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# Welcome to Landmark Chambers' 'The Review of Judicial Review: Reflections on the Faulks Review' webinar

The recording may be accessed here.

# Your speakers today are…

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**Richard Drabble QC (Chair)**

**Topic:**
Independent Review of Administrative Law (IRAL): introduction

**David Lock QC**

**Topic:**
Review of Administrative Law: challenges on scope and exercise of powers

**Samantha Broadfoot QC**

**Topic:**
Review of Administrative Law: duty of candour & disclosure

**Tim Buley QC**

**Topic:**
Reflections on the Faulks review: should judicial review be codified?

# Your speakers today are…

Landmark Chambers

**Kate Olley**

**Topic:**
Reflections on the Independent Review of Administrative Law:
Time Limits, Relief, Appeals and Costs

**Justin Bates**

**Topic:**
Quasi-judicial review claims and unintended consequences

**Alex Goodman**

**Topic:**
Possible amendments to the law of standing

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# Independent Review of Administrative Law (IRAL): introduction

**Richard Drabble QC (Chair)**

# KEY FACTS AND TIMETABLE

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- 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

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- 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.

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- 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

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- 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

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- 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

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- 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.

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# Quasi-judicial review claims and unintended consequences

**Justin Bates**

# Terms of reference – 31 July 2020

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"1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.

2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.

3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (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 on which a decision may be declared unlawful."

Note F

These issues affect all cases involving public law decision making, and not simply JRs, since they would modify substantive law. So, they would apply, for example, to the tenant raising as a defence in private law housing proceedings the illegality of a rent increase by the council as in Wandsworth LBC v Winder [1985] AC 461.

# Alarm bells ringing

- How far does this go?
- Disputes *between* public authorities?
- What about quasi-JR issues? (*e.g* appeals on a point of law s.204, Housing Act 1996)
- Public law defences

*Winder*

*Boddington (!!)*

# Disputes between public authorities?

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*Examples*

1) "Ordinary residence" disputes for *e.g.* social care purposes

- LA v LA

- cross border disputes (see, *e.g. Milton Keynes v (1) Scottish Ministers (2) East Lothian Council*)

2) Homelessness decision to accept an application and then refer to a second LA, where LA wishes to dispute some aspect of the first decision (*e.g.* eligibility)

*R v Slough BC Ex p. Ealing LBC; R (Ealing LBC) v RBK&C*

3) Cases where LA needs to JR itself!

- *e.g. R v Bassetlaw DC, ex p. Oxby* [1998] PCLR 283

# Quasi-JR claims

- Appeal on a point of law

*Examples*

Housing Act 1996, s.204 (homelessness appeals in the county court)

A “point of law” includes not only matters of legal interpretation but the full range of issues akin to those which would otherwise be the subject of judicial review: *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] A.C. 430.

- Implications for devolved issues in Wales (Housing (Wales) Act 2014,Pt.2)

# Public law defences

- A tenant is entitled to raise any “conventional public law issue” as a defence to a possession claim
  - Exceptionally valuable for mandatory grounds
  - Extends beyond “core” public authorities to include housing associations and other unusual landlords (*e.g.* Canal and River Trust)

# Unintended consequences?

- Does protecting central government mean harming local government and/or citizens who interact with local government?

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# Reflections on the Faulks review: should judicial review be codified?

**Tim Buley QC**

# TERMS OF REFERENCE AND QUESTIONS IN CALL FOR EVIDENCE

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- The IRAL terms of reference include this question:

  *1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law should be codified in statute?*

- This is reflected in two questions in the Call for Evidence:

  *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?*

  *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?*

# WHAT ARE THE GROUNDS FOR JUDICIAL REVIEW?

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- Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374:

  *… one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community.*

- I suppose that one could envisage section 1 of the JR Act 2021 which sets out these three heads of JR, but I strongly doubt that that would provide any greater *clarity* on what are the grounds for JR.

