THE BAR of NORTHERN IRELAND

Independent Review of Administrative Law

Call for Evidence

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction. Northern Ireland's independent referral Bar represents one of the cornerstones of our legal and justice system with an important history of providing expert impartial representation across a range of areas. This includes judicial review which the recently initiated Independent Review of Administrative Law purports to investigate and potentially limit across the United Kingdom. This is deeply concerning for the Bar Council, particularly given that our society in Northern Ireland is distinct from other parts of the UK as one which still experiences a legacy of conflict alongside the unique constitutional arrangements that have arisen from this.

2. More broadly, the Bar Council observes that judicial review is not a branch of substantive law that can simply be altered to implement a change of Government policy in a particular field of law. It is a procedure that allows citizens to challenge the lawfulness (i.e. not the merits) of decisions by the Government and other public bodies. It reflects the constitutional role of the court in ensuring that the powers of the executive and the legislature are exercised in accordance with the law. The separation of powers and the rule of law as fundamental constitutional principles are central to this Review; judicial review and the values upheld by it sit within the very foundations of the UK constitution. Therefore any effort to curtail judicial review in the manner suggested by the Terms of Reference is very concerning as it potentially alters this constitutional balance by seeking to reduce the power of the court and, correspondingly, increase the power of the executive.

3. The Bar Council notes that the Independent Review of Administrative Law was initiated by the Ministry of Justice in July 2020 and yet the process governing the Review still appears unclear. However, it is evident from the wide-ranging scope of the Terms of Reference that the Government has embarked upon a fundamental review of judicial review, both substantive and procedural. The title of the self-described 'Call for Evidence' issued in September 2020 '*Does Judicial Review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?*' appears to be a loaded question. It is also a question on which the Review's Chair has already publicly expressed his view around the decision in *Cherry/Miller (No 2)* [2019] UKSC 41 in which the Supreme Court "*mishandled the law*

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

of our constitution which it was duty-bound to apply".[1] Therefore we would also query the extent to which this Review can truly be described as 'independent' in light of such a public statement.

4. The Review Chair also suggests a way in which the Government could respond to the decision: "*What can the Government do? It can hope that the decision will simply be a one-off and that later courts will decline to follow the judgment further. That might prove to be wishful thinking. Or it can invite Parliament to legislate to settle authoritatively the non-justiciability of the prerogative power to prorogue Parliament and perhaps also to impose further limits on the scope of that power. While they are at it, Parliament might want to legislate to protect other, related prerogative powers. Legislation of this kind may be the only way to limit the courts' incursion into political territory*".[2] The Bar Council takes the view that these public statements have undermined confidence that the Review will be independent and created a perception that it may not be neutral on the very matter which it has been designed to consider.

5. The Call for Evidence states that the Review Panel is "*particularly interested in receiving evidence around any observed trends in judicial review, how judicial review works in practice and the impact and effectiveness of judicial rulings in resolving the issues raised by judicial review*". It includes a questionnaire which is unlikely to elicit a fair and balanced spectrum of evidence for the Review Panel. Firstly, the questionnaire is directed only to Government Departments. There is no opportunity for other potential categories of parties, such as applicants and notice parties, to provide evidence. There is therefore no balance of views, with evidence being sought only from those whose decisions are challenged by way of judicial review. Secondly, the questionnaire itself is skewed to obtain (i) complaints about the present jurisdiction of the courts in judicial review and (ii) proposals designed to reduce the accountability of the Government to the courts. There is no corresponding section inviting proposals to remedy deficiencies in the process or to extend the powers of the courts. Consequently, the Review Panel is unlikely to have all of the relevant evidence to carry out its task properly.

6. The Call for Evidence also gives a timeframe of just six weeks (subsequently extended to seven) for responses which the panel will then use as a "*strong evidence base*" around which to develop its analysis. The Cabinet Office's own 'Consultation

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

[1] Policy Exchange, '*The Law of the Constitution before the Court, Supplementary Notes on The unconstitutionality of the Supreme Court's prorogation judgment'*, Professor John Finnis (2019) at https://policyexchange.org.uk/wp-content/uploads/The-Law-of-the-Constitution-before-the-Court.pdf

[2] Ibid

Principles'[3] linked to within the Call for Evidence note that consultation exercises "*should last for a proportionate amount of time*" based on legal advice and taking into account the nature and impact of the proposal. Indeed the exercise must also be governed by certain entrenched common law principles, namely that consultation must be conducted at a time when the relevant proposal is at a sufficiently formative stage, adequate information and time must be provided to allow a proper and informed response and there must be conscientious and open-minded consideration of all responses.[4] The Bar considers that a timeframe of just seven weeks for consultation with stakeholders is entirely inadequate for a subject matter of such importance for citizens across all jurisdictions of the UK.

