



The Bar Council

Bar Council response to HM Government consultation on “Judicial Review Reform - The Government Response to the Independent Review of Administrative Law “

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Government consultation on its response to the recommendations made by the Independent Review of Administrative Law in its report published 18 March 2021 and also further reforms to judicial review which are described as building on *“the analysis in the Report, and on some of the options the Panel suggested but on which they did not make definite recommendations”*.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

¹ §11 of the Judicial Reform Consultation

Introduction

4. The Bar Council in general terms would endorse the analysis and supports the conclusions and recommendations of the IRAL report save for where it takes issue as set out below. The Bar Council however wishes to register its concern about two specific matters.

5. The first matter is the view expressed by the Lord Chancellor as an apparent premise to the further reforms to judicial review beyond the IRAL recommendations and the second is the decision to proceed with significant proposals by way of a public consultation of some 6 weeks only.

6. In § 2 of the Lord Chancellor's Foreword the following is stated:

7. *"The [IRAL] Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision-makers has been replaced, in essence, with that of the court."*

8. The above identification is however nowhere to be found within the Panel's report. This is a matter that Lord Faulks himself also took issue with and made clear in an interview by Joshua Rozenberg (*Law in Action* and Joshua Rozenberg's blog 23 March 2021 and has been noted by other commentators [e.g. "Judicial reviews must not be blunted in the name of politics", Jonathan Jones, *The Times*, March 2021].

9. Based upon Lord Wolfson of Tredegar's response in the House of Lords on 22 March to Lord Browne of Ladyton as to the source of this statement, it is understood that the Government is relying upon §7 of the Concluding chapter of the IRAL report and to conclude only that *"that the panel is clear that there are cases where the courts have gone beyond a supervisory approach"* which clearly differs from the assertion by the Lord Chancellor.

10. That paragraph in the IRAL report states as follows:

"The Panel, however, is well aware that there have been occasions when, in the words of Professor Varuhas, the courts may be thought to have gone "beyond a supervisory approach" and employed "standards of scrutiny that exceed what is legitimate within a supervisory jurisdiction". That the courts have been able to do this is because Parliament has, for the most

part, largely left it to the judges to define the boundaries of judicial review". [emphasis added].

11. This also quite clearly therefore is not an identification of a *"growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction"* as alleged.

12. The Bar Council cannot therefore concur with that assessment of the IRAL panel's careful and balanced analysis of the issue. There is no finding of any growing tendency of 'judicial overreach'.

13. We would refer the Lord Chancellor and the Government instead to §20-23 of the Introduction to the Panel's report which acknowledges the political context of the review and Chapters 2 and 3 which make specific reference to the issue.

14. The second matter is the short length of time currently given to the public and interested parties to respond to these important proposals to change the law surrounding Judicial Review. The current Consultation Principles adopted by the Government in 2012 no longer refer to specific time periods such as 12 weeks (other than for publication of responses) but advises that *"Consultations should last for a proportionate amount of time"* and be based on *"legal advice and taking into account the nature and impact of the proposal. Consulting for too long will unnecessarily delay policy development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses."*

15. The period of 6 weeks does not appear to the Bar Council to be proportionate, most especially in light of the nature and impact of the proposals and which include proposals that do not have as their source the IRAL report itself. As a notable contrast, the current consultation in respect of further changes to the General Permitted Development Order 2015 (as amended) in respect of electronic communications infrastructure permitted development rights to support 5G and extend mobile coverage is to run for 8 weeks and follows an earlier consultation.

16. In addition, as an overall matter the Bar Council is very concerned that the Government is seeking to bring forward these proposals, more specifically the additional proposed reforms beyond those recommended by the IRAL, some of which are potentially fundamental and far-reaching by way of a consultation in this limited, and rushed, format. The Bar Council and others asked for more time to respond – this

was refused with, we regret to say, the wholly unconvincing justification that respondees have already had the opportunity to consider the matter in the context of the IRAL. That reasoning glosses over the point that the most significant elements of the consultation are new. In the Bar Council's view, if such weighty matters are to be considered it would be much more appropriate if they were to be the subject of thorough consideration, for example by the Law Commission.

17. We do, of course, note that at §15 of the consultation it is described as being taken "*at an early point*" in the development of the proposals and the Government "*are very aware that certain proposals will need further iteration, before we can consider bringing forward legislation*". In the Bar Council's view, further consultation on any proposals with appropriate time in which to consider them, will be fundamental. These are not matters which can in any way be considered to be so urgent as to justify the type of "emergency" approach to legislating which has characterised a great deal of recent Government activity.

18. In all the circumstances, just as IRAL at §1 of the Introduction to its report, recognised the views expressed by many that the period of time given for its task was "*inadequate given the complexity, scope, and importance of the issues*" and decided therefore to limit its analysis to the parameters allocated, so the Bar Council's response is necessarily far more limited than the implications of the proposals truly merit.

19. In order however to provide as clear and helpful response as possible within these constraints, the Bar Council has sought to take the approach that where it agrees with the IRAL panel's analysis and recommendations, it was not necessary to provide detailed reasoning. Where it has been possible to provide a slightly more reasoned approach it has done so, however, again, it is clear in the Bar Council's view that more time to consider these proposals should have been made available.

