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Submission to the Independent Review of Administrative Law

Jamie Grace¹ and Marion Oswald²

Recommendations

- We would recommend that the Review considers both the structure of the proportionality test and a process of rolling review that would allow for the better deployment of government policy when facing conditions of considerable uncertainty, or particular policy on the use of innovative technology.
- We propose that, combined with a robust and rolling oversight function, a model of 'experimental' proportionality review could assist in upholding a fair balance between the rights of the individual and the interests of the community in situations of uncertainty and crisis³.

1. Introduction

1.1 Thank you for inviting contributions to the Independent Review of Administrative Law, and for your consideration of the submission below. Jamie Grace is a specialist public law lecturer, and his research focuses on human rights and administrative law issues connected to the criminal justice system of England and Wales⁴, as well as the administration of patient data practices⁵. Jamie has also published a short textbook on constitutional and administrative law⁶. Marion Oswald has a background as a practising solicitor within Government, technology companies and private practice, and within academia has developed a particular

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³ See M. Oswald and J. Grace, 'The Covid-19 Contact Tracing App In England and 'Experimental Proportionality'', forthcoming in *Public Law*, January 2021, draft paper available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632870

⁴ See for example J. Grace, 'Algorithmic impropriety in UK policing?', (2019) *Journal of Information Rights, Policy and Practice*; Vol, 3 Issue 1 (online); M. Duggan & J. Grace, 'Assessing vulnerabilities in the Domestic Violence Disclosure Scheme', (2018) 2 *Child and Family Law Quarterly* 145; J. Grace, 'Clare's Law, or the national Domestic Violence Disclosure Scheme: The contested legalities of criminality information sharing', *Journal of Criminal Law* (2015) 79(1) 36-45; and J. Grace, "'Too well-travelled", not well-formed? The reform of 'criminality information sharing' in England and Wales", *Police Journal* (2013) 86(1) 29-52.

⁵ J. Grace & M. Taylor, 'Disclosure of confidential patient information and the duty to consult: The role of the Health and Social Care Information Centre', *Medical Law Review* (2013) 21(3), 415-447

⁶ J. Grace, *Key Facts Key Cases: Constitutional and Administrative Law*, Routledge, 2015

specialism in the use of digital technologies and the application of public law frameworks to algorithm-assisted public sector decision-making⁷. Jamie and Marion are a successful academic research partnership, with a body of joint research that is based largely in the public law context⁸.

2. The amenability of public law decisions, and non-justiciability

2.1 The concept of amenability, largely based around determining a 'public function' (CPR 54.1 (2)) is currently flexible enough. It needs to be something that can be considered on a case-by-case basis. The development of bodies of case law on the concept of amenability is an important reminder that there is a principle of a separation of powers which can in fact be given meaningful effect through the development of the common law. The courts are not hamstrung by their reliance on determining the amenability of a decision through the application of principles through case law, even in situations where defendant bodies are only exercising a 'public function' in *some* of their functions overall, as shown in the recent case of *R (The Liberal Democrats and The Scottish National Party) v ITV Broadcasting Limited* [2019] EWHC 3282 (Admin) at 65-85.

2.2 The only purpose for a statutory codification of rules concerning amenability to review would be to restrict the scope of amenability. We would disagree that such codification is necessary. Indeed, given the number of public functions being performed by the private sector, in fact, the review should instead be looking at expanding the scope of JR.

We do not think that there are any areas of decision-making by public bodies which need to be newly set outside the reach of judicial review. This is not compatible with the rule of law; which surely requires that, over time, there is instead a steady reduction in the number of

⁷ See for example M. Oswald, 'Algorithm-assisted decision-making in the public sector: framing the issues using administrative law rules governing discretionary power', *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 376.2128 (2018): 20170359.