7. The Bar's detailed submission to the Independent Review of Administrative Law's Call for Evidence is principally aimed at addressing the premise of the Review's Terms of Reference insofar as they relate to Northern Ireland and to explain why reforms that would impact on the capacity of the courts in Northern Ireland to review administrative decisions would be seriously detrimental to the public interest here given our unique circumstances as a society with a history of conflict and division. It reflects the views of our practitioners with many years of dedicated experience specialising in judicial review work. Our response is structured to begin with an overview specifically placing the Review's Terms of Reference within context for Northern Ireland before dealing with the specific questions detailed in the Call for Evidence document.

Overview: Judicial Review in Northern Ireland

8. The introduction to the Call for Evidence states that the IRAL is interested in "*all UK-wide and England and Wales powers only*" and "*will not consider any changes to devolved policy".* The focus on England and Wales is also apparent from the composition of the Review Panel which includes only one member with a primary interest in public law outside England and Wales, Professor Alan Page. However, the Call for Evidence distributed to "*all listed parties*" clearly goes beyond Government Departments and the jurisdiction of England and Wales. Whilst Professor Page's expertise in the Scottish devolution arrangements will undoubtedly benefit the Review Panel, we would stress that Northern Ireland's constitutional settlement is completely unique within the United Kingdom and entirely different to that which exists in Scotland. Therefore the Bar is surprised and alarmed by the omission from the panel of any apparent experience or expertise in the practice and procedure of judicial review in Northern Ireland. It also renders it difficult to see how the panel

[3] Cabinet Office, *Consultation Principles*, published 19 March 2018 at https://www.gov.uk/government/publications/consultation-principles-guidance

[4] *R v Brent London Borough Council, ex parte Gunning* [1985] 84 LGR 168

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

could adequately ensure that "*any wider implications for the devolved administrations will be carefully thought through".*

9. The Bar also contends that it is not entirely clear what is meant by "*devolved policy*" and "*UK-wide policy*". In any event, there appears to be a two-fold assumption underpinning the Terms of Reference that (i) the Westminster authorities have the power to change the law and practice of judicial review in Northern Ireland to the extent that 'UK-wide policy' is concerned; and (ii) changing the law on 'UK-wide policy' without corresponding changes relating to judicial review on devolved matters is practicable. The Call for Evidence also suggests that it is anticipated that the Review will have some implications for judicial review in Northern Ireland given that *"the Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies".*

10. There is no indication as to what "*minor and technical changes*" might mean in practice as the Call is silent on the aspects of court procedure that might be engaged. Indeed if the review ultimately recommends a more restrictive form of judicial review, it is unclear as to whether there would even be political support for any such move intent on limiting access to justice in Northern Ireland.

11. The Review Panel will appreciate that justice, including judicial review, is a devolved (transferred) matter in Northern Ireland and it is worth noting this regardless of whether the panel recommends changes to the legal principles governing judicial review or only "*minor and technical changes to court procedure*". Parliament cannot legislate unilaterally about devolved matters without breaching the Sewel Convention; any legislation traversing on devolved matters normally requires a Legislative Consent Motion in the Northern Ireland Assembly.[5]

12. Therefore an attempt to change the law governing judicial review around excepted and reserved matters (UK-wide policy) would be constitutionally illegitimate. Parliament can properly change the substantive law of, for example, immigration (a UK-wide policy matter that has not been transferred) but the powers of the courts on a judicial review of those making immigration decisions are devolved (transferred) matters. When judicially reviewing immigration decisions, the courts in Northern Ireland are not exercising statutory powers created by the (UK-wide) immigration legislation but common law powers of the courts in this jurisdiction. Matters

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

[5] See also Dr. Ronan Cormacain, '*Legislative Competence in Northern Ireland and the Independent Review of Administrative Law*', U.K. Const. L. Blog, 15 October 2020, available at https://ukconstitutionallaw.org/

concerning the powers of the Supreme Court are excepted matters but not matters concerning the powers of the High Court or the Court of Appeal.[6]

13. Furthermore, even if any legislation were to contain ouster clauses purporting to restrict the power of courts to review decisions in relation to an excepted matter, such as immigration, the scope and effect of such clauses would remain a matter of law for the courts in Northern Ireland to decide.[7]

14. Insofar as legislation were effective to limit the scope of judicial review in Northern Ireland over matters which are excepted or reserved (as decisions being made by the UK Government), this could give rise to a situation where different laws, practices and procedures could apply to different respondents in the same case, for example, in applications where both the Secretary of State and Stormont Ministers are respondents by virtue of their respective powers and duties (as was the position in the recent case involving the Executive Office's failure to establish the Troubles victims' payments scheme - *Re McNern and Turley* [2020] NIQB 57). This would result in the case against the Secretary of State having to be argued under the new UK judicial review law and procedure but against the Stormont Ministers under Northern Ireland judicial review law and procedure; a form of two-tier justice that would be difficult to justify and complex to operate in practice.

15. Beyond the broader questions as to whether an Act of Parliament purporting to abolish or curtail judicial review could be struck down as unconstitutional,[8] any such legislation if effective would have a particularly detrimental effect on the public interest in Northern Ireland. Given the unique constitutional arrangements in this jurisdiction and the periodic political vacuums in power, the judicial review role of the courts in Northern Ireland has proved to be indispensable and any attempt to restrict its availability would be contrary to the public interest. During times of general political instability and uncertainty, aggrieved applicants have been able to resort to the judicial review court and resolve disputes in an ordered, constructive and constitutional manner.