Executive Summary

- The Bar Council found, that the IRAL report clearly did not identify a "growing tendency" for judicial overreach and that the assertion that it did is simply not correct.²

² Paragraphs 6-12

- The Bar Council considers that the consultation period of 6 weeks for proposals which are constitutionally far reaching and go beyond the IRAL report and its careful analysis is wholly inappropriate.³
- With regard to suspended quashing orders (Q1 and 2), if it is a measure to be taken forward, the Bar Council strongly endorses the IRAL recommendation to amend the s31 of the Senior Courts Act 1981 to provide the courts with the discretion and power to avoid the use of power in circumstances where it would be clearly inappropriate.⁴
- With regard to suspended quashing orders (Q1 and 2) the Bar Council does not consider s102 of the Scotland Act 1998 provides an appropriate precedent.⁵
- With regard to Cart judicial reviews (Q2) the Bar Council considers the IRAL conclusions as to the efficacy of such claims and the extent of the drain on judicial resources is questionably based, nevertheless the Bar Council accepts that the judges themselves have formed the view that the law should be changed. This should be done by rewording the Tribunals, Courts and Enforcement Act 2007.⁶
- The Bar Council agrees that the consultation proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only [Q3].⁷
- The Bar Council does not accept the need for any of the additional proposals for reform which lie behind Qs 4 to 7. The IRAL report provides no basis for them and the analysis contained in the Government response is wholly deficient as a basis for what would amount to a very substantial law reform programme.⁸
- Insofar as these proposals involve powers for a court to make rulings which have only prospective effect, they are subject to the practical and principled objections which the courts have had to such a possibility.⁹

³ Paragraphs 14-18

⁴ Paragraphs 20-29

⁵ Paragraphs 20-29

⁶ Paragraphs 30-34

⁷ Paragraph 36

⁸ Paragraphs 61-64

⁹ Paragraph 61

- The approach that is suggested to statutory instruments is unacceptable as a matter of basic principle.¹⁰
- There is no practical need to legislate in respect of the distinction between “void” and “voidable”.¹¹
- With regard to ouster clauses (Q8) the Bar Council does not accept the Government’s assertions that the courts have failed to give effect to “many” ouster clauses as a matter of fact or that there is a need to “clarify the effect of ouster clauses” through the proposed changes or at all.¹²
- The Civil Procedure Rule Committee should be invited to remove the promptitude requirement, consider extending the current three-month time-limit to encourage pre-action resolution and consider the circumstances in which the parties may agree an extension of time within which to bring a claim (Qs 9-11).¹³The proposals for a “track” system are not supported (Q12).¹⁴
- With regard to the proposal (Q13) to compel parties to judicial review to identify organisations or wider groups with whom they are affiliated, the Bar Council notes this is aimed at assisting the courts but considers it is unnecessary (in light of the duty of candour) and could involve infringement of Article 6 and Article 10 of the Equality and Human Rights Commission.¹⁵
- The proposals for formalisation of Replies are supported (Q14).¹⁶
- The proposals in respect of the Pre-Action Protocol and Summary Grounds of Defence are not supported (Q15).¹⁷
- The proposals for extension of time for Detailed Grounds of Response should not be introduced at the present time (Q16).¹⁸

¹⁰ Paragraph 62

¹¹ Paragraphs 52-56

¹² Paragraphs 65-76

¹³ Paragraphs 80-84

¹⁴ Paragraphs 84-92

¹⁵ Paragraphs 93-99

¹⁶ Paragraphs 100-102

¹⁷ Paragraphs 103-112

¹⁸ Paragraphs 113-114

Response

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

20. The Bar Council considers it is helpful to address the above questions together and split the issues into (i) Suspended Quashing Orders and (ii) Cart Judicial Reviews.

(i) Suspended Quashing Orders

21. The IRAL report at § 3.64 following its review of remedies recommended giving “*the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void ab initio. Doing this would have the advantage of allowing the courts to issue suspended quashing orders in response to the unlawful exercise of public power*”. Prior to that direct reference was made at §3.56 of the IRAL report to the fact that in Scotland “*suspended quashing orders may be issued under section 102 of the Scotland Act 1998 [‘the SA 1998’], which provides that in a case where a court or tribunal has decided that the Scottish Parliament or a member of the Scottish Government has acted beyond the bounds of their competence, the court or tribunal may make an order “suspending the effect of [its] decision for any period and on any conditions to allow the defect to be corrected”*”.

22. As noted at §54 of the consultation, the IRAL report goes on at §3. 68 and 69 to recommend amending section 31 of the Senior Courts Act 1981 (along similar lines to s.102) to grant a similar discretionary power to the Courts in England & Wales to make suspended quashing orders in appropriate cases. The IRAL report specifically suggests the enactment of a “*new subsection (4A), which would read, “On an application for judicial review the High Court may suspended any quashing order that it makes, and provide that the order will not take effect if certain conditions specified by the High Court are satisfied within a certain time period.”*”

23. IRAL favours this approach stating “*it would be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded, as opposed to awarding either a quashing order with immediate effect or a declaration of nullity*”. The existence of a discretion in the terms of the proposed

subsection (4A) is important; it ensures that the courts will be able to avoid the use of power in circumstances where it would be clearly inappropriate.

