Submissions in response to IRAL 'Call for Evidence'.
Patrick O'Connor Q.C., Doughty Street Chambers: 26.10.20.

Introduction.

1. The IRAL has called for submissions under their Section One Questionnaire exclusively from Government Departments. Otherwise, issues are raised under Section 2, Codification and Clarity: and Section 3, Process and Procedure. Since mine is an individual submission, I do not have the resources or the overview necessary to providing detailed answers to Qs. 2 and 3. I wish therefore to make some general and contextual submissions about the work of IRAL, which are relevant to those two questions.

The IRAL process.

2. The process for this review is opaque. At the moment, it seems possible that the Review will conclude and report simply on the basis of answers to the above questions. This is unsatisfactory and unlikely to produce a fair representation of the issues. For example, the answers to the Questionnaire under Section One will inevitably provide a one-sided picture from the Executive side, to which there seems to be no provision for any answer. After all, Claimants' lawyers may well be able to provide in response a quite different perspective upon the detailed examples provided by the Executive. If this is to be an exercise 'behind closed doors', a heavy burden must therefore be accepted by the Review to scrutinise with great care the answers to this Questionnaire. No government department, but perhaps especially not of this government, is above presentational devices of various degrees. Every Department of this government will know what answers are expected by the Cabinet Ofice. It would be naïve for this Review simply to take Questionnaire answers at face value.

3. More generally, the first sentence of the Introduction to the Call for Evidence seeks to investigate "…how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive …. etc." Yet this exercise makes no provision for the first part of that balance to be evidenced. It is not at all clear why is there not an equivalent questionnaire for citizens and their representatives, exemplifying the positive values of JR as it currently operates, and consequent improvements in public administration?

4. Even Question 2 of the Questionnaire for Government Departments asks "*In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? "* The focus is upon process and effectiveness in that question. Why is there no question about

substance: asking "*does the prospect of being judicially reviewed improve the quality of your decisions?"* Many public law commentators argue that this is a significant public benefit from effective 'JR': e.g. from ensuring the taking into account of all relevant factors: allowance for legitimate expectations: and the giving of reasons. If such a question produced acknowledgements from decision makers in Government Departments to that effect, that would be highly significant for the Review. It would also reveal some commonality of interest between each side of the posited 'balance'. This is not a 'culture war'. There seems to be either no interest in exploring this possibility, or an unwarranted assumption that no such acknowledgement would emerge.

5. These are telling features of the current exercise, which are not just linguistic. They are indicators that this Review is too closely restricted by the agenda of the current Government, which is clearly to restrict the breadth and availability of JR. The contrast between the priorities of the Labour Government's Green Paper, Cm. 7170, July 2007, 'The Governance of Britain.' and those behind the current Commission is telling. In 2007, they were "The proposals published in this Green Paper seek to address two fundamental questions: *how should we hold power accountable,* and how should we uphold and enhance the rights and responsibilities of the citizen?" The current government seems to be more concerned to protect the exercise of power from legal challenge and accountability. Professor Meg Russell has made this point to PACA, hearing of 6.10.20., transcript, Q.5 and Q. 22.

6. The IRAL is part of the "Constitution, Democracy and Rights Commission', (as yet not established), which will look at "the broader aspects of our constitution" and "come up with proposals to restore trust in our institutions and in how our democracy operates". The relationship between the two is ill-defined. There is however some irony in an overall concern to 'restore trust in our institutions', and yet an agenda to limit accountability of those institutions to the law. The public have enormous and enviable faith in our judiciary. They therefore will have all the greater trust in our institutions if they are subject to effective scrutiny by a body they trust, to ensure that those institutions act within the law.

7. The 'terms of reference' of IRAL require that " It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive *to govern effectively under the law*. " The major concern of the government must arise from litigation which they have lost, and in which the Court has ruled that the government were not acting in accordance with the

law. The Government presumably disagrees with such rulings. Unless the Review is convinced that the Court ruling was wrong, then the basic premise does not arise. This puts the Review in a very strange constitutional position. The Government has every legal resource to appeal and to reverse the objectionable ruling in the normal way. Is the Review being asked to gainsay the extant rulings of the Courts?

8. This basic confusion led Lord Sumption to state to PACA Committee in their public session, 6.10.20. [in answer to Q. 29, transcript available], that an effective review would require a wholesale re-write of administrative law. "*For that reason, I think that the only practical way of actually dealing with this issue—and I think it is an important issue on which I have some sympathy for the Government position—is to codify and rewrite the whole of English administrative law. I don't think that that is going to be an easy thing to do and I don't suppose that is going to commend itself to the Government, but that simply underlines the difficulty of what it is trying to do. Without rewriting the whole of English administrative law, you are not going to alter attitudes that I think the Government are right in thinking have occasionally trespassed from strictly legal issues to purely political ones. There is not a neat boundary line between those two things but there is a broad band that separates the two and I think one needs to recognise that."*

9. Note D to the IRAL Terms of Reference, says: "The Panel will focus its consideration of the justiciability of prerogative powers to the prerogative executive powers as defined in 3.34 of the Cabinet Manual. " Yet this very important constitutional issue is not mentioned in the Questions at Section 1, 2 or 3, upon which submissions are invited. This is not an optimal way to proceed.