16. Northern Ireland's devolution settlement is inextricably linked to the divisive issues which precipitated its inception and still characterise its operation in the present day.[9] In respect of transferred powers, Northern Ireland's Government operates by way of mandatory coalition which brings its own unique governance challenges with political

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

[6] Northern Ireland Act 1998, Schedule 2, paragraph 11A
[7] *R (Privacy International) v IPT* [2019] UKSC 22
[8] *R (Jackson) v AG* [2006] 1AC 262 at paras 102, 104-107
[9] Colin Knox, *Devolution and the Governance of Northern Ireland*, Manchester: Manchester University Press, 2010, page 8

stability often reliant on the relationships between opposing political parties within a multi-party Executive. Disputes about decisions made by the Government can arise which renders it particularly important for judicial review to operate effectively and without impediments. The courts cannot resolve political disputes but the role they can and do perform is to review the legality of political decisions that are challenged by an aggrieved applicant with the standing to do so (on occasion, a Minister in the same Government as the Minister whose decision is challenged).[10]

17. Consequently, judicial review is a safety valve that not only redresses the grievances of those adversely affected by official decisions but, by providing an independent and impartial dispute resolution mechanism, helps to keep Government functioning in this jurisdiction. This is done within conventional legal limits but it is a constitutional safeguard that is particularly needed in Northern Ireland where, unlike the other devolved regions of Scotland and Wales, Governments are not formed on a normal majority basis and are not necessarily composed of Ministers with a shared vision and collective responsibility.[11]

18. Judicial review is a safeguard that also operates in the absence of a functioning Government. Historically, the UK Government has assumed powers to administer direct rule from Westminster in the absence of a devolved administration. However, this did not happen in the three years between January 2017 and January 2020 with the Northern Ireland Civil Service taking responsibility for the day-to-day running of public services without ministerial direction. This inevitably gave rise to serious issues concerning the powers of civil servants to make decisions that would ordinarily have been made by Ministers or by the Executive.[12] This overlapped with issues concerning the decision by the UK Government to permit this situation and the extent of its legal obligations to exercise the powers in the Northern Ireland Act 1998 to deal with it. It is difficult to imagine how a judicial review addressing these matters globally could have been properly conducted if the law and procedure governing the application depended on (and varied with) the status (UK or devolved) of the respondent.

[10] For example, see *The Minister of Enterprise Trade and Investment's Application* [2016] NIQB 26
[11] Ray McCaffrey, '*Coalition Government and the Power of Ministers and the Executive*', NI Assembly Research and Library Service Briefing Note, Paper 99/10 (28 September 2010) at http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2010/executive-review/9910.pdf
[12] Institute for Government, '*Governing without Ministers: Northern Ireland since the fall of the Power-sharing Executive*', September 2019 at https://www.instituteforgovernment.org.uk/sites/default/files/publications/governing-without-ministers-northern-ireland.pdf

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
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Questionnaire

Section 1 – Questionnaire to Government Departments

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

19. The Bar is very concerned by the Review's inclusion of a questionnaire directed solely to Government Departments. The questions also push respondents towards considering whether the prospect of judicial review "*seriously impedes the proper or effective discharge of central or local governmental functions*" and results in "*compromises which reduce the effectiveness of decisions*".

20. We cannot see that there is any acceptable rationale behind the omission of a corresponding invitation for the comments of other organisations for whom judicial review is also significant as they may be able to provide a contrasting viewpoint around the impact of judicial review. Therefore we are forced to conclude that the Review has failed to provide an open and balanced opportunity for organisations working across a wide range of sectors with experience of judicial review to provide evidence. This ultimately casts doubt on whether any options for reform which the Panel will present to the Lord Chancellor and the Chancellor of the Duchy of Lancaster towards the end of the year will be properly informed by a representative evidence base.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

21. There are a number of additional points which the Bar would make in relation to the IRAL's Terms of Reference. They appear to be premised on an assumption that judicial review currently interferes with the discharge of Government functions and is therefore an area requiring change; any such change is misleadingly described as an 'improvement' to the law in this question.

22. It is concerning that suggested reforms, such as to the duties of candour and disclosure, referred to in the Review's Terms of Reference could restrict the scope of a challenge by removing a vitally important safeguard against unlawful, improper and otherwise flawed administrative decision-making. The Bar would also query whether it could ever be regarded as constitutionally proper for the scope of a challenge to the Secretary of State or the duties owed to the court in terms of disclosure and candour to be narrower than those applicable to the devolved administrations.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

23. It is unclear as to how such differential and, by definition, lower standards could be defensible if the justification for judicial intervention in both cases is the same in order to ensure that decisions are made within the law. It is also worth noting that in light of significant failings in record keeping and transparency concerning the RHI scheme in Northern Ireland, the RHI Inquiry report published in 2020 recommended that "*notes of significant meetings between officials and ministers, particularly those affecting decision-making and spending, must be taken and retained. The responsibility for ensuring this is done should be clearly identified and compliance should be ensured in practice*".[13] The Review's Terms of Reference refer to the 'unintended consequences' of any changes and we would again stress the potential difficulties with the operation of two different legal and procedural frameworks for judicial review across NI and the UK.