24. The approach is clearly different from s.102 of the SA 1998 which relates specifically to findings by the Scottish Courts that Acts of the Scottish Parliament or any provision of such an Act are “*not within the legislative competence of the Parliament*”, or “*a member of the Scottish Government does not have the power to make, confirm or approve subordinate legislation that he has purported to make, confirm or approve*” or “*any other purported exercise of a function by a member of the Scottish Government was outside devolved competence*”. In addition, it needs to be considered in light of the potential effect of ss 29, 54 and 57 of the SA 1998 which can render unlawful any provision of the Act or function which is “*outside the legislative competence*” (s29) or “*devolved competence*” (s54) of the Scottish Parliament (s.29) or is “*incompatible*” with the European Convention on Human Rights or retained EU law (s57). S.102 to that end allows for the avoidance of legislative ‘gaps’ arising from such declarations of unlawfulness (see Salvesen v Riddell [2013] UKSC 22).

25. The Bar Council notes the suggestion at §55 of the consultation that there is “*a disparity... between the section 102 Scotland Act precedent and the Report*” because “*section 102(3) stipulates that “in deciding whether to make [a suspended quashing order], the court or tribunal shall (among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected*”. This it is understood provides in the Government’s view “*clarity in relation to when suspended quashing orders will be more appropriate than immediate quashing orders*”. Thereafter, the consultation centres upon whether to accept the IRAL recommendation which is said to leave it “*up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded, as opposed to awarding either a quashing order with immediate effect or a declaration of nullity*” or to take the seemingly preferred Government route which is to “*set out in legislation factors or criteria that the court should take into account when considering whether a suspended quashing order is appropriate*” and indeed as a further alternative to go further and set out “*criteria... which must be considered by the courts, and which, if met, mandate the court to use a suspensive order unless there was an exceptional public interest in not doing so*” or indeed a combination.

26. In the first instance, in terms of the IRAL recommendation that a power for the courts to make suspended orders is the subject of legislation, the Bar Council considers that there are practical difficulties as well as jurisprudential ones. The latter are

encompassed by the debate about nullity and the effect of ‘extending the life’ of an act that has been found to be void (see Ahmed v HM Treasury (No.2) [2010] UKSC 5) as well as the difficulties and unfairness which arise with the suggestion of prospective orders (see below in respect of the response to Questions 4-7) (e.g. the absence of a remedy for party who successfully brings a challenge) most especially as the consultation appears to propose suspended powers should be granted outside of legislative issues.

27. In short, the Bar Council considers such orders are likely to be inappropriate for individual administrative decisions which are found to be unlawful and in particular if there were to be a presumption mandating such an effect e.g. an unfair refusal of benefit; a planning decision granted without consideration of some relevant material consideration; compulsory purchase of a property without due consideration of the viability of the scheme behind the Compulsory Purchase Order (CPO). The factors relevant to the justification of such an order are likely also to go beyond the Simplex test¹⁹ used by the Court when exercising its discretion as to relief or under s. 31(2A)-(2C) of the Senior Courts Act 1981.

28. The Bar Council also understands from colleagues in the Faculty of Advocates that the power under section 102 of the SA 1998 is useful albeit rarely used²⁰, based as it is upon a legislative act or function being found to be outside the Scottish Parliament’s competence, when there are a series of checks and balances to ensure that legislation is within its competence.

29. In all the circumstances, the Bar Council, noting that the Government states at §57 of the consultation that it is “*not committed to pursuing any of the specific proposals*”, would endorse the IRAL recommendation to amend the Senior Courts Act 1981 as described if the Government seeks to encapsulate the power in legislation and allow the matter to be at the Court’s discretion.

¹⁹ See Simplex GE (Holdings) Ltd v Secretary of State for the Environment [2017] PTSR 1041 , 1060 (1988)

²⁰ Albeit considered recently in Philips v Scottish Minister [2021] CSOH 32 following a finding that the The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No.11) Regulations 2021 constituted a disproportionate interference with the ECHR art.9 right of ministers and church leaders of Christian churches . The court ultimately concluded that the power were not necessarily such as to justify an order under s.102 but was not required in any event as the Scottish Government amended its regulations.

30. In reaching this conclusion, the Bar Council takes the view that by setting out criteria this would grant scope for additional disputes to arise over whether such matters as “*exceptional public interest*” arise and how that would fit with decisions that significantly affect third parties or individuals. To that end, there would therefore be potential for the Courts to engage with the types of merit issues as part of judicial review that the Government response clearly wishes to avoid as well as creating scope for protracted disputes over the exercise of the new power and additional delays and costs in the system, which may further prejudice the successful claimant.

(ii) Cart JRs

31. With regard to the recommendation by the IRAL report that the Government should legislate to reverse the Supreme Court’s decision in *R (Cart) v The Upper Tribunal; R (MR (Pakistan)) v The Upper Tribunal (IAC)* [2011] UKSC 28 and which the Government wishes to take forward, the Bar Council does not seek to repeat the analysis of the law carried out by IRAL. However, a great deal of weight was placed upon the data and information the IRAL had available to it²¹ and its analysis thereof which led the panel to conclude [3.46] that “*when an application for a Cart JR is made “Only rarely will the judge conclude that the hurdles set out in CPR Rule 54.7A have been surmounted.” It will be rarer still that granting permission to pursue an application for a Cart JR will result in an error of law on the part of a FTT being identified and corrected. In fact, this happens so rarely (on the above figures, in 0.22% of all applications for a Cart JR since 2012) that we have concluded that the continued expenditure of judicial resources on considering applications for a Cart JR cannot be defended*”. As the Government is no doubt aware, the validity of this exercise and the conclusions drawn has been questioned by academics and practitioners (see in particular Joe Tomlinson and Alison Pickup: *Putting the Cart before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews* 29 March 2021 UKCLA) which in short show that it would be unsafe to rely upon the analysis as it simply did not provide enough meaningful and correct information.

