Howard League for Penal Reform
1 Ardleigh Road
London N1 4HS
Tel: 020 7249 7373
Email: info@howardleague.org
Web: www.howardleague.org

Howard League for Penal Reform's response to the government's consultation on proposals for reforming judicial review
April 2021

Summary

1. The Howard League welcomes the opportunity to respond to the government's consultation on proposals for reforming judicial review. Judicial review has made law better for citizens, particularly those who would otherwise have no voice if they were treated unlawfully.

2. As the Independent Review of Administrative Law emphasised, any changes that curtail the powers of the court should cause the government to "think long and hard". Changes to judicial review risk undermining the rule of law and the system of checks and balances that maintains Britain's unwritten constitution.

3. Given the constitutional risks associated with changes to judicial review, it is essential to acknowledge that there is no need for concern about the overreach of the courts. Lord Faulks publicly acknowledged on BBC Radio 4's Law in Action in March 2021 that the government wrongly characterised the Independent Review as suggesting that there is a growing willingness to accept an expansion of the remit of judicial review. The Review concluded that the "government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action".

4. Some of the proposals would undermine the force of judicial decisions, with worrying constitutional implications. The Howard League believes that suspended quashing orders are not necessary and the courts should retain a discretion not to suspend quashing orders. Redefining the principle of nullity would weaken the separation of powers. Given that ouster clauses pose a serious threat to the doctrine of the separation of the powers, the courts should retain their current ability to consider their validity.

5. The proposal to introduce prospective-only remedies is unjust and would undermine the equalising force of the law. If the government truly wishes to ensure that judicial review is there to protect individuals' rights, it cannot deprive claimants who have already been wronged of an effective remedy.

6. The Howard League agrees that some of the technical proposals such as removing the promptitude requirement and a formal right of reply for claimants would be helpful. Other proposed procedural reforms such as the requirement to name interveners and extend deadlines for defendants to prepare replies are not needed: they would complicate the judicial review process and add further delay.

7. The proposals could have a chilling effect on access to justice and undermine the government's equality duties. Judicial review is often the last best hope of people with protected characteristics. A full equalities impact assessment should be conducted in accordance with duties under the Equality Act 2010 before any change is contemplated.

1. About the Howard League for Penal Reform and summary of response

1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.

1.3 The Howard League's legal team works directly with children and young adults in prison. We have drawn on our legal work in responding to this consultation.

1.4 This response sets out the key points that the Howard League is most concerned about. The Howard League also endorses the submission to this consultation by the Public Law Project and echoes its conclusion that the government's concerns are already addressed within the existing judicial review system.

1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The government should think long and hard before curtailing the powers of the court

2.1 Judicial review has made law better for citizens, particularly those who would otherwise have no voice if they were treated unlawfully. In a previous consultation on proposals for reforming judicial review, the government explained that judicial review "can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the executive to account" (Ministry of Justice, 2013).[1] Judicial review ensures that public authorities behave lawfully and that individual citizens can challenge decisions which are unlawful and wrong.

2.2 Judicial review upholds the separation of powers which is central to the unwritten British constitution. As a report by the Constitution Society puts it, "[t]he courts' ability to subject decisions of the executive to an independent review of lawfulness defines our constitutional climate" (Street, 2013, p. 8).[2] There is a real danger that changes to judicial review will undermine the rule of law and the checks and balances which maintain the British constitution. It is for this reason that the Independent Review of Administrative Law chose to "emphasize that *any* changes should only be made after the most careful consideration" (Faulks et al, 2021: p. 129).[3]

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264091/8703.pdf
[2] https://www.consoc.org.uk/wp-content/uploads/2013/12/J1446_Constitution_Society_Judicial_Review_WEB-22.pdf
[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

2.3 In addition to upholding the rule of law and protecting individuals from the wrongful exercise of power, judicial review has a positive impact on the executive. A recent Institute for Government report found that government departments could improve the quality of their decision-making by proactively considering the risk of judicial review: this ensured that their policies were fully thought-through as well as being lawful (Institute for Government, 2021).[4] Statistical research has shown that an increase in judicial review litigation improves the quality of local authority services, as measured by national performance indicators (Platt et al, 2010).[5]

3. The government's concern about judicial overreach is misplaced

3.1 The consultation document suggests that the Independent Review of Administrative Law "identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction" (Ministry of Justice, 2021, p. 8).[6] Yet this claim cannot be found in the Review itself and has since been countered by its chair: in an episode of BBC Radio 4's *Law in Action* in March, Lord Faulks QC clarified that the Panel "did not think there was an overall trend" and that their conclusions had not been characterised correctly (Faulks, 2021).[7]

3.2 Far from criticising the courts for overreach, the Review concluded that "the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action": in turn, the Review found that politicians ought to "afford the judiciary the respect which it undoubtedly due when it exercises these powers" (Faulks, 2021: p. 132). The consultation document does not appear to have taken this important message on board.

4. Some of the proposals have worrying constitutional implications

4.1 The Howard League opposes the proposals to introduce suspended quashing orders and to narrow the interpretation of nullity and ouster clauses. These proposals would undermine the force of judicial decisions and – as a consequence – the separation of powers.

4.2 There is no need to introduce suspended quashing orders: the length of court proceedings means that public authorities have time to remedy straightforward procedural issues before a quashing order is granted. However, if the power to suspend quashing orders is introduced, it should always be at the court's discretion and suspensions should only be granted in exceptional circumstances.