24. The Bar also notes that the Review's Terms of Reference do not make any mention of the Human Rights Act 1998. However, we would query whether consideration of the grounds for judicial review will stray into the realm of human rights law and to the extent that the Human Rights Act 1998 is a 'UK-wide' statute, any narrowing of the grounds under the Act would likely have direct implications for Northern Ireland. The potential arises for a system emerging whereby decisions of the Secretary of State would be challengeable with reference to grounds that are narrower than those that would apply to other section 6 public authorities in Northern Ireland.

25. Beyond the cases detailed elsewhere relating to the lack of a devolved administration in Northern Ireland, there are a range of other notable cases relevant to the unique context of Northern Ireland in which judicial review was the only available and effective way in which the applicants could pursue particular rights based challenges. One example of this is *Re Ewart's Application* [2019] NIQB 88[14] which concerned the incompatibility of abortion law in Northern Ireland, specifically sections 58 and 59 of the Offences Against the Person Act 1861 and section 25(1) of the Criminal Justice Act (Northern Ireland) 1945, with Article 8 ECHR. Other recent cases include one relating to a challenge to the prohibition on same-sex marriage in Northern Ireland under the Marriage (Northern Ireland) Order 2003 (*Re Close et al* [2020] NICA 20) and the case of *Re Siobhan McLaughlin* [2018] UKSC 48 involving a challenge to Northern Ireland's Department for Communities for refusing to pay widowed parent's allowance to a mother solely on the grounds that she had not been married to her partner before his death.

[13] The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme, March 2020, R26 at https://www.rhiinquiry.org/report-independent-public-inquiry-non-domestic-renewable-heat-incentive-rhi-scheme

[14] See also *Re Northern Ireland Human Rights Commission's Application* [2018] UKSC 27

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

26. The Review's Terms of Reference begin by asking whether "*the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute*". The notes to the Terms of Reference then ask, among other things, whether such legislation codifying the grounds of review would "*promote clarity and accessibility in the law and increase public trust and confidence*" in judicial review.

27. The Bar considers that it would be very difficult to codify the substantive law of judicial review in any meaningful way in order to achieve greater clarity or accessibility given the gradual evolution and context sensitive nature of its development and application. It is difficult to envisage any way in which a statute could do anything further than merely detail the widely accepted high-level principles of judicial review without impinging on the flexibility inherent in its operation in the context of each individual case. Any attempt to set down in statute the grounds of judicial review in a meaningful amount of detail would likely be very lengthy, detailed and technical rendering it far from clear and accessible to the general public. In addition, many of the grounds of judicial review cannot be meaningfully defined in the sort of abstract way that codifying legislation would necessarily adopt because they interact with the diverse statutory frameworks that define the powers whose exercise is under review in any given case.

28. The Bar anticipates that the Review may in any event prefer a 'restrictive' model of codification that would purposely aim to narrow the grounds upon which judicial review can occur. It is unclear from the Terms of Reference as to how this might be attempted but this ultimately turns on the Review's flawed central assumption that the law of judicial review can be changed or codified just as any other area of law can be. Furthermore, the political narrative surrounding the Review mistakenly assumes that judicial review has been synonymous with overreach through the development of the grounds for review.

29. Such an assessment is incorrect and neglects the nuance found in the wider body of case law in which the court has sought to prevent the proliferation of grounds for judicial review. For example, the case of *R (on the application of Gallaher Group Ltd and others) (Respondents) v The Competition and Markets Authority (Appellant)* [2018] UKSC 25 in which the court held that domestic administrative law does not recognise a distinct principle of equal treatment. Lord Sumption stated at [50]: "*In*

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories".

30. In addition, there are a number of case examples in the context of Northern Ireland in which the judiciary has declined to intervene which demonstrates the way in which they very clearly respect the boundaries between the courts and the Executive. The Review Panel should consider the case of *Re McGuinness' Application (Leave)* [2019] NIQB 92 in relation to decision making in the absence of a Justice Minister which again illustrates the very particular political difficulties in this jurisdiction. Another useful case is *The Department of Justice v Bell (Patricia) and Police Ombudsman for Northern Ireland* [2017] NICA 69 in which Gillen LJ espouses a number of important principles at [19] in distinguishing between decisions for the Executive and the courts: "*There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary*".

31. Furthermore as highlighted above in our overview, the Review's Terms of Reference are focused entirely on England with little concern shown for the potential impact on judicial review proceedings in Northern Ireland. Any statutory intervention in the process would potentially have a detrimental impact on the complex, esoteric and unique nature of the Northern Ireland constitutional settlement, particularly the ever evolving one which has pertained since the passing of the Northern Ireland Act 1998. The Review Panel should note a number of judicial review cases of relevance which demonstrate the essential role which our courts play in safeguarding the rights and protections afforded to all citizens by the Belfast Agreement and the 1998 Act.