32. To that end, the Bar Council is troubled by the fact that it does appear that proper and robust evidence is not available to the Government or the public to demonstrate the real extent to which Cart JRs are an ineffective waste of or drain upon judicial resources.

²¹ MoJ statistics of total number of applications for a Cart JR each year from 2012–2019 and reports in Westlaw and BAILII where the application for a Cart JR resulted in a finding of an error of law [3.45 IRAL]

33. As noted however in the Introduction to the IRAL report [10] the matter of Cart JRs was raised following a request received from judges “to look at Cart reviews, which some of those who gave evidence thought adds an additional layer of appeal that was as unnecessary as it was unintended”. This view is also reflected in a statement by Lord Hope of Craighead following publication of the report and the consultation (Hansard 22 March 2021 Column 710).

34. “My Lords, of course Parliament has the power to legislate to limit or exclude judicial review. The question is how far it should go. I was a member of the panel of the Supreme Court in the Cart case. We set the bar as high as we could when we were defining the test that should be applied, but experience has shown that our decision has not worked so I agree that it is time to end that type of review.” The Bar Council, despite the questionable conclusion as to the true extent of the drain on judicial resources from Cart JRs, nevertheless accepts that the judges themselves have seemingly formed the view that they are and should in any event go.

35. The question asked in the consultation is how best to achieve the aims of the proposals in relation to Cart JRs and it would appear that the most obvious route would be to reword the Tribunals, Courts and Enforcement Act 2007 taking into account the analysis of that Act and its effect by Lady Hale in her judgment in Cart at [22 – 29] and at [37].

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

36. Yes, for the detailed reasons and analysis set out in Chapter 5 of the IRAL Report.

The additional proposals for consultation

Introduction

37. This section of the Response addresses questions 4 to 7 of the Consultation. These raise issues relating to a proposal to provide a general discretionary power for prospective only remedies (Q4); a particular approach relating to statutory instruments, involving either a presumption of prospective only quashing or mandating prospective only quashing (Q5); a more general requirement relating to prospective quashing orders with the same alternatives of a presumption or

alternatively a mandatory requirement (Q6); and proposals designed to define the circumstances in which a decision or use of a power was null and void (Q7).

38. The general thrust of the reasoning behind these proposals includes the proposition that their enactment will lead to greater predictability in the results of a judicial review. The Bar Council does not accept this general thrust. As explained above, it regards the IRAL report as a high quality piece of work. The reasoning of the IRAL Report does not provide a basis for the additional proposals. If enacted, courts and litigants would necessarily have to be involved in extensive litigation to work out the practical effects for all involved and the principles on which the courts should act in giving effect to the new legislation. The proposals are for extensive intervention in a complex and highly important area of law. Unforeseen consequences would be inevitable. A six week consultation does not provide anything like a sensible basis for intervention of this sort. The Bar Council does not regard it as necessary to go beyond the carefully considered result of the Faulkes Report itself. If, contrary to this view, it is thought desirable to consider further measures, it has to be recognised that they involve substantial law reform. This should be undertaken in a careful and considered way, not on the basis of a short consultation paper produced in the interval between the receipt by government of the IRAL Report and the publication of the Government response. The Law Commission should be involved so that all the implications of the proposals can be thought through.

39. This section of the Bar Council response proceeds by highlighting some of the background legal issues involved before proceeding to provide answers to Qs 4 to 7.

The conventional approach to prospective only remedies

40. The proposals involve consideration of prospective only remedies. Accordingly, the first and basic point to be made and borne in mind is that the common law (in the widest sense) has always lent against prospective only remedies. The reasons for this, which are both principled and practical, were set out by Lord Nicholls in *In re Spectrum Plus Ltd* [2005] 2 AC 680. Paragraphs [4] to [12] of his Opinion draw attention to some “*basic, indeed elementary, features of this country’s judicial system.*” His description of the role of the court is that it is adjudicative. “*Courts decide the legal consequences of past happenings.*” He went on to point to other features, including the normally binding effect of precedent [5]; that from time to time a court ruling on points law “*represent a change in what until then the law in question was generally thought to be*”

and “A change of this nature does not always involve departing from or overruling a previous court decision. Sometimes a court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held.”[6]; that “a court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively” [7]; and that “People generally conduct their affairs on the basis of what they understand the law to be. This “retrospective” effect of a change in the law can therefore have disruptive and seemingly unfair consequences.” [8].

41. Lord Nicholls went on to consider the practice in the United Kingdom; and the position in other jurisdictions at [18] to [22]; and the position in Luxembourg at [23]. He cited [66] and [69] of *R(Bidar) v Ealing London Borough Council* [2005] QB 812, which recite the fact that rulings of the Court of Justice are normally retrospective but that there was power “exceptionally” to limit the temporal effect of judgments, which would be exercised “only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to have been validly in force.” A fair summary of this comparative material is that prospective only rulings are exceptional in any jurisdiction.

42. His Opinion considered the practical difficulties arising from prospective overruling at [26] and [27]; and the objections in principle at [28].

43. It is to be observed that one of the objections in principle to prospective overruling is that use of the power to make them takes the court outside its normal role of adjudicating on facts and arguments that the parties place before it. Lord Nicholls described the principled objection in this way at [28]: “Prospective overruling robs a ruling of its essential authenticity of a judicial act. Courts exist to decide the legal consequences of past events.....With a ruling of this character the court gives a binding ruling on a point of law but then does not apply the law as thus declared to the parties to the dispute before the court.”

