify what has already been done – and held to be unlawful. This conflates the interests of government with what Parliament has actually said. It may well be possible for a government to rely on a large majority to pass more or less any measure. but it does not follow that the initial legal error was correctable, or one that Parliament intended to be valid no matter

what. After all, the executive may have acted in breach of a provision that was passed in a different session and under a different administration.

28. So far as it is possible to detect a positive case in the CP for making suspended quashing orders, the arguments seem to be:

    a. A quashing order is a blunt instrument. This is already met by the courts' discretion to refuse relief. The courts will often decline to quash a decision, instead making a declaration only or no order. If some further action is needed then in most cases this can be addressed by a mandatory order, or the circumstances will be such that the government will make further provision.

    b. Allowing the defect to be corrected is said to allow for the "*best outcome for all parties*" [53]. There is no explanation in the CP as to how this is the case. In reality, the likely outcome is that defendants will be incentivized to do the minimum that the court has indicated is necessary to validate an unlawful decision that would otherwise have been quashed. The CP assumes that most defects are curable in this way but that is not so. Requirements like consultation, fairness and the PSED are valuable precisely because they feed into the process at the start. It is far too late by the time matters get to a judgment to take the steps necessary to comply with a suspended order.

    c. There is said to be a precedent in the Scotland Act 1998 [54]. Although section 102 of that Act contains a power to suspend a quashing order, it must be understood in context. The Scotland Act created a new legislature (Scottish Parliament) and executive (Scottish Government). The power which section 102 creates is done in the context of a new legal regime. That is a markedly different situation to what the CP proposes, which would be to use legislation to make dramatic changes to a system of common law remedies carefully developed by the courts. *Ahmed* demonstrates that it is within the jurisdiction of the courts to further develop those remedies, if necessary. *Ad hoc* comparisons across legal regimes are rarely, if ever, a sound basis for lawmaking, and Parliament should be very cautious in doing so in this case.

29. Question 1: We do not agree with the suggestion for the introduction of a suspended quashing order in any of the forms proposed.

30. We also do not agree with the list of proposed factors in paragraph 56.

31. If suspended quashing orders are to be introduced then the principles on which they are granted should be developed by the courts, although it would be right to specify mandatory conditions that must be met before an order can be suspended. In particular:

    a. They should only be available where there is a procedural defect that can be remedied, but this should not lightly be held to be the case. It would be wrong in principle to allow for a suspended order where the defect cannot be remedied.

    b. A suspended order should not be made where the court's decision was foreseeable. Decision-makers should not be permitted to take a risk that their actions are unlawful and then have a second attempt.

    c. A suspended order should only be available where the court is satisfied that adequate provision has been made to compensate or otherwise provide redress for any harm done by the unlawful action. This will include, but will not be limited to, losses suffered by third parties.

    d. There should be a strong presumption against suspended orders and they should only be made where there is a compelling case for them. Mere executive convenience should never be enough.

32. In addition, and if suspended orders are to be used, then there will need to be significant consequential changes to matters like costs and legal aid. It would be unacceptable, and inimical to the role of judicial review, if successful claimants were to be treated as not being successful or if their success was qualified in some way because the order was suspended.

33. Question 2: We do not have any views on how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders. We disagree with both aims.

Additional proposals

34. Question 3: We confine our comments to England and Wales. Since, for the most part, we disagree with the proposals we would not favour them being extended to Scotland and Northern Ireland and any decision to do so would need far more consideration than is being given in the CP.

Prospective remedies

35. The proposals for prospective remedies suffer from many of the same defects as those for suspended quashing orders, but in an aggravated form. The only real arguments advanced is that prospective remedies would promote certainty, and the costs associated with retrospective quashing. This places administrative convenience above the important rule of law principle that government must act according to the law. The appeal to certainty is a strange one where certainty is only achieved at the expense of validating (at a later date) the government's breach of the law.