32. The appeal case of *Re Buick's application for Judicial Review* [2018] NICA 26 concerned a successful challenge to the Department for Infrastructure to grant planning permission for a major waste treatment centre and energy from waste incinerator in the absence of a Minister. In the context of the fragile political backdrop outlined, the importance of the role of the court as a bastion of democratic accountability and protector of the unique constitutional arrangements in Northern Ireland's post-conflict society cannot be underestimated. Meanwhile the decision also led directly to the recently restored Northern Ireland Assembly enacting the Executive Committee (Functions) Act (Northern Ireland) 2020. The court's exposure of a problem as part of a democratic legal process led to the Executive taking the steps which it determined appropriate in order to respond to it; no Government committed to the principles of democracy and the rule of law should be threatened by such outcomes.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

33. Statutory intervention could also have a negative impact on the important role that judicial review plays in allowing some of the most vulnerable in society to vindicate their fundamental rights in the Northern Ireland context. The case of *JR80's Application* [2019] NICA 58 involved an application brought by a survivor of Historic Institutional Abuse who successfully challenged the failure to implement a redress scheme as recommended by the final report of the Historical Institutional Abuse Inquiry delivered in January 2017. The Court of Appeal concluded that the Executive Office had the power to implement the scheme under the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 at [118], which permitted civil servants to act in the absence of Ministers (a form of governance which the court considered "*neither democratic nor appropriately accountable*" at [93]).[15] It also highlights the kind of difficulties that would arise if, in any case, the court were obliged to consider the legal liabilities of respondents under two different legal and procedural frameworks, i.e. one for the UK Secretary of State and one for the Executive Office as the devolved Department.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which? 5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

34. The Bar notes that the Terms of Reference refer to "*whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government*". We can infer from this that the Review intends to narrow the circumstances in which matters are justiciable and potentially place certain 'subjects' or 'areas' beyond judicial review.

35. The Supreme Court case of *Cherry/Miller (No 2)* [2019] UKSC 41 already clearly demarcates the boundary between what is justiciable and what is not at [31]: "*The courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been*

[15] See also comments of McCloskey J in his leave decision (see [2018] NIQB 32 at [13]):"*One of the consequences of the [indefinite moratorium afflicting the Executive and legislature of Northern Ireland]… is that members of the Northern Ireland population are driven to seek redress from the High Court in an attempt to address aspects of the void brought about by the absence of a functioning Government and legislature… While the spotlight on the implementation of the HIA redress proposals should be firmly on the Northern Ireland Executive and Assembly it is, rather, on the courts*".

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

sufficient reason for the courts to refuse to consider it… almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense". Therefore the courts are clearly competent to answer questions as to whether the legal effect of political decisions is proper and statutory codification of this principle would not add any further clarity to it.

36. However, the Bar is very concerned that the Review intends to remove certain categories of decision from judicial review altogether. It is worth noting that statutory provisions have consistently failed in the past to oust the supervisory jurisdiction of the courts given that the availability of judicial review is among the most fundamental constitutional protections. This can be seen in the case of *R (Privacy International) v IPT* [2019] UKSC 22 in relation to the use of ouster clauses. Consequently, it is difficult, if not impossible, to restrict or dislodge judicial review in any consequential way and no form of codification could easily result in exhaustive categories of justiciable and non-justiciable powers. Nevertheless, it is a troubling objective and serves to reinforce the perception of a slanted consideration of judicial review.

37. The Bar also believes that it is vital to reference the unique constitutional context of Northern Ireland again in response to these questions given that any changes around justiciability could have an impact on cases in this jurisdiction. For example, the case of *Re McNern and Turley* [2020] NIQB 57 involved a legally consequential political decision in relation to the failure of the Executive Office and Secretary of State for Northern Ireland to establish a Troubles Victims' Pension Scheme as required under the Northern Ireland (Executive Formation etc) Act 2019 and the Victims' Payments Regulations 2020. McAlinden J observed at [27]:

> *"Put in its starkest terms, the Executive Office seeks to persuade the Court that it is legitimate for the Executive Office to deliberately refuse to comply with a legal requirement set out in a legislative scheme promulgated by the Westminster Parliament in order to force changes to that legislative scheme.* ***This is a truly shocking proposition. It demonstrates either wilful disregard for the rule of law or abject ignorance of what the rule of law means in a democratic society****".*

38. The need for judicial supervision to secure compliance both with the law and with acceptable standards of decision-making is particularly apparent in this case. This case again highlights the kind of difficulties that would arise if the court were obliged to consider the legal liabilities of respondents under two different legal and procedural frameworks with one for the UK Secretary of State and one for the Northern Ireland Minister or Department. We are also left querying whether the Review panel has given any consideration to whether the removal of 'areas' or 'subjects' from the scope

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

of judicial review could have a subsequent impact on limiting the ability of citizens in Northern Ireland seeking redress from the court which at times can provide the only effective way of securing a necessary remedy in this jurisdiction.