44. In this passage, Lord Nicholls is describing the objection in principle. He did not regard it as absolute. In the particular case, the House of Lords readily declined to limit the temporal effect of its judgment, despite its impact on a settled view of the law which had been held for years. The general approach of the Lords can be summarised by saying “never say never”; the law was (and is) sufficiently flexible to accommodate the need for a temporal limitation on the effect of a judgment in wholly

exceptional circumstances. But this is far removed from the more routine temporal limitations contemplated by the Government response.

45. *Spectrum* was a private law case; and, of course, the present proposals are for primary legislation which would not need to adhere to the approach the common law finds desirable. But two points arise immediately out of these thoughts.

46. The first is simple. Lord Nicholls set out practical and principled objections to prospective only rulings. These objections arise out of consideration of the real world and apply equally to legislative proposals.

47. The second concerns the subject matter of a high proportion of judicial reviews – statutory interpretation. Very many judicial reviews in essence concern the correct interpretation of a statutory provision, possibly in the form of the limits or true meaning of a provision providing the *vires* for a statutory instrument; or underlying a central or local government policy; or simply underlying individual decisions, for example in planning, immigration or social security. In these cases of statutory interpretation, there is no basis for making a distinction between private and public law cases. The court has to decide the meaning of the statutory provision in both. And on the approach spelt out in *Spectrum*, the meaning given by the court to the statutory provision establishes the meaning it should always have borne. Indeed, in *Spectrum*, both Lord Steyn and Lord Scott found it “*difficult to see how it could be possible to permit prospective overruling in a dispute about the interpretation of a statute.*” [45].

48. Further, the same issues of statutory interpretation can get before the courts by different routes. In social security, for example, issues can be raised by judicial review (possibly by way of a challenge to the assumptions underlying a policy) or by an appeal by an individual claimant to the First Tier Tribunal and onwards to the court system. The Government response does not deal with features of the overall scheme of this kind. It would be inappropriate for the courts, at whatever level, in a statutory appeal by an individual claimant to make prospective only rulings; and by parity of reasoning similarly inappropriate in judicial review proceedings considering an issue of statutory interpretation.

49. There are other obvious difficulties in this type of case. The proposals for suspended quashing orders envisage leaving the old law in place in the interval between the judgment and the time the quashing order comes into force. But what,

then, is a decision-maker to do when he needs to decide an individual case in the gap? The Court of Appeal has, for example, decided that the law is not x but y. It issues a suspended quashing order. The logic of the Government response is that the decision maker applies law x, despite the existence of a judgment saying the law is y. This is at the least extremely odd. The oddness is not a result of issues arising from the distinction between void and voidable, but from the contrast between the law the decision-maker is compelled to apply and the reasoned judgment of the Court of Appeal saying that view of the law is wrong.

50. None of these issues are considered in the Government response. In the Bar Council's view, they reinforce the perspective that the Response is an inadequate basis for major reform proposals beyond those contemplated in the IRAL Report itself. The IRAL report provides no support for the reasoning behind questions 4 – 7; the Government response does not come close to providing any alternative foundation. It contains no detailed description of the different types of judicial review which the proposals potentially affect; and, consequently, contains no analysis of the different principles which a court might apply across a wide range of very different situations. This consultation is inadequate not only because of its shortness but also, and more importantly, because of a lack of analysis of how the proposals would actually work.

51. Another area in which the Government response is deficient relates to the ability of Parliament to respond on a sectorial basis to potential problems caused by the retrospective effects of court rulings. The anti-test case rule contained in s27 of the Social Security Act 1998 and the certification procedure brought in by the Local Government (Contracts) Act 1997 to deal with potential uncertainty affecting local government, often PFI, contracts are prominent examples. Nor is there any analysis or indication of how the proposals would fit in with statutory jurisdictions such those relating to planning or homelessness appeals which do not involve judicial review but in which the courts apply similar principles to error of law.

The distinction between actions within and outside competence – the void/voidable debate

52. [71] to [81] of the Government response concentrate on the potential distinction between actions that are void (and therefore treated as never having had any legal effect) and actions which are voidable. [81] formulates some principles arising out of a desire to see courts acting on the basis of a critical difference between actions that

are within competence but are in some way flawed; and actions that are simply without competence.

53. The Bar Council does not consider that this distinction can be readily maintained. It is not possible to readily characterise a basis on which it can be said that the exercise of power is simply unauthorised by the underlying source of power (normally a statutory provision) and a flaw in the manner of the exercise of the power.

54. Take, for example, a situation in which a court is considering whether a particular action of Government is authorised by the underlying statute. In some circumstances, it might be clear as a matter of statutory interpretation that it is not – it is simply not the sort of action that the statute authorises. It is outside the “four corners” of the statutory provision. The analysis put forward in the Government response would lead to the conclusion that the government lacked the competence to carry out this action. It would draw a distinction between this situation and one in which the government was acting for an improper purpose; or on the basis of irrelevant considerations.

55. It is not considered that this distinction can be maintained. In both cases, and in the paradigm case of the exercise of a statutory power, it is necessary to construe the statute. This will inform the court of both the actions that the statute authorises; and the basis on which the actions can be taken. The blunt truth is that an action taken for a *purpose* which on a true construction of the statute is not authorised by it; or on the basis of *considerations* which on a true construction are not relevant, is unauthorised by the statute in precisely the same way, and to the same extent as, an action outside the “four corners” of the statutory provision. The potential distinctions put forward in [81] of the Government response between actions within the competence or jurisdiction of the statutory power; and errors (“however egregious”) which are committed in the course of exercising that power cannot be maintained. Once again, the Government response provides no adequate basis or analysis for embarking on major statutory intervention.

