THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW PANEL
CALL FOR EVIDENCE

KRW LAW LLP

Introduction and Scope

1. KRW LAW LLP (KRW) is one of the largest legal aid practices in Northern Ireland. Our main areas of work include criminal defence, public law, clinical negligence and actions arising out of the Conflict in Northern Ireland.

2. KRW's public law practice has included litigation at every level of the senior courts as well as the Supreme Court and erstwhile Appellate Committee of the House of Lords.

3. This note is submitted in response to the Call for Evidence (the Call) dated 7 September 2020 by the Independent Review of Administrative Law Panel (IRAL). This note will only provide answers to questions 3 – 5 as posed in the Call. This is because it is unclear (given Note A(1) on the scope of IRAL) whether the practice and procedure of judicial review in Northern Ireland is within the terms of the review, while being clear that the *substantive law of judicial review*, at least insofar as such law interacts with "UK wide powers" (Note A(1)) is within the terms of the review.

4. For the avoidance of doubt, however, KRW maintains that a review of the practice and procedure of judicial review *in Northern Ireland*, which includes multifarious matters of standing, costs, time-limits for commencing litigation, the duty of candour, discovery and avenues of appeal and re-hearing are inappropriate to be considered by a panel with:

    a. no apparent experience or expertise in the practice and procedure of judicial review *in Northern Ireland*; and

    b. a mandate which is focussed heavily on England and Wales, which has developed different procedures and practices in judicial review from those in Northern Ireland since at least 1999, when the two jurisdictions radically diverged in their respective rules of procedure (and principles and practices associated therewith) applicable in the senior judiciary of each jurisdiction (the Civil Procedure Rules[1] in England and Wales and the Rules of the Court of Judicature[2] in Northern Ireland).

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[1] The Civil Procedure Rules 1998 (as amended) (1998 No. 3132)
[2] The Rules of the Court of Judicature (Northern Ireland) 1980 (as amended) (1980 No. 346)

Question 3: case for statutory intervention and codification of judicial review

5. No attempt at meaningful codification of the substantive law of judicial review could ever achieve clarity, conciseness or public accessibility by any measure. This is broadly because:

    a. the exercise of the jurisdiction to review (in other words, *how* a court approaches a judicial review matter) depends on the power or statute the court is asked to review – there is thus a necessary flexibility which inheres in judicial review and which could not be codified in a way which retains *a meaningful flexibility*; and

    b. because of (a) above, the development of the substantive law of judicial review has been subject to dynamic judicial development and evolution on a "case-by-case" basis – any attempt to *codify* such dynamism defeats the point of such dynamism.

6. As a result of the foregoing, a statute which does anything further than enumerate the widely accepted principles of judicial review could not achieve the kind of drafting necessary to allow for any *meaningful exercise* of judicial review.

7. The analogy that can be usefully drawn with this exercise is to ask the question whether Parliament has ever been successful in codifying the definition of its own sovereignty. Statutes such as the European Union (Withdrawal Agreement) Act 2020[3] and the devolution statutes[4] make passing (or explicit) *references* to the sovereignty of the UK Parliament without attempting to define the term. The reason why this is a useful analogy is because the sovereignty of the UK Parliament is also a judicially created and judicially enforced principle.[5] Plainly, the difficulty in successfully codifying *one* judicially created and enforced principle indicates the difficulty in codifying a *body of such principles*.

8. Within the Northern Ireland context, there are additional difficulties which render codification of the substantive law of judicial review impossible. There are differences between England and Wales on the one hand and Northern Ireland on the other, in the way in which powers and duties in public law are construed and held to apply. A recent case in the Northern Ireland Court of Appeal in which KRW acted illustrates this point: *Hughes and others v Charity Commission*.[6]

9. In *Hughes*, the main controversy surrounded the way in which the Charity Commission for Northern Ireland exercised its powers under the Charities Act (Northern Ireland) 2008 (the 2008 Act). The 2008 Act permits the Charity Commission, a body corporate, to exercise its statutory functions by committee, but the Charity Commission delegated a number of its