⁸ M. Oswald and J. Grace, 'The Covid-19 Contact Tracing App In England and 'Experimental Proportionality'', forthcoming in *Public Law*, January 2021, draft paper available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3632870; M. Oswald, J. Grace, S. Urwin & G. C. Barnes (2018) 'Algorithmic risk assessment policing models: lessons from the Durham HART model and 'Experimental' proportionality', *Information & Communications Technology Law*, Volume 27, 2018 - Issue 2, 223-250; M. Oswald and J. Grace, 'Intelligence, policing and the use of algorithmic analysis: a freedom of information-based study', *Journal of Information Rights, Policy and Practice* (2016) 1(1) (online); and J. Grace and Oswald, M. "'Being on our radar does not necessarily mean being under our microscope": The Regulation and Retention of Police Intelligence', (2016) 22(1) *European Journal of Current Legal Issues* (online).

legal powers which are non-justiciable, or not amenable to review by the courts. Certainly, the actions of government ministers should continue to be as accountable to the courts as they are, too, to Parliament. In *Miller No.2*, where the Supreme Court unanimously found that the Prime Minister had unlawfully advised the Queen to prorogue Parliament for a lengthy period⁹, and prior to a General Election, Lady Hale and Lord Reed, on behalf nine other Supreme Court justices, were clear that the matter of determining the lawfulness of the prorogation, or otherwise, was a justiciable matter. Also refuting the idea that the courts should show more deference to the government by refusing to make a decision in the case, Lady Hale and Lord Reed wrote [at 33] that:

"... the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts."

3. Grounds of review; links to the nature of legal powers, and links to remedies

3.1 Currently, the grounds of judicial available to claimants in argument are best seen as divided thematically, along substantive versus procedural lines, as well as the obvious categorisation as grounds of review as largely common law-based, or Human Rights Act-based. We would suggest that whilst undergraduate students, for example, sometimes (understandably) struggle with the scope and application of the current arrangement of grounds of review, there remains a flexibility in the current position of grounds of review which facilitates a balance between scope for argument and doctrinal certainty, and which suits both legal practitioners and judges respectively. Attempts to limit the use of certain grounds in argument against only some types of decision in public law, using a codifying or re-organising statute, would be a new type of systemic ouster clause, in effect - and one that would lead to either much meta-argument over whether the HRA could be used to 'read in' certain arguments based on the European Convention, and/or much case law output as to what might actually be taken to be the intention of such codification, particularly in relation to the interpretation of famously fluid grounds of review. Famously, for example, Lord Bridge noted that "the so-called rules of natural justice are not engraved on tablets of

⁹ *R (Miller) v The Prime Minister* [2019] UKSC 41

stone”¹⁰. A statutory exercise in purporting to restrict some grounds of review to only some areas of public law decisions could well be followed by a series of judicial lessons, not in the arts of so engraving administrative law, but in the futility of trying to nail jelly to a wall.

3.2 There is some scope, however, for the possibility of individual grounds of review being 'tidied up' in an exercise of statutory codification, where the nature and structure of those grounds are already the subject of academic debate. The doctrine of 'legitimate expectations' is one that scholars have recently begun to study more with an eye to doctrinal, typological reform, with Dr. Joe Tomlinson, for one, calling for a "significant reorientation and an expansion of the study of how law protects legitimate expectations"¹¹. Sometimes, too, new grounds of review will still need to be developed, or refined from older concepts from within the common law, particularly as methods of government and policymaking shift over time.

3.3 There are developing methods of 'algorithmic' administration in government, featuring the use of machine learning technology; but which require a response from the courts in the longer term that amounts to the refinement of 'algorithmic impropriety', to tackle the specific problems raised through decision-making informed or made by these types of artificial intelligence¹². There is also the possibility of adding 'experimental proportionality' to the span of concepts included in proportionality-type review; since, we feel, there are policy positions which require government decisions to be presumed to be proportionate, if only so they are reviewed at a later point by an independent regulator or the courts.

4. Adopting the concept of 'experimental proportionality'

4.1 As the Covid-19 pandemic has demonstrated, much public sector decision-making is made in a context of uncertainty. This is particularly the case where innovative technologies are to be deployed and thus it is difficult to assess the potential benefits and harms and to come to a conclusion regarding the required necessity and proportionality tests.

¹⁰ *Lloyd v McMahon* [1987] 1 A.C. 625 at 702.

¹¹ See Joe Tomlinson, 'Do we need a theory of legitimate expectations?' *Legal Studies* (2020), 40, 286–300, 287.