56. In any event, it is not believed that such intervention is justified. Public law practitioners do not in practice spend any substantial time considering whether an error in the exercise of the power renders the action void or voidable. This is because of the range of remedial responses that are in practice available to the court. This is reflected in the passage in the current edition of *De Smith* at 4-062 to 4-067 describing

"The situation today". There, the authors describe the distinction between void and voidable decisions as being of little practical consequence.

Should statutory instruments be subject to particular protection?

57. The Government response, at [67], discusses the views of Sir Stephen Laws about statutory instruments, suggesting an approach under which impugned clauses in statutory instruments would be immune from retrospective invalidation. The reasoning behind this proposal is said to be that *"acts of a legislative nature (including secondary legislation) are inherently different from other exercises of power"*.

58. There are fundamental difficulties with the proposals in [67]. Statutory instruments axiomatically derive their effect from the empowering provision under which they are made. If they are not within the terms of that provision, it follows that parliament has not authorised them. Any reform on the lines contemplated in [67] is subject to the objections to prospective only rulings outlined above. If anything, the objections are stronger in that those affected by the secondary legislation will have been subject to a legislative constraint that parliament did not intend.

59. It is also unclear how the proposals in [67] would be consistent with the continued ability of those affected by secondary legislation which is not authorised to mount a collateral challenge.

60. Sir Stephen Laws comments that there is the potential for injustice because of a reasonable reliance by those affected on the apparent legality of the secondary legislation. However, the discussion of *Spectrum* above demonstrates that this problem is not particular to public law. Any decision which changes a settled perception of the law has the potential for this kind of effect, in both public and private law. In both, the effects can and will be mitigated by constraints on the available remedies in respect of closed, past, transactions.

Answers to questions 4 to 7

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

61. The Bar Council does not consider that there should be any amendment to s31 beyond that specifically contemplated by the IRAL report. Widespread or routine use of prospective-only remedies would be subject to the practical and principled objections explained above. Further, even without an amendment, the courts could react to any extreme circumstances on the “never say never” basis explained by Lord Nicholls in *Spectrum* but would be extremely slow to do so. The Government response does not point to any precedent in other comparable jurisdictions for the routine use of prospective only remedies.

Question 5: Do you agree that the proposed approaches in (a) or (b) will provide greater certainty over the use of statutory instruments, which have already been scrutinised by parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

62. The Bar Council considers that there are substantial practical and principled objections to either of the approaches to statutory instruments outlined in Question 5. Further, legislation making radical provision of this sort would inevitably necessitate a considerable volume of litigation, including extensive appeals, as the courts explored the principles on which they should work.

Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

63. The proposals in Question 6 are subject to the same objections as those concerning statutory instruments in Question 5.

Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when courts can and should make a determination that a decision or use of a power was null and void?

64. The short answer to this question is no. The task of seeking to distinguish between the limits of the competence of a body exercising statutory powers and errors within that competence would be formidably difficult. Once again, legislation making the attempt would inevitably spark extensive litigation and appeals.

Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

65. With regard to ouster clauses and the cases which have considered them, the Bar Council would draw the Government's attention to the following from DeSmith (8th ed) §4-008 which states that they:

"demonstrate how carefully the courts will scrutinise any attempt to oust their ability to protect the citizen against abuse of power by public bodies and at the same time how important it is to the rule of law that Parliament does not attempt to do so inappropriately. In this area in a jurisdiction where there is no entrenched constitution there is a very heavy responsibility for restraint on all the arms of government."

66. At §6 of the consultation the Lord Chancellor states that within the consultation, he wants to focus *"attention first on the most pressing issues, namely ouster clauses and remedies, before considering whether any broader reforms are necessary."*

67. The earlier question (i.e. Q2) with regard to 'Cart JRs' is addressed separately and above therefore Question 8 appears to be directed at clarifying ouster clauses 'generally' with the stated aim of giving effect to them. The question of whether ouster clauses are effective is generally a matter for the courts in discharging their constitutional role of interpreting the legislation of Parliament. Such a general approach in the Bar Council's view is inappropriate and it appears to be assumed that ousters are necessarily easily or systematically overridden by the courts.

68. It is very clear in the Bar Council's view that the IRAL report carried out a detailed analysis of ouster clauses in Chapter 1 and 2 under the broad topics of Codification and Non-Justiciability respectively, as well as touching on it in Chapter 3 under the heading Moderating Judicial Review. Whilst the Government in its consultation at [39] asserts that the *"the Panel maintain that ouster clauses are not antithetical to the Rule of Law and are a legitimate instrument for Parliament to use to delineate the bounds of the courts' jurisdiction"* the passages to which the consultation refers (80-2.89) notably end with the following finding *"The debate over the limits of Parliamentary sovereignty in such cases is discussed in Lord Bingham's analysis of the rule of law [Bingham, The Rule of Law (Allen Lane, 2010), chapter 12]. While acknowledging the potency of the debate, the Panel approaches the issue on the assumption that the doctrine of Parliamentary sovereignty means that Parliament has the power to legislate in such way as to limit or exclude judicial review. The wisdom of taking such a course and the risk in doing so*

are different matters. Indeed, the Panel considers that there should be highly cogent reasons for taking such an exceptional course.” [emphasis added]

69. This does not in the Bar Council’s view read as weighing in favour of ouster clauses as a route the Government should take (even though it can) and indeed the Bar Council does not read the IRAL report as making that recommendation at all. This is reflected in the conclusions chapter at [8 (f)] when it states the following *“Parliament could oust or limit the jurisdiction of the courts in particular circumstances if there is sufficient justification for doing so. It would have to confront “hostility” from the courts, careful parliamentary scrutiny and rule of law arguments (Chapter 2)”*.