# An expanded list?

- What would an expanded list look like? Question 1 of the Call for Evidence lists:

  *a. judicial review for mistake of law*

  *b. judicial review for mistake of fact*

  *c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)*

  *d. judicial review for disappointing someone's legitimate expectations*

  *e. judicial review for Wednesbury unreasonableness*

  *f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account*

  *g. <u>any other ground of judicial review</u>*

- So even the question in the call of evidence recognises that this does not capture all, or perhaps most, of the grounds for JR. Notably, it overlooks the most simple.
- In reality, impossible to think of a modest or short list which captures all of the grounds whilst also providing any notable clarification. If *clarity* is the real aim, rather than radical reform, then the answer to the question posed is surely a resounding “no”.

# MORE RADICAL REFORM?

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- There is reason to think that the aim behind the establishing of IRAL, including this question, is more radical. Some evidence of this can be seen in the Terms of Reference and the Consultation Paper:

  *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 of a power within the permitted scope. Traditionally, the first was subject to control (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 of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?*

- In so far as the distinction referred to did exist it was overridden in *Anisminic Ltd v FCC* [1969] 2 AC 147 i.e. 51 years ago. So this, if means anything at all, suggests a radical retrenchment of the grounds for judicial review.

# MORE RADICAL REFORM? (2)

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- Secondly, the thrust of the questions in Section 1 of the Call for Evidence is in invitation for public authorities to say why judicial review is problematic of vexing to them. The sub-text appears to be that judicial review is problematic.
  - There is no corresponding invitation to NGOs and individuals to explain why judicial review has been important or valuable or led to better decisions.
  - There is a fundamental ambiguity in what would “improve” decision making (question 2). An authority which has its decision declared unlawful may nevertheless regard it as a good decision. Improve for who? From what perspective?
  - Fundamentally unclear how this series of questions will inform IRAL’s response to the other questions. Does this go to procedure only, or to substance?

- In any case, certainly some grounds for concern that IRAL is to consider, or should consider, *reform* of the grounds for judicial review rather than mere *clarification.* For reform, see limitation

# THE CONSTITUTIONALITY OF MORE RADICAL REFORM

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If the government (with or without the support or IRAL) wishes to make more radical reform, so as to significantly cut down upon the grounds for judicial review or indeed the justiciability of particular kinds of decision, can it do so? On any view this is not a straightforward question (and must depend to an extent on the detail of the reform). But there are reasons to think, at least, that the issue is not straightforward:

- Judicial review comes from the *inherent* jurisdiction of the High Court to interpret and apply the law.
- In *Anisminic,* the House of Lords in effect nullified an ouster clause which purported to render a particular body immune from challenge. It interpreted the clause so as not to cover acts of the body which were unlawful (i.e. as contrary to *any* ground for judicial review).
- *Anisminic* was recently followed in *Privacy International* [2020] AC 491, and contains speculation about the ability (reflecting earlier *dicta*) about the approach to the court to a completely clear ouster. The logic can be applied to an attempt to "oust" *grounds* for judicial review which derive, ultimately, from the court's interpretation of the particular statutory scheme

# CONCLUSIONS

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- If one takes seriously the focus on “clarification” of the grounds for judicial review, very difficult to see that there is any real benefit to be had.

- Does not mean that codification in itself is *necessarily* bad, but difficult to see how it achieves anything in our system.

- Any more fundamental reform or limitation of the grounds for judicial review is a law reform task of monumental proportions, and raises extremely difficult issues of effectiveness given the central constitutional role of judicial review of public law in our system.

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# Review of Administrative Law: challenges on scope and exercise of powers

**David Lock QC**

# What does the review say?

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“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 of a power within the permitted scope. Traditionally, the first was subject to control (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 adecision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach”

# Established No Go areas for the Courts

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- Article 14 of the Bill of Rights

*"That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."*

- But:
  - The decision as to what constitutes a 'proceeding in Parliament', and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House: *R v Chaytor & Ors (Rev 2)* [2010] UKSC 52
  - Prorogation of the house is not a "proceeding in parliament: *R (Miller) v The Prime Minister* [2019] UKSC 41.