<u>The Political Agenda.</u>

10. It is worth foregrounding the political agenda behind the bland appearance of many of the issues placed before this review. The establishment of IRAL is testament to the influence of Policy Exchange, and its connections with Michael Gove, who was its chair when set up in 2002. Policy Exchange is a well funded, so called 'centre right' Think Tank. It also scores 'zero' for transparency on the sources of its funding, which is probably from ultra-conservative American organisations. Though not entirely clear publicly, it seems that Michael Gove, as Minister for the Cabinet Office, has overview of this CDR Commission and IRAL.

11. Policy Exchange, through its sub-group, the Judicial Power Project, has a long history since at least 2013, of discovering, or fomenting, so- called

'public concern' about what they called 'judicial overreach'. This focused upon the breadth of judicial review, especially in application of the Human Rights Act. 'Modernising' the latter is one of the issues designated for the Commission. It is worth examining their best effort to articulate their objections. They produced a glossy booklet called '*Human Rights and Political Wrongs: a new approach to Human Rights law'*, by Noel Malcolm, in 2017. He tried but utterly failed to identify the boundary of what properly falls within the remit of the Courts and what would be 'overreach'.

12. Similarly with the successive lectures of Lord Sumption over many years on the same topic. He has been remarkably cavalier with his attempts at examples of 'judicial overreach'. In his Mann lecture of 2011, Sumption suggested four examples of 'judicial overreach', including the Pergau Dam case. All four were promptly refuted by Stephen Sedley in the London Review of Books. In his 2013 Kuala Lumpur lecture, these examples disappear. Instead he castigated the '*ex parte Witham*' decision of 1997. This struck down an Order imposing unaffordable fees for a litigant, since it impeded the right of access to the Courts, without express power. He called this a '*revealing example*' of '*precisely the kind of policy decision which on any orthodox view of English public law is not for judges. It is an inescapably political question*.' The 2017 Supreme Court in the 'Unison' case reached the same decision upon the same grounds as *Witham*, which was expressly approved. Sumption now in his Reith Lectures describes the Unison decision as '*perfectly orthodox*.'

13. He too in his Reith Lectures advanced no explanatory principle which could distinguish those 'political' issues which fall outside the proper domain of 'the law'. Nor does Sumption suggest a 'political' mechanism by which such issues could be decided. Is it realistic to imagine a Parliament which could find the will, and the necessary time and resources? Nor does he suggest a practical means by which the 'law' should withdraw from its extended 'empire'. Would this need legislation, or should the Supreme Court re-consider several decades of decisions about the boundaries of public law?

14. Sumption seems to have abandoned any attempt, to draw a principled boundary between the law and what should be left to politics. He said this to the PACA hearing on 6.10.20., on Q. 29: "I think it is a mistake to try to separate out judicial review generally from the other constitutional issues because judicial review at the moment is one of the two major ways—the other being parliamentary scrutiny—in which Governments can be kept within their proper function. I don't think that anybody is suggesting that simply because there is a large political element in a particular judicial

decision it should not matter whether the Government exceeds their powers or behaves in a way that is unlawful. You have to preserve some system for ensuring that the courts are able to do that. That clearly has major constitutional implications that are very difficult to separate from the broader constitutional issues that we have been discussing to date."

15. The prisoner rights case of *Ex parte Daly* [2001] UKHL 26, perhaps highlights the difficulty of drawing any principled boundary. This decision was based first upon "*an orthodox application of common law principles*", taking account of the balance between prisoners' rights and the need to maintain discipline and security in prisons. It then turned to parallel ECHR rights, which confirm that assessment. If the common law '*balancing exercise'* was not '*judicial overreach'*, then how can it become so when, a few paragraphs later, parallel Convention rights are considered?

Question: Section 2.

16. In relation to IRAL's Section 2, Codification and Clarity, the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should not be codified in statute. This is a centralising Government with a large majority which would restrict JR by means of 'codification.' This would have the defect of removing the flexibility of the 'common law' which is almost universally praised as one of the glories of our legal system. It would be bound to create a rigid framework which would not survive the test of time. It would also politicise this aspect of the law, and start a fraught process of change with successive governments.

Timetable.

17. Generally, I would hope that the Review will push back against any implicit or explicit timetabling pressures to produce its report. There are many commentators including Lord Sumption, who are responsibly explaining the complexity of these issues. Time and care is required before potentially, for example, reducing a part of our delicate constitution to written form, and in isolation from a wider Constitutional Review. Note (2) to the IRAL Terms of Reference advises: "The review will consider whether there might be possible unintended consequences from any changes suggested. " The greatest such risk would arise from a rushed process.

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