70. Despite this and rather to the contrary the Government at [39] states its view that *“the doctrine followed by the courts since the Anisminic decision, which has led to many ouster clauses not being given effect to, is detrimental to the effective conduct of public affairs as it makes the law as set out by Parliament far less predictable, especially when the courts have not been reluctant to use some stretching logic and hypothetical scenarios to reduce or eliminate the effect of ouster clauses.”*

71. The Bar Council does not accept that as a matter of simple fact “many” ouster clauses have not been given effect to, or that the academic disputes about them mean that there is a practical problem requiring urgent, or any, legislative intervention. There is a parallel here with the concern in the Government response with the void/voidable debate, which is already stated is said by the leading textbook to be of little practical importance.

72. The Government goes on to suggest that it believes there is a real “danger” arising from the interpretation by the Courts of *“clauses in a way that does not respect Parliamentary sovereignty”* but then equally accepts that the *“courts’ approach is [not] totally incorrect”* and that what is needed is *“further clarity...to set out how the courts should interpret such clauses and the circumstances in which ouster clauses must be upheld”*.

73. The Bar Council does not agree that there is any evidence that the courts are somehow approaching statutory interpretation, which is clearly one of their central functions, on the basis of a deliberate challenge to parliamentary sovereignty. As noted in the introduction, despite the suggestion to the contrary the IRAL panel did not conclude that there was evidence of a growing tendency for ‘judicial overreach’.

74. The Government’s views expressed in the consultation also appear to proceed on the basis that Parliament has made its intention clear in the specific legislation and

proposes to substitute this with a general approach. This has the potential to have serious implications on judicial review and undermines the Rule of Law.

75. The Bar Council would refer again to the conclusions of the IRAL report which notes the *“inevitable tensions”* which arise from time to time between the judiciary, the executive and Parliament [10] and ends by expressing its view that [15] *“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. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.”*

76. The Bar Council would respectfully agree with the panel’s approach and conclusions and therefore does not accept that there is a need to *“clarify the effect of ouster clauses”* [11] through the proposed changes or at all.

Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

77. The IRAL addressed a number of procedural reforms, noting that *“The judicial review pre-action protocol procedure is operating as a significant means of avoiding the need to make claims and for valid cases to be considered and settled by defendants, as well as identifying claims which were not arguable.”* At paragraphs 4.133 – 4.149, the IRAL considered the issue of times limits in CPR 54.5, which now forms the basis for questions 9-11 of the consultation.

Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

78. The Bar Council agrees with this proposal to follow the approach in Northern Ireland and to abolish the requirement for “promptness”, provided there remains a discretion to extend any time-limit in appropriate cases.

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

79. The Bar Council tentatively supports this proposal. The IRAL noted observations from consultees that the three-month time-limit for issuing judicial review proceedings is already substantially shorter than that which applies in most other areas of law. Although shorter time-limits facilitate certainty in the decision-making and operation of public bodies, they can be counter-productive by leaving little time to identify and explain to a potential claimant why a proposed claim is weak, or leaving the parties with limited time to resolve claims with potentially good prospects. In reality, the identification of issues in correspondence and compliance with the duty of candour can be time-consuming in complex cases, resulting in little additional time to facilitate pre-action resolution.

80. We agree that the Civil Procedure Rule Committee should be invited to explore whether a short additional period would help to alleviate some of these practical issues prior to issuing proceedings, whilst ensuring that the time-limits remain sufficiently short to be conducive to the good governance of public bodies.

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

81. The current three-month time-limit is tight and applies regardless of the complexity of the claim, the nature of the issues raised, the existence of any impact on third parties or the nature of pre-action correspondence. The IRAL report noted comments at paragraph 4.143 that the practice of defendants indicating they will not take any point on the time-limit may reassure “some claimants some of the time”, the implication being that the court may not necessarily endorse such agreement in the absence of any formal basis to do so.

82. There seems little practical reason why the claimant in a complex case that has no impact on any third party should not be able to rely on a defendants' agreement to extend time to challenge its decision. Given the host of factors that may make agreement by the parties to extend the time-limit more, or less, suitable in any individual case the Bar Council supports an invitation to the CPRC to consider the circumstances in which the parties may agree an extension of time within which to bring a claim.

Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

83. The Bar Council would not support this proposal. As paragraph 101 notes, this is not a matter which the IRAL Panel chose to pursue or explore in any further detail. The extent to which the proposals would give rise to greater "efficiency" is highly doubtful. Indeed, it is far more likely that they would have the opposite effect.

84. Judicial review already has simplified procedural rules, and significant judicial case management through the permission stage, crystallised in an order granting permission. This makes provision for detailed grounds of defence, further evidence, skeleton arguments, trial bundles and other agreed documentation.

85. The order will also specify a duration, venue and whether the case would be suitable for hearing by a Deputy High Court Judge. Where other directions are required, these are normally set out in the claim form or the Acknowledgement of Service. There is also provision for rolled-up hearings to allow for expedition where appropriate.