36. As with much of the CP, the discussion here focuses only on the minority of cases where there are perceived challenges to broad policy determinations, whether in delegated legislation or otherwise. We do not agree with the proposal but there can be no reason at all to apply it to the usual type of case where an individual is seeking redress for an unlawful decision which has directly affected them.

37. Where chaos would follow from a quashing order, then the courts are already able to withhold relief, and it is difficult to identify any gain from adding this additional remedy to what is an exceptional power. As with the suspended order proposal it will increase the cost and complexity of litigation and will inevitably drag the courts into the merits of the decision-making process.

38. As with suspended orders, we consider there is no need for reform in respect of prospective remedies. If prospective remedies are to be introduced they should only be available in highly restricted circumstances. In practice it is hard to see how they would ever be appropriate unless irreversible detriment would otherwise be caused to third parties who have relied on the measure in the reasonable belief that it is lawful. Reliance by the decision-maker or associated public bodies on administrative or economic

burdens on them cannot be enough, because it is wrong in principle for public authorities to be able to rely on this kind of detriment to validate actions or decisions which would otherwise be unlawful.

39. As with suspended quashing orders the court should only ever be permitted to make a prospective order where satisfied that adequate steps will be taken to make redress for the consequences of the unlawful action. The CP refers to compensation and remedial schemes in para 60, but contains no details or commitment to putting them in place.

40. There would also need to be procedural changes to make clear that a claim will not be considered academic or the claimant to lack standing because of the risk that relief will be prospective only. Costs and legal aid rules may also need to be amended to make clear that a claimant who secures a prospective order is a successful party.

41. Question 4: We do not agree that there should be an amendment to s. 31 SCA to allow prospective only remedies. If such an amendment is made then it should only be available in highly restrictive cases.

42. Question 5: We do not agree that prospective quashing orders should be mandatory or presumed in the case of statutory instruments.

43. The discussion in this section is limited to statutory instruments, in contrast to the main proposal about prospective orders which seems to cover any kind of decision. It is not clear whether the words "*which have already been scrutinized by parliament*" is intended to include only those cases where there has been a debate.

44. The CP refers to "*parliament-based*" solutions and to "*remedial legislation*" without explaining what this means. The reality is that most responses to challenges to subordinate legislation will take the form of new Regulations and not primary legislation but the opportunity to subject these to effective Parliamentary scrutiny is, all too frequently, minimal. Even where Regulations are subjected to debate this is insufficient to examine the issues. Examples given by Alexandra Sinclair and Joe Tomlinson of the Public Law Project include[5]:

5 How abuse of delegated legislation makes a mockery of lawmaking - Prospect Magazine

"The Aviation Safety (Amendment etc) (EU Exit) Regulations 2019 are 146 pages long and were debated for 21 minutes in the House of Commons. The Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019 are 619 pages long and were debated in the Commons for 52 minutes and the Lords for 51 minutes. The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 are 26 pages long and made 36 different amendments to existing legislation, which Labour peer Denis Tunnicliffe described as having "no themes or interrelationship." They were debated for 11 minutes in the House of Commons. It does not require expertise to see the problem here". Many of the statutory instruments implementing lockdown measures during the Covid-19 pandemic have come into effect before being laid before Parliament, i.e. without any Parliamentary scrutiny at all.

45. Against this background the confidence in remedial legislation in para 68 is misplaced. The only effect of making orders prospective is to remove delegated legislation from what is often the only effective scrutiny that it receives – in the courts. It would reduce the court's decision to no more than advice that the government would be free to follow or ignore when making new legislation. Since any further quashing order would also be prospective only there would be little incentive to ensure that that was lawful either, so raising the bizarre prospect of successive prospective quashing orders where the legal issue is never resolved.

46. None of this proposed change is necessary. It is probable that the court can grant prospective only orders but this is restricted to extreme cases exemplified by *R (British Academy of Songwriters, Composers and Authors) v SS Business Innovation and Skills* [2015] EWHC 1723 (Admin), where Green J limited the effect of his order because of the uncertain impact on third parties. It is always open to the government to respond to a court decision by making different delegated legislation or proposing changes to primary legislation. A shift to prospective only orders is not needed to facilitate this.