# But have the Courts added to powers in last 40 years?

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- Terms of reference set up dichotomy between “scope and “exercise” of powers
- If a public body acts outside the scope, it acts unlawfully because it does not have the power to do what it does
- But does that mean that, until the last 40 years, any exercise of a power cannot be challenged in the court if the public body had the power
  - Bad faith
  - Dishonesty
  - Improper Purpose
  - Unreasonableness

# Is “no review of exercise of a power” premises correct?

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**Associated Provincial Picture Houses, Limited v Wednesbury Corporation**

[1948] 1 KB 223 per Lord Greene

“When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. The exercise of such a discretion must be a real exercise of the discretion …. the authority must disregard those irrelevant collateral matters”

# The exercise of a discretion - 1948

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“Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent”

“Warrington L.J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another”

# *Short v Poole Corporation* [1921]

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"Thus no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative.

It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void"

# Challenge to the exercise of a power

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Contrary to the case advanced in the Terms of Reference, control by the Courts over the exercise of the powers is not a recent development

> *e.g. Kruse v Johnson* [1898] looked at test by which the question as to whether certain by-laws were unreasonable or not was to be decided.

Improper purpose doctrine may have been expanded by *Padfield* doctrine

- But that builds on C19th foundations
- If power is given to public authority for purpose A, should courts refuse to act if it is used for purpose B?

# What is this part of the review really about?

- Appears to be an attempt to prevent the inner workings of government decision making being exposed to judicial scrutiny:

- To avoid asking:

  - What decision was made
  - By whom
  - For what purpose
  - For what reasons

- It is a political question whether that scrutiny should be curtailed.

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# Review of Administrative Law: duty of candour & disclosure

**Samantha Broadfoot QC**

# Disclosure obligations

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- Normal rules of civil litigation do not apply
- PD CPR Part 54
- Obligation is to comply with the “duty of candour”

# Issues

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1) Timing

2) Scope

# Timing

- Duty of candour has existed for a long time
- Pre-2000 caselaw: “the duty of the respondent to make full and fair disclosure” e.g. *Ex p Huddleston* [1986] 2 All ER 941, 945
- Note: does not refer to disclosure in the modern sense of disclosure of documents
- Questions of disclosure were usually post-permission

# Timing

- Al Sweady [2009] EWHC 2387
- Catalogue of disclosure problems

→ TSol guidance: January 2010 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/285368/Tsol_discharging_1_.pdf

"The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol…"

# Timing

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- It is arguable that this goes further than the state of the caselaw at the time

- From a public body perspective, one can see how this may be seen as a very demanding obligation
  - Administratively onerous before a case has even been launched;
  - ‘fishing expedition’ cf FOI
  - Not yet adjudicated to cross the arguability threshold

# Scope

- Historically – evidence by affidavit
- Gradual evolution: e.g.
  - *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 15
  - *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 950

# Scope

- One of the reason why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court.

- “It is the function of the public authority itself to draw the court’s attention to relevant matters… This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”

*R (Citizens UK) v Home Secretary* [2018] 4 WLR 123 at [106].

# Scope

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- Critical importance of seeing underlying documents
- Onerous? May depend on nature of the case – but still low compared to civil litigation
- Embarrassing?

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# Possible amendments to the law of standing

**Alex Goodman**

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# Reflections on the Independent Review of Administrative Law: Time Limits, Relief, Appeals and Costs

**Kate Olley**

# The Terms of Reference- para 4

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4.Whether procedural reforms to judicial review are necessary, in general to ‘streamline the process’, and, 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** in claims for judicial review, (f) on **rights of appeal**, including on the issue of permission to bring JR proceedings and; (g) on **costs and interveners**.

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# Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

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# Thank you for listening



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