39. The Bar urges the panel to proceed with great care and caution in this area. We would also point to the recent case of *R v Adams* [2020] UKSC 19, which was not a judicial review case but a criminal appeal. However, unusually it was one that turned on a point of public law, relating to the application of the *Carltona* principle.[16] The significance of this case is that it demonstrates that administrative law is not a discrete area to which only judicial review is relevant. The potential restriction of justiciability, or of the grounds on which unlawfulness may be found, may reasonably be expected to have consequences beyond the practice of judicial review that may not be immediately apparent.

Section 3 – Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

40. Yes. The construction of the questions in this section suggest that they are premised entirely on judicial review practice and procedure in England and Wales. There are differences between the two jurisdictions as in Northern Ireland judicial review is an application originating under Order 53 of The Rules of the Court of Judicature (NI) 1980 which does not appear to be reflected in the Review's questions on process and procedure.

41. Furthermore, the time limits for commencement of judicial review litigation also differ between the two jurisdictions. In Northern Ireland all judicial review applications must be commenced within three months from the date when the grounds for such applications arose but in England and Wales, claims in respect of planning matters must be filed within six weeks 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 promptness requirement which is retained in the Civil Procedures Rules in England and Wales was removed in Northern Ireland in an effort to provide greater certainty to litigants.

42. Judicial review cases in this jurisdiction have two distinct stages. At the first stage the claimant must secure the leave of the court to proceed. The judge can determine this on the papers if favourable to the claimant and can also convene an *inter-partes*

[16] *Carltona v Commissioner of Works* [1943] 2 All ER 560

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

hearing. A refusal of leave to apply for judicial review must be preceded by such a hearing. In granting leave the judge can specifically point to apparent weaknesses in the respondent's case and can also press for consensual resolution; this has become a helpful feature of judicial review proceedings in Northern Ireland in recent years. This typically involves the respondent rescinding the impugned decision, undertaking to make a new decision and paying the claimant's costs.

43. It is also worth noting that the current procedure for judicial review in Northern Ireland is governed by Practice Direction 03/2018 containing a Pre-Action Protocol[17] which aims to promote partnership, cooperation, efficiency and expedition within reasonable timescales whilst also ensuring each party's right to a fair hearing. As a general rule, the Pre-Action Protocol requires that the putative applicant's pre-action letter should be transmitted not later than seven weeks following the date of the impugned decision, act or measure and that the proposed respondent should respond within the ensuing three weeks. The Bar considers that the three month time limit, coupled with the early engagement required by the Courts under the Pre-Action Protocol, help to ensure that the right balance is presently struck between allowing time for a claimant to lodge a claim and ensuring effective administration.

6. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

44. No. The Bar has seen no evidence to suggest that the rules regarding costs in judicial reviews are too lenient on unsuccessful parties. As explained above, the two stage process to judicial review in Northern Ireland typically acts as a filter against unmeritorious cases as applicants must demonstrate an arguable case and secure the leave of the court at the first stage. We consider that the court already has significant flexibility in this jurisdiction on the issue of costs. As per Order 62 rule 2(4) of The Rules of the Court of Judicature (NI) 1980 and Section 59 of the Judicature (NI) Act 1978: "*the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid*".

45. Order 62 rule 3(3) provides that where a court in the exercise of its discretion makes an order as to costs, then that court "*shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs*". The principle that costs

[17] Judicial Review Practice Direction 03/2018, Appendix 1 at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Practice%20Direction%2003-18%20-%20Judicial%20Review.pdf

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

should normally follow the event is also enshrined in case law. In *YPK & Ors* [2018] NIQB 1 McCloskey LJ held that with regard to costs two overarching principles shine more brightly than any other at [21]: "*The first is that costs lie in the discretion of the Court. The second is that the unsuccessful party should normally pay the costs of the successful party*". Current legislation and case law make it clear that costs should normally be awarded to the successful party. However, the court does have a discretion which depends on the circumstances of each case which helps to ensure fairness. In general, the experience in this jurisdiction is that the courts normally award costs to the successful party and only refrain from doing so where the particular circumstances of the case require a departure from the normal rule. The result is that, following full hearings, orders for costs are normally made in favour of Government departments where the court has found that they have acted lawfully whilst orders for costs are normally only made against Government departments where they have acted unlawfully.

