Hand in glove? Public affairs and public law

Gordon Nardell KC and Ed Bowie

Ed Bowie of DRD Partnership and Gordon Nardell KC of Twenty Essex describe how public affairs and public law can best combine to get Ministers to rethink controversial plans.

For years, exasperated Ministers have pointed the finger at the courts for a government's failed policies. Instead of a sober analysis on where a policy may have gone wrong, a narrative has evolved that public law tools have grown in their scope to frustrate the business of government.

To that end, attacks on 'lefty' and 'activist' lawyers were used to justify the Judicial Review and Courts Act 2022, which ended the ability to appeal against decisions of certain tribunals mostly relating to immigration/asylum cases. That theme set the tone for proposals to scrap the Human Rights Act (now themselves scrapped); meantime, leaked documents indicate that further reforms are on their way.

All of this suggests that public law challenges against policy must be effective; clearly, Ministers don't like them. However, statistics show that just 2.2% of judicial reviews lodged actually succeed. Even those that 'succeed' often produce a pyrrhic victory, leaving Ministers free to take much the same decision again. This reflects the limited grounds on which the courts can review decision-making, with the focus largely on the process rather than the substance of a decision.

So, when is a public law-led challenge to policy the best route to take? And given their limitations, when would those public law mechanisms be better used to support or integrate into a public affairs strategy?

Knowing what you want to achieve

To understand the best route to take, the organisation bringing the challenge needs to be clear on what it wants to achieve.

The Judge Over Your Shoulder, the civil servant's legal 'bible', explains that public law is designed to allow public bodies to perform their duties speedily, efficiently and fairly. Mechanisms that can be used to exercise the public's scrutiny include:

- Responding to consultations and calls for evidence.
- Making complaints of maladministration to Ombudsmen.
- Judicial review. It is this option that Ministers have said is being abused to "conduct politics by other means".

The second and third of these tools generally come after the fact of the decision being made. While lawyers and public affairs professionals alike will generally encourage their clients to engage with consultations, there are concerns that Ministers go through the motions only to announce a largely pre-determined decision.

As a result, it is unsurprising that many judicial review claims are based on allegations of an inadequate or unfair consultation process. A high-profile example was the 'successful' 2007 Greenpeace challenge to the announcement of new nuclear power stations following a 'consultation' exercise that failed to make clear this was really Ministers' preferred option. In this case, the Government went on to make the same decision again – demonstrating the practical limits of judicial review.

Timing is everything

This amplifies the importance of a well-aimed public affairs strategy, which is at

its most effective when activated well before a decision is made.

In doing so, the campaign's purpose is to demonstrate to decision-makers the reasons why the policy will be ineffective or run counter to their own objectives. In high-stakes areas – think the Rwanda deportations policy – it is true that Ministers are unlikely to budge from their proposal.

However, on the more technical policy decisions that impact a particular industry, there is a real prospect of convincing officials – and sometimes Ministers directly – of the need for a change of tack.

In Kelloggs' recent judicial review over food regulations, Mr Justice Linden made a point of the decision by Kelloggs not to take the 'ample opportunity' afforded to it via consultations to provide its views. In doing so, the court illustrated how engaging with policy from the outset is a critical way to really get ahead of an issue.

Other times, the decision will have been taken but the evidence shows that the policy is not working as intended.

Either way, the purpose of a public affairs-led campaign is to change what is going to be (or what has already been) put in place – unlike judicial review, which can only examine narrow questions of legal validity.

In some cases, especially where the political arguments are finely balanced, compelling legal advice or the mere prospect of judicial review can be a decisive factor in advice to Ministers to jump one way rather than another. This approach was used effectively to persuade the Scottish Government that it was not obliged by EU state aid law – as it claimed to have been advised – to put publicly-owned ferry services to market tender.

More recently, the release of Lord Pannick KC's legal opinion on the Privileges Committee's inquiry into statements made by then-Prime Minister Johnson was a classic illustration of deploying legal advice to support a wider campaign narrative. Both this and the Scottish example demonstrate how legal input can be a useful ingredient of public affairs advocacy.

Working with, not against

A consequence of taking the public law route can, however, be to simply antagonise the decision-maker (as well as to expend time and money). High-profile judicial reviews challenging decisions made during the pandemic and in relation to the Rwanda policy have been effective in bringing attention to the issues, but less successful in achieving actual policy change.

There was little chance given ministers' political commitment to their policies in these areas. Nevertheless, in the face of the Government's own spin machine, public affairs advocacy can have an important role in influencing the public narrative around a legal challenge on a matter of social or political importance.

Quite rightly, judges are not swayed by the way a story about judicial review proceedings plays in the media; but by contrast, the Government is likely to be sensitive to how effectively its own narrative is either accepted or challenged among some commentators. That in turn can influence its choice of legal arguments and ultimately place it on the defensive in court.

None of that undermines the point that in most areas of policymaking, the most effective approach is likely to be early deployment of a sensitive public affairs campaign – working with legislators, proposing alternative drafting and building an alliance of impacted organisations.

Public law arguments and judicial review proceedings may well be there as a backstop, but engaging with the detail at the start of the process will yield better results.

The Government's reforms to judicial review demonstrate how alert it is to the possibility of challenge. Given the implicit threat that public law tools pose to decision-makers, organisations that genuinely want to see policy improved should consider how a public affairs strategy could be best deployed. Legal options as part of a wider toolkit can help deliver change.

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