[3] Section 38(1).
[4] Northern Ireland Act 1998, section 5(6); Scotland Act 1998, section 28(7); Government of Wales Act 2006, section 107(5).
[5] *Jackson v Attorney General* [2006] 1 AC 262, [102], Lord Steyn.
[6] [2020] NICA 13

functions to its staff. Such delegation was held to be impermissible under the 2008 Act by the Court of Appeal. This contrasts sharply with the case of *Noon v Matthews*,[7] in which the England and Wales High Court had held that a comparable body corporate, the Conservators of the River Cam, could lawfully delegate a prosecutorial function to an employee of the body corporate.

10. Despite having been referred extensively to *Noon* and the reasons set out in that case by Lord Justice Beatson, the Court of Appeal in Northern Ireland interpreted the 2008 Act more strictly than the comparable statute in *Noon*, owing, partly, to a previously decided case in the Northern Ireland High Court: *Re Bell's application*.[8] In *Bell*, Mr Justice Girvan (as he then was) had undertaken an extensive examination of delegation of statutory functions conferred upon bodies corporate *in Northern Ireland*, deciding that such delegation should be construed narrowly. *Bell* had been referred to Beatson LJ in *Noon*, who had held that the reasoning of Girvan J in *Bell* did not apply to the context in *Noon* or to similar decisions in the English High Court.[9] The Court of Appeal, in turn, disagreed with whether the approach in *Noon* was conclusive on the issue of delegation.[10]

11. *Hughes* illustrates one way in which the courts in Northern Ireland take a different approach to statutory powers when compared to the approach taken by the courts in England and Wales. Attempting to codify a uniform "one size fits all" approach across the UK would therefore require a level of detailed, precise and technical language which would, as stated at the start of this section, not result in any level of clarity, conciseness or accessibility.

Question 4: justiciable and non-justiciable powers

12. In the substantive law of judicial review, whether a power is justiciable is a question of constitutional propriety, determined by the judiciary. Among the clearest language demarcating the boundary between what is justiciable and what is not is the decision of the UK Supreme Court in *Miller and Cherry v Prime Minister and others*.[11] In that case, the Court clearly stated that *political questions* were outside the purview of the courts, but *questions of law* with "a political hue" were within their purview. Thus, a court would be incompetent to answer a question of political propriety, but competent to answer the question whether the *legal effect* of political decisions is proper. Statutory codification of this principle would not add any further clarity to it.

13. If, however, the intent behind codification is to *immunise* certain decisions or categories of decisions from judicial review, then the history of such statutory attempts serves as a stark lesson in their impact. Parliament has, throughout history, attempted to immunise certain decisions and determinations from judicial review by purporting to oust the jurisdiction of

[7] [2014] EWHC 4330 (Admin).
[8] [2000] NI 245.
[9] *Noon* (n7 above) at [35].
[10] *Hughes* (n6 above) at [42].
[11] [2019] UKSC 41, [31].

the courts (and especially that of the High Court) in respect of those decisions and determinations.

14. The language Parliament has utilised in this endeavour has ranged from broad (as in *Anisminic v Foreign Compensation Commission*[12] and *R (Privacy International) v Investigatory Powers Tribunal*[13]) to highly detailed (as in *Reg v Cheltenham Commissioners*[14]). However, the effect of such language has been the same – that the jurisdiction of the courts to review the lawfulness of decisions and acts *has not been ousted*.

15. The reason why statutory provisions have consistently failed to oust the supervisory jurisdiction of the courts is that the availability of judicial review is among the most fundamental constitutional protections.[15] As such, it is difficult, if not impossible, to restrict or dislodge in any consequential way. Moreover, the interpretation of statutory language, to determine its legal effect, is a judicial, not legislative function, and one which seeks to determine "not what Parliament meant, but the true meaning of what they said".[16]

16. In determining the "true meaning" of any enacted statute, including one which purports to immunise any power from judicial review, the courts utilise various rules of proper construction in order to give a meaning to statutory provisions which is, as far as possible, constitutionally appropriate. One of the most important of such rules is the principle of legality, which was articulated thus: "Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption."[17] One such principle and tradition of the common law, self-evidently, is the availability of judicial review.