46. This question appears to imply that there should be costs implications against an applicant at the leave stage potentially as a punitive measure but the Bar considers that costs must remain a matter for the court to exercise discretion over in the unique context of the application before it. At present costs are rarely granted to an applicant where an application is resolved prior to the grant of leave and the award of costs to a respondent is even less common prior to the grant of leave. This can happen where, for example, the unsuccessful applicant failed to properly engage prior to seeking leave or otherwise failed to comply with the Pre-action Protocol.[18] Where a case is discontinued after the grant of leave but prior to a full hearing, the award of costs will depend on the reasons for the discontinuance. It is also worth noting that whilst a claim may be 'unsuccessful', it may also perform a valuable function in providing legal clarity on an issue. For example, the case of *Re Greencastle Rouskey Gortin Concerned Community Limited's Application* [2019] NIQB 24 which involved "*novel statutory provisions which have not previously been judicially considered in this jurisdiction".*

7. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

47. Yes. The Bar has seen no evidence to suggest that the costs of judicial review claims are not proportionate. It is worth noting that Protective Costs Orders are another way for providing an applicant with security by limiting the costs awarded against him/her should they lose the case and are becoming increasingly common. They allow public interest issues to be pursued where an applicant does not have adequate funding and can be particularly important given that issues of fundamental constitutional and

[18] Ibid, Part A Paragraph 6 & Appendix 1 Paragraph 4 and 8

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

human rights significance can arise in such cases. The risks of accumulating costs where the case is lost can deter potential applicants from bringing important public interest cases and therefore these orders can perform a vital function in supporting access to justice. Where the court makes a protective costs order this will generally limit the liability of both parties for costs. Therefore issues of public interest can be litigated without the risk of extensive costs orders against either the applicant or the relevant Government department. The criteria for these orders are set out in *Corner House Research, R (on the application of) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192 at [74].

48. It is also worth noting the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provided for fixed costs in legal challenges to environmental decisions. The 2013 Regulations have been amended by The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017, which provide the courts with greater flexibility when setting the costs caps applicable to both the applicant and the respondent in environmental cases.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

49. No. All remedies in judicial review cases in this jurisdiction are discretionary and can be tailored to suit the particular needs of the case. Order 53 of The Rules of the Court of Judicature (NI) 1980 details the flexible, practical and effective remedies which the court can direct, namely an order of mandamus, an order of certiorari, an order of prohibition, a declaration, an injunction and/or damages. The court also has the power to make the following: an award of damages (Order 53, rule 7), an order remitting the decision to the lower deciding authority for reconsideration or reversing or varying the decision (Section 21 of the Judicature (NI) Act 1978), an injunction or declaration concerning public office (Section 24 of the Judicature (NI) Act 1978), a substituted sentence in a criminal case (Section 25 of the Judicature (NI) Act 1978) and a declaration under the Human Rights Act 1998.

50. Therefore, where an applicant is successful, a court has power, inter alia, to direct the respondent to take a particular substantive course, to quash the decision of the respondent, to prohibit the respondent from doing a particular act, to make an injunction, to award damages, to direct the respondent to take its decision again, to make a declaration or to grant no relief at all. The court has a wide discretion in relation to the order of remedies and so they are far from inflexible.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

51. Furthermore, there is no requirement on the court to grant any kind of remedy at all even where an applicant has been successful. For example, where a court is of the view that the sole ground of relief established is a defect in form or a technical irregularity and no substantial wrong and no miscarriage of justice has occurred or no remedial advantage could accrue to the applicant, then the court has a discretion not to grant a remedy as per Section 18(5) Judicature (NI) Act 1978.

52. However, this discretion is not limited to cases where there is a technical irregularity. Indeed in all cases the court has a wide discretion as to what remedy to grant and also whether to grant any remedy at all. The Court of Appeal decision of *Credit Suisse v Allerdale Borough Council* [1997] QB 306 saw Lord Hobhouse LJ describe this discretion: "*The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act*".

53. The experience of practitioners in this jurisdiction suggests that where a remedy is granted, success does not always result in the outcome that the applicant was seeking. It is extremely rare for the court to make an order requiring a respondent to reach a particular substantive result. The furthest that the court is likely to go is to order the respondent to re-take a decision lawfully.

54. Finally, it is also worth noting that a properly formulated claim should always make clear the remedy being pursued and the court will ensure that this remains under careful review as the proceedings advance. It is important to also consider this in the wider context of the Pre-Action Protocol for Judicial Review in NI which has a specific section on 'Non – Litigation Options' and we would reiterate that alternative remedies are available prior to judicial review and there is an expectation from the court that these options will have been exhausted with proceedings as a 'measure of last resort'.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

55. The panel should be aware that the Lord Chief Justice of Northern Ireland commissioned a comprehensive review of civil justice in Northern Ireland in 2015 with a report published in 2017. It addressed a range of matters, including a dedicated chapter on judicial review.[19] The recommendations made in this area, such as addressing the significant investment of court time at the leave stage, have now largely been addressed by the new Practice Direction referenced elsewhere with proactive and flexible judicial case management continuing to operate effectively.

56. The Review's Report devotes considerable attention to the issue of alternative dispute resolution in the context of judicial review. The Bar considers that the relevant provisions of the new Practice Direction in Northern Ireland have addressed this which has operated satisfactorily to date. It is also worth noting that the judge will expressly encourage the parties to consider exploring consensual resolution through a mediation/ADR mechanism if appropriate, particularly at the leave stage. The court can then impose a moratorium on further cost incurring steps pending further order and directions. The parties are required to operate within a court imposed timetable with reporting at an appropriate time which typically works well in practice.