47. If prospective quashing orders are to be introduced for the reasons suggested by the Government then it will be necessary to introduce further change to make effective parliamentary scrutiny a reality. Options might include a requirement that any measure introduced following a prospective order must (a) be subject to a positive resolution of both Houses of Parliament and (b) be accompanied by a full explanation as to how the findings of the court have been addressed and what remedial measures are to be taken.

48. Question 6: We do not agree that suspended orders should be presumed or mandatory. This follows from our view that such orders are unnecessary and if they are introduced

at all they should be exceptional. It is also concerning that the suggestion here is that suspended orders should be presumed or mandatory in all cases and not only in relation to delegated legislation. It is one thing to give the Government an opportunity to persuade Parliament to pass legislation to validate what the courts have held to be unlawful. It is quite another to give any decision-maker an opportunity to make a second decision by which it can avoid the consequences of having acted unlawfully in the first place.

Nullity

49. The section on this topic deals with a major constitutional debate with astonishing brevity and with highly selective and tendentious use of sources. Having proclaimed that it is interested in "*targeted incremental change*" the paper goes on to suggest reversing *Anisminic* and legislating to "*put it beyond doubt that this theory [i.e. nullity] is not the law*". Since it has been held to be the law by a series of cases at the highest level up to and including *Privacy International* this is an ambitious objective and betrays a startling lack of understanding of the law. The proposal amounts to codification in all but name because it seeks to reconfigure the judicial review jurisdiction by spelling out the consequences of different kinds of unlawfulness.

50. This proposed change, which would with one stroke set aside the development of judicial review over many years, is reckless and carries with it a serious risk of unintended consequences. The reality is that for most practitioners the debate about nullity is virtually never an issue and the courts reach pragmatic solutions according to the demands of the case. However, that is not to say that the issue is unimportant. Professor Neil MacCormick observed that: "*there is often a need in hard cases to dig down to the level of constitutional theory in order to solve questions about private rights and public powers*"[6].

51. *Ultra vires* and the doctrine of nullity that is closely allied to it is one of the fundamental organizing principles of public law. It is wrong to suggest overturning it on the basis of the kind of superficial analysis in the CP. What it risks is removing the present principled basis for judicial review, without proposing a replacement. In so doing it leaves questions

[6] See "*Jurisprudence and the Constitution*" (1983) 36 C.L.P. 13, 20. – Cited by Lord Steyn in *Pierson* p. 584.

like collateral challenge and the position of *ultra vires* contracts without any ready answer since the cases in this area have developed in the context of an acknowledged doctrine of nullity.

52. It is not necessary for the Government to take this step and the CP does not suggest any reason why this is a priority. It is not necessary in order to implement the other changes proposed in the CP: Parliament can - even in the face of principled constitutional opposition - legislate for measures such as prospective and suspended orders without this and the suggested measures about ouster clauses do not depend on nullity.

53. Question 7: We do not agree that the suggested proposals will provide clarity and consider they are fundamentally misguided. We consider that the changes would be likely to lead to protracted and problematic litigation and seriously undermine the principles on which judicial review is founded. The proposals suffer many of the problems of codification with none of the advantages.

Ouster Clauses

54. The current approach of the courts to ouster clauses is appropriately restrictive. The MOJ has not demonstrated any need for change. The CP foreword refers to this as a "*pressing*" issue but it is hard to see why that is and no explanation is given.