4.3 As suspended quashing orders are unnecessary, there is no need to redefine the principle of nullity. In contrast, there are extremely good reasons to avoid undermining the power of the courts in this way. By significantly narrowing the circumstances in which the courts can declare a decision or exercise of power to be null and void, the government's proposal would infringe on judicial discretion and weaken the checks and balances in the British constitution.

[4] https://www.instituteforgovernment.org.uk/publications/judicial-review
[5] https://academic.oup.com/jpart/article/20/suppl_2/i243/932292
[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf
[7] https://www.bbc.co.uk/sounds/play/m000td1g

4.4 The government proposes restricting courts' ability to review potentially unlawful government actions by narrowing the scope for judicial interpretation of ouster clauses. This is a concerning proposal which again threatens to undermine the separation of powers. Courts must retain the power to consider the validity of ouster clauses.

5. Prospective-only remedies are unjust and must not be introduced

5.1 Prospective-only remedies are unjust: they deny meaningful redress to the people who have been affected by a wrongful decision or policy and remove the equalising force of the law. It is also likely to breach the government's equalities duties if people who are harmed by unlawful decision-making, who are especially likely to have protected characteristics, are not granted any remedy.

5.2 The consultation document recognises that prospective-only remedies would create an "immediate unjust outcome" but suggests that "this would be remedied in the long-term" (Ministry of Justice, 2021, p. 28).[8] Yet the unjust outcome would not be a one-off event for a small number of people: it would potentially apply to everyone who was affected by any wrongful decision or policy after the introduction of prospective-only remedies.

5.3 Prospective-only remedies would mean that judicial review is no longer an effective measure to protect the rights of the individual against the state.

6. The Howard League agrees with the proposals to remove the promptitude requirement, extend the time limit and introduce a formal right of reply

6.1 The Howard Leagues agrees that removing the promptitude requirement would be helpful to enable the Pre-Action Protocol to be followed in full and that this would encourage pre-action resolution. The time limit should be increased to at least four months for the same reason.

6.2 It would be helpful to have a formal provision for filing replies within seven days of receiving the Acknowledgement of Service: this would place the existing practice of claimants on a more certain footing.

7. The role of interveners would be undermined by any duty to name all potential interveners in advance

7.1 The Howard League does not support the introduction of a requirement on parties to identify to court any organisation or wider group who might intervene. If the aim of this proposal is to manage the use of interventions, it is not necessary: The court has discretion to refuse permission for an intervention or to restrict its length.

7.2 The role of an intervener is to assist the court rather than to assist parties. The Howard League has intervened in cases to provide expert evidence based on its legal and policy work: this evidence has aimed to help the court to make an informed decision. A duty on parties to identify potential interveners would undermine this role and compromise the neutrality of interveners.

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf

8. The other procedural changes are unnecessary and would cause complication and delays

8.1 The proposal to increase the time limit for defendants to submit Detailed Grounds of Resistance is unwarranted and would cause unhelpful delays.

8.2 The proposal to introduce a "track" system for judicial review would be convoluted and unnecessary: judges already filter and manage judicial review cases effectively at the permission stage.

8.3 The Howard League has found that the Pre-Action Protocol works well, except when it is undermined by lack of engagement from defendants. It does not need amending.

9. Chilling effect on access to justice and equalities

9.1 The proposals threaten to deny claimants an effective remedy and reduce the power of the courts. The Howard League is concerned that this would have a chilling effect on access to justice, discouraging individuals from challenging public authorities when they have been treated unlawfully.

9.2 Over the five years from 2015 to 2020, the most common categories for judicial review were immigration, planning, "Family, Children and Young Persons", prisons and homelessness (Ministry of Justice, 2020).[9] Based on these statistics, it is likely that the proposals would disproportionately affect people from Black and minority ethnic backgrounds and young people. In addition, mental and physical health problems are common among both people in prison and homeless people (Homeless Link, 2021; House of Commons Health and Social Care Committee, 2018; House of Commons Committee of Public Accounts, 2017).[10]

9.3 The Howard League has found that judicial review can often be the last best hope of people with protected characteristics. Most of the young people supported by the Howard League's legal team are from Black and minority ethnic backgrounds and many have mental or physical health conditions. When they are treated unfairly by public authorities, this often builds on a much longer history of discrimination and unmet need. It is essential that the government carries out a full equalities impact assessment before contemplating any changes in accordance with its duties under the Equality Act 2010. The government should also consider carrying out a child rights impact assessment.

10. Conclusion

10.1 The Howard League urges the government to think carefully before introducing any changes to judicial review: as the Independent Review of Administrative Law pointed out, judicial review is essential to the rule of law and upholds the separation of powers which the British constitution relies upon.

---

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926431/CJSQ_Apr_Jun_csvs.zip

[10] https://www.homeless.org.uk/facts/homelessness-in-numbers/health-needs-audit-explore-data; https://publications.parliament.uk/pa/cm201719/cmselect/cmhealth/963/963.pdf; https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/400/400.pdf

10.2 The removal of the promptitude requirement, the extension of the time limit and the introduction of a formal right to reply are sensible changes which should be considered by the Civil Procedure Rule Committee.

10.3 The other proposals are at best unnecessary and at worst actively harmful, undermining the rights of the individual and endangering the rule of law.

The Howard League for Penal Reform
29 April 2021