57. The experience of our practitioners suggests that judicial review cases do at times resolve prior to trial. This is likely due to a cultural shift involving a number of factors, such as judicial influence, cost saving, increased transparency on the part of public bodies and the enhanced role of judicial review in educating public bodies. See the comments of McCloskey J in *Edmunds v Legal Services Agency for Northern Ireland* [2019] NIQB 50 at [26]:

> *"ADR has also featured in the Practice Directions and protocols of the senior civil courts of Northern Ireland for many years. Notably, the breadth of its potential as a mechanism for the consensual resolution of disputes other than via litigation is reflected in its recognition in the first of the Judicial Review Court Practice Directions, published as long ago as 2005. The experience in this court during the past two years has been that in every case where the court has exhorted ADR two consequences have followed. First, the parties have invariably responded positively. Second, consensual resolution has been achieved in every case".*

58. In addition, practitioners report that the prospects of resolution prior to trial are relatively high in relation to some particular types of challenge, such as those

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

[19] Review of Civil and Family Justice in Northern Ireland, *Review Group's Report on Civil Justice*, September 2017, page 289 at https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Civil%20Justice%20Report%20September%202017.pdf

involving decisions relating to education.[20] The sending of a pre-action letter or the issue of proceedings in respect of a child with special educational needs who has not been provided with an appropriate school placement can often act to focus minds and results in the provision of such a school placement. In this context, judicial review therefore provides an efficient, fast and appropriate remedy for some of the most vulnerable in our society. It can often be the only remedy available to them and without it their contribution to society is likely to be diminished.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

59. The rules of public interest standing are not treated too leniently by the courts which are entirely capable of considering this issue.[21] The Rules of the Court of Judicature (NI) 1980 Order 53 rule 3(5) states that the applicant requires sufficient interest in the matter to which the application relates. Any restrictions aimed at limiting the scope of standing could potentially negatively impact upon groups or organisations advocating for social, economic or environmental issues. For example *Re Friends of the Earth's Application* [2017] NICA 41 was an application which was successful on appeal concerning the relevance of the 'precautionary principle' to sand dredging at Lough Neagh. New rules limiting standing could potentially prevent important applications in the public interest that might not otherwise be brought.

Conclusion

60. The Bar Council notes that the Lord Chancellor, in a recently published letter to Joanna Cherry QC MP dated 08 October, indicated that "*the Panel will only be focusing on reserved powers when considering reform and in so doing would focus on UK-wide powers or procedures relevant only to the jurisdiction of England and Wales*". This suggests that the panel will not be considering the position in Northern Ireland which is difficult to reconcile with the Terms of Reference. However, on closer analysis it may only mean that the "*focus*" will be on England and Wales. This terminology appears ambiguous and leaves open the alarming prospect that the Review Panel will indeed consider "*reform*" of the powers and procedures in Northern Ireland but only

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

[20] For example, postponements to post-primary transfer tests in Northern Ireland agreed in September 2020 with the Department of Education following issue of judicial review proceedings. UTV News Report: Transfer tests to be put back to January 2021, High Court hears

[21] See for example *Northern Ireland Commissioner for Children and Young Peoples' Application* [2009] NICA 10 in which the Court of Appeal rejected the Commissioner's standing on its challenge to parental corporal punishment

incidentally and without bringing to bear the kind of serious focus that would be required if the implications of any such proposals were to be fully understood.

61. The Bar Council hopes that the Review Panel will recognise that it would be neither sensible nor constitutionally appropriate to seek to curtail the powers of the courts in Northern Ireland to judicially review decisions concerning either devolved or non-devolved matters. The comments of recently retired Supreme Court Justice Lord Kerr are particularly insightful in this regard: "*if we are operating a healthy democracy what the judiciary provides is a vouching or checking mechanism for the validity [of] laws that parliament has enacted or the appropriate international treaties to which we have subscribed*".[22] Former Supreme Court President Lord Neuberger's recent remarks are also of fundamental importance in this context: "*Once you deprive people of the right to go to court to challenge the government, you are in a dictatorship, you are in a tyranny… The right of litigants to go to court to protect their rights and ensure that the government complies with its legal obligation is fundamental to any system*".[23]

62. Finally, depending on the conclusions reached by the Review Panel on any proposed reforms to judicial review, we would expect the Government to comply with the conventional requirements of a proper consultation process. In particular, by formulating any proposed reforms with sufficient precision to allow for detailed and considered responses to any proposal from all who wish to respond (not just from Government Departments) and by allowing for a minimum of 12 weeks for those responses.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.mcgimpsey@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

[22] The Guardian, '*UK needs judges to limit government power, says Lord Kerr*', 19 October 2020 at https://www.theguardian.com/law/2020/oct/19/uk-needs-judges-to-limit-government-power-says-lord-kerr

[23] The Independent, '*Brexit: Boris Johnson's new laws put UK on 'very slippery slope' to dictatorship, warn ex-Supreme Court president*', 08 October 2020 at https://www.independent.co.uk/news/uk/politics/boris-johnson-dictatorship-lord-neuberger-supreme-court-internal-market-bill-b867546.html