

Independent Review of Administrative Law (IRAL): introduction



Richard Drabble QC (Chair)

KEY FACTS AND TIMETABLE

- The Faulks Review (IRAL) has issued a call for evidence which runs from 07.9.20.
- Responses must be sent to IRAL@justice.gov.uk by 19.10.2020
- The Review will submit recommendations to the Lord Chancellor and Michael Gove by the end of the year.
- The Panel Members are Lord Faulks QC; Professor Carol Harlow; Vikram Sachdeva QC; Professor Alan Page; Celina Colquhoun; Nick McBride.

KEY ISSUES IDENTIFIED IN TERMS OF REFERENCE AND CALL FOR EVIDENCE

- Title of Call for Evidence is *“Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?”*
- It identifies the following specific areas for inquiry –
- Whether the amenability of public law decisions to judicial review and the grounds of public law illegality should be codified in statute
- Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of justiciability/non-justiciability...could be considered by the Government.

- Whether, where [it should be justiciable] (i) on which grounds... (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds.
- Whether procedural reforms are necessary.....in particular (a) on the burden and effect of disclosure in particular in relation to “policy decisions” in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing, (d) on time limits for bringing claims; (e) on the principles on which relief is granted... (f) on rights of appeal, including on the issue of permission to bring judicial review proceedings and; (g) on costs and interveners.

FOCUS OF THE CONCERNS OF GOVERNMENT

- Footnote to terms of reference records *“Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise within the permitted scope. Traditionally this was subject to control by (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between “scope” and exercise has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end (“scope”) to all of the conventional [JR] grounds and proportionality at the other (“exercise”). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope and therefore considered. Is this correct and, if so, is this the right approach?”*

- For short insight into Lord Faulks personal views see interview with Frances Gibb *The Times* 10.9.20.
- Unsurprisingly the prorogation case features (“*I agree with the divisional court that it was a matter of politics*”); but note also concern about the Supreme Court ruling in eg *Unison* and the disapplication of *Carltona* in the case concerning internment of Gerry Adams- holding that personal signature by Home Secretary requires.

STRUCTURE OF THE CALL FOR EVIDENCE

- Section 1 of the Call for Evidence states that IRAL has created a questionnaire to be sent to Government Departments. *“In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local government functions? If so, can you explain why, providing as much evidence as you can in support?”*
- There follows a list (a) to (k) involving the classic grounds for review but also eg standing and time limits. It also asks *“does the prospect of being judicially reviewed improve you ability to make decisions? If not, does it result in compromises which reduce the effectiveness of decisions?”*

- Section 2 asks about the desirability of statutory intervention in the judicial review process.
- Section 3 deals with Process and Procedure, including costs, standing and remedies. Questions asked include “*Do you have experience of settlement at the door of the court?*” “*Do you think there should be more of a role for ADR?*” “*Do you have experience of litigation where issues of standing have arisen?*”
- The Call for Evidence does not set out any specific proposals for reform.

CONCLUSION

- There are at least two different aspects to the review.
- First, there is a suggestion that basic judicial review principles may have taken a wrong turning over the last forty years. This is a fundamental proposition. The timetable for examining this and suggesting remedies is short.
- Second, there are a potentially separate set of concerns about the burden on administrators arising from obligations of disclosure and the resources that have to be devoted to defending a challenge.

Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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