¹² See J. Grace, 'Algorithmic impropriety in UK policing?', (2019) *Journal of Information Rights, Policy and Practice*; Vol, 3 Issue 1 (online)

4.2 In order to address this, we would recommend that the Review considers both the structure of the proportionality test and a process of rolling review that would allow for the better deployment of government policy when facing conditions of considerable uncertainty, or particular policy on the use of innovative technology. We propose that, combined with a robust and rolling oversight function, a model of 'experimental' proportionality review could assist in upholding a fair balance between the rights of the individual and the interests of the community in situations of uncertainty and crisis.¹³ This model has two elements: first, adding a fifth stage to the proportionality test to recognise elements of 'experimental proportionality' (with key language in added emphasis in bold text):

- '(a) is the legislative object **sufficiently important** to justify limiting a fundamental right?;
- (b) are the measures which have been designed to meet it **rationally connected** to it?
- (c) are they **no more than necessary** to accomplish it?
- And (d) do they strike **a fair balance** between the rights of the individual and the interests of the community?"
- And now... *e) in determining that 'fair balance' over time, will the measures put in place be **meaningfully and periodically reviewed** (if those measures are experimental, novel or original in their scale or application), and are there **sufficiently dedicated mechanisms** in place to ensure they will be?*

4.3 This element of the test would apply when the application of technology in a novel setting or manner is designed to tackle a problem of sufficient importance to justify the interference with a fundamental right. Even at the initial stage, the test would still require the public body to demonstrate a baseline connection to a legitimate aim, that the outcomes or benefits (even if theoretical at that stage) are rationally connected to such aim, and a reasonable belief that there is no disproportionate effect on individual rights.

4.4 This model of proportionality review, combined with rolling oversight by the Court or appropriate regulatory body, would, we suggest, enable public bodies to move ahead with the piloting of new technologies while providing the public with reassurance that the consequences would be independently overseen.

¹³ n 3

5. Procedural reforms: or the lack of necessity thereof

5.1 The pre-action protocol is a continuing success. Public bodies and ministers are able to address policy positions which need improvement, following the receipt of a letter before claim. Just in our own area of expertise, this has been shown in recent examples, including the reversal of government policy on a Home Office-operated 'visa algorithm'¹⁴, and a claim in relation to the use of an A-Level 'grades algorithm' by Ofqual¹⁵.

5.2 On issues of standing, again it is not clear as to why the current rules governing the demonstration of necessary standing would be revisited unless it was to seek to preclude claims that were politically awkward for government and public bodies to face. The rules as to a requisite 'sufficient interest' are sufficiently clear, including for campaigning groups that would seek judicial review in relation to a practice or policy they seek to challenge. The courts are also confident in requiring campaign groups seeking to use Articles of the ECHR as the grounds of review to find an individual 'victim' affected by a policy or practice, or who run the risk of being so affected, as was the case in *R (Fox and others) v Secretary of State for Education* [2015] EWHC 3404 (Admin), where the British Humanist Association was refused permission, but went on to support the individual claimants in their successful application for judicial review.

5.3 Current rules on time limits and around the requisite elements for permission to apply for review are bedded in, and need little or no further statutory clarification. This is despite initial concerns around the effect of section 84 of the Criminal Justice and Courts Act 2015, which was to create a new process for *refusing* leave/permission. This can require a determination by the court as to whether there would be the 'highly likely' outcome of no 'substantial difference' following judicial review, even if a full hearing were to take place. It was observed by Cotter J in *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) at 140 that "...great caution must be exercised by the Court in second guessing, according to a high standard of probability and on an entirely hypothetical basis, what the outcome would have

¹⁴ Helen Warrell, 'The Home Office drops 'biased' visa algorithm', *Financial Times*, 4th August 2020 < <https://www.ft.com/content/a02c6c42-95b1-419c-a798-0418011d2018>> accessed 5th October 2020

¹⁵ Sally Weale and Heather Stewart, 'A-Level and GCSE results in England to be based on teacher assessments in U-turn', *The Guardian*, 17th August 2020 < <https://www.theguardian.com/education/2020/aug/17/a-levels-gcse-results-england-based-teacher-assessments-government-u-turn>> accessed 5th October 2020.

been if the conduct complained of had not occurred." However, the courts have now had more than five years to acclimatise to the new statutory approach required of them by the language of section 31 of the Senior Courts Act 1981, as amended, and so this should not need revisiting.