55. An MOJ consultation seminar on 22nd April 2020 suggested that ouster clauses tend to be reserved for areas with a high political content where Parliamentary control is a more suitable way of securing accountability without the need for a "*zero sum*" approach. This is wrong on a variety of levels:

    a. Ouster causes are not limited in this way unless 'political' is expanded to cover almost anything. For example, *Anisminic* concerned compensation payments.

    b. Even if ouster clauses were limited to this class of case that is not a reason to exclude judicial review or any supervision by the courts. On the contrary this may be more necessary in cases where fundamental rights come face to face with political expediency. The courts are more than capable of recognizing the boundary between legal and political judgment and more than capable of

calibrating the standard to be applied in particular subject areas. Parliament need not be afraid of allowing the bodies it establishes to be subject to legal scrutiny.

c. It is unclear how it is suggested that Parliament is the appropriate vehicle to secure individual redress in such cases. Yet again the authors of the CP seem unable to recognize that the vast majority of judicial review cases involve decisions which directly affect individuals' daily lives; but the CP nonetheless proposes sweeping changes that ignore this dimension. The proposals for Cart JRs are an example. The CP recognizes that removing jurisdiction over these cases is an ouster but is it really suggested that somebody facing, for example, the imminent threat of removal following an unlawful decision will find a remedy in Parliament?

56. Question 7: We doubt that the measures suggested in this section will be effective to ensure that future ouster clauses survive challenge. The main defect is that the proposals try to identify, in advance, an exhaustive set of criteria by which to address measures of this kind. The problem is that not all ousters are the same and if one lesson can be taken from the case law on this topic it is that each needs to be addressed in its specific context.

57. We do not have any proposals for other measures as we do not think that the government should, as a general proposition, be seeking to legislate to make ouster clauses unchallengeable.

Procedural reform

58. Question 9: We agree that the promptness requirement is unnecessary and can be removed; but we do not consider this is a pressing need for amendment to the existing procedure.

59. Question 10/11: We do not agree that the time limit should be extended generally. It is often too short in individual cases but the better solution is to allow the parties to agree to extend it. This is more flexible and avoids the risk that parties are forced into issuing at the end of the period which will be a feature of any fixed time limit. This need not have any undesirable knock on effects because an agreement to extend will only bind the parties to it. It will therefore be of most help in the typical case brought by an individual.

60. Question 12: We do not think 'tracks' are necessary or appropriate. They will cause unnecessary complication and the scope for satellite disputes. The present system allows for proportionate and effective case management, including prioritisation of urgent cases, and decisions about allocation of cases and case management (for example, whether a case is suitable for hearing by a Deputy High Court Judge, or whether there should be a Divisional Court) are usually taken when permission is granted, with any necessary directions being made at that stage. That approach also allows for case management to reflect the changing implications of a case and/or the grant of interim relief which may affect the urgency or importance of a hearing.

61. Question 13: We do not think there should be a requirement to identify potential interveners. This is over-complicating and may end up putting third parties under pressure to become involved in proceedings when they would not otherwise do so. The criteria and process for interventions could be clarified further, but this is better taken forward through discussion in the Administrative Court User Group and good-practice guidance through the ACO Guide.

62. Question 14: We do consider there should be provision in the rules for a Reply. This formalises an existing practice but should be specified in the rules in the interests of transparency. A Reply should be optional.

63. Question 15: The question is confusing. Paragraph 105(a)refers to summary grounds but the narrative in para 108 talks about detailed grounds and seems to imply that detailed grounds may be needed before permission is granted, which is not the case. The question also assumes that a failure to follow the pre-action protocol will necessarily be by the Claimant when it is at least as common for the Defendant to fail to comply. We do not think that proposal (a) is necessary. If the pre-action protocol has been followed by the Defendant, then it can respond by referring to the pre-action letter. If the pre-action protocol was not followed by either party or new points arise then they may decide to say more. Since there is no obligation to submit summary grounds of defence (the sanction is the risk that permission will be granted and inability to participate in any hearing) this is a matter for decision by individual Defendant authorities and it is unnecessary to include it in the Civil Procedure Rules.

64. Question 16: We do not agree with a blanket extension of the time for filing detailed grounds and evidence and no explanation has been given for this, or evidence that the current period causes difficulty. Authorities ought to be able readily to explain the basis for a decision which has already been taken, and the proposal is likely to cause delay.

65. We do not think that any changes are necessary to the pre-action protocol.