86. All such case management is conducted in accordance with the overriding objective.

87. We do not consider that this common framework for all judicial reviews can therefore realistically be simplified to drive further efficiency. More complex cases do not require a separate track to enable what can already occur through bespoke directions.

88. We would agree with one aspect of the question that the introduction of a “‘track’ system” is a matter that could only proceed following detailed review by the Civil Procedure Rules Committee.

89. However, the starting point therefore for any CPRC analysis would have to be robust data in respect of the number, type and duration of claims determined by the Administrative Court. The collection, organisation and analysis of such data involve detailed questions which would have to be undertaken not just in consultation with CPRC but also specialist practitioners, both barristers and solicitors.

90. It could therefore only proceed with further consultation with the Specialist Bar Associations in this field, with a much longer timeframe than has been allowed on this occasion: at least 3 months.

91. The Bar Council cannot therefore recommend specific criteria for allocation, due to underlying flaws in the concept, and we would not recommend that this is pursued.

Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

92. In the context of the issue of Interveners, the Government proposes in its consultation that, rather than take forward the IRAL review recommendations which is that “*criteria for permitting intervention should be developed and published, perhaps in the Guidance for the Administrative Court*” at this stage, instead it wishes to defer to an unidentified response to the IRAL which “*suggested imposing a duty on parties to identify to the court not just the named challenger, but any organisation or wider group that that individual represents or is affiliated with, who might assist*”.

93. There are a number of provisions within the Criminal Justice and Courts Act 2015 related to costs provisions directed at interveners (see s 87(1)-(7)).

94. Section 87 (6) in particular governs the circumstances in which interveners can be made to pay costs incurred by other parties; for example, where: “(b) *the intervener’s evidence and representations, taken as a whole, have not been of significant assistance to the court*” or “(c) *a significant part of the intervener’s evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings*”. In addition, s 88(4) of the CJCA 2015 means

an intervener cannot seek a costs capping order in order to try and limit the amount of costs that may be awarded against them.

95. In the Bar Council's view it is clear that there are controls and disincentives to bodies who may seek to intervene in a judicial review case.

96. The suggestion that in addition there be a duty placed upon claimants or indeed defendants to declare their affiliations, even if the aim is to identify parties who might assist the parties and/or the court, is, in the Bar Council's view, unnecessary and also concerning. Such a duty would seem to be in breach of Article 6 and Article 10 of the ECHR.

97. It should be highlighted of course that there is already a duty of candour on the part of Claimants as well as defendants and which the IRAL considered in some detail.

98. The Bar Council does not therefore consider it would be useful or indeed lawful and proportionate to introduce a requirement to identify organisations or wider groups that might assist in judicial review cases.

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

99. The Bar Council agrees with the IRAL's recommendation, which reflects existing common practice in the absence of specific CPR provisions.

100. We agree that this should be considered by CPRC, who may wish to explore the precise length of time offered.

101. Whilst 7 days will be appropriate in many cases, there will be a category of cases that merit provision for extension of time – due to the volume of material or complexity of subject matter.

Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

102. We presume that the reference is to Summary, rather than Detailed Grounds of Resistance – given the reference to paragraph 105(a) only.

103. The Bar Council has significant concerns about the practicality of this proposed reform. We consider that it will significantly increase procedural disputes, impede the permission stage and have unintended consequences in respect of defendant workload.

104. The Summary Grounds of Resistance is a very well-established document under Part 54. Such a document is able to set out precisely which aspects of the claim are defended, on what grounds, and where applicable with proportionate accompanying evidence. Our understanding is that such documents are regarded by the judiciary as very helpful documents at the permission stage. They are able to match the individual grounds exactly and write permissions decisions accordingly.

105. The Pre-Action Protocol Letter, and a Pre-Action Protocol Response is a much less well-defined document. By definition, it operates outside Part 54, rather than within it.

106. Judicial review time limits are already constrained. The Pre-Action Protocol process operates within even further time constraints within those time limits – allowing for response times by prospective defendants.

107. Whilst recommended timescales are given in the Pre-Action Protocol (Defendants to be given 14 days to respond), these are not fixed. This reflects the practical reality of the delay in claimants being able to secure advice, then make decisions on whether to issue and finally complete the necessary documentation.

108. If these proposals were to be implemented, there would likely be considerable dispute between parties as to the nature and extent of compliance with the Pre-Action Protocol.

109. In respect of (a)(ii), the proposal gives rise to further complexity as to what amounts to “sufficient notice” or “new grounds”. A response to a Pre-Action Protocol Letter may, for example, give rise to the identification of new grounds.

110. The proposals may therefore have the unintended consequence of placing even more time pressure upon defendants and their legal advisers before the elapse of the judicial review time limit in the conduct of their Pre-Action Protocol Responses.

111. The Bar Council would therefore recommend retention of the status quo in respect of the requirement to file Summary Grounds of Resistance in all cases.

Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

112. The Bar Council would not support the extension from 35 to 56 days. It will plainly not be practical in urgent cases or in those cases which are particularly time-sensitive, such as Planning Court cases. However, the consultation provides no explanation or evidence that the 35 days currently gives rise to any difficulties, justifying a change.

113. Again, we would urge further consultation with Specialist Bar Associations on the appropriate timescales in the relevant sub-specialisms of administrative law work.

114. The Bar Council does not consider it can helpfully provide any information or further commentary in response to Questions 17 – 19 of the consultation.

The Bar Council
April 2021