17. Decisions in the Northern Ireland courts, such as *Hughes* and more recently, *McNern's application for judicial review,*[18] which concerned a challenge to the failure of the Executive Office in Northern Ireland to take certain actions in relation to the provision of pensions in relation to injuries sustained during the Northern Ireland Conflict, illustrate a particular focus on accountability for powers and duties at public law.

18. *McNern* in particular is illustrative of the kind of legally consequential political decision-making which the Supreme Court had (in *Miller and Cherry*) had held to be entirely justiciable. In that case, two individuals who claimed entitlement to a pension were denied the ability to make their claims because the Executive Office had failed to designate a Northern Ireland department to exercise functions relevant to the administration of

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[12] [1969] 2 AC 147.
[13] [2019] UKSC 22.
[14] (1841) 3 QBD 467.
[15] See e.g. *R (Cart) v Upper Tribunal* [2011] UKSC 28, [122] per Lord Dyson JSC.
[16] See e.g. *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft* [1975] AC 591, per Lord Reid.
[17] *R v Home Secretary, ex p. Pierson* [1998] AC 539, per Lord Steyn.
[18] [2020] NIQB 57.

the scheme of such pensions. Although the failure had been due to overtly political reasoning (relating to the funding of and eligibility for the pensions), such that the Court was invited to conclude that it was incompetent to determine the issues, Mr Justice McAlinden in the High Court dismissed the argument of the Executive Office in strong terms[19] and upheld the applicants' challenge in that case.

19. No form of codification could take the foregoing matters into account in a way which results in neat and exhaustive categories of justiciable and non-justiciable powers, especially if the intent underlying such codification is to reduce the category of justiciable powers in favour of enlarging the category of non-justiciable powers.

Question 5: procedure

20. As previously set out, KRW strongly submit that a panel with no apparent experience or expertise in the practice of judicial review in Northern Ireland is ill-equipped to consider questions pertaining to the procedure of judicial review *in Northern Ireland*.

21. However, in the interest of completeness, it is necessary to briefly touch on issues raised by way of Question 5. Firstly, the language used in formulating Question 5 suggests that this question is premised entirely on judicial review practice and procedure in England and Wales. In that jurisdiction, a judicial review is a modified Part 8 claim,[20] whereas in Northern Ireland, it is an originating application under Order 53 of the Rules of the Court of Judicature.[21] This distinction is consequential in that it is reflected, for example, in the language of the Internal Market Bill.[22]

22. Moreover, the time-limits for commencement of judicial review litigation also differ between the two jurisdictions: whereas in Northern Ireland, *all* judicial review applications must be commenced within three months from the date when the grounds for such applications arose, in England and Wales, claims in respect of planning matters must be filed no later than six weeks after the grounds for such claims first arose, and all other claims must be filed *promptly and in any event not later than three months* after the grounds for such claims first arose. The promptitude requirement which the Civil Procedures Rules retain was deleted in Northern Ireland[23] following the judgment of the Court of Justice in *Uniplex (UK) Ltd. v NHS Business Services Authority*[24]. This was done in order to *provide* certainty to litigants.[25]

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[19] *Ibid.* [26].
[20] CPR 54.1(e).
[21] Order 53 Rule 1, RCJ (NI) 1980.
[22] Clause 47(8).
[23] The Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017.
[24] Case C-406/08, judgment of 28 January 2010.
[25] See e.g. Andrew Ryan, 'Judicial Review – no need to be prompt in Northern Ireland' *Irish Legal News* (19 January 2018).

Conclusion

23. The foregoing matters illustrate the impossibility of approaching statutory codification of judicial review, whether in its substantive or procedural law, on a UK-wide basis, while still aiming for clarity, certainty and accessibility.

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13 October 2020