# What can we expect from proposed judicial review reform?

**The Ministry of Justice is currently holding a consultation on proposed reforms to judicial review in England and Wales. The consultation follows the Independent Review of Administrative Law (IRAL), which was established in July 2020 to examine trends in judicial review and to consider recommendations for reform. The consultation sets out the government's response to the IRAL report, its understanding of the constitution and its aims with regard to judicial review, as well as specific proposals for reform. John Litton QC of Landmark Chambers shares his thoughts on the proposals.**

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The IRAL concluded in its report that judicial review was essential to the rule of law and to the constitutional right to have access to justice where the independence of the judiciary, and high reputation in which it is held internationally, meant that the government should consider very carefully any attempt to curtail its powers. Although it advised against statutory codification of judicial review it suggested options for consideration (without making specific recommendations) in a number of areas and made recommendations for limited legislative and procedural reforms. The IRAL's proposed legislative reforms were to:

- reverse the effects of the decision in *R (Cart) v The Upper Tribunal* [2011] UKSC 28 in which the Supreme Court held that a refusal by the Upper Tribunal of permission to appeal against a first-tier tribunal decision could be judicially reviewed for errors of law, and
- to amend section 31 of the Senior Courts Act 1981 (SCA 1981) to give the High Court the power to make a suspended quashing order (ie a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met)

On procedural changes, the IRAL recommended:

- the provision of guidance to intervenors in judicial review claims setting out criteria for intervention
- the abolition of the requirement to bring a claim promptly but to retain a three-month time limit, and
- making formal provision for a claimant to serve a Reply within seven days of the service of an Acknowledgement of Service

Responding to the IRAL's report, the government has agreed to the recommendations and indicated that it intends to take these measures forward through legislation and the Civil Procedure Rule Committee. In doing so, it said that it did not think 'the time is right to propose far-reaching, radical structural changes to the system of Judicial Review'.

However, in addition to accepting the IRAL's recommendations, the government is considering further reforms which it says build on some of the options considered by the IRAL but on which they did not

make any specific recommendations. These additional reforms are limited to England & Wales and relate to:

- further amendments to SCA 1981, s 31 to provide a further discretionary power for prospective-only remedies (ie to allow for unlawful clauses in statutory instruments not to be upheld in the future while deeming their past use valid)
- providing clarity to when the court can/should make a determination that a decision or use of a power is a nullity in order to make suspended quashing orders successful
- ouster clauses so that they are not rendered ineffective by legislating for how such clauses are interpreted to restrict the court from not give effect to an ouster clause except exceptionally
- whether the Civil Procedure Rules Committee should consider (1) allowing parties to agree to extend the 3-month time limit to bring judicial review claims; (2) the allocation of judicial review claims to different 'tracks'; (3) the requirement to file Grounds of Resistance before permission is granted; and (4) and extending the time limit, once permission is granted, for submitting detailed grounds of defence and evidence

Thus, while the government has accepted the IRAL's recommendations in full, it has gone on to propose further legislative and procedural changes not recommended by the IRAL. In particular, attention is likely to focus on the government's proposals to restrict the court's powers to interpret ouster clauses because the IRAL considered that an undesirable effect of codifying judicial review would be to restrict the ability of the courts to interpret and apply the law in individual cases and concluded that the statutory abrogation of judicial review (eg though ouster clauses) should only be excluded by the most clear and explicit words in the statute.

The legislative/procedural reforms recommended by the IRAL and accepted by the government are ones which were widely supported by consultees in their responses to the call for evidence and are unlikely to be controversial. The further procedural changes on which the government is consulting are also unlikely to be very controversial. However, claimants will be particularly concerned as to the legislative proposals in relation to ouster clauses because of the effect that they are intended to have on limiting claims for judicial review. There may also be some concern as to the nullity proposals and the effect of prospective orders. Those government departments and other decision makers who spend large sums of money defending judicial review claims will no doubt be broadly supportive of the recommended and further proposed changes.

The government says it strongly supports the rule of law and the importance of judicial review as a component of accountability within our system of democratic and parliamentary accountability. However, it has put a marker down that it is ultimate for Parliament to decide how judicial review should operate. In going beyond the IRAL's recommendations and consulting on these further legislative/procedural reforms, the government has clearly indicated that it has not abandoned its wish to rein in the scope of judicial review and is doing so in, what it considers to be, an incremental way. Others may consider these additional proposals to be more than just incremental and the start to a protracted campaign to limit judicial review. However, given the IRAL's conclusions, the government

is clearly cautious not to appear too dogmatic and is testing the waters through its consultation on the recommended and further proposed changes.

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